In the

Supreme Court of the United States

Michael Anthony Maness,

Petitioner,

v.

James R. Meyers, Presiding Judge

No. 73-689

Washington, D. C.
October 22, 1974

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MICHAEL ANTHONY MANESS, Petitioner, v. JAMES R. MEYERS, PRESIDING JUDGE	No. 73-689

Washington, D. C.

Tuesday, October 22, 1974

The above-entitled matter came on for argument at 11:49 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM F. WALSH, ESQ., 1955 Richmond Avenue, Houston, Texas 77006 For the Petitioner

JOE B. DIBRELL, ESQ., Chief, Enforcement Division, Assistant Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-689 in Maness versus Meyers.

Mr. Walsh, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM F. WALSH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WALSH: Mr. Chief Justice, and may it please the Court:

This case involves a $500 fine from a Texas District Court and in that context, it is obviously not an important case and that is obviously not why this Court granted certiorari.

The importance of this case is that it involves the very independence of the American Bar to give free, untrammeled legal advice to a client who has the right, should he choose to do so, to follow it or disregard it.

Now, I think perhaps I should make it clear. I think it has been made clear in the briefs and I don't know if the Court has seen them. There is no allegation or suggestion or suspicion that Mr. Maness, who is a member of the Bar of this Court and of the United States Court of Appeals for the Fifth Circuit and, of course, the Texas Supreme Court and so on was in any way contumacious in any personal sense to the trial court.

Actually, there were three lawyers involved in

this case, a Mr. Friedman, who is, unfortunately, now deceased and a Mr. Maley, who may presently be in the courtroom. I don't know whether he is.

But three lawyers gave sincere legal advice that this particular client did not have to produce certain documents which the state contended were incriminatory and it is simply a case of a lawyer being punished for giving advice on a federal constitutional right and that is what this case is all about.

Now, we have had a tradition in most countries since Shipley Adams represented the British soldiers in the Boston Massacre of lawyers at least being allowed to represent and advise their clients and that tradition is about to be destroyed if this contempt citation stands up and that is the importance of the case.

Fortunately, it has already been decided once.

I think perhaps the value of my presentation here is perhaps in discussing the facts rather than the law because the law has been completely discussed in our briefs.

As a matter of fact, the case has already been decided by United States District Court. If you will examine Appendix C in our brief on the merits at the beginning of page 74, you will find the opinion of Judge Roberts in Austin dealing with Mr. Maley, who was co-counsel in the case and it's a White Horse situation. There is no

difference between the cases. It was simply a choice of remedies. Mr. Maley chose to go the habeas corpus route through the --

QUESTION: And Mr. Maness has chosen to go that route?

MR. WALSH: No, Mr. Maness chose to come to the Supreme Court because he thought that it was important enough that this Court decide it.

It so happens, your Honor, that both remedies were available. You could go the habeas corpus route or the certiorari route and it was Mr. Maness' feeling very strongly that the case was important enough to be decided by this Court and I might --

QUESTION: Could he go to Judge Roberts now?

MR. WALSH: Sir?

QUESTION: Could he go to Judge Roberts now?

MR. WALSH: Well, I don't know that he could, having come here.

QUESTION: Sure he could.

MR. WALSH: But Judge Roberts has decided Mr. Maley's case and decided it in what I think is a simple, lucid, short opinion that it is obvious that a lawyer has the right to tell someone that, in his opinion, you have a right to exercise a constitutional right.

QUESTION: Is there an appeal pending from

Judge Robert's decision?

MR. WALSH: Yes, sir, your Honor, it is in the Fifth Circuit and the Fifth Circuit is holding it in abeyance pending this Court's decision of Mr. Maness' case.

QUESTION: Had this been a criminal right to counsel case, I suppose the right of the lawyer to express his views on a constitutional right could be based on the provision of the Constitution that supports the right of counsel.

But in a civil proceedings, what is the precise basis for this?

MR. WALSH: Your Honor, you understand there was a criminal prosecution pending --

QUESTION: Yes, but this was --

MR. WALSH: -- separately from this.

QUESTION: -- this was a civil proceeding.

MR. WALSH: But had the evidence been made available in the civil proceedings, it obviously would have been made available in the criminal proceedings.

QUESTION: Well, do you contend that the defendant in the civil proceedings had a federal constitutional right to counsel?

MR. WALSH: Your Honor, he had a constitutional right to counsel that -- yes, I would contend that. I think a citizen in any case has a constitutional right if he has

employed counsel or has a lawyer working for him. But you must remember that there was pending a criminal case in the state courts and that the lawyer's focus was as much concerned with that pending criminal case as it was with the civil case, which became the genesis of this action.

QUESTION: But this was a civil proceeding, wasn't it?

MR. WALSH: This was a civil proceeding alleging the commission of a criminal offense and I noted that this particular day, according to my latest information, from Law Week and so on, this Court has before it either having granted certiorari or applications for certiorari, some 26 cases involving pornography and obscenity and I think in the middle of the trial, when this Court itself has had considerable difficulties through the years in determining the limits and bounds of what is right and what is proper, with this Court having some 26 cases before it right now, for a lawyer working in a -- a Texas town to do anything except suggest to a client that he ought to exercise his rights regarding self-incrimination, I think would probably be negligence.

Now, we have briefed, in some detail, the merits of the actual defense of McKelva. I mean, the merits of his refusal to produce the information called for by the subpoena and by the court order and the only reason we have

done that -- and as a matter of fact, my client, who is a member of this Bar -- we -- we have had some disagreements about the matter but the only reason we have done it is simply to assure this Court that the advice was given in good faith, that it wasn't just an effort to avoid legal process or something of that sort.

QUESTION: There are cases, are there not -- quite a number of them -- of witnesses in a civil action, either parties or independent witnesses refusing on Fifth Amendment grounds to respond to questions?

MR. WALSH: Your Honor, the simple remedy for that and the remedy that was presented by this case -- and it really becomes the funny feature of this case -- is that of course the state district judge had the right, Mr. McKelva having received his advice from his two lawyers, Mr. McKelva had the right to disregard the court's order and thereby be put in jail for contempt and then it could have been tested by habeas corpus.

In this case, it was tested by habeas corpus. Judge Roberts issued a writ for Mr. McKelva and the minute the state judge learned that the federal court had entertained and granted the writ to bring it under the federal court, the state judge called Mr. McKelva from the county jail and said, I am going to let you go. Your behavior has been very good and you may be released. And, of course,

mooted the only traditional way of handling this case.

I don't think this Court can find a case -- we have, I think, done a decent job of research and I don't think this Court can find a case where a lawyer has been put in jail for giving noncontumacious advice, just because a judge happens to think that it contrary to what he wants done.

QUESTION: Wouldn't your argument be the same, despite the fact that as you say, you have briefed the merits of this question?

MR. WALSH: We wanted you to know it was in good faith.

QUESTION: Your argument would be the same, wouldn't it, if the advice had turned out to be -- or even in your opinion was clearly erroneous advice, wouldn't it?

MR. WALSH: Erroneous, yes. Good faith is the question.

QUESTION: Assuming it was in good faith.

MR. WALSH: I think I am entitled to make mistakes in my practice of law without going to jail. Now, if I am arguing a proposition to you which is not in good faith, if I am trying to kid the Court, this Court or the court in Tyler, that is another kettle of fish and, quite frankly, I might take a somewhat different position in that event. But so long as the legal advice is, in fact,

given in good faith and, as I say, in this case we have tried to demonstrate to you that there are good faith grounds for believing that the advice was correct.

QUESTION: What should a judge do in a civil proceeding when a witness takes the Fifth Amendment and says he won't answer the question and the judge considers it and says, well, this just happens to be within the area that the Fifth Amendment doesn't apply to and I direct you to answer the question. And the witness says, I'm awfully sorry, I won't do it.

MR. WALSH: That is exactly what. They put the man in jail for contempt of court and then, then in Texas we would have a right to litigate the legality of the confinement and the --

QUESTION: What about the lawyer who says, now, you go ahead and refuse to answer?

MR. WALSH: Sir, my light is on, but let me say this, the Appendix clearly shows, and the record clearly shows that the lawyers did not advise him to ignore any court order. They simply advised him of what they thought his legal rights were.

MR. CHIEF JUSTICE BURGER: You can enlarge on that answer after lunch, if you want to.

MR. WALSH: If I may, I would appreciate it. Thank you.

[Whereupon, at 12:00 o'clock noon, a recess was taken for luncheon until 1:02 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Walsh, you may continue. You have about 19 minutes of your time left.

MR. WALSH: Mr. Chief Justice Burger and may it please the Court:

I have asked the marshal to divide my time in half so that I may have some time for rebuttal and I just have a few more remarks I wish to make to the Court at this time.

First, I would like to point out that if Michael Maness is guilty of contempt of court for advising a client about his Fifth Amendment rights, this Court ought to summon Mr. St. Clair back for advising President Nixon not to surrender those tapes and hold him in contempt of court.

This is perfect situation of a lawyer giving --

QUESTION: Isn't that Prup?

MR. WALSH: Prup? Yes, your Honor.

QUESTION: Let me ask you, was the -- if the judge rules that Fifth Amendment privilege is not available in a certain context which is being claimed by a party or a witness and insists that a subpoena be complied with or that an answer be given to a question and the lawyer advises the client not to answer, do you suggest that neither the

lawyer nor the client is in contempt of court?

MR. WALSH: No, I didn't suggest that the client was not.

QUESTION: All right, the client is in contempt of court.

MR. WALSH: This Court has decided that very question in Ryan versus United States --

QUESTION: But the lawyer is not?

MR. WALSH: No, I think that the lawyer has the right to give free and untrammeled advice under any circumstances, as long as it is an honest, professional opinion.

QUESTION: Let's suppose that the client at that very moment had to write to challenge a judge's ruling --

MR. WALSH: Yes, sir.

QUESTION: -- upon appeal. Instead of disobeying, he could appeal.

MR. WALSH: Yes, sir.

QUESTION: And he chooses not to appeal but disobeys. The situation would be different, I suppose.

MR. WALSH: Your Honor, I would be making a quite different argument if that were the case, but under the Texas law as it applies to this particular case, there is no way to do that.

QUESTION: So the only way to test a judge's

ruling is to be in contempt and then have the challenge under the Fifth Amendment ruled on as part of the contempt proceedings?

MR. WALSH: That is correct, sir.

QUESTION: And either get a stay of that or a habeas corpus?

MR. WALSH: Well, your Honor, the lawyers attempted to obtain habeas corpus relief from both the Supreme Court for the Texas and the Court of Criminal Appeals, both of which denied relief. They then went to the United States District Court for the Western District of Texas which granted a writ of habeas corpus and the minute the federal court granted the writ, the state judge released the prisioner, thereby mooting the whole case.

QUESTION: Did he fine him?

MR. WALSH: Sir?

QUESTION: Did he fine him or just wash that case out?

MR. WALSH: He just washed it out.

QUESTION: Is there any dispute between you and your opponents as to whether there was a procedure in Texas to challenge this ruling, other than by contempt?

MR. WALSH: Well, Mr. Zwiener and Mr. Dibrell can answer that, but I don't think there is any such dispute and -- am I correct?

QUESTION: Well, I'll ask them.

MR. WALSH: If you would. I don't believe there is any way to do it and --

QUESTION: Well, if -- excuse me. Go ahead.

MR. WALSH: Well, that is all, your Honor. I just did want to suggest that -- before I turn this over to my friends in the Attorney General's office, I do want to suggest that we are toying here with the right of a free American lawyer to give free and untrammeled legal advice to a person who is in trouble and that is what is really involved in this case and I hope the Court will recognize it in deciding it.

QUESTION: When you cast it in that form, of course, it, at least doesn't give very much difficulty.

But let me suggest a hypothetical case, just an ordinary civil lawsuit.

MR. WALSH: Yes, sir.

QUESTION: Personal injury or whatever, an accounting case, and you have a witness, not a party. If a party refuses to answer, the Court has many sanctions. He can either dismiss the case of the --

MR. WALSH: Yes, sir.

QUESTION: -- plaintiff or he -- the plaintiff's counsel can exploit that in argument if it is the defendant. We'll lay that aside.

A third party witness and the third party witness refuses to answer on the grounds that it is self-incrimination . Is the court at that point absolutely bound? Or can the court make some inquiry into the good faith of the person?

MR. WALSH: Your Honor, I think the court can hold the witness in contempt and let the witness exercise his right to habeas corpus and other relief which is variable, which is precisely what this Court decided in Ryan.

QUESTION: Now let's more to his lawyer.

MR. WALSH: Pardon?

QUESTION: Now let's more to his lawyer, as in this case.

MR. WALSH: Yes, sir.

QUESTION: And the answer of the witness is that, on advice of counsel, naming him, he declines to answer for these reasons. If you can hypothesize a situation where the claim is, on its face, utterly frivolous and unfounded and here you are in the middle or in the process of a trial, which might have to be declared a mistrial as a result -- there might be many untoward results -- is the court totally without power to deal with that situation, other than contempt of the witness himself?

MR. WALSH: Well, frankly, I am not at brief to

discuss that but my answer would be, just having briefed the rest of this case, my answer would be yes, he wasn't in contempt.

QUESTION: Just moot against the witness and not against the lawyer.

MR. WALSH: I am willing to concede, your Honor, that there are peculiar circumstances that I can conceive of where the lawyer's advice would be so frivolous that perhaps the court could take disciplinary action, but I don't think by way of contempt. I think the way would be through the grievance procedure and something of that sort.

QUESTION: Take disciplinary action or refer it, depending on --

MR. WALSH: Yes, sir.

QUESTION: The rules of the jurisdiction, refer it to the proper body.

MR. WALSH: Yes, sir.

QUESTION: But independent of the case and independent of any contempt proceedings.

MR. WALSH: Your Honor, that happens to be my opinion. I -- as I say, that we are not involved in that here.

QUESTION: No.

MR. WALSH: This one was under a criminal accusation at the time and it happened to arise in the

context of the civil action but he was under a pending, existing, criminal action at the time.

QUESTION: And the matter sought to be produced was the subject of the criminal procedure?

MR. WALSH: Yes, sir and it was contraband. The state has cited Bellis in its briefing. Now, the material in the Bellis case was not contraband. In this case, if the state was correct in its contention that it was contraband, it seems to me they should also say that the man has the right to refuse to produce it.

Thank you, your Honors.

QUESTION: Sir, supposing that instead of the attorney's objection and advice being based on Fifth Amendment grounds, this came up in the course of a proceeding where his client was on the stand, his client, say, was the defendant in a civil action and he is being cross-examined and the other lawyer asks him a question and his lawyer objects on the grounds of hearsay and the trial court overrules the objection and tells the client who is on the witness stand to answer the question and then the lawyer says, very politely, "Just a minute, your Honor, I am telling my client not to answer that question."

Now, there is no constitutional issue involved there. Would you say that case is different from yours?

MR. WALSH: Your Honor, yes, I would say it is

different because of the pendency of the criminal proceedings against this man and so on, but I would go a little further.

First, if the client wishes to follow his lawyer's advice and the lawyer says, "Don't answer that question," I don't care what the judge says, he chooses to follow it, he goes to jail and that may be tested in the proper appellate remedy, as was suggested in Ryan.

Now, just a moment, your Honor. The next thing is if it is totally frivolous information that the lawyer has given the client. If it is stupid advice, we do have laws involving malpractice where the client has remedy against the lawyer.

QUESTION: I thought your argument was based, though, on the idea that this was advice about a constitutional claim?

MR. WALSH: That's right. That is involved in this case, your Honor.

QUESTION: Well, but in my example, it is simply a question of whether it is hearsay and whether he is required to answer in a normal course of interrogation of a witness. Wouldn't you draw a rather sharp distinction?

MR. WALSH: I have been drawing a sharp enough distinction so that I am sort of unwilling to answer your question.

QUESTION: Well, is this --

MR. WALSH: Because it isn't involved in this case.

QUESTION: Well, is the free and untrammeled right of a lawyer to give legal advice something that exists quite apart from the subject on which he is advising?

MR. WALSH: I think so.

QUESTION: And in the courtroom, he --

MR. WALSH: No, not competely free on the subject on which he is advising, no, I don't think that is so at all.

QUESTION: But regardless of whether the subject he is advising on is a constitutional right or not, you feel that in a courtroom, a lawyer has a right to give free and untrammeled legal advice?

MR. WALSH: I do.

QUESTION: And what is the source in the Constitution for that claim?

MR. WALSH: The constitutional right to counsel.

QUESTION: He doesn't have a right --

MR. WALSH: He has a constitutional right, for instance, to a jury trial on anything involving more than $20.

QUESTION: But that is --

MR. WALSH: And that is involved in the constitutional right to have counsel represent you.

QUESTION: But that is a Seventh Amendment right

that is conferred on litigants in federal court. But you were in state court.

MR. WALSH: Well, I would be prepared to contend that the Fourteenth Amendment encompasses the right to trial by -- the right to assistance of counsel in civil courts, if you happen to have counsel and he is there and -- as these lawyers were. Whether you have the right to appointed counsel, as we do in criminal cases, is another kettle of fish but, certainly, if you have a lawyer there, and he gives you the advice and you follow it, I think that is your risk and your remedy is against the lawyer.

QUESTION: There is nothing the judge can do about it?

MR. WALSH: Yes, he can put the client in jail.

QUESTION: Nothing the judge can do to the lawyer?

MR. WALSH: Well, I have seen one case in my own home federal district where the lawyers asserted a claim of privilege as to the communication that was made to them by the client and Judge Connally took the position, fine, I'm going to hold you in contempt of court if you don't answer the question, and he said that if you are right, you can revert. But you understand, this was the lawyer directly claiming a privilege of his own. This is not advising a client, as we have in this case and Judge Connally's

position was, well, I am going to hold you in contempt and if you want it in the Supreme Court or the Fifth Circuit or anywhere else, that is fine, but I am not going to reduce the sentence at the end of 120 days. But that is a different situation.

Now, I think the lawyer has a certain degree of immunity and I think it is up to this Court to protect it.

QUESTION: And your position would be the same if there was an injunction outstanding against the party and the lawyer advised him not to -- he thought the injunction was invalid and he just advised him to disobey it?

MR. WALSH: Well, your Honor, I would hope that I would advise him to appeal the injunction.

QUESTION: Well, I know, but what if you didn't? You advised him to disobey it?

MR. WALSH: Your Honor, if there was judicial relief available, it would be a different kettle of fish.

QUESTION: Well, that --

MR. WALSH: But in this case there is no judicial relief available.

QUESTION: Isn't that a critical point in your entire argument?

MR. WALSH: I think it is an important point. Whether it is critical or not, I don't know, but it certainly is an important issue and I agree with you that

the Court needs to consider it but the fact remains that in this case there was no relief available, other than the relief that was actually granted by the United States district judge and was there after it mooted by the state judge when he realized that he was going to get into federal court.

And that is the peculiar reason for this whole case.

I would like very much to keep some of my time and unless the Court has other questions -- and turn it over to my friends from the Attorney General's office.

MR. CHIEF JUSTICE BURGER: Very well. Very well, Mr. Walsh.

MR. WALSH: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Dibrell.

ORAL ARGUMENT OF JOE B. DIBRELL, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. DIBRELL: Mr. Chief Justice, and may it please the Court:

Before starting into my point, I would like to, I think, clear the record with reference to the matter in the way this case came here. I think that there is no evidence or insufficiency of evidence on the question concerning the fact that the attorney did, in fact, advise McKelva, the witness, not to produce the magazines

that were subpoenaed. There is no question that he advised them further the second time not to produce them and actually that this advice was what was followed and what Judge Clawson held to be compensable on the part of the witness as well as the attorneys.

I think, as pointed out on page 14 of the Petitioner's brief, that they want -- I am sure that there is no question about the jurisdiction or about the fact that the actual advice had been given to disobey the trial judge's order to produce the material.

QUESTION: Is there any information as to why he dropped the charges against the party and didn't drop them against the lawyer?

MR. DIBRELL: McKelva served seven days in jail, your Honor. They were not dropped. He actually served. It was a ten-day criminal contempt sentence and he served seven of those days and the judge released him three days early and at the time --

QUESTION: Well, did he give any relief to the lawyers?

MR. DIBRELL: Well, of course, relief for the lawyer, under the Article 1911(a) of the Texas statute, your Honor, Mr. Justice Marshall, the -- before the attorney can actually be held in contempt, actually have to pay a fine or serve time in jail when the contempt has

been asserted by the judge, another judge must come in and preside over the matter and hear the matter somewhat as a review to -- and make an independent judgment as to whether to uphold the contempt of the attorney. This was done in this case by Judge Meyers.

QUESTION: But as soon as the federal court moved, they turned the defendant loose.

MR. DIBRELL: That was before the writ -- or denied -- my understanding, as I recall it, before the writs were denied by the Supreme Court of Texas or the Court of criminal appeals with reference to the -- not to McKelva, but with reference to -- the -- this -- the contempt, actually, of the lawyers as far as making a final determination occurred long after the mootness of the McKelva contempt.

QUESTION: It did?

MR. DIBRELL: Yes, your Honor, because the attorneys had not had their review by Judge Meyers under the Texas procedure where the attorneys --

QUESTION: I'm not talking -- I'm talking about the judge, the original trial judge, his original action. He didn't -- that's straight he didn't touch it at all as to the lawyer but he did as to the attorneys.

MR. DIBRELL: I think under 1911(a), once he made the decision, your Honor, he no longer had the decision to

do it. I think it is now up to Judge Meyers,to another judge who is assigned. Judge Clawson no acts or has control of the contempt of the lawyers at that point.

I think once he had made the adjudication, then to whether or not it is going to be upheld or whether they are going to be in contempt or not would be determined by the judge who was assigned to make that determination.

QUESTION: Well, my other question is, when a witness in Texas pleads the Fifth Amendment, do they use the jargon most states use, that on the advice of counsel I claim the Fifth Amendment?

Do they use that jargon in Texas?

MR. DIBRELL: They have on occasions, your Honor and --

QUESTION: They have on occasions?

MR. DIBRELL: Yes, they have on occasions, your Honor.

QUESTION: Did McKelva go up through the -- try to get a review of his contempt conviction in the state system?

MR. DIBRELL: He had to make an application to the state before we could have, I think, had jurisdiction for Judge Roberts. I think he had actually made an application to the Court of Criminal Appeals and to the Supreme Court as well. I don't think there was any question

about perhaps there was jurisdiction by Judge Roberts to initially grant the writ as far as not having exhausted state remedy.

QUESTION: So you did not get a review because he was released before there was an opportunity to go into that?

MR. DIBRELL: That is right, your Honor.

QUESTION: There was a subpoena issued for magazines and then there a motion to quash, wasn't there?

MR. DIBRELL: There was a motion to quash, yes, sir.

QUESTION: And that was what was argued before the judge?

MR. DIBRELL: Well, the argument, the motion contained one thing that the magazines were not owned by the defendant and the property interest --

QUESTION: But it was also asserted Fifth Amendment?

MR. DIBRELL: It was also asserted Fifth Amendment.

QUESTION: The judge overruled the motion to quash.

MR. DIBRELL: He overruled, yes.

QUESTION: Now, under Texas procedure, could that decision have been appealed?

MR. DIBRELL: No, no, not that part of it. Not unless -- I think that --

QUESTION: So there was no remedy. There was no remedy at that point to protect the materials claimed to be protected by the Fifth Amendment except not produce them and argue that on contempt.

MR. DIBRELL: I think that the remedy, of course, that we want to get, and my principal argument first --

QUESTION: Is that right?

MR. DIBRELL: What, sir?

QUESTION: Is that right or not?

Was there or wasn't there some other remedy?

MR. DIBRELL: Well, perhaps it might -- I'm not sure. I don't think it is developed in the state policy or procedures. I don't know that they would actually be prohibitive of trying to obtain an appellate judge's mandamus if a judge --

QUESTION: But the denial of the motion couldn't be appealed under Texas proceedings?

MR. DIBRELL: Not at that point. Actually, just the denial of the motion to quash the subpoena at that point. That's right.

QUESTION: And you don't know whether or not --

MR. DIBRELL: He had not yet held them in contempt yet, either , at that point, your Honor.

QUESTION: And you don't know whether or not mandamus was available?

MR. DIBRELL: No, I do not.

I would like to point out very -- right at the beginning here that the Respondent is not in a position here to urge a decision in any way that would actually destroy or diminish or dilute the witness' right to assert a Fifth Amendment privilege or even a right of a counsel to give legal advice to its effects.

Really, what the Respondent is here and what we are seeking and urging upon this Court is some validation of the tools of the trial judges to compel the order of proceedings of the matter that is before him.

I think it is Respondent's, really, contention here that it is the judge and not the lawyer who must be the final arbiter of such matters and, as to the suppression of evidence or claim of privilege subject to review as the trial proceedings can go on in due course and I readily admit that the conduct of counsel here was not contumacious but I think it is clear that it was contentious in the sense that it did actually counsel a disobedience of the trial judge's order for the production of these matters.

QUESTION: Well, what if that order had been directed, as I think Mr. Justice White suggested, to a question submitted to the witness while he was on the stand in the course of trial and he declined to answer on the grounds that the response might tend to incriminate him?

Would you think that the lawyer could be held in contempt for so advising him?

MR. DIBRELL: No, your Honor, not until such time as the judge specifically said, you go ahead and answer the question and then if the lawyer persists in telling him, I think it is at that point, it is the witness' determination to make that determination, whether he wants to be held in contempt, go ahead and suffer the consequences of being held in contempt or --

QUESTION: Isn't that the normal -- isn't that the ordinary route to test it? As it is under the federal system under Rule 17?

MR. DIBRELL: Yes, it is, your Honor. Now, this might not be a normal means, but by the same token, if we give this absolute right, it would -- and I think that the -- if the Court is going to sanction the action form of the counsel or just to actually disobey the court's order in that point and not be held in some obedience to following the court's order, I think it has already been pointed out in other areas of disobeying an order of the court, the courts are turned into boards of arbitration.

QUESTION: How far do you carry that, Mr. Dibrell? Suppose -- getting back to the question my brother Marshall asked -- the response was, on advice of counsel, respectfully refused on grounds of self-incrimination and the judge

says,"Well, I don't honor that. You answer." And the answer was,"Well, I'm sorry, your Honor, on advice of counsel I respectfully refuse to produce it on the grounds of self-incrimination."

Now, in that circumstance, would the lawyer who had given the advice -- would he have been in the difficulty that this lawyer is?

MR. DIBRELL: I think he would, yes, your Honor. I think, if I understand your question right --

QUESTION: I am speaking of before he ever takes the stand, he consults an attorney and the attorney tells him, "No, if you are asked to produce it, you just say that under advice of counsel you are not producing it and pleading the privilege against self-incrimination."

MR. DIBRELL: No, at that point, no, I don't think so.

QUESTION: Not at that point. All right, now, the judge says, "Well, I don't agree with you and I order you to produce it." And the witness says again, "I am sorry, but on the advice of counsel, I refuse to produce them."

MR. DIBRELL: That is not the facts in this case.

QUESTION: I know it is not. But I am asking you, would the lawyer be in the same difficulty that Mr. Maness is?

MR. DIBRELL: No, I do not think so.

QUESTION: Well, then, why is Mr. Maness in the difficulty he is in?

MR. DIBRELL: I think because the feeling and the frustration upon the part of the trial judge in this proceeding, where, first of all, he denied the motion to quash the subpoena. Then he asked counsel -- he did not want to hold McKelva in contempt of court at this point. He says, "I want to give you an opportunity to produce these magazines that have been subpoenaed. How much time would you like?"

Counsel replied here, "Well, you will have to make that determination, your Honor. We can't suggest it should be even ten days, we still would not produce them."

Nevertheless, the court recessed until 1:00 o'clock and to permit the production of the magazines in obedience to his order.

QUESTION: And the lawyer persisted in the advice he had initially given.

MR. DIBRELL: That is right, persisted in it. It is his second persistence in it that we -- that the Respondent feels was contemptible on the part of counsel.

QUESTION: Is the lawyer frustrating the judge or the Fifth Amendment frustrating him?

MR. DIBRELL: I don't think the Fifth Amendment was -- he was frustrated, of course, in the facts of this

case, obviously. I think that the briefs that we filed and the facts that I think -- your decision in Bellis -- actually in analysis of Boyd, I think that clearly, as far as the actual facts of this case, McKelva did not have a right to assert the Fifth Amendment. I mean, he couldn't properly assert it. It wasn't ultimately there.

QUESTION: I thought possession would be a crime in Texas.

MR. DIBRELL: This is still a civil proceedings, Mr. Justice Douglas, in the sense that we are trying just to see whether or not the injunction is not wanted for the prosecution.

QUESTION: There is something about the Fifth Amendment. Even though it is a civil proceeding, if possession was a crime, you would be protected, wouldn't you?

MR. DIBRELL: I think that Mr. Justice Black had indicated in Adams versus Mendler the fact that you would still be able to -- the asserting of the Fifth Amendment privilege would give amenity to what actually at that point flowed from it if you actually had to produce it and these books, at this point, I don't think we could use. That is the factor showing that he had possession of them and the criminal prosecution.

QUESTION: You mean, that would be subject to a

motion to suppress?

MR. DIBRELL: Yes, well, he could still have his motion to suppress the evidence later on.

QUESTION: On the grounds that he was compelled to produce it against his will?

MR. DIBRELL: Yes.

QUESTION: Do you think that is enough protection?

MR. DIBRELL: I think that what this Court needs to help decide is, to keep the balance a balance of what the right of the people and the right of the court to ultimately have all of the facts brought forth in a proceedings so that the proceeding and criminal proceeding obviously -- Fifth Amendment privileges, other constitutional rights.

It is the responsibility and duty of the Court to take these witnesses and parties as well, but that -- I think that what is necessary and what would be helpful in this area is that we could go ahead and actually have the prophylactic rule adopted, as suggested by the lateral rules of evidence -- the fact that this would be, you actually would have this amenity. You go ahead and produce it and you would have this amenity from actual to criminal prosecution, using the criminal prosecution as part of it.

QUESTION: Mr. Dibrell, let me see if your position is what I think it is. I take it you have conceded all along that this Mr. Maness could advise his client

initially --

MR. DIBRELL: Yes.

QUESTION: To take the Fifth. And then, the court having ruled, I take it that you feel that what he should advise the client in,"In my judgment, you have the right to take the Fifth, but if you do, you may go to jail but I, as a lawyer, have to advise you to obey the orders of the court."

Isn't this essentially what you are saying at this point?

MR. DIBRELL: Yes, your Honor.

QUESTION: And that, I take it you feel, is different than to persist in advising the client to take the Fifth?

MR. DIBRELL: I think so. Once the court has had to make some determination -- at least, once he has had to be the arbitor of this particular matter of the proper assertion of the Fifth Amendment or not, what I am -- I think trial courts, all trial courts need, at least have the -- as far as possible to make sure there is a free judgment call as possible to protect the rights of the witness who is claiming a privilege, as well as to protect the rights of the parties who are entitled to have the information come into the trial.

QUESTION: The court could be wrong, though.

MR. DIBRELL: Yes.

QUESTION: And I've seen lawyers -- we'll all known instances, certainly, or we think we have known--

MR. DIBRELL: That's right, yes, your Honor, and I think what we need is to cut down as much as possible the error upon the part of the trial judge.

QUESTION: Well, what if the client is told to produce the second time and he says, "May I talk to my attorney?"

The judge says all right and he talks to the attorney and he asks the attorney, "Is the judge right?" and the attorney says, "Well, in my judgment, he is wrong."

"Well, how can we test it?"

And the attorney says, "Just refuse to answer him and we'll test it out in contempt proceedings, but you are going to be held in contempt, but if you want to test it out, I advise you to --"

MR. DIBRELL: The suggestion that I would make.

QUESTION: "The only way you can test it out is to refuse to produce it. We can test it out that way."

MR. DIBRELL: I would --

QUESTION: That would be a rather normal conversation, wouldn't it?

MR. DIBRELL: If I can get -- I think that your question hits to one part, I hope, Mr. Justice White,

in that what is needed, I think, as far as trial judge is concerned, recognizing that they are the protectors of the rights of the witnesses and all the parties, at least to have an in camera examination of documents which had been subpoenaed to make a better determination and perhaps would even urge that some in chambers inquiry up to a point as to what the testimony --

QUESTION: Well, the point is, Mr. Dibrell, suppose -- suppose in this instance, Mr. Maness had said, "All right, you'd better obey," and so he surrendered the documents, he had possession of them.

And the next day there is a misdemeanor charge under your Section 3 that for having possession with intent to distribute any obscene matter.

I gather that, on the strength of what he surrendered, even though his lawyer thought he did not have to surrender it, but just to obey the judge he surrendered them, I guess he could go to jail, couldn't he?

MR. DIBRELL: You are talking about an involuntary surrender.

QUESTION: Well, certainly, that is what I am talking about, in response to the --

MR. DIBRELL: I think at that time he could move to suppress the --

QUESTION: Is it established law that he could

suppress in those circumstances in Texas?

MR. DIBRELL: Well, I think that Texas is under the same rulings of this Court as any other state court in the sense that I think this Court has ruled that you can still -- has found that you can still move to suppress evidence.

QUESTION: We find that sometimes some of these things are not always followed in the state courts, so my question is, is in Texas, in the state court proceedings, is it accepted law that the involuntary production would enable him to suppress it as evidence at a subsequent criminal trial?

MR. DIBRELL: I can't cite you to a case, your Honor but my hunch would be, yes, that it would be.

QUESTION: It isn't, perhaps, quite enough for the man to know that ulitmately, in the federal court, he might be vindicated if, in fact, it would be incriminating to him -- or tend to be incriminating in the state court system. Isn't that correct?

MR. DIBRELL : I don't think that he would -- frankly, I don't think that the state courts have had the point where he would -- I don't think that they would say that he would have this right, any more than he would in the federal system.

QUESTION: Well, then, doesn't that tend to give

some color of validity to the lawyer's advice.

If you can't answer that it is established Texas law that that would be subject to a motion to suppress and to a successful outcome, then doesn't that justify a lawyer telling him not to produce?

MR. DIBRELL: I think that frankly, that the state court would sustain a motion to suppress. But I cannot cite you to a case.

QUESTION: Well, what if the lawyer had said to the client exactly what you have just said --

MR. DIBRELL: Yes.

QUESTION: -- to the Court? That "I think." If the client, during a recess, then, asked him the question and he said, "I think, but I can't cite any case, that it will be subject to a motion to suppress"?

MR. DIBRELL: Well,your Honor, there again, I think the contempt here is the actual very -- to go ahead and actually disobey, not just giving advice as to what might be the consequences.

QUESTION: Mr. Dibrell, on your -- you say the only way to try it out is to go to jail?

MR. DIBRELL: This is what Mr. Ross has indicated, that he let his client go to jail.

QUESTION: WEll, if that is the only way to do it, and you say that is one way of trying it out and the judge

puts both the lawyer and the client in jail, how do you get it tried while they are in jail? Both.

MR. DIBRELL: Well, of course, in this case, the judge did not put them both in jail until he'd -- you don't get the trial.

QUESTION: Well, you say he should have put them in.

MR. DIBRELL: What, sir?

QUESTION: Could he have given him ten days, his lawyer?

MR. DIBRELL: He gave him ten days, but he could not then put the lawyer in jail.

QUESTION: Why not?

MR. DIBRELL: Because another judge has to come in and hear the matter.

QUESTION: Why not?

MR. DIBRELL: Because Article 1911(a) of the Texas statute provides that an officer of the court of the attorney who is held in contempt by a judge, that judge must let another judge come in and preside over the matter.

QUESTION: So then he, say that judge says, "Go to jail." How do you litigate that?

MR. DIBRELL: Well, you'd have to litigate it by a writ of habeas corpus.

QUESTION: IN jail?

MR. DIBRELL: Well, he would be brought forth to litigate in court.

QUESTION: Well, what is that to the Fifth Amendment in a civil proceeding in Texas, other than the judge's unfettered discretion?

MR. DIBRELL: I don't think it is any more unfettered discretion than any judge in the trial of any proceedings, he has got to consciously follow the -- what he understands what, actually, the law is. He is under the same commands of the federal as anyone else in the matter of constitutional law and preserving and protecting the rights of witnesses or parties.

QUESTION: But this is the Fifth Amendment we are talking about.

MR. DIBRELL: Yes, and the Fifth Amendment.

QUESTION: To the Constitution.

MR. DIBRELL: I think that he is either going to -- when the privilege is raised, he has either got the option of either, obviously, he has got the option of either sustaining the assertion that they are --

QUESTION: Are you advised that the lawyer might have been wrong in the Fifth Amendment, the advice he gave? And if you assume that he could be wrong, would you also assume that the judge could be wrong?

MR. DIBRELL: Yes, your Honor, the judge can

also be wrong.

QUESTION: Ten days will settle that?

In jail.

And if he turns him loose, he can't tell us what protection he has.

Can you?

MR. DIBRELL: If he turns the --

QUESTION: Materials loose.

QUESTION: Materials, turns it over.

MR. DIBRELL: I think he still has available a motion to suppress the evidence, even at this proceedings.

QUESTION: He has the right to file a motion. He has a right to file for --

MR. DIBRELL: He has a right also to object to it. The judge has not even had an in camera inspection of the material yet.

QUESTION: Can you give me one case in Texas that grants a motion to suppress? I understood you to say you did not know of one.

MR. DIBRELL: A case to suppress evidence?

QUESTION: In these circumstances.

MR. DIBRELL: In these circumstances.

No, I cannot give you a case, your Honor.

QUESTION: Well, I gather the trial judge indicated that it would be. On page 11 of the Petitioner's

brief is a colloquy. I think that is what it means. The trial court said, "Which could have been reached by a motion to suppress that evidence or by an objection to an attempt to introduce it."

Now, I don't know what law the trial court was remarking on, but I take it that is what he was referring to.

MR. DIBRELL: Judge Clawson was taking this attitude.

QUESTION: Yes.

MR. DIBRELL: Yes. Thank you.

QUESTION: Well, he is saying that it could be reached. Does that mean -- is that an assurance that, when reached, it would be granted?

MR. DIBRELL: I think it was an assurance by this Court in this proceeding that it could be reached by that name.

QUESTION: That wasn't the trial judge, was it? This is the second judge, isn't it?

QUESTION: No, it's the trial judge.

QUESTION: I can't make out --

MR. DIBRELL: No, that is the trial judge.

QUESTION: That's the trial judge?

You are sure about that?

QUESTION: It is Judge Clawson, if you look at the

bottom of page 8, I think. It begins with Judge Clawson and then carries on through pages 9, 10 and 11.

MR. DIBRELL: Yes, it is Judge Clawson, your Honor.

QUESTION: Mr. Dibrell, what is the normal Texas procedure when someone is found in contempt during the course of a trial for that person who is himself on a contempt to obtain appellate review in the state system?

MR. DIBRELL: By writ of habeas corpus to the state court, state appellate court.

QUESTION: And would McKelva, the client, a witness here, was he in a position to seek habeas corpus had he gone to jail too, or had he been sentenced for contempt by Judge Clawson?

MR. DIBRELL: He was sentenced for criminal contempt of ten days and --

QUESTION: By Judge Clawson?

MR. DIBRELL: By Judge Clawson, yes, your Honor.

QUESTION: And he sought the state habeas corpus, did he not?

MR. DIBRELL: Sought the state habeas corpus.

QUESTION: All the way up.

MR. DIBRELL: All the way up.

QUESTION: And if the Texas Court of Criminal Appeals or the Supreme Court had thought his claim

meritorious --

MR. DIBRELL: They could have granted it.

QUESTION: They could have granted it.

QUESTION: Well, I misunderstood. I thought you told us a few minutes ago that he was released from custody before he had an opportunity to get a review of his contempt?

MR. DIBRELL: No, he had already made this before he had a review by the federal district judge.

QUESTION: I misunderstood you.

We are talking about McKelva now?

MR. DIBRELL: Yes, McKelva. No, he had already been refused by the state court.

QUESTION: And then, in effect, the judge's ruling sustained that?

MR. DIBRELL: That's right.

QUESTION: Right.

QUESTION: And so that if he had turned the magazines over, he could never have had that review?

Because he never would have been held in contempt.

MR. DIBRELL: That's right, he would not have been held in contempt. He would have been obeying the judge's order at that point.

QUESTION: Sorry to track over it again, but the

judge's statement at page 11 of your brief --

MR. DIBRELL: Of Petitioner's brief, your Honor?

QUESTION: Yes, right near the top of the page where the court said, "Referring to the action, the compulsory production, that it could have been reached by a motion to suppress that evidence or by an objection to an attempt to introduce it."

Now, you say that you can't cite any case in which the Texas courts have held that it is -- that motion would be successful because of the depression exerted by the power of the subpoena.

Is the court saying any more than pointing out the standard routine remedy, you can always make a motion?

MR. DIBRELL: I think yes, your Honor, he is pointing out here that, actually, at this point of the subpoena deuces tecum, there is no record, there is no books or anything else. The court has not even had an opportunity to make an in camera examination to rule on the admissibility of them by having to see, to actually make a judgment call in that sense of incrimination or anything else.

All he has is the motion and the raising of the assertion of the privilege by counsel and I think that the trial judge here was trying -- was pointing out to counsel that if I turn these over to the city attorney, who has asked for the court to subpoena these magazines, at that

point you can object to their being introduced by the city attorney, raising the grounds and to still have a review of that and appeal later as to whether or not, if I do admit them, you can object to it. You can have a review by the appellate court to determine whether I made a correct judgment or not.

If it's my view that they should be suppressed or your objection is good, they do not come into this trial.

QUESTION: Well, what is the scope of the Fifth Amendment incrimination clause? Does it mean that you can only use it if you are certain to be convicted of something, or does it mean that you can assert the Fifth Amendment right if it will expose you to prosecution?

MR. DIBRELL: Well, I think that this Court has already determined that it is very personal, has to be very personal in its claim and it must be asserted for, as I think -- as I read the decisions and I understand the decisions, going to the actual privacy of the person, either his effects, his papers and, of course, also his testimony which might be -- is obviously personal to him if it incriminates him.

QUESTION: But that doesn't quite answer my question.

MR. DIBRELL: All right, sir.

QUESTION: In Texas, as the Texas courts apply

the Fifth Amendment to the Constitution, is it necessary to show, in order to assert it successfully, that you are bound to be convicted? Or is it enough to show that you are likely to be prosecuted?

MR. DIBRELL: No, I don't think that you have to show that you are bound to be convicted. No, I think that it is enough to show that you might be prosecuted. I think that -- I don't think there is any difference in the fact that it might be -- you have got to show that there is obviously some incrimination. Otherwise, I don't think that there is proper assertion under the Fifth Amendment privilege.

QUESTION: Let's order our facts a little. Assume that there was no criminal proceeding pending in this case and he declined to produce on the advice of counsel who said, "If you do produce, then you are very likely to be prosecuted." Would that be a -- would you regard that as a good, valid claim that should be recognized by the Texas court?

MR. DIBRELL: I don't see the distinction there because whether there was possible some criminal prosecution pending, or civil, I think that still he has got a duty to produce these particular magazines in this case.

My time is up, your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Dibrell.

Mr. Walsh, do you have anything further?

REBUTTAL ARGUMENT OF WILLIAM F. WALSH, ESQ.

MR. WALSH: Very little, your Honor. I'll just say this. Every time I have to go down to the police station at midnight and tell a client, "By George, you have a Fifth Amendment right not to talk to the police," I guess I am obstructing justice if that is within the meaning of what our friends from the state say.

But the fact is that the advice given in this case was obviously sound. It was obviously founded on careful pleadings. It, I think, is totally sustained by a breach.

But I don't think that is the key issue in this case. I think the key issue is the right of a lawyer to give advice and this Court, in Ryan, has made it very clear that there is a conventional, easy, simple way to pursue this matter and handle it and in answer to the question that was asked from the bench, first, I'd like to point out that at page -- I believe it is 41 of the Appendix, the Court of Criminal Appeals of Texas simply denied the motion for leave to file an original application for habeas corpus as to McKelva.

The Supreme Court of Texas did the same and both of those notations are at page 41 of the Appendix.

QUESTION: And did all that happen within seven

days?

MR. WALSH: Yes, they moved fast, your Honor and did everything they could for their client but they then received the writ of habeas corpus from Judge Roberts and it was on that day -- as a matter of fact while they were hand-carrying the writ of habeas corpus from Judge Roberts to the State District Court.

He apparently learned of it through some informant which we honestly do not know and he had the man brought over from the county jail and dismissed the charge against him and, of course, that mooted the federal habeas corpus as to the client.

QUESTION: And this was a criminal contempt, wasn't it? It wasn't civil contempt.

MR. WALSH: Well, he was in contempt of court, your Honor. I am not sure how --

QUESTION: Well, anyhow, ten days certain.

MR. WALSH: Yes and that was what was given the lawyers, too.

QUESTION: And the lawyers also had ten days.

MR. WALSH: And as Mr. Dibrell has said, the reviewing judge changed the jail sentence as to the lawyer -- as to both Mr. Maley and Mr. Maness to a $500 fine but, of course, on nonpayment of the fine, they are subject to going to jail.

QUESTION: Yes.

MR. WALSH: And there is what I think, a perfectly sound opinion from Judge Roberts, that is, Exhibit C of our brief on the merits.

Judge Roberts is from Texas. He knows what goes on and how it goes on and, quite frankly, I don't think this Court could do any better than to simply adopt Judge Roberts' opinion as to both parties.

QUESTION: Now, I see Judge Meyers' opinion. Where is --

MR. WALSH: No, Judge Roberts' opinion, your Honor.

QUESTION: Oh, Judge Roberts, yes, on the habeas.

MR. WALSH: I believe it is Exhibit C. Yes, at page 74 of our brief on the merits.

QUESTION: All right.

MR. WALSH: And Judge --

QUESTION: Isn't there a normal procedure in Texas for granting immunity when the state wants testimony that it is going to be in the --

MR. WALSH: Your Honor, we have several incoming statutes on immunity in various kinds of cases.

QUESTION: But you normally, the prosecutor or judge or somebody has to make it clear to the witness or to the party that -- that removes the danger.

MR. WALSH: Well, yes, and furthermore, I might point out that the idea that Mr. Dibrell suggested to the Court, I accord with. I think Chief Justice Burger had his fingers on it.

If this were released, even after advice of counsel, there would be a serious question in my mind as a defense lawyer, whether it wasn't voluntarily released.

I mean, yes, if you actually hit the guy over the head and take something away from him, there is no problem, but if it is your decision not to contest a court judgment and simply accept it and bring those materials into court, there is a serious question in my mind as to whether that is not a voluntary surrender and therefore, your right to suppress may indeed be restricted.

I simply bring back the Court's attention to that.

I have used most of my time. Unless the Court has further questions, I'd like to thank the Court for its attention and for the privilege of being here.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Walsh.

Thank you, gentlemen, the case is submitted.

[Whereupon, at 1:48 o'clock p.m., the case was submitted.]