Florida Law Review

Volume 19 | Issue 2 Article 10

September 1966

# Constituitonal Law: The Right to Jury Trial for Criminal Contempt

John D. McKey

William C. Sherrill

When this proscription infringes on the free exercise of religion, however, the first amendment dictates that the state be made to demonstrate a compelling interest in such infringement. Since the question for decision is of federal constitutional proportions, the test elucidated by the United States Supreme Court should be adhered to. More importantly, as long as a valid constitutional test is available to fairly and logically weigh conflicting social policies, common sense requires that it be utilized. North Carolina can constitutionally control the use and possession of peyote. Unfortunately, the North Carolina court wielded its power to control in a manner that both ignored the mandate of the Federal Supreme Court, and eviscerated the first amendment rights of the defendant.

DAVID MONACO

## CONSTITUTIONAL LAW: THE RIGHT TO JURY TRIAL FOR CRIMINAL CONTEMPT

*Cheff v. Schnackenberg*, 86 Sup. Ct. 1523 (1966)

The petitioner was held in contempt by the Seventh Circuit Court of Appeals for failure to obey a court order requiring compliance with a cease and desist order issued by the Federal Trade Commission. His demand for a jury trial was denied. After a full hearing by a three-judge panel he was found guilty and sentenced to six months imprisonment. On certiorari, the United States Supreme Court HELD, sentences for criminal contempt[1] in federal courts must be limited to a maximum of six months unless a jury trial is granted or waived. Judgment affirmed, Black, Douglas, J.J. dissenting.

1. There are two kinds of contempt: civil and criminal. The primary distinction between the two is the purpose of the punishment. In civil contempt the penalty is remedial in that the accused may terminate the sentence at any time by obeying the court decree. In criminal contempt cases, however, the sentence is for a definite length and strictly punitive. Bessette v. W. B. Conkey Co., 194 U.S. 324, 328 (1904). The Court has held that *civil* contempt may still be tried without a jury, but the sentence must end when the contemnor has either complied with the court order or circumstances arise so that it is no longer possible for him to comply. Shillitani v. United States, 86 Sup. Ct. 1531 (1966). See generally Note, *Criminal Contempt Procedure in Florida — Proposals*, 18 U. FLA. L. REV. 78 (1965), for a discussion of the treatment of criminal contempt in Florida.

Prior to the instant decision, it was settled that no right to a jury trial existed for one charged with criminal contempt.[2] Summary trial of contempt at common law was considered to be of "immemorial usage"[3] and the Judiciary Act of 1789,[4] which gave the courts of the United States a discretionary power to punish for "all contempts of authority," was held to be declaratory of the common law.[5] Contempts were not "crimes"[6] or "criminal prosecutions"[7] and were not within the contemplated range of the jury provisions of the Constitution.[8] The underlying assumption was that the power to try contemnors without a jury is inherent and necessary to enforce compliance with orders and judgments,[9] as well as to preserve the dignity of the court.[10] Much doubt has been cast on this assumption[11] but the Court has refused to reopen the historical argument.[12]

The proceeding has been classed as sui generis, possessing the qualities of both criminal and civil wrongs.[13] The courts have thus kept the procedure flexible while extending many rights of a criminal prosecution to an accused.[14] In *United States v. Barnett*[15] the Court affirmed prior holdings but indicated that the severity of the penalty

2. United States v. Barnett, 376 U.S. 681, 695 & n. 12 (1964).

3. 4 BLACKSTONE, COMMENTARIES 283 (1899).

4. 1 Stat. 83.

5. United States v. Barnett, 376 U.S. 681, 687 (1964).

6. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ." U.S. CONST. art. III, §2.

7. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

8. See, *e.g.*, Green v. United States, 356 U.S. 165, 184 (1958); Myers v. United States, 264 U.S. 95, 105 (1924); Eilenbecker v. District Court, 134 U.S. 31, 38 (1889).

9. United States v. Barnett, 376 U.S. 681, 698 (1964), quoting from Eilenbecker v. District Court, *supra* note 8, at 36.

10. *Ibid.*

11. See generally FOX, CONTEMPT OF COURT (1927); Frankfurter & Landis, *Power To Regulate Contempts*, 37 HARV. L. REV. 1010 (1924); Nelles, *The Summary Power To Punish for Contempt*, 31 COLUM. L. REV. 956 (1931).

12. Green v. United States, 356 U.S. 165 (1958).

13. See, *e.g.*, Green v. United States, note 12 *supra; In re* Oliver, 333 U.S. 257 (1948); Michaelson v. United States, 266 U.S. 42 (1924); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); Bessette v. W. B. Conkey Co., 194 U.S. 324 (1904).

14. See, *e.g.*, *In re* Oliver, note 13 *supra;* Cooke v. United States, 267 U.S. 517 (1925) (right to counsel, compulsory process for witnesses, right to cross-examine witness, right to reasonable notice of the charge, right to a public trial); Gompers v. United States, 233 U.S. 604 (1914) (benefit of statute of limitations generally governing crimes); Gompers v. Bucks Stove & Range Co., note 13 *supra* (proof of guilt beyond a reasonable doubt and freedom from compulsion to testify).

15. 376 U.S. 681, 695 n.12 (1964).

might entitle a contemnor to a jury trial. The *Barnett* dictum was derived from an earlier case which held that the nature of the penalty must be weighed in determining whether an offense "in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury . . . ."[16]

At the time of the creation of the Constitution there were numerous petty criminal offenses to which the right to a jury trial did not attach.[17] The Court in the instant case, relying on the *Barnett* dictum, concluded that the proceeding to try criminal contempt is to be viewed as equivalent to the procedure for petty offenses. The procedure for determining whether an offense is petty has been to consider both the quality of the offense[18] and the severity of the penalty.[19] The instant case applied this two-fold test to criminal contempt and concluded: (1) that the quality of the offense did not warrant a jury trial as a matter of right[20] and (2) that the penalty for a petty offense as defined by federal law[21] is imprisonment not exceeding six months. Therefore, the Court reasoned that if the penalty for criminal contempt would exceed six months imprisonment, the right to jury trial would attach. Cheff's conviction was affirmed, however, because his sentence did not exceed six months.

The instant case is unique in that it glosses over the precedent of one hundred and fifty years of summary trial of criminal contempt[22] to carve an exception based upon the petty offense theory. The Court, however, did not strictly adhere to precedent[23] in determining whether

16. District of Columbia v. Clawans, 300 U.S. 617, 625 (1937).

17. See, *e.g.*, Williams v. Augusta, 4 Ga. 509 (1848); Wilmarth v. King, 74 N.H. 512, 69 Atl. 889 (1908); State v. Griffin, 66 N.H. 326, 29 Atl. 414 (1890). From an historical analysis, Frankfurter and Corcoran concluded: "[T]he framers did not mean to provide for jury trials in criminal cases under the new government beyond the established practice in their various states." *Petty Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 969 (1920). But see Kaye, *Petty Offenders Have No Peers*, 26 U. CHI. L. REV. 245 (1959).

18. District of Columbia v. Colts, 282 U.S. 63 (1930).

19. District of Columbia v. Clawans, 300 U.S. 617 (1937).

20. Cheff v. Schnackenberg, 86 Sup. Ct. 1523, 1526 (1966); see Myers v. United States, 264 U.S. 95, 105 (1924).

21. 18 U.S.C. §1 (1964).

22. In Green v. United States, 356 U.S. 165, 183 n.14 (1958), the Court emphatically said: "[T]he statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trials as a matter of constitutional right."

23. Indeed, the precedent concerning petty offenses is none too clear. The first case, Callan v. Wilson, 127 U.S. 540 (1888), focused only upon the qualitative seriousness of conspiracy. The next important case so often cited as authority for the "severity of the penalty" test was Schick v. United States, 195 U.S. 65 (1904);

an offense is petty. Rather than considering the quality of the defendant's conduct,[24] the Court concluded that criminal contempt per se did not entitle one to a trial by jury. Therefore, the Court's primary concern was with the severity of the penalty.[25] Further, the instant case judged the severity of the penalty by the sentence actually imposed. The traditional test had been to consider the maximum potential sentence.[26]

The decision probably will not mark a new trend in the test for petty offenses, however, because the approach was necessitated by the peculiar nature of contempt. Unlike most offenses, there is no statutory limit to the penalty that may be imposed for criminal contempt.[27] Furthermore, it would not be an easy task for the Court to distinguish the degrees of qualitative seriousness[28] when contempts display a myriad of forms.[29] By refusing to consider the seriousness of various

but *Schick* seems more concerned with whether it is permissible to allow the defendant to waive a jury trial. District of Columbia v. Colts, 282 U.S. 63 (1930), was concerned with the nature of the offense. Seven years later District of Columbia v. Clawans, 300 U.S. 617 (1937), considered only the penalty.

24. In District of Columbia v. Colts, note 23 *supra*, the Court considered only the qualitative seriousness of the offense. Even though the penalty for reckless driving was mild, the Court found it to be an offense *malum in se* and thus the defendant had a right to a jury trial.

25. Cheff v. Schenackenberg, 86 Sup. Ct. 1523, 1528 (1966). Sole reliance upon 18 U.S.C. §1 (1964) is also not supported by precedent. In the last case to use the "severity of the penalty" test for a petty offense, District of Columbia v. Clawans, 300 U.S. 617, 630 (1937), no reference was made to the statutory classification of petty offenses available in the Code. Instead, the Court asked if the potential penalty offended a contemporary "public sense of propriety and fairness."

26. In District of Columbia v. Clawans, note 25 *supra*, the defendant was convicted, without a jury trial, of engaging in business without a license and was punished by sixty days in jail or a fine of $300. In affirming the conviction, the Court held that the test for a petty offense consists of the following questions: (1) Was the offense indictable at common law? (2) Was the *potential* penalty considered severe at common law? (3) And more especially, is the maximum *potential* penalty today considered to be so harsh as to require a jury trial?

27. 18 U.S.C. §§401-02 (1964) leave the maximum potential penalty for criminal contempt to the court's discretion.

28. In District of Columbia v. Colts, 282 U.S. 63, 73 (1930), the Court held that reckless driving was an offense of "[S]uch obvious depravity that to characterize it as a petty offense would be to shock the general moral sense." But in recent years the Court has avoided the ambiguous test of "shocking the conscience," see Rochin v. California, 342 U.S. 165 (1952), in favor of more objective constitutional standards, Mapp v. Ohio, 367 U.S. 643 (1961). Similarly it has been shown with much justification that the *malum in se/malum prohibitum* distinction is difficult to apply to criminal law with the precision required by due process. See Note, *The Distinction Between Mala Prohibita and Mala in Se in Criminal Law*, 30 COLUM. L. REV. 74 (1930).

29. The dissenters argue that as long as all contempts are lumped together, all contempts must be considered serious and thus all should be triable by jury as a matter of right. Cheff v. Schnackenberg, 86 Sup. Ct. 1523, 1530 (1966).

kinds of criminal contempt and by adhering to statutory penalty classifications the Court avoided a difficult area[30] that is perhaps more properly a realm for legislative action.[31] In certain limited areas of contempt Congress has provided by statute a mandatory right to a jury trial.[32] One of these, the Clayton Act,[33] was held to be constitutional although it presented the problem of a conflict of legislative and judicial powers.[34]

The present decision is inapplicable to the states because it is merely a supervisory rule and not a constitutional mandate. The Supreme Court has consistently held that the fourteenth amendment does not require states to retain the right to a jury trial in criminal prosecutions.[35]

A jury trial in federal courts will provide a cushion of community values between the accused and the broad discretionary power of the judge.[36] In cases of more serious criminal contempts, which involve a possibility of greater penalties, the speed and convenience of a summary trial become justly subordinated to the individual's right to have a jury pass upon his guilt.[37] One serious procedural problem, however, is created by the decision. By conditioning the right to a

30. For the Court to attempt to classify contempts would be "faintly reminiscent of declaring 'common-law crimes,' a power which has been denied the federal judiciary since the beginning of our republic." Cheff v. Schnackenberg, *supra* note 29, at 1530; see United States v. Gradwell, 243 U.S. 476 (1917).

31. See Green v. United States, 356 U.S. 165, 189 (1958) (separate opinion).

32. FED. R. CRIM. P. 42(b) provides that in criminal contempt "the defendant is entitled to a trial by jury in any case in which an act of Congress provides." Several contempt statutes have so provided: *e.g.*, the Clayton Act (antitrust act), (1914), 18 U.S.C. §3691 (1964); the Norris-LaGuardia Act (labor disputes), 18 U.S.C. §3692 (1964); the Civil Rights Act of 1957, §151, 71 Stat. 638 (1957), 42 U.S.C. §1995 (1964); the Civil Rights Act of 1964, §1101, 78 Stat. 268 (1964), 42 U.S.C. §2000h (1964).

33. 18 U.S.C. §3691 (1964).

34. Michaelson v. United States, 266 U.S. 42 (1924). Congress perhaps may not limit the Supreme Court's contempt authority but it can limit the power of lower federal courts to deal with contempt without a jury. Bessette v. W. B. Conkey Co., 194 U.S. 324, 327 (1904); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

35. Irvin v. Dowd, 366 U.S. 717, 721 (1961); Fay v. New York, 332 U.S. 261 (1947); Palko v. Connecticut, 302 U.S. 319 (1937). In Fay v. New York, *supra* at 288, the Court held "[C]ondemnation shall be rendered only after a trial, in which the hearing is a real one, not sham or pretense . . . . Trial must be before a tribunal not biased by interest in the event." Thus, due process may someday require that state courts grant a jury trial in contempt proceedings on the grounds that trial by the offended judge is trial by a tribunal biased by interest in the event.

36. See Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283, 290 (1962).

37. See Kaye, *supra* note 17, at 268-70. Indeed, in cases when the act of contempt was initiated several years prior to trial there is no great necessity for speed. See Green v. United States, 356 U.S. 165, 193 (1958) (dissenting opinion).

jury upon the length of the sentence imposed, the trial judge is forced to grant or deny a jury trial without knowledge of the facts that should determine the sentence. This will not result in the kind of certainty in criminal law that due process seems to guarantee,[38] nor is it consistent with the fundamental nature of the accusatorial process.[39] Indeed, in cases in which the sentence is less than six months, the contemnor may be in danger of greater injustice than prior to the present decision. The judge who conducts the summary trial will be the same judge who has already considered guilt and established a probable penalty.[40]

Because the penalty is within the court's discretion, the judge will still have great leeway in denying a jury trial for criminal contempt. In close cases, the judge will probably give fewer penalties over six months imprisonment. Thus, a silent but important purpose of the principal decision (to restrain lower federal courts from imposing severe sentences)[41] will be indirectly accomplished. In his concurring opinion, Mr. Justice Harlan warned that limiting the penalty for criminal contempt, not tried by a jury, to six-months imprisonment may preclude implementation of "locally unpopular decrees."[42] It would appear, however, that a six-months sentence would adequately effectuate this purpose and should be sufficient to preserve the dignity, order, and authority of the judiciary.

Criminal contempt remains an unsettled area. The Supreme Court has consistently rejected constitutional arguments seeking to lessen judicial discretion over a contemnor, but has demonstrated a willingness to mitigate the harsher aspects of its contempt power. The immediate result of the present decision probably will be a decrease in the number of criminal contempt sentences exceeding six months.

---

38. *Cf.*, United States v. Harriss, 347 U.S. 612, 617 (1954).

39. *Cf.*, Malloy v. Hogan, 378 U.S. 1 (1964).

40. *Cf.*, Fay v. New York, 332 U.S. 261, 294 (1947).

41. The interest in the severity of the penalty imposed in the instant decision seems to stem at least in part from the dissent of Mr. Justice Goldberg in United States v. Barnett, 376 U.S. 681, 728 (1964), which demonstrated great concern for the length of imprisonment terms imposed for contempt in recent years. See, *e.g.*, Piemonte v. United States, 367 U.S. 556 (1961) (18 months); Reina v. United States, 364 U.S. 507 (1960) (two years); Brown v. United States, 359 U.S. 41 (1958) (15 months); Green v. United States, 356 U.S. 165 (1958) (3 years). Mr Justice Goldberg felt that criminal contempts were "tried without a jury at the time of the Constitution . . . because they were deemed a species of petty offense punishable by trivial penalties." United States v. Barnett, *supra* at 751-52. However, Mr. Justice Goldberg's historical analysis has been somewhat discredited. See generally Tefft, *United States v. Barnett, "'Twas a Famous Victory,"* SUP. CT. REV. 123 (1964). Nor has the Court adopted the argument. Cheff v. Schnackenberg, 86 Sup. Ct. 1523 (1966).

42. Cheff v. Schnackenberg, *supra* note 41, at 1538.