86-2458

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE SASSOWER,

Plaintiff-Appellee,

-against-

SHERIFF OF WESTCHESTER COUNTY,

Defendant,

and

LEE FELTMAN, ESQ., As Receiver for Puccini Clothes, Ltd.,

Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF INTERVENOR-APPELLANT
STATE OF NEW YORK

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Preliminary Statement

The decision which is the subject of this appeal was rendered by United States District Judge David N. Edelstein, Dec. 4, 1986, and entered on December 8, 1986. It is unreported.

Questions Presented

1. Did the district court have jurisdiction to grant the habeas corpus petition when the custodian, the City of New York, was not named as a respondent?

2. Did the district court err by not holding a hearing to determine whether contemnor waived his right to an evidentiary hearing by failing to appear at fact-finding proceedings before a state court referee after he received actual notice of the criminal contempt proceedings?

3. Does a state criminal contempt statute which provides that in non-summary contempt proceedings, "the party to be charged must be notified of the accusation, and have a reasonable time to make a defense," on its face violate fundamental fairness when state courts construe it to require a full evidentiary hearing if the contemnor controverts the charges by pleading not guilty?

Statement of the Case

1. Brief overview of prior contempt and disciplinary proceedings against Mr. Sassower

Apart from the criminal contempt proceedings involved here, Mr. Sassower has previously been held in criminal contempt on four occasions and in civil contempt twice, in connection with the lengthy litigation concering the dissolution of Puccini Clothes, Ltd.* On December 14, 1984, the Hon. Martin Evans, Justice of the Supreme Court of New York, held Mr. Sassower in civil contempt for willfull refusal to comply with court orders prohibiting him from representing Hyman Raffe, a former Puccini shareholder, in the Puccini litigation and fined him $250. In re Barr, No. 01816/80 (Sup. Ct. New York Co. Dec. 14, 1984), R. 46-49.**

On June 7, 1985, the district court held Mr. Sassower in civil and criminal contempt for failing to appear at a deposition in a related proceeding pursuant to court order. Raffe v. Citibank, N.A., 84 Civ. 305 (EHN) (S.D.N.Y. June 7, 1985) (Nickerson, J.), Exhibit 4 to Objections of Intervenor Lee

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* The "already long and tortured history of litigation in the New York State courts," Raffe v. Citibank, N.A., 84 Civ. 305, slip op. at 3 (E.D.N.Y. Aug. 1, 1984) (Nickerson, J.) (memorandum and order), aff'd, 755 F.2d 914 (2d Cir. 1985), related to the dissolution of Puccini Clothes, Ltd., is summarized in Judge Nickerson's opinion and in Raffe v. Doe, 619 F. Supp. 891 (S.D.N.Y. 1985), appeal dismissed, Nos. 85-7963, 85-7965, 85-7967, 85-7969 (2d Cir. Mar. 18, 1986).

** Pages in the Record on Appeal in the state criminal contempt proceedings challenged in this appeal are indicated as "R.__."

Feltman, Esq., as Receiver for Puccini Clothes, Ltd., to Report of Magistrate Gershon, district court docket no. 17 ("Feltman Objections"). This Court affirmed. 755 F.2d 914 (2d Cir. 1985).

On July 1, 1985, the Hon. Alvin F. Klein, Justice of the Supreme Court of New York, entered an order finding Mr. Sassower guilty of criminal contempt for violating an order of Justice Ira Gammerman, dated January 23, 1985, permanently enjoining him from filing certain actions related to the Puccini proceedings and sentenced him to 30 days imprisonment and fines totalling $1250.00. Raffe v. Riccobono, No. 9522/85, slip op. at 6-7 (Sup. Ct. New York Co. July 1, 1985), Exhibit C to Feltman Objections. The Appellate Division, First Department, unanimously affirmed. Raffe v. Riccobono, 113 A.D.2d 1038, 493 N.Y.S.2d 70 (1st Dep't 1985), and the New York State Court of Appeals dismissed the appeal sua sponte on the ground that "the order appealed from does not finally determine the action within the meaning of the Constitution." Raffe v. Riccobono, 66 N.Y.2d 915, ___ N.E.2d ___, 498 N.Y.S.2d 1027 (1985).

On the same day that Justice Klein entered his order, Justice David B. Saxe entered an order holding Mr. Sassower in criminal contempt for filing another action in violation of the same order of Justice Gammerman. Raffe v. Feltman, Karesh & Major, No. 8749/85 (Sup. Ct. New York Co. July 1, 1985), Exhibit D to Feltman Objections. He sentenced Mr. Sassower to ten days in jail and a $250 fine. The Appellate Division, First Department, affirmed, 113 A.D.2d 1038, 493 N.Y.S.2d 70 (1st Dep't

1985), and the New York Court of Appeals dismissed the appeal. 66 N.Y.2d 914, ___ N.E.2d ___, 498 N.Y.S.2d 1026 (1985).

As a result of these contempt convictions and other professional misconduct, he has been disbarred. In re Sassower, N.Y.L.J., Feb. 27, 1987, at 1, col. 4 (App. Div. 1st Dep't Feb. 23, 1987) (per curiam).

2. The prosecution of Mr. Sassower for criminal contempt in state court challeged here

a. The criminal contempt motion

On January 30, 1985, the Receiver moved in Supreme Court, New York County, for an order punishing Mr. Sassower for 64 counts of criminal contempt. R. 20. The notice of motion informed Mr. Sassower that the Receiver would move the court on the return date, February 14, 1985, for an order punishing him "for 64 separate Counts of criminal contempt of court on the grounds that he has continuously refused to comply with and has wilfully and flagrantly violated several orders of this Court." R. 20-21.* The supporting affidavit identified four orders or

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* In addition, the notice declared above the caption:

> WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.
>
> Notice: The purpose of the hearing is to punish you for a contempt of Court. Such punishment may consist of fine or imprisonment, or both, according to law.

R.20. This notice exceeded the requirements of Judiciary Law § 751, which requires only actual notice. See discussion in Point III.B, below.

groups of orders forbidding Mr. Sassower from filing any papers related to the Puccini dissolution, which he allegedly violated by filing such papers. R. 23-24.

First, the Receiver alleged that Mr. Sassower had violated two separate orders, dated February 1, 1982, entered by the Supreme Court, New York County (Sinclair, J.) disqualifying him from representing Mr. Raffe in various actions and in the dissolution proceeding because of his conflict of interest with his former clients. In re Barr, No. 01816/80, R. 57-61; Barr v. Raffe, No. 16792/80, R. 62-66 (the "disqualification orders"). On December 14, 1984, the Supreme Court, New York County (Martin Evans, J.), found that Mr. Sassower had violated the disqualification orders by preparing all litigation papers in these actions and the dissolution proceeding. In re Barr, No. 01816/80 (Sup. Ct. New York Co. Dec. 14, 1984) (order for contempt), R. 46-49. In his affidavit in support of the motion for criminal contempt, the Receiver identified 37 documents which Mr. Sassower filed after December 14, 1984, in violation of the disqualification orders. R. 30-34.

Second, the Receiver alleged that Mr. Sassower violated orders to show cause entered by Justice Thomas J. Hughes on December 7, 1984. These orders, entered as a result of repeated filings of lawsuits related to the Puccini dissolution, continued temporary restraining orders on behalf of Jerome H. Barr and Citibank, N.A., individually and as executors of the Estate of Milton Kaufman, Robert Sorrentino, Eugene Dann, the Receiver, and the attorneys for each of these parties. See R. 35. The temporary restraining order signed concerning the Receiver stated:

> ORDERED, that pending the hearing of this motion, George Sassower, Esq. and Hyman Raffe, . . . are hereby enjoined and restrained from serving or filing in any tribunal or court of this State any further lawsuits or proceedings against the law firm of Feltman, Karesh & Major or any member or employee thereof or anyone affiliated therewith, or against its client, Lee Feltman, Esq. in his capacity as court-appointed permanent receiver for Puccini Clothes, Ltd., arising out of or relating to Puccini Clothes, Ltd., its shareholders, officers, directors or employees, or its judicial dissolution, or the litigations or proceedings arising therefrom, or the receivership, or the representation of the receiver by Feltman, Karesh & Major. . . .

In re Barr, No. 01816/80 (Sup. Ct. New York Co. Dec. 7, 1984), R. 53. On December 19, 1984, Justice Gammerman entered a permanent injunction embodying the terms of the restraining orders. See R. 35-36. The Receiver listed three lawsuits which Mr. Sassower filed against these parties within three weeks of the entry of the permanent injunction. R. 36.

Third, the Receiver alleged that Mr. Sassower had violated an order entered on January 25, 1985, by Justice Greenfield. R. 36-39. That order permanently enjoined Mr. Sassower from representing Puccini:

> ORDERED, that neither George Sassower, Esq. nor any other attorney may represent or purport to represent Puccini Clothes, Ltd. in any legal action, proceeding or otherwise unless expressly authorized to do so by Lee Feltman, Esq., in his capacity as court-

appointed and duly qualified permanent receiver of the property and assets of Puccini Clothes, Ltd.

In re Barr, No. 01816/80 (Sup. Ct. N.Y. Co. Jan. 25, 1985), R. 55-56. The Receiver identified 13 complaints and petitions which Mr. Sassower filed as counsel of record in which he purported to represent Puccini. R.37-39.

Fourth, the Receiver alleged that Mr. Sassower violated certain directives entered by the Referee. R. 39-40. As a result of the proliferation of Puccini-related litigation, Justice Xavier C. Riccobono, the Administrative Justice of the Supreme Court, New York County, had entered an administrative order (the "administrative order") on March 26, 1984, directing that all remaining issues in the dissolution proceeding, except those currently sub judice before a Supreme Court justice, all discovery motions in related actions, and all factual issues raised in any of these actions or proceedings be referred to a referee to hear and report, with recommendations. R. 43-44, 45.

The administrative order led to the appointment of Special Referee Donald Diamond to oversee certain matters in the Puccini litigation. R. 39. Pursuant to that order, the Referee issued directives providing that: (1) no party was permitted to make a motion without a pre-motion conference at which the factual issues raised by the motion were to be resolved, and (2) any application for reargument and renewal could be made only by an order to show cause signed by the justice who signed the order from which reargument or renewal was sought. R. 39. The

Receiver listed nine instances in which Mr. Sassower filed such motions or applications without complying with the directives. R. 40-41.

On February 9, 1985, Mr. Sassower cross-moved for an order dismissing the criminal contempt proceeding,* on the ground that it violated the equal protection clauses of the New York and United States Constitutions. R. 129-30. The motion was returnable on February 14, 1985.

In the affidavit supporting his February 9 cross-motion, Mr. Sassower did not deny that he had filed all of the papers listed in the Receiver's affidavit or any of the other factual allegations in the affidavit, but he did plead "Not Guilty." R. 132. He contended that the prosecution was barred by double jeopardy, that the proceeding was procedurally defective, and that he was entitled to a hearing on the ground that the criminal contempt proceeding, as well as the earlier civil contempt proceeding, denied him equal protection because he was "being made subject to an invidious and arbitrary prosecution." R. 132. He also requested a "speedy trial," R. 132, and "a plenary hearing, with the aid of subpoenas," to determine "the extent of this discriminatory prosecution." R. 135. The remainder of the affidavit alleged that his activities exposed dissipation of Puccini assets, "a massive larceny of

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* He also sought to have the December 14, 1984 order by Justice Evans holding him in civil contempt vacated in this cross-motion.

judicially entrusted funds," and "perjury, betrayal of trust by the receiver and his law firm, conspiracy, and other egregious, if not criminal, conduct." R. 133-34. In addition, he claimed that the "[t]he entire receivership system is nothing but an invitation to corruption" and that a Senior Attorney in the Office of the Attorney General violated his statutory duties under the Business Corporation Law by acting as "the representative of those members of the judiciary who aided and abetted this 'rape' of this judicial ward." R. 135. Thus, according to Mr. Sassower, none of his conduct "was intended to or in fact prejudiced the legitimate rights of Puccini, Dann, and Sorrentino." R. 134.*

b. The proceedings before the Referee and Special Term

On April 5, 1985, Justice Evans referred the criminal contempt motion and Mr. Sassower's cross-motion to renew his opposition to the December 14, 1984 civil contempt order to Referee Diamond pursuant to Justice Riccobono's March 26, 1984 administrative order requiring the referee to hear and report on factual issues. R. 143-44. The order stated that "[b]oth motions raise questions of fact which cannot be determined on papers alone." R. 143.

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* Two other cross-motions, dated February 1, 1985, also were returnable on February 14. Mr. Raffe claimed, in a supporting affidavit for one cross-motion attacking the criminal contempt motion, that "most of the 'crimes' committed by Mr. Sassower were intended to and did aid Puccini." R. 139. The other, by Mr. Sassower, attacked only the December 14, 1984 civil contempt order by Justice Evans. R. 97-98.

At the direction of the Referee and in accordance with the procedure which the Referee had previously established for Puccini-related litigation, the attorney for the Receiver contacted Mr. Sassower in April 1985 to inform him that the Referee would conduct proceedings on the criminal contempt motion and cross-motions. Affidavit in Support of Objections to Report, dated November 24, 1986, of Magistrate Nina Gershon, sworn to November 26, 1986, J.A. 35.* Although he had actual notice,** Mr. Sassower did not appear before the Referee. Id., J.A. 35.***

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* Pages in the Joint Appendix in this appeal are indicated as "J.A. ___."

** Mr. Sassower never denied during the state proceedings that he had actual notice of the charges and of the date and time he was required to appear before the Receiver.

*** Mr. Sassower has refused to appear in proceedings before the Referee, whom he has called "a criminal," Transcript of proceedings before United States Magistrate Nina Gershon (November 24, 1986) ("Gershon Transcript"), J.A. 124, on the ground that he had been "excluded" from the Referee's courtroom. Gershon Transcript, J.A. 119. Mr. Sassower apparently was referring to an order dated September 24, 1984, barring him from sitting as a spectator in the courtroom in Puccini-related proceedings in which he had been disqualified because he had obstructed the proceedings. R.86-92. Nothing in this order prohibited Mr. Sassower from attending other proceedings or proceedings in which he was a party.

He has also failed to appear, except by written submissions, in other criminal contempt proceedings against him in Puccini-related litigation. For example, he failed to appear before United States District Judge Eugene H. Nickerson in a related case, Raffe v. Citibank, N.A., No. 85-7521, slip op. at 2 (2d Cir. Sept. 13, 1986) (unreported opinion), and before state court Justice Alvin F. Klein in Raffe v. Riccobono, on May 29, 1985.

After Mr. Sassower failed to appear at the April 1985 proceedings before the Referee, the Referee determined that his papers, the cross-motions, did not raise any issues of fact and decided to proceed without a hearing. Report of the Special Referee, dated May 1, 1985 ("Referee's Report"), R. 149.

The Referee recommended that with respect to the 63 counts where documentary evidence, res judicata, and collateral estoppel established "contumacious conduct," Mr. Sassower should be fined $250 per offense and be confined for a period of thirty days. Id., R. 212. In making these recommendations, the Referee concluded that warnings, fines, and similar measures had had no impact:

> Mr. Sassower has been adjudged in contempt for his willful refusal to obey the order removing him from acting as attorney for Mr. Raffe and substantial financial penalties have been imposed for his conduct in the Federal Courts. Additionally, disciplinary proceedings are pending against him before the Departmental Discipline Committee of the Second Department. The foregoing are actions arising out of the Puccini related cases.
>
> He has been severely criticized by the Appellate Division, First and Second Departments and Supreme Court, Westchester County has issued an injunction for his improper acts, similar to those described in the moving papers.
>
> All of the foregoing has [had] no effect in deterring Mr. Sassower from the willful refusal to obey the mandates of this Court. The only effective remedy would be to place Mr. Sassower in the structured environment that confinement would provide.
>
> Additionally, the obvious purpose of the disqualified lawyer's violation of the orders of

failure to attend the proceedings. Raffe v. Citibank, N.A., Nos. 85-7251, 85-7471, slip op. at 2 (2d Cir. Sept. 13, 1985) (unreported decision in related case); Agur v. Wilson, 498 F.2d 961 (2d Cir.), cert. denied, 419 U.S. 1972 (1974).

In Raffe, this Court affirmed a district court criminal contempt order entered by Hon. Eugene H. Nickerson after Mr. Sassower failed to appear in response to an order to show cause why he should not be held in criminal contempt on the return date. This Court explained,

> Finally, we find Judge Nickerson's contempt order appropriate under the circumstances. We have reviewed appellants' claim that criminal contempt entitles them to a hearing. We find no merit to appellants' procedural objections, in view of their failure to respond adequately to Judge Nickerson's order to show cause and the statement in Mr. Sassower's affidavit dated June 6, 1985, that no personal appearance was necessary.

Slip op. at 2. Similarly, in Agur, this Court found that a defendant charged with civil contempt, who had been given an opportunity to produce evidence at a hearing and refused to take part, had waived his right to a hearing and thus had no due process claim. In light of "the trend in this and other Circuits to afford the same or similar procedural safeguards to person charged with civil contempt as to those charged with criminal contempt, In re Rosahn, 671 F.2d 690, 697 (2d Cir. 1982), it should follow Agur here.

The record in this case demonstrates that there is a serious question whether Mr. Sassower waived his right to a hearing by failing to appear before the Referee when he began conducting fact-finding proceedings. Mr. Sassower did demand a hearing and a speedy trial, in his cross-motion, J.A. 132, but, according to the affidavit of Donald F. Schneider, Esq., Mr. Sassower failed to appear before the Referee when the Referee began conducting his fact-finding proceedings, despite actual notice. J.A. 35. Apparently, the Referee did not determine to proceed without a hearing until after Mr. Sassower failed to appear, since both Justices Riccobono and Evans envisioned hearings.*

Since neither the district court nor the magistrate ruled on the Receiver's offers of proof on this issue, J.A. 120; Feltman Objections at 2-4, this Court should vacate the district court order and remand for fact-finding proceedings to determine whether Mr. Sassower did waive his right to a hearing by failing to appear.**

POINT III

JUDICIARY LAW SECTION 751 IS CONSISTENT WITH DUE PROCESS

A. The requirements of due process in non-summary criminal contempt proceedings

The scope of due process required in state non-summary criminal contempt proceedings is well-established. The court

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* Justice Riccobono referred all factual issues raised by motions to the Referee "to hear and report." R.44. Justice Evans referred the motion for criminal contempt to the Referee because it "raise[d] questions of fact which cannot be determined on papers alone." R. 143.

** New York courts have also adopted this approach in state habeas corpus petitions. See, e.g., Sassower v. Finnerty, 96 A.D.2d 585, 586, 465 N.Y.S.2d 543, 546 (2d Dep't 1983).

must provide the defendant with notice of the charges and an opportunity to be heard. Actual notice is sufficient and, with petty offenses, the court need not provide a full-blown trial, but must protect certain fundamental rights and give the defendant an opportunity to present evidence in defense, explanation, or mitigation. The trial court has broad discretion in determining the scope of the hearing. The constitutional test is fundamental fairness, not the sixth amendment.

Since 1889, the Supreme Court has held that in non-summary criminal contempt proceedings:

> "notice should be given to the [defendant] of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceedings shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

Ex parte Savin, 131 U.S. 267, 279 (1889) (quoting Randall v. Brigham, 74 U.S. (7 Wall.) 523, 540 (1868)). The Court has continued to adhere to these basic requirements of notice and an opportunity to be heard. See, e.g., Taylor v. Hayes, 418 U.S. 488, 498 (1974); Groppi v. Leslie, 404 U.S. 496, 502 (1972); In re Oliver, 333 U.S. 257, 273 (1948); Cooke v. United States, 267 U.S. 517, 537 (1924) (Taft, C.J.).

As this Court has recognized, actual notice of the charges is sufficient; no particular form is required. United States v. Lumumba, 794 F.2d 806 (2d Cir. 1986), aff'ing, 598 F. Supp. 209, 211 (S.D.N.Y. 1984); Musidor, B.V. v. Great American

Screen, 658 F.2d 60, 65 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982); *In re Sadin*, 509 F.2d 1252, 1256 (2d Cir. 1975).

The defendant has certain fundamental rights in the contempt hearing:

> Due process of law... requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenvation of the offense and in mitigation of the penalty to be imposed.

Cooke, 267 U.S. at 537. These rights also include the presumption of innocence, the right to be proved guilty beyond a reasonable doubt, and not to be compelled to testify against oneself. *Bloom v. State of Illinois*, 391 U.S. 194, 205 (1968) (*citing* *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911). The defendant is "entitled to a public trial before an unbiased judge." *Bloom*, 391 U.S. at 205 (*citing* *In re Oliver*, 333 U.S. 267 (1948), and *Offutt v. United States*, 348 U.S. 11 (1954)). The defendant may introduce evidence to show that the judge is biased and, therefore, that the defendant is entitled to a trial before another judge. *Offutt v. United States*, 232 F.2d 69, 71-72 (D.C. Cir.), *cert. denied*, 351 U.S. 988 (1956). The defendant is entitled to testify under oath. *Ex parte Savin*, 131 U.S. at 279.* *See also* *Musidor, B.V. v. Great American Screen*,

* In serious contempts, the defendant is entitled to trial by jury. *Bloom*, 391 U.S. at 211. A serious contempt is one in which a sentence of more than six months is actually imposed, *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974); *Taylor v. Hayes*, 418 U.S. 488 (1974). The penalty imposed in this case was 30 days imprisonment.

658 F.2d at 64-66 (2d Cir. 1981) (scope of due process).

Nevertheless, the state need not afford the defendant in a nonsummary prosecution of a petty contempt a "full-scale trial." Taylor v. Hayes, 418 U.S. at 500 n.9. In that case, the Court expressly rejected a claim by the dissent that the Court was requiring a full-scale trial. Id. As this Court recently explained in remanding a criminal contempt proceeding to the district court, "[o]n remand, the district court need not hold a full-blown trial, but [the defendant] should be allowed a reasonable opportunity to defend or explain his actions or present arguments in mitigation." United States v. Lumumba, 741 F.2d 12, 17 (2d Cir. 1984); see also United States v. Lumumba, 794 F.2d 806, 808 (2d Cir. 1986) (approving the procedure employed on remand). Furthermore, the court has wide discretion in controlling the scope of the hearing. As the court of appeals explained on remand in Offutt, "in the exercise of a sound discretion the hearing judge may control the scope of testimony and the number of witnesses, to avoid cumulative testimony and prevent placing on trial either the judge before whom the alleged contempt occurred or the prosecutor." 232 F.2d at 72.

The appropriate standard governing criminal contempt prosecutions, contrary to the report of the magistrate, Report, J.A. 26, is due process, rather than the specific requirements of the sixth amendment governing criminal trials. United States v. Martinez, 686 F.2d 334, 343 (5th Cir. 1982); United

States v. Bukowski, 435 F.2d 1094, 1101 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971); see also United States ex rel. Vuitton et Fils S.A. v. Karen Bags, 592 F. Supp. 734, 749 (S.D.N.Y. 1984), aff'd. sub nom. United States ex rel. Vuitton et Fils S.A. v. Klayminc, 780 F.2d 179 (2d Cir. 1985), cert. granted, 54 U.S.L.W. 2348 (U.S. 1985) (Nos. 85-1329, 85-6207), argued, 55 U.S.L.W. 3511 (Jan. 13, 1987). In Bukowski, the court rejected a claim that the Supreme Court decision in Bloom overruled an earlier decision exempting criminal contempt prosecutions from the requirement of grand jury indictments. It cited a Supreme Court decision which held that "since the foundation of our government [,] proceedings to punish such offenses have been regarded as sui generis and not 'criminal prosecutions' within the Sixth Amendment or common understanding." Myers v. United States, 264 U.S. 95, 104-05 (1924). The court of appeals explained that "[t]he procedural protections which have gradually surrounded imposition of criminal contempt penalties thus represent the accretions of 'fundamental fairness' rather than application of provisions of the Bill of Rights to contempt prosecutions as 'crimes.'" Bukowski, 435 F.2d at 1101.

B. New York's non-summary criminal contempt procedures are consistent with due process

Section 751 of the New York Judiciary Law governs the procedures used for prosecuting both summary and non-summary criminal contempt occurring in the context of civil proceedings. Its primary purpose is to aid the court in civil litigation. New

York has an entirely separate provision in its Penal Law governing procedures used to prosecute criminal contempt in the context of criminal proceedings. N.Y. Penal Law § 215.50 (McKinney 1975). Civil contempts, which may involve the same acts as those prosecuted under section 751, are regulated by other provisions of the Judiciary Law. See N.Y. Jud. Law § 753 et seq. (McKinney 1975 & Supp. 1987). The purposes of civil contempt and criminal contempt prosecutions are entirely different.*

The only issues here are whether non-summary criminal contempt procedures under section 751 violate the fourteenth and

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* The distinction between criminal and civil contempt is fundamental:

> A criminal contempt is defined as a wilful disobedience of a Court's lawful mandate and is imposed generally to preserve the power and vindicate the dignity of the Court. "The purpose of a criminal contempt proceeding for wilful disobedience of its lawful mandate is to vindicate the authority of the Court and its orders." Thus an order of the Court must be obeyed, no matter how erroneous it may be, so long as the Court is possessed of jurisdiction and its order is not void on its face. This requirement of obedience to the lawful mandate of the Court obtains even though it is afterwards held that the order was erroneous or improvidently made or granted by the Court under misapprehension or mistake.
>
> By contrast, a civil contempt generally has as its purpose the provision of a remedy for an injured suitor, to preserve and enforce the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.

State v. Congress of Racial Equality, 92 A.D.2d 815, 816-17, 460 N.Y.S.2d 58, 60 (1st Dep't 1983) (citations omitted). See also Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

sixth amendments to the United States Constitution and whether, on the peculiar facts of this case, those procedures as applied to Mr. Sassower were constitutional.* As demonstrated in the preceding section, the sixth amendment is inapplicable here and, as shown below, the non-summary contempt procedures under section 751, as construed by New York courts and as applied here, more than satisfy the requirements of due process under the fourteenth amendment.

Section 751 expressly provides that when a criminal contempt under section 750, which defines contempt, is not committed in the immediate view and presence of the court, "the party charged must be notified of the accusation, and have a reasonable time to make a defense." N.Y. Jud. Law § 751(1) (McKinney 1975).** These express requirements are essentially the same as in Savin and all subsequent Supreme Court decisions in non-summary contempt cases that

> "notice should be given to the [contemnor] of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceedings shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

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* Thus, the summary procedures employed in New York to prosecute direct contempts in the immediate view and presence of the court are not involved here.

** Section 751(1) has been part of New York law virtually unchanged since at least 1829 when it was codified as part of Revised Statutes of New York. N.Y. Rev. Stat. tit. 2, art. 1, § 12 (1829) ("Contempts committed in the immediate view and presence of the court, may be punished summarily; in other cases, the party charged shall be notified of the accusation and have a reasonable time to make a defense").

Ex parte Savin, 131 U.S. 267, 279 (1889) (quoting Randall v. Brigham, 74 U.S. (7 Wall.) 523, 540 (1868)).

As demonstrated above, in greater detail, this "includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." Cooke, 267 U.S. at 537.

As construed and applied by New York courts,* section 751 more than satisfies these requirements. According to the New York Court of Appeals, the alleged contemnor prosecuted under this section must "be given an opportunity to be heard after notice," which includes the opportunity to submit "proof" in response to evidence offered to sustain the charge. Douglas v. Adel, 269 N.Y. 144, 147, 199 N.E. 35, 37 (1935). The sufficiency of the notice and the reasonableness of the time to prepare a defense depend on "the particular circumstances of each case," but New York courts will always assure that the rights of the accused receive "adequate protection." Spector v. Allen, 281 N.Y. 251, 257, 22 N.E.2d, 360, 363 (1939). See also, Koota v. Colombo, 17 N.Y.2d 147, 151, 216 N.E.2d 568, 569, 269 N.Y.S.2d

* Federal courts are bound by the construction given to state statutes by the state's highest courts, see, e.g., Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 n.9 (1978); Larkin v. Grendel's Den, 459 U.S. 116, 122 n.4 (1982), and its intermediate appellate courts. Brown v. Ohio, 432 U.S. 161, 168 (1977); Shuttlesworth v. Birmingham, 382 U.S. 87, 91 (1965).

393, 395 (1966) (Fuld, J.) (procedure satisfied due process where contemnors afforded ample notice, represented by counsel, given opportunities to justify their conduct, and failed to offer any evidence to support their charge that district attorney was acting in bad faith). See also County of Rockland v. Civil Service Employees Association, Inc., 62 N.Y.2d 11, 14, 464 N.E.2d 121, 123, 475 N.Y.S.2d 818, 818 (1984) (criminal contempt must be proved beyond a reasonable doubt.)

New York's appellate courts have also construed section 751 consistently with the due process clause. In the leading Appellate Division case, State University of New York v. Denton, 35 A.D.2d 176, 316 N.Y.S.2d 297 (4th Dep't 1970), the court reversed a criminal contempt conviction of persons not parties to an injunction and not acting in conjunction with them. "[F]or the guidance of the [trial] court and parties in future criminal contempt proceedings arising out of civil actions," id. at 180, 316 N.Y.S.2d at 302, it outlined the due process protections which New York requires in such proceedings. It declared:

> "In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself, Gompers v. Buck's Stove & Range Co., supra, (221 U.S. 418, 31 S. Ct. 492, 55 L.Ed. 797) p. 444. The fundamental characteristics of both are the same." (Michaelson v. United States ex rel. Chicago, St. P.M. & O.R. Co., 266 U.S. 42, 66, 45 S. Ct. 18, 20, 69 L. Ed. 162.) Due process of law requires that the accused should be advised of the charges against him and have a reasonable opportunity to meet them by way of defense or explanation with the assistance of counsel and the right to call witnesses. (Cooke v. United States, 267 U.S. 517, 537, 45 S. Ct. 390, 69 L. Ed. 767.)

Id. at 180-81, 316 N.Y.S.2d at 302-03. In addition, it recognized

> as fundamental in a proceeding of this nature the right to be confronted by the accuser and to cross-examine him. When, as here, a person charged with criminal contempt has controverted the charges through his attorney as he is entitled to do (Peo. ex rel. Supreme Court v. Albertson, 242 App. Div. 450, 453, 275 N.Y.S. 361, 365), a full hearing is required at which the disputed issues of fact may be resolved. At such a hearing witnesses should be produced, rather than mere affidavits, thereby ensuring a party the right to confront and cross-examine witnesses. These rights are basic to a defendant charged with the commission of a criminal act and we see no reason why they do not appertain to one charged with criminal contempt with the same force as those rights explicitly assured by Gompers v. Buck's Stove & Range Co., supra, and Cooke v. United States, supra.

Id. at 181, 316 N.Y.S.2d at 303.

In Albertson, the court overturned a conviction for indirect criminal contempt where the identity of the accused contemnor was established at a hearing only by an unsworn statement. The court declared that neither unverified hearsay nor unverified out-of-court admissions to a judge were sufficient to prove criminal contempt when the alleged contemnor had "negatived all concession by saying 'not guilty' through his counsel." 242 A.D. 450, 453, 375 N.Y.S. 361, 365 (4th Dep't 1934). Thus, absent a valid waiver, under Denton and Albertson, an accused contemnor who controverts the charges by a plea of not guilty is entitled to a hearing at which any factual disputes may be resolved.

The Second Department adopted Denton - Albertson standard in a criminal contempt prosecution under the Penal Law when, relying on Denton, it declared that criminal contempt was a crime and "the usual due process rights afforded to criminal defendants apply to an accused in a criminal contempt proceeding." Holtzman v. Bealty, 97 A.D.2d 79, 82, 468 N.Y.S.2d 905, 907 (2d Dep't 1983). See also People ex rel. Roache v. Hanbury, 162 A.D. 337, 342, 147 N.Y.S.2d 851, 855 (2d Dep't 1914) (right to notice and an opportunity to be heard).

The Third Department adopted a similar approach in Ingraham v. Maurer, 39 A.D.2d 258, 334 N.Y.S.2d 19 (3d Dep't 1972) (per curiam). In that case, the court equated criminal contempt proceedings with ordinary criminal proceedings. Id. at 259-60, 334 N.Y.S.2d at 20-21. It stated that "ordinarily, in a criminal proceeding or even in the case of a traffic infraction, a defendant may merely deny the charges against him and upon such denial the accusors were put to their proof and the defendant has an opportunity to cross-examine, with no requirement that he submit any proof on his own behalf." Id. at 260, 334 N.Y.S.2d at 21. The defendant denied the charge that he willfully disobeyed a court order and declared he had complied with it. Therefore, it was

> apparent that there were issues of fact which the court could not resolve without a trial. . . . The affidavits on behalf of the respondent remain nothing more or less than affidavits and when controverted by a person having knowledge, such affidavits cannot in any proceedings form a basis for summary relief.

Id. at 260, 344 N.Y.S.2d at 21. The court remanded the case to the trial court for a hearing.*

Trial level courts also apply section 751 in non-summary contempt proceedings consistently with due process. See, e.g., Dep't of Housing Preservation v. Lamison, 118 Misc.2d 1013, 1014, 462 N.Y.S.2d 109, 110 (New York City Civ. Ct. 1983) (indigent defendant entitled to assistance of counsel in criminal contempt proceeding); In re Epstein, 43 Misc.2d 987, 990, 252 N.Y.S.2d 771, 774-75 (Sup. Ct. New York Co. 1964) (procedural due process requires certain basic rights regarding notice, a hearing, and an opportunity to defend); People v. Finkelstein, 202 Misc. 1080, 1083, 118 N.Y.S.2d 400, 403 (Ct. Gen. Sess. New York 1953) (alleged contemnor entitled to same rights accorded a defendant on trial, presumption of innocence, and proof beyond a reasonable doubt).

On the facts of this case, the procedure employed by the New York Courts was constitutional. The trial court sent the criminal contempt motion to the Referee to resolve factual issues pursuant to an administrative order requiring such issues to be sent to the Referee to hear and report. The petitioner received actual notice of the criminal contempt charges and the date and

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* The First Department also construes section 751 consistently with procedural due process requirements. People ex rel. Choate v. Barrett, 56 Hun. 351, 355-56, 9 N.Y.S. 321, 326 (1st Dep't), aff'd, 121 N.Y. 678, 24 N.E. 1095 (1890) (necessity for presentation of proof in a legal and formal manner). See also N.A. Development Co. Ltd. v. Jones, 99 A.D.2d 238, 242, 472 N.Y.S.2d 363, 366 (1st Dep't 1984) (criminal contempt must be proved beyond a reasonable doubt) (citing Gompers and Bloom).

tire of the proceedings before the Referee. He pled not guilty and demanded a hearing. Under New York law, and the administrative order, if he had appeared before the Referee on the date required, he would have had an opportunity to present arguments in defense, explanation, or mitigation of his conduct. He did not appear before the Referee and had made it clear on other occasions that he would not appear before him. After petitioner failed to appear, the Referee determined to proceed without an evidentiary hearing.

Nevertheless, petitioner had a further opportunity to present written and oral arguments in defense, explanation, or mitigation of his conduct when he appeared before the Appellate Division. After hearing petitioner, the Appellate Division agreed that petitioner was in criminal contempt, but concluded that on the facts "Special Term abused its discretion by its failure to impose a sanction in the light of continuing contempts and [petitioner's] stated intention to continue to do so." 121 A.D.2d at 325, 503 N.Y.S.2d at 392. Therefore, it imposed a sentence of 30 days. Nothing in the Appellate Division's decision indicated that it was rejecting the requirement in New York law that a person charged with non-summary criminal contempt be afforded the <u>opportunity</u> for a hearing. Thus, the non-summary criminal contempt procedures followed here provided all that due process requires: "that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." <u>Cooke</u>, 267 U.S. at 537.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the district court.

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Respectfully submitted,

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