Supreme Court of the United States

OCTOBER TERM 1969

In the Matter of:

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM ALLEN,

Respondent.

Docket No. 606

Place Washington, D. C.

Date February 24, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

— — —

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1969

STATE OF ILLINOIS,

Petitioner

vs.

WILLIAM ALLEN,

Respondent

The above-entitled matter came on for argument at 10:30 a.m., Tuesday, February 24, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

JOEL M. FLAUM,
Assistant Attorney General,
State of Illinois
188 West Randolph Street (Suite 2200)
Chicago, Illinois 60601
Attorney for Petitioner

H. REED HARRIS, Esq.
39 South LaSalle Street
Chicago, Illinois 60603
Attorney for Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 606, Illinois against William Allen.

ARGUMENT OF JOEL M. FLAUM,

ASSISTANT ATTORNEY GENERAL OF ILLINOIS

ON BEHALF OF PETITIONER

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

Before proceeding with argument, at the suggestion of the Office of the Clerk this morning, I was informed that correspondence from Respondent's attorney failed to reach the Court that was dated February 20, 1970. In that correspondence he asked that the Court please disregard the second argument entitled, "The Case is Moot". To the extent that the Court will entertain that and unless there are questions in that regard, the Petitioner will stand on his brief on that point.

MR. CHIEF JUSTICE BURGER: We well take note of that, Mr. Flaum.

MR. FLAUM: Thank you, Your Honor.

Q You agree that the case is not moot, do you not?

A Yes, we do, Your Honor. We argue it at some length in our brief. If you want an explanation on it, I would go forward.

Q Apparently, there is no longer an issue between you?

MR. CHIEF JUSTICE BURGER: Could you keep your voice up a bit?

MR. FLAUM: Yes, Your Honor; I will.

Q Who filed this; you?

A Yes, Mr. Justice Douglas. This was filed by ---

Q By you or by the ---

A --- by the State of Illinois as the Petitioner.

Q I know, but I say, who filed this memo on mootness?

A The point was raised in the Respondent's brief. We replied in a reply brief. And then the letter was forthcoming last week from the Respondent, asking that it be withdrawn as a point.

Turning to the instant case, Your Honors, a case which we feel is one of first impression, certainly factually, before this Court. However, a little more than 100 years ago in Federal District Court of New York, one George Davis was put on trial for perjury. Shortly after the onset of that trial the defendant became unruly. This was during certain statements being made by the prosecutor. The defendant was removed from the courtroom.

During a motion for a new trial, the trial judge ruled "in his absense during a part of the opening only because of his own disorderly conduct. It does not lie in his mouth to complain of an order which was made necessary by his own misconduct."

Now, 101 years later, the People of the State of Illinois ask this Court to review and reverse the Court of Appeals of the Seventh Circuit's decision in Illinois v. Allen

Allen was indicted for armed robbery in 1956, tried in Criminal Court of Cook County, Illinois, and sentenced to a term of 10 to 30 years in the penitentiary. He is presently on parole, and I am informed, a parole violator.

From the beginning of the trial, Allen insisted on his right to question jurors on voir dire examination. He embarked on a deliberate and knowing course of disruption, outbursts, and threats which finally culminated in his removal from the courtroom during most of the presentation of the State's case. We contend the facts are not in dispute.

Q Was he present for some part of the trial?

A He was present, Your Honor, for the entire defense; in fact, relative calm was to obtain when the defense began its presentation. He was taken out during the voir dire examination which he was conducting.

Q So he was not there for the opening?

A He was not there for the opening.

Q Nor for any evidence in the State's case?

A Not in the State's case. He was given opportunity to come back immediately after the voir dire and immediately before the presentation of the State's case. An invitation was extended by the trial judge through counsel to have him return.

The dialogue upon his return was such that it clearly ---

Q There was an appointed counsel, wasn't there?

A There was.

Q He was present throughout the State's case?

A Throughout the entire State's case.

Q And did he cross-examine the witnesses?

A He did.

Q Did he make an opening?

A He did. Your Honor, I withdraw that. I am not sure if he chose ---

Q What is the Illinois practice; is the opening made immediately after the jury?

A Yes, it is.

Q By both the State and the defense?

A Yes, by both.

The reason we contend the facts in this case are not in dispute is that a reading of the Court of Appeals, even in its majority opinion, as well as the dissent in the Seventh Circuit in the per curiam opinion of the Illinois Supreme Court clearly are in agreement on the nature of the conduct here. Of the ten reviewing judges who have had an opportunity to examine the record, all ten agreed on conduct. Only two felt constrained by constitutional prohibition, as they read it, to rule that Allen was unlawfully removed from his trial.

Just briefly, the Respondent threatened the life of

the trial judge, ripped his attorney's files and harangued the court in such a way that the judge felt his removal was necessary.

I might add that there was warning in all of these cases. From the commentators on this area, I suggest if this rule of exclusion is allowed, that it be appropriately done in those areas where there are warnings.

The Court of Appeals in its majority opinion found adequate warning by the trial judge, and, I suggest, there was more than one warning included in the admonitions from the trial court for the Respondent to remain silent.

Q How long did the whole trial take?

A Mr. Justice Harlan, I believe the trial took approximately two-and-a-half days. It was a jury trial; it was a simple case of an armed robbery of a tavern. Allen was identified by the bartender. In turn, Allen identified the victim.

The defense was insanity and a year-and-a-half before, the defendant had been declared incompetent. He had been restored and his defense of insanity was rejected by the trier of facts.

We are here today because we feel--- We have asked this Court to review, because we do not believe that the Constitution of the United States compels the result which the Seventh Circuit, reluctantly, I might add, arrived at.

We feel that the right of confrontation, through its

birth in the common law and its adoption by the Sixth Amendment, certainly wasn't meant to broaden the exceptions that the common law recognized.

And this Court, in 1926 in Salinger vs. the United States, specifically mentioned that while the common law was brought into the purview of the Sixth Amendment's right of confrontation, it certainly wasn't meant to make exceptions not included in that new amendment.

This Court had, in Diaz vs. the United States in 1912, clearly addressed itself to the issue of waiver. In that case -- a murder case out of the Philippines, tried under the Philippine Code -- the Court concluded that what they were reviewing was a substantial equivalent of the Sixth Amendment.

The issue in Diaz as presented, or the claim made, was that the Supreme Court -- in the Supreme Court here -- that he did not waive the right of confrontation, but that he could not waive it.

This Court held that waiver was possible, was permissible, and did obtain in that case. In that case the defendant voluntarily left the court; he sent a message to the presiding judge that he would not return.

The significant, we feel, in this case are two things: 1) The Davis Case, which was the only direct American precedent other than a prior Illinois case in 1956 on this point, was mentioned in Diaz favorably. And what is

significant is that in Diaz they are reciting Davis which was an involuntary removal case.

We feel that if waiver is recognized, certainly in the waiver by an escapee from a courtroom, that the unruly defendant is not to be accorded treatment different than the escapee. Diaz makes it clear that a defendant who walks out or escapes waives his right to be present and that the trial can continue.

We believe there is no difference between a defendant who walks out of the courtroom and a defendant who is ordered removed because his courtroom conduct makes a fair and orderly trial impossible. If there is waiver in the former case, we think there is waiver in the latter.

On the issue of whether waiver has been recognized, our research indicates that only the Davis Case in 1869, two English cases, one a felony case, one a misdemeanor case -- Rex v. Browne, Regina V. Berry -- also in the 19th century. But it has never been rejected by a court of review, as we can find.

Further, we suggest that this Court in dictum in the Diaz Case and in a subsequent case in Snyder vs. Massachusetts has adopted the waiver principle and that the dictum allows for its application here.

I might add that in dictum in Snyder vs. Massachusetts, a capital case involving whether a defendant was entitled to

view the scene when the jury left to do that, Mr. Justice Cardozo specifically added: "No doubt the privilige (the privilege of confrontation) may be lost by consent or even at times by misconduct." Though in the Snyder vs. Massachusetts Case that wasn't at issue, and we acknowledge ...

Q I am just wondering, is the correct analysis really of waiver or that one may forfeit the right to be present by misconduct? In this instance, as I understand it, this respondent protested his removal in the beginning.

A Yes, he did, Your Honor.

Q Now really, he wasn't absent voluntarily in that sense was he.

A No.

Q And we have dealt with waiver, haven't we, ordinarily in terms of a voluntary relinquishment of a known right?

A I think that is true, Your Honor.

Q Then why isn't this really a question whether the constitutional rights have been forfeited by misconduct? Isn't that, at least, more realistic and, perhaps, more honest analysis?

A If I might disagree to an extent, Mr. Justice Brennan, I feel the waiver is applicable in this case for this reason. The dialogue between the judge and the defendant in this case was one of not a lack of communication. They seemed

to be understanding. The warnings seemed to be clear. Certainly when one reads the record in this case, the defendant had no problem in making his intentions known.

The Court of Appeals found, they said, a patient and very tolerant judge. I think that when the dialogue reaches a level it did in this case, with the inclusions of the warnings which might result if in fact the conduct does not cease, that waiver would not be stretching the concept to apply it here.

I think it would also lend to a more flexible rule of discretion and, if I might suggest, more easy to handle for courts below, if this Court so rules that waiver was permissible in this instance.

We find the commentators, while acknowledging limited authority on the case, seem to be pretty much unanimous in their feeling, at least of this ruling, that removal is the appropriate remedy.

We, in our study, found that the development of the right to be present was early cast in jurisdictional terms. And we suggest that if it has any vitality today, it may only be, perhaps, in capital cases ---

Q Do you say removal is the remedy or one of the remedies?

A One of the remedies, Mr. Justice Marshall. We suggest that we just broaden the trial judge's discretion to exclusion as one along with contempt and what apparently has

been permitted by lower courts, binding and gagging. Our feeling is that it doesn't fall outside binding and gagging. In fact, it is a much more reasonable and a much more desirable end for justice to have the exclusion when it is imparted in a case like this.

Q Are you familiar with this Court's recent opinion on the case where we refused to consider an appeal where it was admitted that the man was a fugitive?

A I am not, Your Honor.

Q You might look it up.

A I will.

We feel that the policy reasons for adopting the exclusion over other forms are: 1) Contempt may not really satisfy the situation. In this case we had a man faced with a possible life sentence. Our feeling is that contempt in cases like that may not level well with a defendant bent on disrupting the trial.

We feel the scene of binding and gagging -- and I question whether the right of confrontation is any better preserved by a defendant who is bound and gagged and manacled -- brings a disservice to the court in which this action takes place.

Q Would you mind stating briefly the facts which you claim we must find from the facts the man did in the courtroom?

A Mr. Justice Black, in this case below, the defendant at the outset announced his unwillingness merely to participate in the trial processes. He informed the judge---

Q To do what?

A He would not particiapte in the trial, not in a voluntary fashion. He informed the court, "You have a right to restrain me, but you haven't got the right to remove me, and you're not going to remove me." And the court replied, "I'll determine that." The defendant, "No you're not; there's not going to be a trial. I'm going to sit here, and you're going to talk, and you can bring out your shackles and straight jacket and put them on me and tape my mouth, but it will do no good, because there's going to be no trial."

Q At one point he said the judge was going to be a corpse, didn't he?

A Yes, he did. Prior to noon recess -- I again stress very strongly, Your Honors, how tolerant this trial judge was -- the defendant announced that the judge would be a corpse upon the defense' return from lunch recess.

Q Was he out on bail or in custody?

A He was in custody, Your Honor.

Q Well, that was slightly a vain threat, wasn't it?

A The record is vague, but there is some indication that when this defendant left the courtroom and went

into the anteroom, he tended to be a little physical with the property in the ---

Q Well, that is what I would say, and isn't your position just to say that in the courtroom he could be violent?

A Yes.

Q You don't have to argue that this is better than shackling do you?

A No, I do not, I think a ---

Q It is on the same level?

A No, Your Honor, I would suggest that this is a milder form of ---

Q But you wouldn't have to win that point.

A No, I understand. But when you said it is on the same level, it would be my ---

Q I was thinking of that Second Circuit case which was the shackling ---

A Bentvena, yes. Well, I think exclusion is a much more preferable remedy to that and much milder.

Q There is a Court of Appeals in the District of Columbia Circuit which reversed that conviction, because the Court shackled and gagged the defendant. I thought other remedies should have been taken.

A Mr. Chief Justice, that is our view. The shackling and gagging -- what it is fraught with is the peril of prejudice to the existing procedure in addition to the

disruptive conduct that may be taking place by the defendant's action.

Q Now this disruptive conduct began at the very moment that the proceedings opened, before they had picked a jury, didn't it?

A In fact, Mr. Chief Justice, it preceded that. In pre-trial before another judge of the Cook County Circuit Court, where he made a motion for a substitution of judges based on prejudice, he again there caused some sort of a scene. So you can trace it back there. But, yes, this started immediately, and, we suggest, on no provocation. There is an absence totally of any dialogue between the prosecutor and the defendant. So there is no act on the part of the State apart from the judge in incurring the wrath of the defendant by any spoken word or any opening statement or the like.

Your Honors, we would add one other fact, and that is we recognize in our asking this Court to acknowledge broader discretion in a trial judge, that is a weighty problem. However, if the police of this country can be entrusted with stop and search discretion which, we suggest, is a low visibility situation, certainly, the entrusting to a trial judge, subject to appropriate review, of the opportunity to expect ---

Q I don't quite understand your analogy; that who could be entrusted with what?

A Mr. Justice Stewart, our position is this. We

recognize we are asking for the recognition of a broad discretion in a trial judge, and recognizing that in any discretion case there is a chance that review is always difficult because the area of discretion is quite often treated by Courts of Appeals in very limited fashion, entrusting great belief that a trial judge normally acts very fairly. We say that this is not a low visibility situation. We are trying to weigh the fear in that regard, that this will not become a wholesale tool of a judge annoyed with the look or the talk of a defendant.

Q Certainly, I suppose General Flaum, all would agree that a trial judge is entrusted with great discretion in what procedures he is going to follow in keeping order and decorum in his courtroom. There is no question about that. But here we have a complaint of a violation of a specific constitutional right, i.e. the right of confrontation. So the fact that there is great discretion really doesn't meet the claim of your adversary.

A On that specific point, Mr. Stewart, I would agree. However, on the violation of constitutional rights: Constitutional right, commentators and this Court have recognized, is mainly to insure the opportunity for cross-examination and, as a collateral benefit of that, the opportunity to observe the demeanor of the witnesses. Certainly, exclusion ---

Q And to face the witnesses and to have the witnesses on the stand facing the defendant. There are at least three ingredients.

A Well, I would suggest, Mr. Justice Stewart, in Barber and Page, the last Sixth Amendment case -- which is not at all in point, but written by this Court in 1968 -- the first two were stressed. And I don't mean to exclude the third, but in this case the first two are the greater.

In this case the counsel continued with the cross-examination. There wasn't a flat denial of the right of confrontation. And the demeanor of the witnesses certainly remained a possibility, because none of them were excluded.

It seems to us that you reach a point in constitutional rights that you can not be without both the right and the ruin of it. And it seems here that we have a case where the defendant is bent on -- and clearly by his statements -- so destroying any right.

Q Didn't he tell the judge, in so many words, at the outset there is going to be no trial. If you try to make me sit down, there is going to be ranting in the courtroom, and you'll have to carry me out. Isn't that a clear indication to the judge that he was going to destroy the trial?

A We feel, Mr. Chief Justice, that is one of three clear indications. When brought back, he insisted that there be no trial, and two of the returns were at the invitation of

of the judge. We have a record that it seems to me is patently clear in the attempt by the judge to bring the defendant around to a reasonable conduct and the declared decision by the defendant to, in no way, entertain, it until -- and this is throughout significant -- until the defense began, and then there was calm. In fact, we found the defendant stating in effect that he realized that his conduct was improper. It connotes to us a certain reflective process that he probably had throughout the trial, but just chose to use in one case.

Q How many times did the court warn him?

A We find at least three, and perhaps four. The fourth one, Mr. Chief Justice, has to be a reading into a statement that doesn't include the word warn.

The Court of Appeals majority opinion concluded that he was warned and did not spell it out, but they found, as well as the Supreme Court of Illinois, a warning encompassed in the dialogue between the judge and the defendant.

Q In your reading of the opinion and judgment of the Court of Appeals this man is free, is that right? I don't see anything about the right of Illinois to try him again.

A Well, this man is ---

Q I mean legally free, not illegally as he is now.

A Right. He is on parole. If this Court were to affirm the Court of Appeals, he would be no longer subject to any of the vital consequences that stem from a parole violator,

and he has a year or so or more to go.

Q As you read the Court of Appeals decision, if this same matter comes up tomorrow in Cook County, how could the judge legally handle it?

A Well, as I read the Court of Appeals, Your Honor, we feel that he can either try to make a contempt citation or he has to bind and gag him. In my jurisdiction and in my city we had the unsightly scene of a bound and gagged defendant recently with a federal marshall placing his hand in front of the gag so that no words would come forward through the gag.

Q Now in the Second Circuit, we didn't have that trouble. When he was gagged, he was gagged. And the Court of Appeals upheld it.

A I am familiar with that case. I would suggest, Mr. Justice Marshall that it is our view that not only must justice be done, but there ought to be the appearance of justice. And if I am right in that assumption, we do a tremendous disservice to promoting that kind of a scene and rewarding conduct which in no way one can sympathize with.

If we have got an incompetent defendant, they he shouldn't be on trial. But certainly one which is a pure, deliberate act of volition, as it was in this case, it is very hard not to find that the limits to the constitutional right had been exhausted.

Q Do I understand your theory to be that he

waived the right of confrontation or that there was no denial of the right of confrontation? I thought your argument was the former the way you began, but then when you begin talking about how he really did have the right of cross-examination through counsel and that ---

A We acknowledge in the strictest sense, Mr. Justice Stewart, that there was a classic denial if the denial of the right of confrontation presupposes never removing a defendant from the view of the actual trial scene. We acknowledge that. What I was suggesting perhaps, not so clearly, was what commentators have suggested are meaningful benefits of the right of confrontation were not totally denied when he had counsel continuing to go forward with the cross-examination.

Q But your argument is that he waived it?

A That he waived it.

Q And you do concede that it was technically violated? If he had not waived it, it was violated?

A Yes; it was violated. The removal is a technical violation, if one can call into play what violation by our waiver.

Q Had there been no waiver, it would have been a violation?

A It would have been a violation.

Q As I read the Supreme Court of Illinois opinion, they didn't say that it was a waiver, but that his conduct

operated as a waiver. Is that about the way they put it?

A Yes, it is, Mr. Chief Justice.

Q They equated it to a waiver rather than saying that it was a waiver?

A Correct. I would imagine that I have been opposing simply because as a trial lawyer I am used to the waiver of the signed paper of a jury waiver or whatever. But, you are absolutely correct. They did not call it direct waiver as much as they did by interpreting it from the conduct.

Q Did they call it a forfeiture?

A Not a forfeiture.

Q You don't get that suggestion?

A No.

Q If he waived anything, why din't he waive the complete trial? Didn't he tell them, he was not going to be tried?

A Well, there is the right of the State, Mr. Justice Black. We feel that the right of the State cannot be denied to the trial. And to acknowledge ---

Q But, if you say he waived one thing, why didn't he waive the whole thing? I thought he didn't want to be tried.

A Well, we feel it does not lie within his power to make that ultimate decision. I think he did not want to be tried or, perhaps I might suggest, Mr. Justice Black, that

maybe he did want to be tried. But in furtherance of his particular defense, this kind of disruptive conduct may have been very calculated. That is just a supposition.

Q What difference does it make whether you are talking about trial or you talk about forfeiture or about waiver? What you have here is a man who defies the court and told them he would not be tried, isn't it?

A Yes, sir. Those are his statements.

Q And he kept making a noise to keep himself from being tried. What difference does it make whether you call it a forfeiture or waiver?

A I just suggested that our theory be labelled waiver. We felt because it is one that we think is very workable. By that I mean the trial judge, reasonably interpreting conduct, can find waiver in a situation like that. That is why we have leaned toward the waiver conduct.

Also because as our reading of the dictum of cases that have peripherally dealt with waiver in this Court, words like, "that he can waive it by his misconduct" as Mr. Justice Cardozo said, suggest to us that was the route that we might appropriately offer up to this Court.

Q Mr. Flaum, I gather from the Illinois Supreme Court judge that he equated to waiver. When you equate something to something, it is not the something, isn't that right?

A Technically, that is correct, Mr. Justice.

Q Technically? Actually. All you are saying when you say it is equated to a waiver, is that you arrive at the same result as if he waived.

A As if he waived, that is true.

Q As their precise language was, "such misconduct was, in turn, effective as a waiver." It has the operative effect.

A Yes, Your Honor. Perhaps, we should have prefaced our claims of waiver as effective as a waiver. We just felt it would not be misleading to offer up to this Court the concept nakedly as waiver and that it would not be different from one of application, if accepted by the Court.

I wonder if I might reserve a minute or two for rebuttal?

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Harris.

ARGUMENT OF H. REED HARRIS

ON BEHALF OF RESPONDENT

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

The facts are not in dispute but ---

MR. CHIEF JUSTICE BURGER: Will you raise your voice, Counsel? We seem to be having a little bit of difficulty with the acoustics today.

MR. HARRIS: The facts are not in dispute, but I

feel that they need some elaboration, so that the Court can more accurately understand the situation of this trial.

The respondent, William Allen, on August 12, 1956 about 3 o'clock in the morning walked into a tavern, went to a corner of a bar where no one was around. When the bartender came over to ask him what he wanted to drink, the bartender saw a gun. Allen said, "I want the money." The bartender took the money and gave it to him. And Allen left.

A few hours later Allen was apprehended. He was searched. No gun, but approximately $200 was found on his presense. The officer said, "Where did you get the money?" And Allen said, "Oh, I robbed this bar this evening." With that he was taken to the police station, and, subsequently, there was a line-up.

When Allen was walked in with several other suspects to be viewed by the owner of the bar and the bartender, both of whom were in the bar when the robbery occurred, before he could be identified, Allen said, "Hey, I recognize you. You look familiar. Didn't I rob you last night?"

Q How is this relevant, now, on our issue?

A Because I am trying to explain Allen's behavior. Allen was then indicted and while in jail, there were several attempted suicides. Allen had a prior mental history. Back in the early 50's he was committed and served some time in a mental hospital.

Subsequently, a pre-trial sanity hearing was held in 1956. It was determined that he could not cooperate with his attorney, and he was sentenced to a mental institution.

Q But that issue is out of this case now, in a sense, isn't it?

A No; but I think it is important for the Court to realize the type of person who Allen was and what the trial judge was confronted with. I don't feel that the trial judge in the warning realized that he was dealing with a person who had a prior mental history and, although the issue is not before this Court, may not have been in full control of his faculties at the time he was tried.

The fact that you may say to someone, "If you don't sit down and be quiet, you are going to be removed" and warn him once or twice, and he continues to disrupt the proceedings, and to remove that person, that is different than dealing with a person who has complete control of his faculties who may realize what the court is saying.

When Allen was subsequently ---

Q Did Allen realize what he was saying when he said, "You're not going to hold any trial. I'm going to wreck the joint"? You were talking about what the judge didn't understand. Do you feel Allen didn't mean that when he said it?

A No; he did mean that.

Q He did?

A He did mean that, because he wanted to conduct his own trial.

Q What should the court do then? Let him break up the courtroom?

A No; because when Allen was brought to trial, he requested the right to represent himself. And the court granted him that right. He began to conduct a voir dire examination.

During the conduct of that examination, after some 14 pages of transcript of examining the first witness, he began to make statements about his case. The State objected. There then began a dialogue between Allen and the judge. The judge warned him not to make statements and to conduct himself only to the qualifications of the jurors.

The dialogue continued. Allen said he was going to conduct this trial as he knew how. The judge warned him, "Any satements and I'm going to deny you the right to represent yourself." Then more dialogue; Allen continued to be disrespectful to the court, because he wanted to conduct his defense the only way he knew how. He is not a skilled attorney; he's an indigent who was on trial for his life. At this time he said life, and the judge said liberty.

But the issue involved is because Allen, at this time, was a three-time loser. This was his fourth conviction. It was possible for him to be sentenced for the rest of his

natural life in the penitentiary. And this may explain to the Court the dialogue between the judge and Allen with respect to life and liberty.

Q What was the judge to do then? Let him conduct the trial the way he wanted to conduct it?

A If the judge felt that Allen had the competence to conduct the trial in the beginning, he should have let him proceed. If he felt that he did not have the competence ---

Q But he didn't know that he was going to carry on like that at the beginning.

A Then you don't begin a dialogue for two minutes and say, "Now do it right; do it the way it should be done, or I'll deny you that right." Why not have a recess? Why not go into chambers? Why not sit down with the man? The judge knew that he had a prior ---

Q But who is running the courtroom in the meantime?

A But the judge should have realized this before he gave him the right. He should have known the type of person he was dealing with. And if he is going to give that person ---

Q But how should he have known it?

A Because his record was before him. The judge ---

Q The record was before the judge?

A The judge knew of his prior commitment to a mental hospital.

Q How did he know it?

A Because the defendant made a request to the court that he wanted an order from a prior judge. This order was a commitment of him to a mental institution several years ago. I am sure that the trial judge must have known that this man was just restored to sanity after being committed.

Q Why is there any reason for him to know that? Nobody raised it. Did the lawyer raise it?

A It wasn't raised by the lawyer, but ---

Q Was it raised by him?

A By Allen?

Q Yes.

A Only with respect to a reference to an order from a previous judge as to his commitment.

Q And when was that?

A That was during this dialogue between the court and ---

Q Well, I am saying at that stage what should the judge do then?

A He should recess the court, sit down with the defendant in chambers. Take five minutes out and explain to him very simply, in a calm fashion, rather than an argumentative fashion, and say, "Here is what is going to happen...".

Q I would suggest that he go and ask the defendant, "How do you want me to run the trial?" Is that what you mean? In that situation the judge had a choice, according to the

Court of Appeals, of three things. He chose one of them.

A Well, there was ---

Q Would it have been better to bind and gag him?

A Well, no. Pardon me. There were two elements: The first was the denial of Allen's right to represent himself. This was denied first. This is what brought about the second confrontation between Allen and the court. Because Allen objected to his not being permitted to continue to represent himself.

The court had appointed an attorney that day to sit with him to protect the record. There is no evidence in the record that Allen and this attorney had any discussions about his case whatsoever. Allen did not want him. He refused to accept him. The judge said, "You sit down; he is going to conduct your defense." He said, "No, he's not. I don't want him." The judge said, "You sit down and be quiet or else I am going to have you removed."

Allen refused to sit and be quiet. He didn't want the attorney who was being appointed. The judge said, "Remove him." Then he was taken out of court.

Q Isn't that a choice made by Allen?

A Pardon?

Q Is that a choice he made? The judge said, "You either keep quiet or get out," and he didn't keep quiet.

A He had the choice after he was given the right

to defend himself, and that right is now denied. Is he to sit still and sit in the chair and have an attorney, who he doesn't know, represent himself, have an attorney who he hasn't talked to, who may know nothing at all about the case? Is he to just sit there, or is he permitted to protest what he thinks are a violation of his rights? And at this point ---

Q How do you protest by saying, "You are going to be a corpse come lunch time?" Is that quoted correctly?

A Well, Allen was in custody. I am sure that this was something that was said in the heat of the dispute between the court and Allen. And I doubt very much if the judge took that seriously. Of course, the judge ---

Q In the New York case, the defendant picked up an old chair and threw it and missed the judge.

A Yes, he did. But that was after the trial had commenced. In Allen, it was illogical, both from his being denied his right to represent himself ---

Q Mr. Harris, are you arguing that as a matter of the confrontation clause, there are no circumstances under which a defendant may be removed from the courtroom for misconduct and the trial proceed without him? Are you going that far?

A I am going that far, because I believe that under today's technological advances there are alternatives for dealing with the unruly defendant which will preserve

his rights to confront the witnesses.

I do not believe that an attorney without his client to communicate with him is capable of properly conducting a cross-examination.

Q What are the alternatives?

A The alternatives are: a glass, sound-proof booth which could be constructed. Such a booth was actually used during a sanity hearing in 1956 in California, and I have in my possession photographs of that booth.

The State of California built a booth which was 12 by 12. It was sound-proof glass; it was air-conditioned. There was a telephone in the booth. In the booth was a guard with the defendant.

When the defendant first got in the booth as soon as the hearing began, he picked up the chair he was sitting in and he smashed it against the glass. They recessed the court and then built an iron chair which was bolted to the floor. There were clamps which were built onto that chair, so the defendant was then seated in the chair with the clamps around his legs. He had a telephone with which to communicate with his attorney who was seated just outside the booth.

Q This is all very interesting, but did you propose that at sometime, or did the defense counsel propose that?

A I proposed that at the Court of Appeals in the

Seventh Circuit.

Q It was a little late, wasn't it? Was it proposed to the trial judge, since you suggested it was a viable alternative?

A No, I did not; it was not proposed at that time. But this is a possible solution. The only problem with this solution ---

Q Are there any others? Do you suggest gagging or something?

A Well, I suggest the possibility of closed-circuit televising the trial to another room where again he can see the proceedings.

Q What about gagging?

A I feel that if the court will not accept closed-circuit television or a booth, then he should be gagged; he should remain in court. Because even though he is gagged and he can't talk to his attorney, he can still hear what is going on.

It is completely different for a defendant to be in court and to hear what is going on, so that at recess he can talk to this attorney, rather than trying to read a transcript during a recess and tell him what should or should not happen or should be said in cross-examination.

Q Well, now certainly, you do not contest that the government has a right to try an accused, doesn't it?

A Yes, sir.

Q These are just safeguards about the accused to see that he gets the kind of trial the Constitution guarantees.

A That is correct.

Q But certainly he has to recognize the government's right to try him, doesn't he?

A Yes.

Q Doesn't that suggest that he may then by his misconduct that he prevent the government from trying him?

A I do not believe that we can permit or a court should permit a defendant to disrupt the trial, to cause a mistrial, to delay the trial by conduct. I feel that his right to be in court is mandatory so he can see what is happening and confer with his attorney.

If he attempts to purposely disrupt the court, I do not think that a contempt sentence is going to be effective. Because, assuming a series of contempt convictions over a period of time, and during this time there may be witnesses who could testify who will now no longer be available. And, thereby, through indirection he may be serving 3 or 4 contempt terms and avoid serving a much more serious term for the charges brought against him.

I think that there are more effective ways of gagging and binding a defendant rather than the one which was used in the recent trial in Chicago of the seven defendants. Bobby

Seale was chained with a sort of make-shift gag on his mouth. Had the court used a strait jacket and a hospital gag as was used in a recent Ohio trial, the defendant would have been immobile, and he wouldn't have been able to bite through the gag and utter noises to disrupt the proceedings.

Q I take it if you have a number of defendants who are equally obstreperous, your thought would be that each would have to have his own cubicle, the State would have to provide one, is that it?

A A cubicle I think is impractical, because as was done in the sanity hearing in California, when the defendant got in the cubicle, as a last effort to disrupt the proceedings, he then pretended to be asleep for the entire hearing.

Q Which lasted 2 or 3 weeks?

A I think a closed-circuit television is mobile, it could be set up in the court, and the cost is nominal. Every bank and savings and loan association of the country have closed-circuit television.

Q The trouble is that doesn't preserve his right to confrontation.

A Yes, but at least he will be seeing the witnesses, and he will be able to communicate with his attorney and tell him how to cross-examine them.

Q But it does not preserve his right to

confrontation.

A Well, that depends on how the right of confrontation is defined. He is to confront them for what purpose? I think the purposes were 1) so he can face the witness and cross-examine him. There is a second reason: so the jury can see the witness and reflect on his demeanor and his testimony. I don't think either of these rights would be violated, if he is placed in a separate room.

Q Suppose he is put in the separate room or in the chamber, and we find at the end of the trial that the telephone -- which sometimes happens-- is out-of-order for 15 minutes. Do we have to have a new trial?

A No; because I think there should be a marshall in the room with the defendant who could -- if the phone is out-of-order -- very simply communicate via runner to the court that the phone's not working, that they must get a repairman in and will recess for 10 or 15 minutes.

Q But if he didn't do it, you would have to have a new trial?

A No.

Q But he didn't have the right of confrontation for 15 minutes. I understand that is your argument.

A He would still have an opportunity to see what is proceeding. If the phone is not working when he tries to phone his attorney, it would only be a matter of minutes for

a runner to go from the room where he is watching the trial to the court to say, "The phone is not working; let's recess." During that time he can communicate with his attorney, and they can very simply go over what he was unable to tell him on the telephone.

Q But if he says from the beginning, "I am not going to be tried. I will do anything to prevent you trying me " what good would all this telephoning do? He still would not be tried. That is his claim, what he intends. What good would that do? Why should the state or the government go to all that trouble to try a defendant, unless the courts are to become absolutely impotent to carry on their responsibilities?

A Because the courts do have a responsibility, and we should not permit certain defendants to usurp the power of the courts and dictate to them what is or is not going to happen.

Q Well, if he said, "I'm not going to be tried", would he cooperate any more if you put him off somewhere where he could get a telephone and call up his lawyer?

A Yes, but at least he is not disrupting the orderly process of trial which is going on. The trial would proceed. He would not have the opportunity to disrupt it which could be done if he was gagged or bound in court, or by ranting and raving.

Because the question then becomes: at what point in

time does a trial judge say to a defendant who is objecting to certain things which the trial judge may be saying, that he has now waived his right to be present.

Q As a lawyer what do you suggest that a judge is under the duty to do, when the defendant announces he will not be tried and conducts himself so as to prevent a trial in the courtroom? What do you think would really be the best?

A I would either have him bound and gagged, or I would build a ---

Q Well, that would look pretty bad, wouldn't it? I am talking about that or the alternative. That would look pretty bad, wouldn't it?

A Why should that look bad? Historically, the defendant has always been bound and gagged, if he tries to cause a disturbance. In the courts in almost every state in the Union ---

Q Well, you think that would be better. What else do you think would be better?

A I think the best thing is to close-circuit the trial to him. I think the next ---

Q To what?

A Televising the trial to the defendant; remove him where ---

Q What do you do when you get out in a small county like I practiced in once that didn't have anything like

that in it?

A If you can't televise the trial, if you can't build a glass booth, then bind him and gag him but keep him in court.

Q This seems to be the theory that this mentally-disabled defendant had from the start. I am reading from the transcript where he said to the judge, after getting his second warning, "You have the right to restrain me, but you haven't got the right to remove me, and you're not going to remove me."

A That is correct.

Q That is the theory of your case here, and that was his theory or case at the trial.

A That is correct.

Q Pretty good analysis on his part.

A He spent a lot of time in prison reading law books, Your Honor. He relied on that recent Illinois Supreme Court decision, the De Simone Case which Counsel referred to, where a defendant did cause disruption. He was removed from the courtroom for a moment, at which time the attorneys approached the bench. They discussed with the court that this might be a violation of his rights, at which time he was brought back in.

His conviction was, subsequently, reversed on other grounds. But the respondent has advised me that he had read

that case, that he realized he had certain rights and he was going to preserve his rights.

Q I am not ready to say that it should be done, but suppose the judge had simply said to him, "All right, you say you will not be tried; I will let you go to jail and stay until you are ready for a trial; I will declare mistrial in this case, and when you want a trial, you can get it"?

A I think that the court had the right to do that. But the problem inherent in that is that there were four winesses ---

Q Don't you think that would be a better thing?

A No, I don't, because there were four witnesses against the respondent. Let's say he goes to jail for six months for contempt of court. He comes out; the judge says, "Are you ready to stand trial again?" He says, "No, I'm not." So he is back in jail for contempt. He is in jail for six months.

Meanwhile, one of the winesses now moves to California; one dies; one becomes sick; and something happens to the other one. He comes back and he says, "Now I'm ready to stand trial, Your Honor. Try me." And there are no more witnesses.

Q Well, that is a delightful thing for him to look forward to, if it would always happen. I remember trying a case once 12 years after a murder was committed. There were

plenty of witnesses there.

A But there are certain instances where the witnesses may disappear, they may die. If this case were to be retried today, I believe that two of the witnesses have died. One has, subsequently, been indicted by the grand jury in Cook County Illinois. So out of the four witnesses against him, there would just be one witness who could possibly testify.

Q You will agree, won't you, that something has to be done to keep the court from being subjected to such indignities, to such frustrations of justice?

A Yes, I do.

To continue with what happened to Allen: Once the trial began, he was brought in, after the voir dire was concluded. The judge said, "You can stay here, if you remain quiet." He was non-committal as to what he was going to do.

The trial began. The first thing that was done is that his court-appointed attorney made a motion for witnesses. The respondent looked around. He didn't see his friends who were supposed to be in court, his sister. He got up and he said, "Where are my witnesses? How can this trial go on?" And with that, the judge ordered him removed, out of court.

He was in court four times in that afternoon which was during the prosecution's entire case. There were four witnesses. Two testified they saw him commit the crime. Two

testified that he admitted to him that he committed the crime.

And the point in testimony was reached, "Do you see the man here who did that?" The witness would look around and say, "No, I don't." And the judge would say, "Bring in the defendant." Then they would drag in this guy with handcuffs in a prison uniform that was stenciled across the front "maximum security". And they would say, "That is the man." The judge would say, "Remove the defendant." They would drag him out again, four times in an hour.

Q But I thought you were arguing a little earlier that he should have been bound and gagged and kept all the time, wouldn't that be a constant reminder?

A Keep him in court, but don't bring him in and out of the court every time you want to identify him. Even in the most primitive identification, police line-up, they don't just bring one person out and say, "Is that the man who did it?" They at least bring several out.

Here they said, "Do you see the man in the courtroom?" He would look around, and he saw several faces, "No, I don't." Okay, bring in the defendant. One guy comes in. "That's the man."

Q But do you think this man has been given about as fair a trial as it was possible for him to get?

A In reading the record, I will acknowledge that the court-appointed attorney did an excellent job. The trial

judge who was in his seventies, who may have had certain pre-conceived notions about justice, because he was a former prosecutor for many years, was also very tolerant with this defendant.

However, I felt that he should have been more tolerant. I felt that once this dispute began, he should have taken the opportunity to sit down with this defendant and explain to him what he was going to do in a conversational tone in chambers. The whole thing would have taken 5 minutes. Not in the heat of argument where the defendant may not be paying attention to what is going on, because he wants to preserve his right to represent himself.

Q How many times was this man convicted, 3 times?

A He was convicted 3 times, and I am advised that there are other charges against him which he was never prosecuted under.

Q How old was he?

A He is 38 now. He was convicted in 1957 ---

Q I am just wondering about why he needs all this fatherly discussion. He is quite a mature person.

A It is not so much him; it is what he stands for, which is the right of the defendant to be tried, to preserve those rights, and to protect those rights.

Q What I don't understand is that under your theory, every other person in that courtroom has to act with

demeanor in respect to the court except the defendant.

A I think that the defendant also has to conduct himself with respect. But you can exclude a spectator from the courtroom without violating the constitutional rights of the defendant. But I believe that you cannot do that to the defendant, the defendant who is on trial.

Q Regardless of what he does?

A Regardless of what he does. If he wants to go to sleep during the trial, that is his right. But if he demands the right to be there, don't exclude him so that he can't see what is going on. And if he tries to disrupt the proceedings, don't let him be successful. Deal with him but preserve his rights in the event that all of a sudden he gets a change of heart ---

Q All your point is that his body must be there?

A Anytime a defendant is tried that is all the court really knows that is there. Because you have no knowledge as to what he is doing in his mind, whether he is thinking about the baseball game that may be going on next week.

Q Is that your idea of confrontation, that he is there, bound and gagged?

A The Constitution does not require that the defendant sit and be alert and pay attention to the trial. It just requires that he be there, so he has the right to confront the witnesses.

Q Well, what is the difference between him sleeping outside and sleeping inside?

A Because if he changes his mind and he wants to pay attention and wants to defend himself, he can then do it.

Q He had four chances to change his mind.

A No; he was warned once about conducting his trial. Then that right was denied him. I believe that he was just warned twice about his being removed. When he didn't pay attention, he was removed. And I don't think those warnings were sufficient.

This is actually a case of first impression. This Court has never really ruled on this issue. The cases I cite, the Hopt Case, the Shields and the Lewis Case deal with examination of jurors or in jury instruction outside the presence of the defendant. These cases rely on due process of the Fifth Amendment.

The Diaz Case came out of the Philippines which, although the Philippine Government had a similar provision as the right of confrontation which was supposedly based on the Sixth Amendment, these expressly waived his right to be present during the trial. One of the reasons was because the trial took several months. They would recess for 30 or 60 days; Diaz was away far from the court, and it was inconvenient for him to be in court. So he said, "Proceed without me. There are only one or two witnesses which are going to be heard, and

my attorney will be there, and he can handle it for me."

I don't believe that what Mr. Justice Cardozo said in Snyder is applicable, because that was a case involving whether the defendant had the right to go to the view of a scene with the jury. Under Massachusetts law that right did not exist, although the right existed in most other jurisdictions. It wasn't a violation of the Fourteenth Amendment, because at this time certain rights under the Sixth Amendment and the First Amendment had not been incorporated and applied to the states under the Fourteenth Amendment.

The Sixth Amendment historically, the right of confrontation, it is not clear where it came from. Some commentators say that it comes basically from the evils of the Star Chamber proceedings in England. Other say it stems from the injustice which happened to Sir Walter Raleigh who was tried in 1603 for treason.

This, in effect, was an early political trial. Queen Elizabeth had died, and her successor, who I believe was King Charles, wasn't pleased with Raleigh. Raleigh had caused a death of a friend of the prince.

MR. CHIEF JUSTICE BURGER: Very well.

You have one minute left, Mr. Flaum.

REBUTTAL ARGUMENT OF JOEL M. FLAUM

ON BEHALF OF PETITIONER

MR. FLAUM: Mr. Chief Justice, may it please the

Court:

Just on the two main cases relied upon by the respondent: Writing in Snyder vs. Massachusetts, Mr. Justice Cardozo stated, "Hopt v. Utah has been distinguished and limited." And what was said in Hopt v. Utah on the subject of the presence of the defendant was dictum and no more, we may say the same with Lewis v. the United States.

And if I might just take a second on the state of the record. Mr. Kelley, who was counsel for the defendant below, was appointed on October 14. The next proceedings were December 11 in the case. He was granted the right to be co-counsel in his case. It was only when he was disruptive during the voir dire that the judge asked that he let his counsel take over. That is when the first right ensued.

I would leave the Court with just this: the Court of Appeals' decision can be sustained only by a most slavish reading of the Sixth Amendment. I respectfully ask this Court to reverse it.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Flaum. Thank you, Mr. Harris. The case is submitted.

(Whereupon, at 12:00 Noon the argument in the above-entitled matter was concluded.)