In the

Supreme Court of the United States

JOSEPH JUIDICE, etc., et al.,

Appellants,

v.

HARRY VAIL, JR., et al.,

Appellees.

No. 75-1397

Washington, D.C.
November 30, 1976

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JOSEPH JUIDICE, etc., et al., Appellants, v. HARRY VAIL, JR., et al., Appellees.	No. 75-1397

Washington, D. C.,

Tuesday, November 30, 1976.

The above-entitled matter came on for argument at 1:22 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

A. SETH GREENWALD, ESQ., Assistant Attorney General of New York, Office and P.O. Address, Two World Trade Center, New York, New York 10047; on behalf of the Appellants.

MISS JANE E. BLOOM, Mid-Hudson Valley Legal Services Project, Monroe County Legal Assistance Corp., 50 Market Street, Poughkeepsie, New York 12601; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1397, Juidice against Vail.

Mr. Greenwald.

ORAL ARGUMENT OF A. SETH GREENWALD, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This is an appeal from a judgment or an order of a three-judge district court in the Southern District of New York, which declared unconstitutional seven sections of New York's judiciary law. They were declared unconstitutional as -- on the basis that they were unconstitutional on their face. In other words, basically that every word in them was unconstitutional. And the basis of this declaration was that they were in violation of the due process rights of the appellees, the plaintiffs below.

The statute, or sections of the statute in question, form part of Article 19 of this law, which provide a process and framework for punishing contempts of court. In this case, those that are denominated or processed for punishing civil contempts.

However, it should be, I think, pointed out that this process applies to all disobedience or disregard of court orders, and while this case is said to come up in the context

of disregard of a subpoena and supplementary proceedings, to disclose assets after a judgment is obtained, it would also apply, the order of declaration of unconstitutionality, to people who violate injunctions in the State court, support orders for where husband or wives are to support their spouses, and the like.

QUESTION: Well, are you saying that the district court didn't merely strike it down in its application as to these particular plaintiffs, but simply said that the State of New York couldn't enforce it at all?

MR. GREENWALD: I say yes, that -- and that was the effect that the State of New York could not enforce or punish contempts of court, period. And it did -- I say that because it declared these seven sections of the law unconstitutional on their face, and it also declared this to be a class action, and the plaintiffs were all people who had ever been subject to civil contempt in the State of New York. And I think it's rather clear from the order that it applied to people who had been and who are currently subject to be.

So it had an all-pervasive effect. And, as I say, it basically and totally enjoined this process, which is fundamental to the operation of any court, State or federal.

Now, as to what are called the facts of this case, the district court recited what it called the typical case of Harry Vail. I wish to emphasize that this was based on simply

allegations in a complaint. Because there was no trial here. Indeed, if you look at the record, there is not even an affidavit from Harry Vail as to the facts of his case.

QUESTION: Did the State file an answer?

MR. GREENWALD: The State in this case, or the appellants, State court judges, were at the time of the hearing before the three-judge court, moving to dismiss. In effect, they never got a chance to file an answer, and I would submit that when the plaintiffs are simply moving for a preliminary injunction, obviously, according to the federal rules, there is no requirement that we file an answer; and after the grant of what was called -- it first, by the way, was a final order, and then they, the district court revised it to call it a partial summary judgment; but, basically, of course, the partial summary judgment was an injunction and, in effect, the grant of final relief.

And certainly it was final in so far as the appellants here, State court judges.

QUESTION: But they did, on page 20 it seems they did try to limit it. They granted a declaratory judgment, but said it was only enjoined against being used against the members of the class.

MR. GREENWALD: Well, but what I wish to emphasize --

QUESTION: Could I interpret that as they were trying to cut back a little?

Not that they were successful.

MR. GREENWALD: [laughing] I think the district court realized, because we had a hearing after the first order came down, after the decision came down, which was in the form of an order, and I pointed out to the district court that their order was so all-pervasive and all-encompassing that it would wreck havoc with the process of State courts adjudicating civil contempt in the State of New York.

And I can confidently say that that was the situation. Judges and lawyers in the State were in such a state of confusion that nothing could be done.

Now, in answer to your question, I think the point was that the district court may have thought it was perhaps cutting back or being a little more judicious in its order, but the practical effect was still that there was no way in the State of New York to issue, even issue process in order to show cause.

QUESTION: Because they held it unconstitutional on its face.

MR. GREENWALD: Yes. And --

QUESTION: On their face. I guess they meant on their face.

MR. GREENWALD: And when you excise seven sections of our Judicairy Law, which provides for the issuance of process, which provide for the hearing, which provide for the

punishment, you are left with nothing. And it was pointed out, I think, by the Sheriff of the City of New York, unless there is a statute, you cannot ultimately punish someone for contempt by commitment in the State of New York unless there is some statute in existence.

Now, getting back to the case of Harry Vail, I also wish to emphasize, and this involves all the appellees, that this involves one county of the State of New York, what seems to be the practice or the procedure in Dutchess County. I think my briefs and the cases I cite show that it is not uniformly or the rule throughout the State of New York, as to how courts proceed in the adjudications of civil contempts. And --

QUESTION: If a witness does not appear in response to a subpoena in an ordinary lawsuit under the New York Code, is the procedure much like this, that is, to issue an order to show cause to that witness why he should not be punished for contempt?

MR. GREENWALD: I would say that it is basically the same, that the disobedience of a subpoena is punishable as a contemplt of court. And, indeed, the subpoena here and pretty much any subpoena that's issued states on its face that disregard of the subpoena is punishable as a contempt of court.

QUESTION: That's true of any subpoena, --

MR. GREENWALD: Right.

QUESTION: -- requiring any witness to show up anywhere; isn't it?

MR. GREENWALD: Yes. I mean that is the ultimate remedy of the court to enforce the subpoena. There has to be some method of enforcement.

QUESTION: Isn't that true even without the statute?

MR. GREENWALD: I -- there has been some discussion as to the inherent power of a court to punish a --

QUESTION: Right.

MR. GREENWALD: -- civil contempt.

QUESTION: Well, that's what "sub-poena" means as a matter of language; it means show up under penalty of what will happen to you if you don't show up.

MR. GREENWALD: Yes. But I submit that in the context of New York's procedure and judiciary law, which sets for a process for the punishment or citing someone for civil contempt, and then a hearing and then an adjudication of contempt, that fully satisfies due process.

Now, Mr. Vail and the other appellees complained of being found in civil contempt, and that after being found in civil contempt they were fined for that civil contempt, and after they failed to pay that fine, they were, or he was -- not all of the appellees were -- committed for nonpayment of that fine.

Actually I would point out that in Mr. Vail's case it happened to be one day, and, in fact, all of the appellees who say they were committed, it was a very short period.

QUESTION: Let me see if I understand this sequence correctly. That first he received a notice in the form of a subpoena that required him to appear for the usual post-judgment inquiry of a judgment debtor; is that correct?

MR. GREENWALD: As to his assets.

QUESTION: And he did not respond to that.

MR. GREENWALD: He did not respond to that, that is, to --

QUESTION: Then the court, when he did not appear, the court issued an order to show cause, directing him to appear to show cause why he should not be punished for contempt; is that correct?

MR. GREENWALD: That is right, on the application or affidavit or affirmation of a judgment credit, his attorney -- he requested --

QUESTION: And he failed to appear then?

MR. GREENWALD: Yes.

QUESTION: And when he did not appear then, then the court issued an order imposing a fine, and that was the third stage.

MR. GREENWALD: That was the third stage. And this, by the way, all these were, of course, personally served on the

judgment debtor, as far as the facts of this case, there is no dispute about that, although you will see an affidavit of someone claiming he got it, he got his subpoena in the mail. If that be the case, then that is a complete defense to the action, or the proceeding.

But certainly as to the class, all of this is personally served. And, as I say, that these are court records.

QUESTION: Do I understand correctly that the fine of some $270, the so-called fine, was then -- did not go into the treasury of the court, but went to the judgment creditor to apply on the debt; is that correct?

MR. GREENWALD: That is correct. The fine, since this is denominated as civil contempt, goes to the party instituting the proceeding, and in all these cases goes to the reduction of the judgment. I think in Mr. Vail's case the fining order required him to pay $10 a week. So, therefore, it wasn't something that had to be paid all at once.

Now, I think the context of one default after another has to be recognized. When we speak about due process, as to this contempt proceeding, there is no dispute that every one of these appellees got notice, and, furthermore, received an opportunity to be heard.

And if at any point the contemner, that's the judgment debtor, had responded and informed the judgment creditor

in the proper manner, or the court, of their indigency -- because these appellees claim they are indigent -- and evidenced his lack of assets, the matter would be ended, because that was the object of the subpoena, to examine as to assets.

So, once again, I would state that, to Mr. Vail and every other appellee here, due process was accorded.

QUESTION: Mr. Greenwald, let me just clarify this one thing in my mind. Had the -- Vail, to take the example, responded to the discovery proceeding and come in and testified that he had no assets, under New York practice what would have happened then?

MR. GREENWALD: That's the end of it. He's responded to the subpoena --

QUESTION: Do they vacate the judgment then? The default judgment.

MR. GREENWALD: No, the judgment is not vacated, but the point is that the purpose of the subpoena was to examine this judgment debtor to see whether he had any assets available to the satisfaction of the judgment. That was the only purpose of the subpoena. To vacate --

QUESTION: If the examination discloses a kind of borderline case, say, does the judge have the power at that proceeding to enter some kind of a payment order than the initial judgment?

MR. GREENWALD: Absolutely not. Because the point is that the judgment debtor has responded to the subpoena. He's not in default.

The only way to vacate the judgment would be, of course, either to make a motion to vacate the judgment or declare bankruptcy, which then can wipe out the judgment. But that's another process.

QUESTION: Is there a judge there at the supplemental proceedings?

MR. GREENWALD: The supplementary proceedings are done on a subpoena issued by the attorney, and normally a judge is not there. There can -- there are some processes --

QUESTION: You say "there", where is that, in a courtroom?

MR. GREENWALD: It can be in a courtroom, or, I think, they oftentimes are returnable at the lawyer's office.

QUESTION: Right.

QUESTION: Like a deposition.

MR. GREENWALD: Like a deposition, right.

QUESTION: And how often can the judgment creditor do this? Let's say, the first time he comes in and the judgment debtor says, "Sorry, I have no money, and I have a lot of debts and no assets", then can the judgment creditor try all over again the following week?

Is there any limit on how many times or how frequently

he can do it, in other words?

MR. GREENWALD: I do not believe there is any limit, but I would submit, of course, if this comes down to being harassment, that obviously relief from the court can be obtained. Indeed, I cite the case where -- in my reply brief, a case called Oysterman's Bank -- where the State court simply enjoined any further supplementary proceedings, after being informed, in an informal manner, just a letter, of the fact that the judgment debtor was on public assistance.

I also wish to emphasize, and having stated what is called the facts, that if this type of matter, this type of adjudication of civil contempt is to be reviewed, I submit that this court should do it on what is a full record, namely, where it has come up through the State courts, where the matter has been fully litigated and the facts found.

And this is why I contend that the district court should have abstained. In other words, it should have considered the applicable principles of federalism, comity, and equity, which apply to any federal court, when I see it in effect reviewing State court decisions.

QUESTION: You mean abstention in the sense that Younger and Huffman, and not in the sense of letting the State court decide a question of State law?

MR. GREENWALD: Well, I am now speaking in the sense of the Younger-Huffman abstention. However, I will say that

I think it's not completely clear, or I think that the abstention to obtain a ruling of the State court as to procedures might be efficacious in this case, too. Because you are dealing here with a statute that basically has not been construed by the State court.

QUESTION: Well, at the time, what was the precise status of the State proceedings when the injunction was entered?

MR. GREENWALD: Well, if we speak about --

QUESTION: There had been a holding of contempt, or had been an adjudication of contempt?

MR. GREENWALD: In the case of Mr. Vail, apparently the whole thing was over. It was almost like -- and that gets to res judicata --

QUESTION: What do you mean it was over?

MR. GREENWALD: He had been found in contempt, --

QUESTION: Yes.

MR. GREENWALD: -- he had been fined.

QUESTION: Yes.

MR. GREENWALD: A commitment order had been issued, and he had paid the fine. So the whole matter is over.

QUESTION: So he faced no confinement, of course.

MR. GREENWALD: Yes. I mean, certainly Mr. Vail's case would not warrant an injunction, I think I could say.

QUESTION: Yes.

MR. GREENWALD: However, if there was any complaint about that, then if it's --

QUESTION: Well, the injunction probably didn't affect his case in any way.

MR. GREENWALD: I couldn't think it really -- it did affect his case. However, I can't rely on the fact that Mr. Vail not having a case for an injunction, because there were other appellees, in fact I think there were eight or nine in number, and they came into federal court after they had been adjudicating contempt, had been served with the finding order, and requested a temporary restraining order from the federal court and obtained same.

And I wish to emphasize, by the way, that I did not oppose any restraint on -- I mean, oppose these restraining orders, but I --

QUESTION: Did you ask for abstention in the lower court?

MR. GREENWALD: I certainly did. And I think it's rather obvious, because there's some discussion of it in the district court opinion.

I also, though, as to the people who had been already found in contempt, I had put in our motion to dismiss, and that's all we had in the district court.

QUESTION: What did the district court mean by -- when he said that he was going to make his unconstitutionality

judgment retroactive?

MR. GREENWALD: Well, because if we --

QUESTION: Does that mean that somebody could get his fine back?

MR. GREENWALD: It would -- it might very well mean that. You see, reading from 20a of the Jurisdictional Statement, this is the order appealed from: the seven sections "are unconstitutional on their face and permanently enjoining the operation of said statutes against plaintiffs and members of their class, namely, all persons who have been or are presently subject to civil contempt proceedings."

Now, if you say "have been", I think that has a common -- the common meaning to me means anybody from the Year One who has ever been held in civil contempt. He can be -- he can be removed from that status. In other words, fines would have to be repaid. You have the possibility of all types of legal action which would be quite disruptive of the whole past contempt process.

QUESTION: It said that the contempt here has been satisfied by the payment of the fine which has been applied on the debt.

MR. GREENWALD: Yes. That's --

QUESTION: So that you regard that as res judicata?

MR. GREENWALD: Yes. In the case of Harry Vail.

QUESTION: Now, suppose, at this point, the judgment

creditor served a notice in the usual way for an additional post-judgment inquiry into assets, reciting in that application that they were informed and believed, under oath, that the judgment debtor had inherited real estate and personal property in the value of at least $15,000.

At the present time, could they proceed, given the judgment of the three-judge court, could they require him to appear and submit to examination, and, if he failed, could a State court judge ultimately find him in contempt?

MR. GREENWALD: Well, I would put it this way: They still can, of course, serve a subpoena in supplementary proceedings. The careful lawyer would be well-advised to put on that subpoena, as the form -- the form company which publishes this type of form, in New York it's generally a form, what we call the Blumberg forms -- would have on it, "failure to reply to this subpoena not only will subject you to punishment for contempt but may result in your fine or imprisonment".

But at this point, after this, after the disregard of this subpoena, if the attorney would seek to, you know, obtain the order to show cause to punish for contempt under section 757, the procedure provided for, he could not do so, because under the judgment of the court below it doesn't exist any more; it's been declared unconstitutional, it's been enjoined, it can't be used.

And -- yes? Go ahead.

QUESTION: Can I ask you a question, Mr. Greenwald? As here, so often, when a man goes to jail, all of a sudden the fine is paid.

MR. GREENWALD: Yes, it's very curious.

QUESTION: Well, it's possible, is it not, for the payment to be made out of exempt property?

MR. GREENWALD: It might very well be possible for the payment. But I wish to point out, and in my reply brief I cite the case of Brown v. Liberty Loan Corporation, where the Fifth Circuit reversed the lower district court and held that it was not necessary to give notice of the fact that you have exemptions. That due process does not require that.

Basically, due process doesn't require or doesn't legislate this type of notice. And --

QUESTION: Well, what I wanted to ask, do you have any procedure in New York whereby a return of payment made out of exempt property can be effectuated?

MR. GREENWALD: I do not know of any procedure. The point I would make is that if a person has exempt property and chooses to satisfy his just debts, and let us recognize the fact that there's a judgment involved, that should not be condemned. He has an exemption, he can rely on that exemption.

But if he has available money and chooses to pay this debt, which has been reduced to judgment, I don't see where any

constitutional objection can be made.

Now, as I wish to emphasize, the federal court here essentially took a State court record and then proceeded to review it, as if it was a State appellate court. And I submit that it does not have that power, and under the principles of Huffman v. Pursue, that abstention is entirely proper in this case.

QUESTION: Let me ask this, in that connection, General Greenwald: How long have these laws been on the books in New York State?

MR. GREENWALD: The Judiciary Law was passed about the turn of the Century, I think it was enacted about 1906 or 1907.

QUESTION: And you said earlier that they have never been construed by the New York courts? I have difficulty following that.

MR. GREENWALD: I don't -- I say they have not been construed in light of these constitutional objections, and that is the type of abstention, the other type of abstention where England v. --

QUESTION: Medical Examiners.

MR. GREENWALD: -- Medical Examiners; that type of construction. And I also point out that as to the supplementary proceedings or the subpoena, this type of subpoena, I believe the contempt process only became applicable in 1963 as a

result of our Civil Practice Law and Rules, which, in another -- in a section, said that disregard of the subpoena is punishable as a contempt of court --

QUESTION: But that's 13 years, and certainly these are not dead-letter laws, they are used every day, aren't they, by lawyers?

MR. GREENWALD: Yes, certainly -- yes, they are used every day.

QUESTION: Aren't these statutes -- isn't this statutory pattern similar to that in a great many of the States?

MR. GREENWALD: Yes, it certainly is. In our Jurisdictional Statement I cite a number of State statutes, and I do not see anything basically different between their statutes and our statutes.

QUESTION: Don't you have a whole jail over in Brooklyn for nothing but these people?

MR. GREENWALD: No, we do not have civil -- we do not have a specific civil jail in New York City any more. And, in fact, --

QUESTION: Where do they put them now?

MR. GREENWALD: They put them in Reiker's Island.

[Laughter.]

MR. GREENWALD: In point of fact, though, it's very difficult if the person takes his opportunity to be heard, to

be fined or be found in civil contempt if you are truly indigent. And this brings me up to, I think I should say -- because I see my time is getting very short --

QUESTION: Mr. Greenwald, I shouldn't use your time this way, but could you help me? What is the statutory authorization for the initial discovery notice served by the lawyer in the post-judgment procedure?

MR. GREENWALD: The statutory authority is in the Civil Practice Law and Rules, I think in the 5,000 or 5200 --

QUESTION: But that's not in -- that has not been held unconstitutional, is that correct?

MR. GREENWALD: No, that's not in issue. The appellees are not contending that they cannot be required to dislose their assets.

QUESTION: No, I understand. Just let me get my problem out before you.

The attorney's notice, then, is not preceded by any court proceeding of any kind, other than the default judgment, is that right?

MR. GREENWALD: No. The attorney issues the subpoena as an officer of the court, as he does in many States, as --

QUESTION: And he has authority, as a lawyer, to pick the time and place and all the rest of it on his own?

MR. GREENWALD: Yes, he has the time and --

QUESTION: And for what period of time after the

entry of the default judgment may he do this?

MR. GREENWALD: I think --

QUESTION: Until the judgment is satisfied?

MR. GREENWALD: I would be speaking from some vague recollection, frankly, that I've seen something like a two-year limit on this, and I couldn't cite the statute; but there is a time limit, basically. I can't --

QUESTION: Now, the rule to show cause why the debtor shall not be held in contempt of court, the contempt of court is the failure to honor the lawyer's subpoena; is that right?

MR. GREENWALD: That is correct. I wish to emphasize, the contempt of court is not the failure to pay the judgment. It --

QUESTION: But do you know of any other State procedures which provide contempt of court for the failure to respond to a notice of that kind, which is not preceded by any court order?

MR. GREENWALD: Well, --

QUESTION: Well, is not the subpoena itself a court order?

MR. GREENWALD: The subpoena is deemed to be a court order, because the attorney in this case is acting as an officer of the court, as he does in many States. I think in some States he can issue, say, a number of types of process as an officer of the court.

But what I wish to emphasize is --

QUESTION: But it's different from the federal system, for example?

MR. GREENWALD: Yes, of course. Right in the federal system, like, I think, a marshal has to serve the summons and complaint; in the State court, anybody can.

But what I --

QUESTION: There are notices of deposition in the federal system that are issued by lawyers. Now, if you don't show up for a deposition, certainly court proceedings can ensue against you.

MR. GREENWALD: That's right.

QUESTION: It's a violation of the court order that then gives rise to the contempt, rather than the failure to show in the first instance.

MR. GREENWALD: Well, but the point is that due process -- and this is what I wish to emphasize, due process requires notice and an opportunity to be heard. The order to show cause here, as is recognized in the district court opinion, gives that notice and then gives the opportunity to be heard in court. Basically, the enforcement of this subpoena is a totally judicial process, and --

QUESTION: Well, he not only gets a subpoena, but then if he fails to live up -- to show up, he then gets an order against him, served on him, --

MR. GREENWALD: Yes, signed by a judge, --

QUESTION: -- which is that you either come in and explain it or you're going to be fined.

MR. GREENWALD: Or be punished for contempt.

QUESTION: Yes.

MR. GREENWALD: And I think those words have a common meaning.

Now, as to the specific objections of the -- if abstention is not applied to this case, --

QUESTION: Well, what if he shows up for that -- what if he shows up in compliance with that order?

MR. GREENWALD: With the order? Then, of course, -- and this isn't fair, I shouldn't say "of course"; the judge would --

QUESTION: Could the judge, under the statute, hold him in contempt no matter what he said?

MR. GREENWALD: Well, he --

QUESTION: If he didn't give a good excuse, could he hold him in contempt?

MR. GREENWALD: Yes, he could hold him in contempt, and of course that holding --

QUESTION: For not complying with the original subpoena?

MR. GREENWALD: Yes, he could. And of course that holding of contempt could be reviewed on appeal.

I'm not here saying that my clients, the State court judges, made the correct decision. Because the correctness of their decision is to be reviewed on appeal. If the person who is held in contempt objects to it.

But what I wish to emphasize is, basic to this case is the claim of indigency of these -- the appellees claim they are indigent. And if any judgment debtor comes into court in response to this order to show cause and says, "I have no money, I am indigent", and of course then the judge would examine them a little further, you know, about that indigency. As a matter of law, he would not be found in contempt.

And, indeed, --

QUESTION: Why not? If he didn't show up for the lawyer's subpoena?

MR. GREENWALD: Because --

QUESTION: Indigency is no defense to failure to respond to process, is it?

MR. GREENWALD: But I do wish to emphasize that the cases, the few cases -- and they are nicely prized in the State of New York -- indicate that if, at the show-cause hearing the judgment debtor shows that he is indigent, that he cannot, you know, that he in effect -- that he cannot pay the judgment, that's the end of the matter. He's not held in contempt.

QUESTION: Even if the lawyer had tried on 35

occasions to get him to respond to a subpoena at his office, and he just refused to come in, said, "I'm not going to any lawyer's office at all, you can't make me", couldn't the judge hold him in contempt for that even if he was indigent?

MR. GREENWALD: It's conceivable, but what I wish to emphasize is that --

QUESTION: Because indigency is not a complete defense.

MR. GREENWALD: But I wish to emphasize that since the ultimate penalty here is a fine, and if the person cannot pay the fine, he cannot be committed, then that's the end of the subpoena. And that is basically what happens in New York, in the New York courts.

The problem in this case is not the lack of any due process, it's the complete disregard of judicial process by the appellees. And if there is any error in the action of the appellants, the State court judges, that was to be reviewed on appeal by the State courts, with an appeal to this Court, if the condemner so chose.

The point is you have really -- have no record here, and these statutes do provide due process.

QUESTION: Is the subpoena that was issued in the first instance here structurally and procedurally the same kind of a subpoena that is issued to bring witnesses into court for purposes of testifying in a trial?

MR. GREENWALD: Yes, basically it is. It tells the --

QUESTION: It just explains the different purpose?

MR. GREENWALD: Yes. It tells the person to come to a place to be examined in accordance with law.

QUESTION: But procedurally you're telling us that it is the same under the New York Statutes?

MR. GREENWALD: Basically, and if you disregard that subpoena, contempt proceedings could be --

QUESTION: Well, don't some of your New York grand jury subpoenas require appearance in the office of the Assistant District Attorney rather than in court?

MR. GREENWALD: I believe they do have a procedure for making them returnable in their office.

I don't think that's -- as I say, that's not the issue in this case. The issue in this case is the State court procedures and decisions, and that's where I think abstention should apply.

And I see -- if I could take another minute -- as I say, the requirement of an actual hearing -- well, there was a hearing here. It's just the problem was the appellees didn't come.

As to the -- and as to actual presence, I think this Court has decided in Blackmer v. United States that this type of actual presence is not required as long as the person has

received notice, and the same type of notice was involved in Blackmer, and he had the opportunity to appear, as he did here.

MR. CHIEF JUSTICE BURGER: I think you've covered that pretty well factually.

MR. GREENWALD: Okay. Thank you.

MR. CHIEF JUSTICE BURGER: Miss Bloom.

ORAL ARGUMENT OF MISS JANE E. BLOOM,

ON BEHALF OF THE APPELLEES

MISS BLOOM: Mr. Chief Justice, and may it please the Court:

There are two essential issues in this case.

First, whether debtors who have disobeyed a subpoena issued by a creditor's attorney may be jailed for up to ninety days --

QUESTION: Now, you said issue. Is that signed by the Clerk of the Court, or authorized by --

MISS BLOOM: No, it is not; it is signed by --

QUESTION: Is it authorized by the Clerk of the Court?

MISS BLOOM: No, it is not. It is signed by the creditor's attorney.

QUESTION: Yes. Now, --

MISS BLOOM: Whether these --

QUESTION: -- is the Clerk of the Court, as you see it for due process purposes, a different kind of an officer

of the court from a lawyer who is admitted to the bar, under New York law?

MISS BLOOM: Yes. Yes, he is.

QUESTION: Hasn't the New York statute delegated to a lawyer, who is attorney of record in a particular case, the authority to issue that subpoena?

MISS BLOOM: Yes, and I don't quite his authority to issue it, and I don't question the fact that the debtors in this case disobeyed the subpoenas.

The question is, whether or not debtors may be jailed for up to ninety days for disobeying the subpoena without ever appearing before a judge and without ever being advised of their right to counsel or assigned counsel if indigent.

QUESTION: Well, that about proves it. He had an opportunity to appear before a judge.

MISS BLOOM: That's correct. They did have an opportunity.

QUESTION: Well, is the State supposed to give more than an opportunity?

MISS BLOOM: I would agree, Mr. Justice Marshall, --

QUESTION: He wants the State to send a Cadillac and pick him up and take him there?

MISS BLOOM: No. No. I would contend that when an individual may be jailed for up to ninety days, that the person must be brought before the court prior to incarceration.

I would agree that in a due process analysis, the opportunity --

QUESTION: Well, suppose Judge Jones issues a subpoena to Sam Brown to appear in his court tomorrow morning, as a witness, and the guy says, "Well, he must be crazy; I'm not going."

Is there any more -- anything necessary other than for the judge to issue a show-cause order and put him in jail?

MISS BLOOM: No. But we have a different situation there.

QUESTION: Well, didn't he issue a show-cause order here?

MISS BLOOM: Yes, he did.

What I'd like to do is to clarify exactly what happened when that show-cause order was issued. And I would like to clarify the statutory procedure by outlining how the statutes operated with respect to Patrick Ward. I would maintain that everything that happened to Patrick Ward was permitted under the statutes.

QUESTION: Is he one of the named plaintiffs?

MISS BLOOM: He is one of the named plaintiffs, that's correct.

I might add that Patrick Ward's affidavit is verified and it is uncontroverted. The creditor's attorneys never answered the complaint.

A default judgment was taken against Patrick Ward in city court in the City of Poughkeepsie for nonpayment of a $125 medical bill. The creditor's attorney then issued a subpoena ordering Ward to appear for a disclosure deposition at the courthouse.

The courthouse was designated as the location, not because a judge was involved in these proceedings, but because that was the requested location.

Ward appeared as instructed. When the attorney did not appear, a clerk instructed Ward to go to the attorney's office. Ward went to the office, and told the attorney that he would produce the information at the courthouse, but not at the attorney's office. He essentially did not understand the purpose or meaning of the subpoena.

Based upon Ward's refusal to provide this information, the creditor's attorney instituted civil contempt proceedings to enforce compliance with the subpoena. He served Ward with a notice of motion to hold him in contempt.

Now, under 757 of the Judiciary Law, the proceedings may be commenced by a show-cause order or a warrant of commitment -- warrant of attachment, or by the creditor's attorney issuing a notice of motion.

If we examine the show-cause order, which appears at page 12 of my brief and in 757, the order does not inform the debtor that failure to appear may result in incarceration or

a fine. It informs him at this point that failure to appear may result in a finding of contempt.

When Ward received the notice of this hearing, he contacted the creditor's attorney and arranged to satisfy the judgment by paying ten dollars a week to the attorney. He did not go to the court hearing. He was again under the misimpression that he didn't have to.

Three weeks later, Ward was laid off from his job and told the creditor's attorney that he would not be able to continue making payments.

Three months later, Ward was served with a contempt order. He was held in contempt for his failure to obey the subpoena, not his --

QUESTION: You say a contempt order at that point. This is not an order to show cause, but an --

MISS BLOOM: That's correct.

QUESTION: -- order actually holding him in contempt?

MISS BLOOM: That's correct.

Now, he was held in contempt for his failure to obey the subpoena, not his failure to appear in court.

QUESTION: Now, the subpoena or the show-cause order?

MISS BLOOM: For not obeying the subpoena.

QUESTION: The original subpoena?

MISS BLOOM: The original subpoena. If we --

QUESTION: Of course he didn't obey it in the sense that if he went to the place of the deposition he refused to testify.

MISS BLOOM: That's correct. He did not obey it. And he was held in contempt for refusing to obey the subpoena issued by the creditor's attorney, not for failing to appear in court.

If --

QUESTION: The original subpoena?

MISS BLOOM: That's correct.

QUESTION: Well, he had obeyed that, he had shown up at the courthouse, hadn't he?

MISS BLOOM: Well, he had not technically given the information. He had appeared and gotten confused about the fact that the subpoena told him to go to the courthouse. He was directed --

QUESTION: That's where he went.

MISS BLOOM: -- directed to go to the attorney's office, and he said, "I'll give you the information at the courthouse."

QUESTION: Well, that's what the subpoena required him to do, isn't it?

MISS BLOOM: Well, under New York law, the fact that he got further notice to go to the attorney's office is sufficient.

QUESTION: I see.

MISS BLOOM: And he could have been held in contempt.

QUESTION: You mean they adjourned the hearing or the appearance to another place, is that it?

MISS BLOOM: That's correct. And under New York procedure --

QUESTION: Under New York law it would be the same as though they adjourned it from the third floor of the courthouse to the fifth floor?

MISS BLOOM: Exactly.

QUESTION: Where does appeal lie from the county court of the appellant here, the appellate division?

MISS BLOOM: The appellate term.

QUESTION: Well, are you saying that it's inconceivable that the appellate term, if your client had appealed that citation, would not have found some violation of the State law and cite him under those circumstances?

MISS BLOOM: I am not suggesting that. I am suggesting, as we will see as these procedures follow, that individuals may be incarcerated who are on public assistance, or have other forms of exempt income, before they realize that -- before they have an opportunity to appeal. And that they suffer this kind of injury before they are aware of appellate procedures.

Secondly, since they do not have an attorney, they may not know that they have these defenses, and they may not use the procedures as they might otherwise.

QUESTION: Well, doesn't the appellate term have authority to grant a stay if it felt that the man was being incarcerated by the county court wrongly?

MISS BLOOM: Yes, they do. Yes, they do.

Let me just respond to that and clarify what I've just said.

The procedure that Patrick Ward would have had to use to stop the proceedings against him, after the contempt order was issued, was to make a motion to vacate the contempt order. He would have gone back before the county court judge that issued the initial contempt order, and he could have gotten a stay at that point.

QUESTION: Well, don't you think that the New York courts could have given you relief without striking down the whole batch of statutes?

MISS BLOOM: They might have, and that --

QUESTION: And don't you think they would have?

MISS BLOOM: They certainly might have. And they -- and we don't --

QUESTION: But by this action everybody is -- there's no more contempt in New York.

MISS BLOOM: Well, the court still has an inherent

contempt power, and the only thing that they can't do is to incarcerate individuals. They can clearly fine them.

QUESTION: Well, is contempt without the power of incarceration any good?

MISS BLOOM: I don't question that these New York courts --

QUESTION: Do you think that all of these statutes are unconstitutional on their face?

MISS BLOOM: Yes, I do.

I think that statutes that put --

QUESTION: All of them?

MISS BLOOM: The statutes that were declared unconstitutional, yes.

QUESTION: You wouldn't settle for them being unconstitutional as applied to your class?

MISS BLOOM: If you want to declare them unconstitutional as applied, that would satisfy our interest.

I feel that whenever individuals are incarcerated without an attorney and without ever appearing before a judge, there is such a high risk that --

QUESTION: Well, my case is that this man was subpoenaed by the judge to appear from him, and he never showed up; and the judge issued a bench warrant and had him brought in. That's as legal as anything I know of.

MISS BLOOM: If that was the --

QUESTION: Is that right?

MISS BLOOM: No. If that was the procedure, Mr. Justice Marshall, --

QUESTION: You mean a court can't do that?

MISS BLOOM: If that was the procedure, I would say that that comports with due process.

The problem that occurs --

QUESTION: Well, I'm saying, you don't find anything wrong with that, do you?

MISS BLOOM: If the person is advised by an attorney --

QUESTION: He is incarcerated without ever seeing a judge.

MISS BLOOM: All right. I misunderstood your question. If the individual is -- if the judge issues a bench warrant, generally the individual is brought before the court.

QUESTION: No, he issued a subpoena. And the man ignored the subpoena, without ever seeing a judge, he ignored it; and, without seeing a judge, the judge issued a bench warrant and put him in the cooler. And they will do it every day. And there's nothing I know of illegal about it. You get your hearing then, yes, you get a show-cause hearing.

But the bench warrant, they will pick you up wherever you are.

MISS BLOOM: There are two different situations in this

case, though.

First of all, as the proceedings indicate, the individual was never held in contempt for wilfully disobeying a court order. There was never any finding that the individual wilfully failed to appear at the show-cause hearing, or wilfully failed to pay the fine. The statutes indicate that an individual can be incarcerated if he neglects or refuses to pay the fine.

QUESTION: But that's a different case from the one here, that the court wrote on. They didn't say anything -- as I understand, on page 2a, they say just the opposite, don't they?

MISS BLOOM: No. If we look at the statutes --

QUESTION: By order of the court, the court will make a final order directing that he be punished if he doesn't return. Right?

MISS BLOOM: You are on 2a of the decision?

QUESTION: The opinion. I mean, once --

QUESTION: In the Jurisdictional statement.

QUESTION: -- once the court issues the show-cause order, doesn't he have an opportunity to go in court and show anything under the sun that would convince the court not to put him in jail?

MISS BLOOM: Yes, he does. And I would --

QUESTION: And isn't --

MISS BLOOM: -- I would contend that if we were talking about property, that an opportunity for a hearing would be enough. I would maintain that since we are talking about depriving an individual of liberty, that more due process must attach.

QUESTION: You never finished telling us the sad story of Mr. Ward, because we interrupted you. I'd be interested in hearing that.

MISS BLOOM: Okay.

Three months later, Ward was served with a contempt order. Ward was held in contempt for his failure to obey the subpoena and not his failure to obey the -- or appear in response to the show-cause order.

QUESTION: Now, is that -- that was authorized by the statute, or was that --

MISS BLOOM: Correct.

QUESTION: -- a clerical error?

MISS BLOOM: That was authorized by the statute.

QUESTION: All right.

MISS BLOOM: The statute -- it's in the finding order.

QUESTION: Unh-hunh.

MISS BLOOM: According to 770, the court issued the order based upon a creditor's affidavit indicating that Ward wilfully disobeyed the subpoena and that this impaired the

creditor's rights.

The contempt order directed Ward to pay $250 plus court costs to the creditor within thirty days, or face incarceration.

Now, under 773 of the statutes, as the creditor chose not to prove that he had suffered any loss, the court imposed the fine of $250 plus costs, even though the underlying judgment was $146. And the creditor received the entire 250 plus costs plus attorney's fees.

When Ward received this order, his income --

QUESTION: Since you recite that, do you suggest there is something wrong with that?

MISS BLOOM: Yes, I do. I would suggest that a civil contempt fine can be either compensatory or coercive, and that a fine of this type is not compensatory, because it is not related to the underlying judgment; it is also no coercive, because the individual is fined until he -- he is jailed until he pays the fine. He is not jailed until he provides the information.

QUESTION: Are you saying that additional costs cannot be allowed to the judgment creditor, --

MISS BLOOM: No, because --

QUESTION: -- when he has had to take these extra steps?

MISS BLOOM: No. The judgment creditor, under the

statute, is entitled to $250 without proving that he suffered any loss. Meaning --

QUESTION: But that's credited against the debt, isn't it?

MISS BLOOM: Well, if the underlying debt is ten dollars, he can still get $250 and keep it. He is then entitled to costs above that, and entitled to attorney's fees above that.

QUESTION: Unh-hunh.

MISS BLOOM: The fine is not coercive, because the individual will remain in jail until the fine is paid. The individual doesn't remain in jail until he provides the information.

QUESTION: But you haven't quite finished Mr. Ward's story, have you?

MISS BLOOM: I will finish.

When Ward received the contempt order, his income consisted of $61 a week in unemployment insurance benefits, with $30 of that going to his ex-wife, pursuant to a New York Family Court support order. The instant action prevented the proceedings from going any further with respect to Ward.

When other debtors failed to pay the contempt fine, the court issued a warrant of commitment based again on a creditor's affidavit --

QUESTION: Have you finished with Ward's story?

MISS BLOOM: Yes, I have.

QUESTION: What happened to him then, ultimately?

MISS BLOOM: Ultimately, a temporary restraining order was issued by the federal court and he was not incarcerated.

QUESTION: Before you leave Ward, what about on May he was served with a notice of motion for order, finding defendant in contempt of court, and ordering him to appear in Dutchess County Court?

MISS BLOOM: That's correct. And, as I --

QUESTION: Was that a valid order?

MISS BLOOM: That was a valid order.

QUESTION: And he disobeyed it.

MISS BLOOM: Well, as I indicated on --

QUESTION: Well now, wait a minute, let me read what he said in his affidavit: "I did not appear". That's what he says in his affidavit.

MISS BLOOM: That's correct. He --

QUESTION: So he disobeyed the order.

MISS BLOOM: That's correct. He went to the attorney's office --

QUESTION: And he sort of got punished for it.

MISS BLOOM: And he went to the attorney's office and told the attorney that he would pay ten dollars a week, and failed to appear.

QUESTION: That's No. 11. No. 10, it says, "I did

not appear". Then No. 11, it says, "In May I contacted Mr. Graham". Those are two separate statements.

MISS BLOOM: That's -- well, what happened, in essence, was that he did not appear at the required hearings, however, he contacted the creditor's attorney and tried to explain what happened.

QUESTION: Well, there was a time span, wasn't there?

MISS BLOOM: That's right. That's right. What he did amounts to civil contempt. I am not questioning that. I am questioning the procedures that were used to fine and possibly incarcerate him as a punishment for civil contempt.

QUESTION: In your recital of Mr. Ward's tribulations, you mentioned the fact that he was subject to a support order. What is the procedure in New York if he had ignored that in the same way that he ignored the other order?

MISS BLOOM: If he had ignored a support order, and the support order was issued by a New York Family Court judge, he would have had -- and if he did not appear at an initial show-cause hearing, the court would physically bring him before the Family Court, and ask him --

QUESTION: How is that accomplished?

MISS BLOOM: They issue what's called a writ of attachment, and the Sheriff goes out, picks up the person, and

brings him before the court. And a hearing would have been held at that time, to determine why he didn't pay the support order.

He also would have been provided with -- he would have been informed of his right to counsel, and he would have been informed that he had a right to assigned counsel if he was indigent.

QUESTION: Is that same procedure followed in a divorce case, where alimony is ordered?

MISS BLOOM: It's followed only in support actions in Family Court. The irony of the situation is that a creditor or an attorney in the support and alimony situation has the option of eighter using the Family Court procedures, which provide the procedural safeguards that we're asking for here, or the procedures in the Judiciary Law, which provide none of those procedural safeguards.

QUESTION: But if the divorce is in an ordinary court, not the Family Court, what are the procedures with respect to alimony?

MISS BLOOM: Well, the procedures will be those found in the Judicary Law, in the challenged sections of the civil contempt statutes.

QUESTION: So the judgment in this case would invalidate that procedure as well as with respect to creditors?

MISS BLOOM: Yes, it would. Yes, it would.

QUESTION: Have you ever heard of a law that's been struck down by this Court on its face, outside of the First Amendment area?

MISS BLOOM: I believe that a law like this can be struck down on its face, because the statutory procedures that operated with respect to the plaintiffs in this case were permitted under the statute.

QUESTION: Well, but then it's not an "as applied" basis. In the case of these particular plaintiffs. Even if you're right on the merits. Is it?

MISS BLOOM: I believe that the district court could have held these statutes unconstitutional as applied to these plaintiffs, or unconstitutional on their face.

QUESTION: Well, these plaintiffs are the whole class of people affected by the law, aren't they?

MISS BLOOM: Yes, they are. Yes, they are.

QUESTION: So if you strike it down as applied to these plaintiffs, you're striking down the whole law, as applied to anybody to whom it applies.

MISS BLOOM: I would say a statutory procedure that permits people to end up in jail without ever seeing a judge or an attorney can be declared unconstitutional on its face. There is no way that you can read it, to make it constitutional.

QUESTION: Well, even in the area of criminal law, if a person -- if a defendant in a criminal case voluntarily

absents himself from the trial, he can still be convicted and sentenced to prison, --

MISS BLOOM: That's correct, but --

QUESTION: -- at least in a misdemeanor case.

MISS BLOOM: -- but the essential difference there is that that person has a right to an attorney. And that attorney will explain to him the consequences that will result --

QUESTION: Well, now you're shifting the ground. Up to now it was -- he didn't get a hearing, but he was given an opportunity for a hearing.

MISS BLOOM: That's correct.

QUESTION: And it was at his behest that he didn't get a hearing. And the same thing in a criminal trial, if you voluntarily absent yourself after the trial begins, you can still be convicted. You have the opportunity to be there, but you -- that's all the State need accord you, even in the context of a criminal conviction.

QUESTION: At any time did he come into a court and ask for the appointment of a lawyer on the basis of his indigency, in order to protect himself?

MISS BLOOM: One plaintiff did, Rabasco. He went into --

QUESTION: Well, this -- I'm talking about --

MISS BLOOM: In this case.

QUESTION: Let's stay on the same man.

MISS BLOOM: This individual did not.

QUESTION: Yes.

MISS BLOOM: Another plaintiff did, and he was told by -- as a matter of fact, he did it in a support and alimony situation, and he was told that there was no right to assigned counsel.

His affidavit is also uncontroverted. The defendants in the lower court did not answer or respond to his affidavit.

QUESTION: Well, was there anything wrong with the -- would there have been any shortcomings in any possible State remedies, or adjudications with respect to your constitutional issues?

In short, could you have raised them in the State court and had them adjudicated?

MISS BLOOM: We could have raised these constitutional issues in the State court. We felt -- with respect to Patrick Ward. With respect to individuals such as Harry Vail, we could have appealed on his behalf. The problem in his case, though, is that we maintain that he suffered too much injury by the time he got to the appellate level. He was incarcerated and his entire income was exempt from execution.

He could have appealed to get that money back. There would be no way --

QUESTION: At some point in that process, if he had

got ahold of a lawyer earlier, he could have raised all the questions he wanted to in the State court.

MISS BLOOM: If he had gotten -- if he had had counsel, he could have; that's correct.

QUESTION: Or if he had known enough himself.

Now, you seem to treat this -- these proceedings a lot like a criminal case, in terms of what procedures might be required, presence and counsel, and things like that, and yet you say it shouldn't be treated as a criminal case, even a quasi-criminal case for purposes of Younger abstention.

MISS BLOOM: That's correct.

I am treating them not as a criminal case for the due process protections that I believe are required here, but a case in which an individual is deprived of liberty. And that can occur in many civil contexts, it can occur in civil commitment context, and others; and I believe that for due process reasons, that an individual must be assigned a lawyer and must appear before a judge before that individual can be incarcerated, for --

QUESTION: No matter how many times he refuses to show up?

MISS BLOOM: Yes. Yes, I believe -- I believe that he doesn't need to be given ten opportunities to show up. What needs to happen is to have him physically brought before the court, as in the New York Family Court procedure, so that

a court can make a reasoned determination as to whether or not this person belongs in jail.

QUESTION: But it -- when you're talking about vindicating the authority of the court, of a State court, you're pretty close to the core of the State interest in its judicial processes, aren't you?

It's not just enjoining some case. This is keeping a court from -- keeping a court from protecting its own authority.

MISS BLOOM: Well, what happened here -- first of all, I think that the statutes must be viewed as purely civil statutes.

QUESTION: Well, I know you think that. [laughing] I don't blame you.

MISS BLOOM: The statutes say that. The statutes say that. They play no part in criminal law enforcement.

QUESTION: Well, Huffman v. Pursue wasn't strictly a criminal case, was it?

MISS BLOOM: No, it wasn't, but the statutes in that case were used in aid of criminal statutes, and the essential difference is that the proceedings were initiated by the State.

In this case we have private individuals initiating proceedings, and there is --

QUESTION: Well, don't you think the State has just

as great an interest in seeing the authority of its courts vindicated, as it does in pursuing a quasi-criminal remedy in an obscenity case?

MISS BLOOM: I believe that there is an essential difference. I believe that we first have to look at what it is that individuals are held in contempt for. They are not being held in contempt as would be the case in a criminal contempt proceeding, for wilfully disobeying a court order. They are being held in contempt for wilfully disobeying a subpoena issued by a creditor's attorney.

There is a --

QUESTION: Yes, but the defendant cannot be held in contempt until he further disregards the show-cause order. It may be he will be held in contempt even if he comes to court in response to that show-cause order, but he cannot be held in contempt without disobeying that order. I mean, he -- at least he cannot be held in contempt without that order having been issued by the judge.

MISS BLOOM: Correct. Correct. However, the order, the ultimate contempt order holds an individual in contempt, not for intentionally disobeying that court order.

The standard is one of neglect or refusal. If an individual breaks a leg on his way to the courthouse, and doesn't appear for the show-cause hearing, he has neglected to obey that court order, and if he intentionally disobeyed the

subpoena, a contempt order could properly issue.

Going back to Mr. Justice --

QUESTION: I don't know the purpose of that illustration, but if he, at some point, showed a court that he broke his leg on the way, you don't suggest that any court would hold him in contempt for not appearing?

MISS BLOOM: He could be held in contempt in his absence, that is my point. And because he has been held --

QUESTION: But don't you think that would be corrected as soon as it was shown that he broke his leg? On the way to the courthouse.

MISS BLOOM: Correct. However, my point is that that may not happen until the individual has sat in jail for ninety days.

QUESTION: But getting back to my brother Rehnquist's original question, isn't it strange that in a private case involving money, et cetera, et cetera, et cetera, it's necessary to knock down seven State statutes in order to give relief to eight people?

Do you know of any case like that?

MISS BLOOM: Well, this is a statutory scheme. There could be up to 15 statutes, the number wouldn't make any difference --

QUESTION: I mean, what difference do these people have, other than their own rights? They don't have any rights

than the rest of the people in the State of New York. Do they?

MISS BLOOM: Well, they are representative of a class of individuals who are subjected to these statutes, sir.

QUESTION: Which is a very simple -- and all they need is relief for that class.

MISS BLOOM: That's correct.

QUESTION: And they don't need to -- relief for all of the other people, if other situations are governed by the same statutes.

MISS BLOOM: You are correct, --

QUESTION: So where does the interest come to this Court that in order to protect these people we have to knock down the whole works?

In order to do, quote, "justice to these people", end of quote.

MISS BLOOM: As I said earlier, these people's interests would be satisfied if these statutes were declared unconstitutional as applied or on their face.

QUESTION: Would you tell me what you -- we've covered so much ground, what do you think is the most objectionable feature in this statutory scheme, as a matter of constitutional law, assuming that these people actually were in contempt of the -- you know, they were properly found

in contempt pursuant to the statute?

Is it the ninety -- possibility of the ninety-day sentence?

MISS BLOOM: No. There are two essential violations. The most essential violation is that they have been incarcerated without having the assistance of counsel. It's significant that in the federal system, every federal circuit that has examined this problem has found a right to assigned counsel in civil contempt proceedings. Most --

QUESTION: At what point would you say the assignment of counsel should take place? Before the arrest or after they are brought into jail?

MISS BLOOM: I believe that the statutory procedure could work as follows -- and I will insert when counsel should be apointed: --

QUESTION: I shouldn't have said "what do you think"; what do you think the Constitution commands in this regard?

MISS BLOOM: I believe that if the creditor is making an application for contempt, that may involve incarceration, that counsel must be assigned when the individual is physically brought before the court by a writ of attachment, which I have described, and it appears that the individual is going to disobey, further disobey the subpoena, and may face incarceration.

QUESTION: Is this critical in this development, that

the court know that the man is indigent or not? Supposing he is a Harvard graduate and a millionnaire, would you make the same argument?

MISS BLOOM: That individual should be advised of his right to obtain counsel.

QUESTION: How do you advise him if he doesn't show up? Is this a defect in the form of the notice?

MISS BLOOM: No. I believe that what needs to happen is this: The show-cause order must be issued, informing the person that they may be arrested if they don't appear. If the person --

QUESTION: Well, the show-cause says he may be punished.

MISS BLOOM: Right. It doesn't say "you may be incarcerated".

QUESTION: But a Harvard graduate would probably figure that out!

MISS BLOOM: Let's assume so.

[Laughter.]

MISS BLOOM: The individual must then be brought before the court by a writ of attachment, physically brought into court, --

QUESTION: He may be taken into custody before counsel is appointed, then?

MISS BLOOM: He must be assigned counsel when he is

physically brought before the court. And --

QUESTION: Even though you don't know whether he's indigent or not?

MISS BLOOM: After -- no, I'm sorry. He must be assigned counsel after the determination has been made that he is indigent. But he must be advised of his right --

QUESTION: And how can you make that determination until you get him before the court?

MISS BLOOM: It can't be done. I don't suggest that it needs to be. I'm suggesting that the assignment of counsel, or the advising of an individual of his right to assigned counsel, must occur when the writ of attachment -- after the writ of attachment has issued, and the individual is physically before the judge.

QUESTION: And he says, "I'm indigent"; now he doesn't really need a lawyer, because the judge is going to turn him free.

MISS BLOOM: Well, unless the creditor has further -- further need for information that he is seeking.

QUESTION: It seems to me that the need for counsel then issues at the same time that it arises.

MISS BLOOM: Not necessarily. I have enumerated in my brief a listing of perhaps ten defenses that can be raised to a civil contempt action. And these are all complicated defenses that one would need an attorney to assert.

QUESTION: But, Miss Bloom, the only way you get a lawyer appointed for you is because you're indigent.

MISS BLOOM: That's correct.

QUESTION: And if you're indigent, you have a complete defense.

MISS BLOOM: Not necessarily.

QUESTION: What kind of defense is that?

QUESTION: You don't need any of these other defenses?

MISS BLOOM: Not necessarily.

QUESTION: And only by indigency do you become eligible for the appointment of a lawyer.

MISS BLOOM: You might not, which would show that in many cases the appointment of a lawyer is not going to be needed. But it will also insure that the individual who does not need the appointment of a lawyer is advised that he has the right to a lawyer.

In these defenses, particularly in the support and alimony area, defenses such as the divorce decree was a foreign decree; the divorce decree is ambiguous; these are the kinds of things that may be raised, which I --

QUESTION: Which are not before us.

MISS BLOOM: Well, these are -- there was a support and alimony individual, in Rabasco, and he might have been able to assert some of these defenses to the proceeding.

QUESTION: Miss Bloom, I'm afraid we haven't given you much of an opportunity to make your own arguments, but may I ask you one other question?

MISS BLOOM: Surely.

QUESTION: I'm interested in the effect of the order. Assume for the moment that we affirm the decision of the district court. The order applies to all persons, without any limitation as to time, who have been subjected to this procedure in the past, to go back to 1906, I suppose, if anybody is still alive.

What remedy would they have, as a practical matter?

MISS BLOOM: Well, I read the order differently. I read the order in light of the opinion. The opinion clearly states that the court has enjoined further application of these statutes, and I believe that very clearly means that it does not have retroactive effect.

QUESTION: That is not what the order says, is it?

MISS BLOOM: No, it is not. But I believe that it can only logically be read in light of the decision.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Miss Bloom.

Thank you, counsel.

The case is submitted.

[Whereupon, at 2:25 o'clock, p.m., the case in the above-entitled matter was submitted.]