JUDGE EDELSTEIN

86 CIV. 7403

AO 241
REV 6/82

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: SOUTERN DISTRICT OF NEW YORK	
Name: GEORGE SASSOWER	Prisoner No.	Docket No.

Place of Confinement: Westchester County - Medical stay by Order of the Appellate Division after three day detention. In custody, was supposed to be transported to Bronx House of Detention, but never left West. Co.

Name of Petitioner (include name upon which convicted): GEORGE SASSOWER

v.

Name of Respondent (authorized person having custody of petitioner): SHERIFF OF WESTCHESTER COUNTY

The Attorney General of the State of:

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Supreme Court : New York County

2. Date of judgment of conviction: Order entered January 27, 1986

3. Length of sentence: Thirty (30) days (see below).

4. Nature of offense involved (all counts): sixty-three (63) counts of non-summary criminal contempt.

(Hon. MARTIN EVANS, while he confirmed the Report of the corrupt fixer Referee Donald Diamond, imposed no penalty, monetary or penal. Appellate Div. modified on June 24, 1986, and imposed sentence of thirty (30) days.

5. What was your plea? (Check one)
   - (a) Not guilty ☒
   - (b) Guilty ☐
   - (c) Nolo contendere ☐

(Absolutely Not Guilty)

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one) None.
   - (a) Jury ☐
   - (b) Judge only ☐

(1) No Trial. Referee Diamond held that a plea of "not guilty" to criminal charges is tantamount to a general denial, which raises no triable issues of fact; (2) Referee Diamond knows of his own knowledge that petitioner is guilty, and therefore no trial necessary; (3) and similar "garbage".

7. Did you testify at the trial? Yes ☐ No ☒

8. Did you appeal from the judgment of conviction? Yes ☒ No ☐

In the non-public courtroom of Referee Diamond, petitioner is barred. In any event there was no trial.

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9. If you did appeal, answer the following:

(a) Name of court Court of Appeals, State of New York

(b) Result Sua sponte dismissal.

(c) Date of result September 9, 1986

(d) Grounds raised Neither Supreme Court, nor Appellate Division had jurisdiction to convict, sentence, and incarcerate without a trial for non-summary criminal contempt; Massiave deprivation of about every constitutional and legal right (federal and state).

Rule 43 (see annexed Writ of Habeas Corpus) Pending in Supreme Court of the United States.

No state corrective process (see letter 8/26/86 p. 2) none of the writs made "as of right" signed, although about 100 mailed.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court Supreme Court: Westchester County.

(2) Nature of proceeding Habeas Corpus

(3) Grounds raised Jurisdiction and Constitutional deprivations. (see annexed Writ of Habeas Corpus).

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Denied

(6) Date of result August 4, 1986. (sent out about 100 successive writ. new matter. None of them returned, granted or denied.

(b) As to any second petition, application or motion give the same information:

(1) Name of court

(2) Nature of proceeding

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(3) Grounds raised ______

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result ______

(6) Date of result ______

(c) As to any third petition, application or motion, give the same information:

(1) Name of court ______

(2) Nature of proceeding ______

(3) Grounds raised ______

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result ______

(6) Date of result ______

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐
(2) Second petition, etc. Yes ☐ No ☐
(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

Appeal pending, Appellate Division, Second Dept.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

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For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
x (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
x (g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Unconstitutional tribunal. Referee Diamond and Appellate Division, are adversaries in civil actions and proceedings, and in pending application for Special District Attorney.

Supporting FACTS (tell your story *briefly* without citing cases or law): (see annexed Writ of Habeas Corpus).

B. Ground two: Double [multiple] jeoardy. Results other than guilty on same contentions about seventeen (17) times, including resounding vindication on same day by Hon. LESTER EVENS; Double punishment (see annexed Writ.

Supporting FACTS (tell your story *briefly* without citing cases or law):

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C. Ground three: Deprived of Sixth Amendment Rights (Fourteenth Amendment)
No trial, no right of confrontation, etc.

Supporting FACTS (tell your story *briefly* without citing cases or law):

(see annexed writ)

D. Ground four Would not permit and did not negate petitioner's contention of invidious and selective prosecution by "criminals with law

Supporting FACTS (tell your story *briefly* without citing cases or law):

degrees", who petitioner has exposed as engaged in the massive larceny of judicial trust assets, perjury, criminal extortion, and corruption, which includes the "trio of judicial fixers" at nisi prius, to wit, Administrator Xavier Cl Riccobono, Mr. Justice Ira Gammerman, and Referee Donald Diamond.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

Everything presented, except collateral consequences, not known at time.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☒ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing None.

(b) At arraignment and plea None.

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(c) At trial None.

(d) At sentencing None.

(e) On appeal pro se.

(f) In any post-conviction proceeding pro se.

(g) On appeal from any adverse ruling in a post-conviction proceeding ~~pro se.~~

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☒ No ☐ all 63.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒
(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☒ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

Sept. 11 1986.
(date)

Signature of Petitioner

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---x

GEORGE SASSOWER,
Petitioner,
-against-
SHERIFF OF WESTCHESTER COUNTY,
Respondent,

---x

Index No. 13503-1986 (West. Co.)

To the above named respondent:

1. The petition of GEORGE SASSOWER, Esq., shows that he is presently being constructively detained by the above named respondent, the actual detention and incarceration having been temporarily interrupted and suspended, under judicially imposed restrictive conditions, by reason of temporary medical needs not available at a penal institution.

2. The cause or pretense of the detention is a warrant of commitment signed by the Supreme Court, New York County.

3. That a court or judge of the United States does not have exclusive jurisdiction to order the release of said person.

4. This writ is sought because of an illegal detention, the nature of the illegality being:

a(1) Petitioner caused the exposure of the massive larceny of judicial trust assets, perjury, and corruption, involving members of the judiciary, including at the Appellate Division. Indeed, there was pending a proceeding, pursuant to County Law §701, brought by petitioner, for the appointment of a Special District Attorney for the criminal prosecution of those named, which included nisi prius and Appellate Division jurists.

(2) Furthermore, there have been and are pending actions and proceedings wherein members of the judiciary, Appellate Division and nisi prius are active defendants and/or respondents.

(3) Consequently, those members of the judiciary and their courts had at the time of the aforementioned Order of the Appellate Division a constitutional and statutory disqualification (Judiciary Law §14; Aetna v. Lavoie, U.S. , 106 S.Ct 1580, 89 L.Ed2d 823; In re Murchison, 349 U.S. 133); not subject to any harmless error analysis (Delaware v. Van Arsdall, U.S. , 106 S.Ct. 1431, 89 L.Ed.2d 674); and thus, the proceedings, vel non, were a nullity.

b(1) The aforementioned non-summary criminal contempt conviction, sentence, and detention violated the federal and state constitutions, in that there was no trial or hearing. It is hornbook law, that as a matter of constitutional ministerial compulsion, no american judge nor court can convict, sentence, and incarcerate anyone for an alleged crime, without a trial, absent a plea of guilty, including for non-summary criminal contempt (Bloom v. Illinois, 391 U.S. 194). In short -- the judiciary simply does not have the constitutional power to deprive one of all rights of confrontation prior to conviction and incarceration (Pointer v. Texas 380 U.S. 400)!

Decisive on negating any possible contention of "harmless error beyond a reasonable doubt" by such total deprivation of confrontation rights, is the fact that petitioner offered to accept 6 months incarceration if found guilty of a single count of criminal contempt, not the 63 as found by Referee DONALD DIAMOND, after a fundamentally fair trial according to law. The offer was not accepted by either the private "self-styled public prosecutors" nor the Appellate Division!

(2) Unadulterated rubbish and ludicrous is Referee DONALD DIAMOND's statement, repeated ad nauseam, and embraced by the Appellate Division, that:

> "a plea of not guilty on criminal charges are tantamount to a general denial and raises no triable issue of fact"!

c(1) On the same day that the Order of Mr. Justice MARTIN EVANS was entered, based on the same facts, evidence, assertions and contentions, the Order of Mr. Justice LESTER EVENS was entered in the same proceeding, which resoundingly vindicated the petitioner.

(2) Additionally there were about fourteen (14) other contempt proceedings based substantially upon the same facts, evidence, assertions and contentions which did not result in convictions. Thus constitutional and statutory "double [multiple] jeopardy", precludes any conviction or incarceration herein.

d. Making punishment herein more egregious, subsequent thereto, when about eight (8) contempt proceedings had vindicated petitioner, effectively vindicated him, or seemed destined to result in non-convictions, Mr. Justice IRA GAMMERMAN, without any prior notice, without warning, without any supporting papers, without a trial, and without even the pretense of complying with Judiciary Law §756, or its constitutional basis, in the same proceeding, based on the same facts, evidence, contentions, and assertions punished petitioner for contempt. Obviously, there can not be "double punishment" for the same alleged crime under either constitutional or statutory standards of "double jeopardy"!

e(1) Senior Attorney, David S. Cook, Esq., is essentially a one-man unit in the Attorney General's Office, assigned to vouchsafe the assets and affairs of involuntarily dissolved corporations, including that of PUCCINI CLOTHES, LTD.

(2) Petitioner, after exposing the massive larceny of Puccini's judicially entrusted assets, communicated with the Attorney General, the statutory watchdog, and it was David S. Cook, Esq., who responded.

(3) For an extensive period there was an exchange of confidential information between petitioner and Mr. Cook regarding judicial improprieties therein, which as far as petitioner's communications were concerned, had constitutional protection.

(4) With the further involvement of the judiciary, of the hundreds of assistant attorney generals who could have been selected to represent Administrator XAVIER C. RICCOBONO and members of his court, and Presiding Justice FRANCIS T. MURPHY and his judicial thrall, it was Mr. Cook who was dragooned for such assignment, carrying with him petitioner's confidential information.

(5) Thus, Mr. Cook or his alter ego, Assistant Attorney General JEFFREY I. SLONIM, Esq., represents the judicial thrall and Puccini simultaneously. Obviously, Mr. Cook, in such conflicting assignment, has jettisoned all his obligations towards Puccini, including those which are mandatory, e.g. Business Corporation Law §1216!

(6) Consequently, although the Attorney General, must, as a "duty" make application for a final accounting and distribution, after the expiration of 18 months, more than 74 months has expired, and not only has the Attorney General and Mr. Cook failed to make any such application, but opposes same when made by your petitioner, who has, inter alia, a vested interest in said involuntarily dissolved corporation.

(7) Petitioner has been judged by tribunals which have had access to petitioner's confidential information concerning their misconduct given by petitioner to Mr. Cook, and information given by Mr. Cook to petitioner, and is being punished in an attempt to compel petitioner to succumb to a criminal code of silence!

f(1) Criminal contempt proceedings, completely controlled by private adversarial counsel are plainly unconstitutional (Polo Fashions v. Stock Buyers, 760 F.2d 696 [6th Cir.], amicus invited, U.S. , 106 S.Ct. 565, 88 L.Ed2d 550; U.S. ex rel. Vuitton v. Klayminc, 780 F2d 179 [2d Cir.]), particularly where, as here, adversarial counsel are nothing better than "criminals with law degrees" who have engaged themselves in the larceny of judicial trust assets, perjury, extortion, and corruption.

(2) Simply to compel the receiver to account, on this judicial trust, and/or to submit his and his criminal co-conspirators records to an impartial judicial examination would instantly reveal that the purpose of petitioner's unconstitutional convictions and incarcerations is nothing less than a desperate attempt to conceal massive criminal activity!

g. Private adversarial counsel, "indulgence peddlers", have employed and are employing these sham criminal convictions as a means of criminal extortion, by compounding alleged criminal conduct and convictions to those who succumb or agree to succumb.

5a. The constitutional mandate against "cruel and unusual punishment" (U.S. Const., Amend. VIII, XIV; N.Y. State Const. V), mandates that petitioner be immediately discharged, paroled pending the hearing herein, and if necessary, until petitioner has exhausted his full panoply of appealable rights.

b. Where the sentence is short, the prejudice irreparable, merit compelling, and there is no danger of flight, punishment under a sham conviction is violative of "due process" and "cruel and unusual punishment", where punishment there should not have been in the first instance!

c. Furthermore, punishment for the petitioner, and those similarly situated, before exhaustion of their state remedies, would render nugatory Article 1, §9 of the United States Constitution for the short term prisoner, since they could not possibly exhaust their state remedies before their short terms expired (cf. Harris v. Kuhlman, 601 F. Supp. 987, 993 [EDNY, per Weinstein, J.])!

There is nothing in the history or spirit of Article 1, §9 which can be read as meaning to exclude the short term prisoner from its protection. Thus, the state must afford such prisoner his freedom where there is no danger of flight until he has exhausted his state remedies, as an acknowledgement to the "supremacy clause" of the federal constitution.

6a. People ex rel. Tweed v. Liscomb (60 N.Y. 559, 569), probably the leading case on habeas corpus in this State, states:

> "It is no new feature in the law that inferior magistrates may, when thereunto called, sit in judgment upon the jurisdiction of the highest courts, when their process or judgment come collaterally before them. ... It matters not what the general powers and jurisdiction of a court may be; if it act without authority in the particular case, its judgments and orders are mere nullities, not voidable, but simply void, protecting no one acting under them, and constituting no hindrance to the prosecution of any right."

b. Even if this petition is considered to be a successive writ, which petitioner controverts, this petition should be granted if "the court is satisfied that the ends of justice will not be served by granting it." (CPLR §7003[b]. The statute comports with clear case law that successive petitions cannot be abrogated without unconstitutionally suspending the writ itself (Sanders v. United States, 373 U.S. 1).

7. Appeals have been taken from the Orders by virtue of which petitioner has been detained to the Court of Appeals, where the jurisdictional question is presently sub judice, and a double jeopardy proceeding pends in the Appellate Division, First Department, which is also sub judice, except for a conditional temporary stay for medical treatment reasons, upon restrictive conditions.

8a. No previous application has been made for this relief, except without a hearing, Hon. MATTHEW F. COPPOLO, dismissed petitioner's petition, on August 4, 1986.

b. Prior to the aforementioned dismissal, without a hearing, which dismissal was the direct result of ex parte transactions, the firm of FELTMAN, KARESH, MAJOR & FARBMAN, Esqs., conceded the issue of the jurisdiction of the Appellate Division, First Department, to issue its Order was a proper subject of inquiry on a writ of habeas corpus, a subject on which petitioner was and still is ready to go forward on.

c. In petitioner's view, as a result of such manifest improprieties, the Order of Hon. MATTHEW F. COPPOLO is a nullity, in addition to not being the subject of res judicata (Sanders v. United States, supra).

d. The firms of FELTMAN, KARESH, MAJOR & FAREMAN, Esqs. and KREINLDER & RELKIN, P.C. are corrupt, who have not and can not account for the assets of Puccini, without exposing the massive larceny, perjury, and corruption that took place wherein they were the prime participants!

e. Obviously, petitioner is repeatedly convicted and incarcerated, not for what he did, but for what he knows, and his refusal to succumb to a "code of silence" and inaction.

9a. Not previously presented to Mr. Justice MATTHEW F. COPPOLO is the contention now made to the Appellate Division, Second Department, that the aforementioned patently sham conviction, which petitioner offered to serve 6 months, if found guilty of a single count of criminal contempt, after a fundamentally fair trial, held according to law, is that such conviction is a "serious crime" (Judiciary Law §90[2f], 22 NYCRR §691.7[b]), which petitioner claims entitles him to a trial by jury (United States v. Craner, 652 F.2d 23 [9th Cir.]; State v. O'Brien, 704 P2d 905 [Haw], affirming 704 P2d 883; Fisher v. State, 305 Md. 357, 504 A2d 626; cf. Morganthau v. Erlbaum, 59 N.Y.2d 143, 464 N.Y.S.2d 392, cert. den. 494 U.S. 993).

b. To the extent that the aforementioned is set forth, this petition can be legally considered an original application (People ex rel. Smith v. LaValee, 29 A.D.2d 248, 287 N.Y.S.2d 601 [4th Dept.]).

10. Obviously, nothing herein is intended to adversely reflect upon the respondent, the Westchester County Sheriff or his attorney, the Westchester County Attorney. On the contrary, they have disobeyed for the past seven months the mandates originating from New York County to "break-into" petitioner's premises, "seize all word processing equipment and soft ware", "inventory" petitioner's possessions and "report" same, and even to "rip open" petitioner's "mattress".

WHEREFORE, your petition prays that a writ of habeas corpus be issue, directed to respondent, requiring respondents to produce or constructively produce the said GEORGE SASSOWER, Esq., forthwith before this Court and forthwith discharged and/or paroled, without unconstitutional burdens attached thereto.

Dated: August 26, 1986

GEORGE SASSOWER

GEORGE SASSOWER, Esq.
Attorney for petitioner, pro se
51 Davis Avenue,
White Plains, N.Y. 10605
914-949-2169

STATE OF NEW YORK)
)ss.:
COUNTY OF WESTCHESTER)

GEORGE SASSOWER, Esq., first being duly sworn, deposes, and says:

I am the petitioner in the within proceeding, have read the foregoing petition, and know the contents thereof.

The same is true to petitioner's own knowledge, except as to matters stated thereon to be based on information and belief, and as to those matters he believes the same to be true.

GEORGE SASSOWER

Sworn to before me this
26th day of August, 1986

GIACCHINO J RUSSO
Notary Public State of New York
No. 03-4806109
Qualified in Bronx County
Commission Expires 1/31/38

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dies and that the action was filed some five months and six days after he exhausted "his grievance/arbitral remedies, within the six months period mandated by *DelCostello*." (Plaintiff's Memorandum of Law, p. 14).

The Court finds this argument unavailing. Plaintiff relies on *Clayton v. International Union,* 451 U.S. 679, 689, 101 S.Ct. 2088, 2095, 68 L.Ed.2d 538 (1981), where the Supreme Court held that exhaustion of internal union appeals procedures would not be required as a prerequisite to a judicial proceeding in certain circumstances. If exhaustion of extra-judicial proceedings were required, it would be appropriate to toll the statute of limitations pending the resolution of those proceedings. However, plaintiff's reliance on *Clayton* is misplaced because while that case involved the use of internal union appeals procedures, this case involves an administrative remedy—the use of a public law board. As the Supreme Court stated in *Czosek v. O'Mara,* 397 U.S. 25, 27-28, 90 S.Ct. 770, 772, 25 L.Ed.2d 21 (1970), duty of fair representation claims are "not ... subject to the ordinary rule that administrative remedies should be exhausted before resorting to the courts."

To toll the statute of limitations pending the board's determination of the wrongful discharge claim would make a fair representation claim unduly contingent upon the petitioner's success in the administrative proceeding. This Court, in its discretion, holds that the statute of limitations regarding the fair representation claim continued to run during the public law board's adjudication.

Conclusion

The claim against the union is dismissed on statute of limitations grounds. The claim against the employer is dismissed for lack of jurisdiction. The Court declines to award costs or counsel fees not finding that plaintiff or his attorney were harassing or engaging in vexatious conduct.

SO ORDERED.

George SASSOWER, Petitioner,

v.

The SHERIFF OF WESTCHESTER COUNTY, Respondent.

No. 86 Civ. 7403 (DNE).

United States District Court, S.D. New York.

Dec. 4, 1986.

Petitioner brought habeas corpus action challenging term of incarceration for his conviction of criminal contempt imposed by New York Supreme Court, Appellate Division, 121 A.D.2d 324, 503 N.Y.S.2d 392. The District Court, Edelstein, J., adopted the report and recommendation of United States Magistrate Nina Gershon, and held that: (1) petitioner had exhausted state remedies, and (2) petitioner's conviction for criminal contempt without evidentiary hearing of any kind was unconstitutional.

Petition granted.

1. Habeas Corpus ⇐45.3(4)

Petitioner who sought to challenge his incarceration for criminal contempt had exhausted his state remedies for purposes of bringing federal habeas corpus petition where state's highest court was given opportunity to address petitioner's claim and chose not to do so, dismissing his appeal without reaching merits because underlying civil action was not final.

2. Constitutional Law ⇐273

Habeas petitioner's conviction for nonsummary criminal contempt without trial or evidentiary hearing of any kind constituted violation of Sixth and Fourteenth Amendments where conviction was based solely on documents filed in court proceedings and where there was no indication that determination of guilt was based on finding that evidence proved petitioner's guilt, including requisite intent, beyond reasonable doubt, notwithstanding justifications of referee who issued contempt order that peti-

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Cite as 651 F.Supp. 128 (S.D.N.Y. 1986)

tioner's not guilty defense in opposition to motion to punish petitioner for criminal contempt failed to allege any facts disputing charges made against him. U.S.C.A. Const.Amends. 6, 14.

MEMORANDUM AND ORDER

EDELSTEIN, District Judge:

Petitioner, *pro se*, brought a habeas corpus action pursuant to 28 U.S.C. Section 2254 to challenge a term of incarceration of thirty days imposed for his conviction on sixty-three counts of criminal contempt.[1] This court referred this habeas corpus petition to Magistrate Nina Gershon on October 8, 1986. On November 24, 1986, Magistrate Gershon held a hearing on this matter and by report and recommendation also dated November 24, 1986, recommended that the petition for the writ be granted. This court, after a *de novo* review and consideration of the objections to the Magistrate's report, adopts the findings and recommendations of the Magistrate.

The petitioner, George Sassower, was found guilty of sixty-three counts of non-summary criminal contempt by a New York State Special Referee. The contempt arose from claims that the petitioner, an attorney, continued to serve pleadings in a number of civil proceedings after being ordered not to do so by Justices Sinclair and Grammerman of the New York Supreme Court. On January 30, 1985, Lee Feldman, the court appointed receiver for a party to these civil proceedings, moved to have Sassower punished for contempt. The matter was referred to Special Referee Donald Diamond by Justice Evans of the New York Supreme Court. Diamond, without conducting an evidentiary hearing or a trial, found Sassower guilty of sixty-three counts of non-summary criminal contempt and recommended that Sassower be fined 250 dollars for each offense and be confined for thirty days.

Justice Evans adopted the Referee's finding of guilt but denied, with leave to renew, the recommendation that a fine and jail sentence should be imposed. On January 21, 1986, Justice Evans denied a renewed motion to confirm the referee's report and to punish Sassower for contempt. The Appellate Division, First Department, however, reversed Justice Evans' denial of the motion to renew and modified Justice Evans' orders to the extent of imposing a sentence of thirty days incarceration.

The United States Supreme Court has held that a defendant in a criminal contempt proceeding is entitled to all fundamental procedural protections. *See Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); *United States ex rel. Vuitton v. Karen Bags Inc.*, 592 F.Supp. 734 (S.D.N.Y.1984), *aff'd sub nom., United States ex rel. Vuitton v. Klayminc*, 780 F.2d 179 (2d Cir.1985). Such procedural protections include a finding of guilt beyond a reasonable doubt, *In re Weiss*, 703 F.2d 653, 662 (2d Cir.1983), and that "requisite intent was present." *In re Irving*, 600 F.2d 1027, 1037 (2d Cir.1979). When the contempt is committed in the face of the court, the defendant is protected by a reduced standard of due process. *See United States v. Lumumba*, 741 F.2d 12 (2d Cir.1984). This, however, is not the situation in the instant petition. Thus, this case, although raised in an objection to the Magistrate's report and recommendation, is inapposite to the issues addressed in Sassower's petition.

Every Appellate Division in the State of New York has recognized the significance of *Bloom v. Illinois*. *See N.A. Development Co. v. Jones*, 99 A.D.2d 238, 242, 472 N.Y.S.2d 363 (1st Dep't 1984); *Holtzman v. Beatty*, 97 A.D.2d 79, 82, 468 N.Y.S.2d 905 (2d Dep't 1983); *Ingraham v. Maurer*, 39 A.D.2d 258, 259, 334 N.Y.S.2d 19 (3rd Dep't 1972); *State University v. Denton*, 35 A.D.2d 176, 181, 316 N.Y.S.2d 297 (4th Dep't 1970). In *Ingraham v. Maurer*, 39 A.D.2d at 259, 334 N.Y.S.2d 19, the Court acknowledged, after citing *Bloom*, "that a criminal contempt proceeding is a criminal proceeding to which the basic fundamen-

1. Contempt was found under New York Judiciary Law section 750 *et seq.*

tals are applicable to the same extent as in any other criminal trial. While the *Bloom* case was directed solely at the issue of the right to a jury trial, it, nevertheless, equates the contempt proceeding with an ordinary criminal proceeding." In *N.A. Development Co.*, 99 A.D.2d at 242, 472 N.Y.S.2d 363, The Appellate Department First Department, after citing *Bloom*, acknowledged that criminal contempt must be proven beyond a reasonable doubt. *Accord County of Rockland v. Civil Service Employees Association, Inc.*, 62 N.Y.2d 11, 14, 475 N.Y.S.2d 817, 464 N.E.2d 121 (1984).

In finding Sassower guilty, the Referee based his report entirely on the papers before him. There was no evidentiary hearing or trial. There is no indication that the determination of guilt was based on a finding that the evidence proved petitioner's guilt, including the requisite intent, beyond a reasonable doubt. Further, the Referee failed to take into consideration the constitutional requirements of non-summary criminal contempt proceedings.

Accordingly, this Court adopts the findings and recommendations of Magistrate Gershon, and the petition is hereby granted.

SO ORDERED.

REPORT AND RECOMMENDATION

Nov. 24, 1986

NING GERSHON, United States Magistrate:

In this habeas corpus petition brought pursuant to 28 U.S.C. § 2254, petitioner George Sassower, *pro se*, challenges a term of incarceration (thirty days) imposed by the Supreme Court of the State of New York, Appellate Division, First Department, on a finding that petitioner was guilty of sixty-three counts of criminal contempt. *In re Jerome Barr v. Sassower*, 121 A.D.2d 324, 503 N.Y.S.2d 392 (1st Dept. 1986). Sassower, an attorney, claims that his conviction and incarceration without a trial for non-summary criminal contempt violated his constitutional right to a trial. He also claims that he was subjected to double jeopardy and that the Referee, who made the contempt finding, and the Appellate Division, which imposed the sentence, were disqualified from acting. The petition was referred to me for report and recommendation by the Honorable David N. Edelstein, District Judge.

[1] Petitioner's appeal to the New York Court of Appeals was dismissed "upon the ground that the order appealed from does not finally determine the proceeding...." *In the Matter of Barr v. Sassower*, 68 N.Y.2d 807, — N.Y.S.2d —, 498 N.E.2d 437 (1986). Although the Court of Appeals dismissed petitioner's appeal without reaching the merits, petitioner fairly presented to that Court the same factual and federal constitutional claims he raises here. That the Court of Appeals declined to hear the appeal from the criminal contempt finding which led to petitioner's incarceration, apparently because the underlying civil action was not final, does not foreclose federal review of that incarceration, which is presently ongoing. The State's highest court was given the opportunity to address the claim. Whether or not it chose to do so, the comity rationale of the exhaustion requirement has been met. I find that petitioner Sassower has exhausted his state remedies. *Daye v. Attorney General*, 696 F.2d 186, 191 (2d Cir.1982) (*en banc*).[1] For the reasons set forth below, I recommend that the petition for a writ of habeas corpus be granted.

The Special Referee relied upon the following orders: On February 1, 1982, New York State Supreme Court Justice Sinclair issued an Order disqualifying petitioner Sassower, an attorney, from appearing as counsel for a Mr. Raffe in "all other ac-

1. Petitioner's writ of habeas corpus in the New York Supreme Court was dismissed on the ground that "there was no basis for the granting of the within writ." *Sassower v. Sheriff of Westchester County*, Slip Op. No. 13503-86 (August 4, 1986) (annexed as Exh. F. to Weissman Afft). However, having raised his claim to the State's highest court, there was no requirement—for exhaustion purposes—that Sassower pursue his claim further in the State courts.

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tions or matters wherein George Sassower, Esq. represents an interest adverse to ... Eugene Dann, Robert Sorrentino and Puccini Clothes, Ltd." Report of the Special Referee (Report), p. 4 (Annexed as Exh. B to Weissman Afft.) *quoting* Justice Sinclair's Order. Justice Ira Gammerman issued an Order on January 23, 1985, permanently enjoining petitioner and Hyman Raffe from "filing or serving, or attempting to intervene in or initiate, in any court, tribunal, agency or other forum of this State, any lawsuit, proceeding, investigation or other adversary matter, and from making or filing a complaint, grievance or correspondence with a professional disciplinary or grievance committee the subject matter of which arises out of or relates to" nine categories enumerated by Justice Gammerman which collectively covered all parties, entities and litigants involved in the multitude of actions previously instituted by either petitioner or Hyman Raffe. Annexed as Exh. D to Weissman Afft.[2]

On January 30, 1985, Lee Feldman, the court-appointed receiver for Puccini Clothes, Ltd., brought a motion to punish petitioner for 64 counts of criminal contempt of court on the grounds that petitioner had repeatedly violated the Orders of Justices Sinclair and Gammerman. By Order of Supreme Court Justice Martin Evans, dated April 5, 1985, the Receiver's motion was referred to Special Referee Donald Diamond. According to Referee Diamond, petitioner's "not guilty" defense raised in his Affidavit in Opposition to the Motion was "tantamount to a general denial of the allegations contained in the petition ...." Report, pp. 14–15. The Referee found that petitioner's "not guilty" defense "does not create a disputed issue requiring a hearing." Report, p. 15. According to Referee Diamond, "[n]o hearing" was "held for a confluence of reasons." Report, p. 5. Petitioner failed to allege any facts "disputing the detailed charges made by movant"; "the violations of the orders alleged to constitute contempt are matters that are documented by the filing of court papers and matters that appear on the record, in court proceedings"; and petitioner served Referee Diamond "with an answer to the complaint" in a proceeding pending before the Departmental Disciplinary Committee in which petitioner asserted that "he has the right to ignore the disqualification order ...." Report, pp. 7, 8, 9. Based on this, Referee Diamond found that "[t]he complaint made by the receiver in the disciplinary proceeding parallels those raised on this motion. Mr. Sassower's answer to that complaint establishes there is no need to hold a hearing herein." Report, p. 9.

Thus, without holding a trial or an evidentiary hearing, Referee Diamond found petitioner Sassower guilty of 63 counts of criminal contempt. He recommended that a fine of $250.00 for each offense be imposed and that petitioner be confined for a period of thirty days. Justice Evans adopted the Referee's findings of guilt but denied, with leave to renew, the Referee's recommendation that a fine and jail sentence be imposed. On January 21, 1986, Justice Evans denied the Receiver's renewed motion to confirm the Referee's report and to punish petitioner for contempt. The Appellate Division, First Department, reversed Justice Evan's denial of the Receiver's motion to renew and modified Justice Evan's Order of November 22, 1985, "only to the extent of imposing a sentence of thirty days incarceration and directing that a warrant of commitment issue forthwith ...." *In re Jerome Barr, supra*, 503 N.Y.S.2d at 392. Petitioner was released on his own recognizance until August 6, 1986 when he was ordered to surrender himself.

After serving three days, petitioner's incarceration was temporarily stayed for medical reasons by an Order of the Appellate Division. On September 25, 1986, the stay was lifted. While released from custody petitioner filed the present habeas cor-

2. In *Raffe v. John Doe*, 619 F.Supp. 891, 899 (S.D.N.Y.1985), petitioner was permanently enjoined from commencing further actions in any federal court arising out of or related to the Puccini dissolution or receivership.

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pus petition.[3] Initially, respondent argued that petitioner was not in custody, a prerequisite for the determination of a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. In an Order issued on November 5, 1986, I found that the limitation on petitioner's freedom imposed by the outstanding incarceration order met the "in-custody" requirement of 28 U.S.C. § 2254. In a Rule 4 Order, also issued that day, I directed that the petition be served on the Sheriff of Westchester County and the Attorney General of the State of New York.[4] The respondent was directed to answer on the merits by November 19, 1986.

On November 19, 1986, petitioner was taken into custody to complete his term of incarceration and the answer of the Sheriff of Westchester County was filed. A hearing was held on November 24, 1986. The Sheriff of Westchester County, the Attorney General of the State of New York, the court-appointed receiver (who was permitted to intervene) and the New York District Attorney[5] were represented at the hearing. Pursuant to a writ ad testificandum, petitioner Sassower was produced from the Bronx House of Detention, where he is presently incarcerated.

"Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. [C]onvictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same." *Bloom v. Illinois*, 391 U.S. 194, 201, 88 S.Ct. 1477, 1481, 20 L.Ed.2d 522 (1968). Although certain factual situations may warrant procedures in a criminal contempt proceeding that are distinct from the ordinary action, *e.g.*, *United States ex rel. Vuitton v. Karen Bags, Inc. (Klaymine)*, 592 F.Supp. 734 (S.D.N.Y.1984), *aff'd* with opinion, 780 F.2d 179 (2d Cir. 1985), *Bloom v. Illinois* has "left no doubt that contempt defendants are entitled to all fundamental procedural protections." 592 F.Supp. at 741. Such fundamental procedures include a finding of guilty on the grounds that the evidence established, beyond a reasonable doubt, *In re Weiss*, 703 F.2d 653, 662 (2d Cir.1983), that the "requisite intent was present." *In re Irving*, 600 F.2d 1027, 1037 (2d Cir.1979).

Every Appellate Division in the State of New York has recognized the significance of *Bloom*. *N.A. Development Co. Ltd. et al. v. Carolyn Jones et al.*, 99 A.D.2d 238, 242, 472 N.Y.S.2d 363 (1st Dept.1984); *Holtzman v. Beatty*, 97 A.D.2d 79, 82, 468 N.Y.S.2d 905 (2d Dept.1983); *Ingraham v. Maurer*, 39 A.D.2d 258, 259, 334 N.Y.S.2d 19 (3rd Dept.1972); *State University of New York v. Denton*, 35 A.D.2d 176, 181, 316 N.Y.S.2d 297 (4th Dept.1970). In *Ingraham v. Maurer*, *supra*, 39 A.D.2d at 259, 334 N.Y.S.2d 19, the Court acknowledged, after citing *Bloom*, "that a criminal contempt proceeding is a criminal proceeding to which the basic fundamentals are applicable to the same extent as in any other criminal trial. While the *Bloom* case was directed solely at the issue of the right to a jury trial, it, nevertheless, equates the contempt proceeding with an ordinary criminal proceeding." In *N.A. Development Co. Ltd.*, *supra*, 99 A.D.2d at 242, 472 N.Y.S.2d 363, the Appellate Division, First Department, citing *Bloom*, acknowledged that "[c]riminal contempt must apparently

3. Petitioner's proposed Order to Show Cause seeking a stay of his arrest and incarceration pending adjudication of his recently filed habeas corpus petition was referred to me. I declined to sign the order in a Memorandum dated September 29, 1986. Petitioner then made a motion seeking a stay of his arrest. That motion was denied in an Order dated November 5, 1986, which was adopted by Judge Edelstein on November 19, 1986.

4. A courtesy copy of the petition, the Rule 4 Order and the Order denying a stay were ordered delivered to the Clerk of the Appellate Division, First Department.

5. On or about November 17, 1986, petitioner applied for an order directing the New York District Attorney and the United States Attorney and/or an independent attorney appointed by the Court to intervene and represent the respondent, Westchester County. Although that motion bore a return date of November 26, 1986, the District Attorney appeared at the hearing as a friend of the court.

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be proved beyond a reasonable doubt.[7] Accord, *County of Rockland v. CSEA*, 62 N.Y.2d 11, 14, 476 N.Y.S.2d 817, 464 N.E.2d 121 (1984).

[2] I find that the procedures afforded to petitioner prior to the Appellate Division order of incarceration did not comport with the mandates of the Fourteenth and Sixth Amendments of the United States Constitution. It is clear from the Referee's report that his recommendation was based entirely on the papers before him. Concededly, neither a full evidentiary hearing nor a public trial was afforded petitioner prior to the Referee's findings of guilt. Furthermore, there is no indication that the determination of guilt was based on a finding that the evidence proved petitioner's guilt, including the requisite intent, beyond a reasonable doubt. The reasons given by the Referee as justification for the conclusion that neither a hearing nor a trial as warranted failed to take into consideration the constitutional requirements of non-summary criminal contempt proceedings.

The receiver contends that petitioner's reliance on *Bloom v. Illinois* is misplaced because petitioner did not request a jury trial. The receiver has misconstrued both petitioner's claim and the significance of *Bloom*. Petitioner correctly relies on *Bloom* as support for his claim that a conviction for non-summary criminal contempt without a trial of any kind is unconstitutional.

The receiver's reliance on *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974), as support for the assertion that a State can punish someone for non-summary criminal contempt without any trial when the term of incarceration imposed does not exceed six months misconstrues the holding in *Taylor*. *Taylor* involved a conviction for criminal contempt where the contemptuous acts occurred in open court during the course of a criminal trial. 418 U.S. at 489, 94 S.Ct. at 2698. At the conclusion of the trial, Taylor was sentenced to a jail term of four and one-half years for his contemptuous acts. 418 U.S. at 489, 94 S.Ct. at 2698. While his appeal was pending, the sentence was reduced to six months. The Supreme Court held that, after a conviction for criminal contempt, the State may reduce a sentence to six months or less rather than retry the contempt charge with a jury. 418 U.S. at 496, 94 S.Ct. at 2702.

The Court in *Taylor* also held that, even where the contempt occurs in the courtroom in the presence of the judge, the justification for summary action is less cogent when final adjudication and sentence are postponed until after trial. Where the contempt occurs before the eyes of a judge, a full-scale trial might not be necessary, said the Court, but it found that the procedures invoked against Taylor were constitutionally infirm. Thus, *Taylor* expanded the protections accorded in summary contempt cases. Nothing in *Taylor* suggests that where, as here, a non-summary contempt is charged, no trial is required unless a term of six months imprisonment is imposed.

The receiver's suggestion that, because the contempt proceeding was brought under the Judiciary Law (Section 750 *et seq.*) and not under the Penal Law, it was civil in nature (and therefore no trial was needed) is rejected. The receiver himself characterized his motion as one "for an order punishing George Sassower for 64 counts of criminal contempt of court." Notice of Motion dated Jan. 30, 1985. The referee and the Appellate Division also identified the proceeding as one for criminal contempt. There is no basis for now treating the contempt charged as civil.

Since Sassower was deprived of his right to a trial prior to being found guilty of criminal contempt, I recommend that the petition for a writ of habeas corpus be granted. Copies of this report and recommendation are today being served upon petitioner and upon all counsel who appeared at the hearing. They are advised that any objections to this report should be served and filed, with a courtesy copy hand-delivered to Judge Edelstein's chambers and a copy to me, by 10 a.m. Wednesday, November 26, 1986. *See United States v. Bar-*

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ney, 568 F.2d 134, 136 (9th Cir.1978) (less than ten days to object to Magistrate's report permitted where circumstances warrant shortened time period). The parties were advised at the hearing of what my report would recommend and they will be advised telephonically that they can pick up a copy of this report today.[6] Mitchell Sassower, Esq. has agreed to pick up a copy of the report and recommendation and deliver it to petitioner.

Hector A. NOLLA MORELL, et al, Plaintiffs,

v.

Jose L. RIEFKOHL, et al, Defendants.

Civ. 86-0296(PG).

United States District Court, D. Puerto Rico.

Dec. 5, 1986.

Former regional director of Puerto Rico Aqueduct and Sewer Authority filed civil rights action alleging that he was dismissed solely because of his political affiliation, in violation of his constitutional rights. On defendants' motion for summary judgment, the District Court, Perez-Gimenez, Chief Judge, held that: (1) dismissal of regional director because of his political affiliation violated First Amendment, and (2) government officials were not entitled to qualified immunity.

Motion denied.

1. Constitutional Law ⟹91

In evaluating appropriateness of political affiliation requirement for government office, court must first ask whether position involves government decision making on issues where there is no room for political disagreement on goals or their implementation, and if answer to this question is found in the affirmative, court must proceed to analyze specific duties and responsibilities of officer in question and determine whether it resembles policy making, a privy to confidential information, a communicator, or some other officeholder whose function is such that party affiliation is equally important requirement, and if this answer is also in affirmative, political patronage is valid prerequisite for position. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⟹91

Dismissal of regional director of Puerto Rico Aqueduct and Sewer Authority because of his political affiliation violated First Amendment, where agency was not involved in government decision making on issues where there was room for political disagreements on goals or their implementation, and regional director's responsibilities were such that political affiliation was not proper requirement for effective performance of office. U.S.C.A. Const. Amend. 1.

3. Civil Rights ⟹13.8(1)

Defense of qualified immunity requires objective review that looks to state of law at time of violation and inquires: whether government official's conduct violated constitutional right that was "clearly established" at the time; and if so, whether official reasonably should have known that his acts constituted such violation.

4. Civil Rights ⟹13.8(1)

In determining existing state of law, for purposes of determining whether government official's conduct violated constitutional right that was "clearly estab-

6. Only the receiver addressed the merits of this petition. The Sheriff of Westchester County chose not to address the merits of the petition either in the papers that were filed or at the hearing. The Attorney General's Office filed no papers and at the hearing the Assistant Attorney General indicated that that office has "no interest in this habeas corpus petition."

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 985—August Term 1986

Submitted: April 13, 1987 Decided: July 15, 1987

Docket No. 86-2458

GEORGE SASSOWER,

Petitioner-Appellee,

—against—

THE SHERIFF OF WESTCHESTER COUNTY,

Respondent,

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

Intervenor-Respondent-Appellant,

STATE OF NEW YORK,

Intervenor-Appellant.

Before:

VAN GRAAFEILAND, PRATT, AND MINER,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Edelstein, *Judge*, adopting the findings and recommendations of Magistrate Nina Gershon, and granting George Sassower's petition for habeas corpus relief from his convictions for criminal contempt.

Reversed and remanded with a direction to deny the petition.

GEORGE SASSOWER, White Plains, NY, Plaintiff-Appellee *pro se.*

FELTMAN, KARESH, MAJOR & FARBMAN (Donald F. Schneider, Edward Weissman, of Counsel), *for Defendant-Appellant Lee Feltman, Esq., as Receiver.*

ROBERT ABRAMS, Attorney General of the State of New York (Lawrence S. Kahn, Deputy Solicitor General, David S. Cook, Senior Attorney, Christopher Keith Hall, Assistant Attorney General, of Counsel), *for Intervenor-Appellant State of New York.*

PRATT, *Circuit Judge*:

This appeal continues, in the federal courts, the " 'long and tortured history of litigation' " that began in New York State courts, *see Raffe v. Doe*, 619 F. Supp. 891, 893 (S.D.N.Y. 1985) (quoting *Raffe v. Citibank, N.A.*, 84 Civ. 305 (E.D.N.Y. Aug. 1, 1984), *aff'd without opinion*, Nos. 85-7251, -7471 (2d Cir. Sept. 13, 1985)), a litigation in which George Sassower has persistently presented meritless claims. *See* Report of the Special Referee, *In re Barr*, No. 1816-1980 (Sup. Ct. N.Y. Co. May 1, 1985).

Lee Feltman, Esq., receiver for Puccini Clothes, Ltd. ("the receiver"), appeals from an order of the district court, Edelstein, *J.*, that adopted the findings and recommendations of Magistrate Gershon, and granted George Sassower's petition for a writ of habeas corpus. Judge Edelstein held that Sassower's conviction in New York State court of 63 counts of nonsummary criminal contempt, for which he had received a 30-day sentence, was unconstitutional because Sassower was not afforded a full evidentiary hearing and because there was no express finding of guilt beyond a reasonable doubt. *Sassower v. Sheriff of Westchester Co.*, 651 F. Supp. 128 (S.D.N.Y. 1986) (memorandum and order).

The principal issue presented on this appeal is whether Sassower's conviction of criminal contempt pursuant to N.Y. Jud. L. § 751 violated his constitutional right to due process where neither the affidavits upon which the finding of guilt was based, nor Sassower's answer to the contempt motion, raised an issue of material fact and where Sassower refused to appear at a hearing before the court appointed referee. On this record we are fully satisfied that Sassower received all of the process he was due and we therefore reverse with a direction to the district court to deny the petition.

BACKGROUND

While we are loath to expend more judicial resources on this vexatious litigant, some recitation of the facts and procedural history of this case is necessary. The facts underlying the voluminous litigation engineered by Sassower are outlined more fully by Judge Conner in *Raffe v. Doe*, 619 F. Supp. 891 (S.D.N.Y. 1985).

Briefly, Sassower was the attorney for Hyman Raffe, a disgruntled shareholder of Puccini Clothes, Ltd. ("Puccini"), a New York corporation dissolved and placed in receivership by the New York Supreme Court. 619 F. Supp. at 892. Despite court orders disqualifying him from representing Raffe and enjoining him from filing Puccinni-related litigation, *id.* at 894-95, Sassower has bombarded both the state and federal courts with numerous motions (over 300), law suits (35), and Article 78 proceedings (40) directed against the receiver and his law firm, the attorneys for the other Puccini shareholders, various members of the judiciary, court appointed referees, and the New York State Attorney General. Brief of appellant Lee Feltman, Esq., as receiver for Puccini Clothes, Ltd. at 2-3. *See* 619 F. Supp. at 894.

Prior to the criminal contempt proceedings leading to this habeas corpus proceeding, Sassower had been held in criminal contempt four times and in civil contempt twice for violating state and federal orders enjoining him from filing actions related to the judicial dissolution of Puccini, and for disobeying a court order to appear at a deposition. *See, e.g., Raffe v. Riccobono*, No. 9522/85, *slip op.* at 6-7 (Sup. Ct. N.Y. Co. July 1, 1985), *aff'd*, 113 A.D.2d 1038, 493 N.Y.S.2d 70 (1st Dep't), *appeal dismissed*, 66 N.Y.2d 915, 498 N.Y.S.2d 1027 (1985); *Raffe v. Citibank, N.A.*, 84 Civ. 305 (Nickerson, *J.*) (E.D.N.Y. June 7, 1985), *aff'd*, 755 F.2d 914 (2d Cir. 1985). As a result of these convictions and based on a finding that he had engaged in "frivolous and vexatious litigation * * * for the purpose of harassing, threatening, coercing and maliciously injuring those made subject to it," Sassower has now been disbarred. *In re Sassower*, N.Y.L.J., Feb. 27, 1987, at 36, col. 3 (1st Dep't Feb. 23, 1987) (per curiam). The New York appellate court also found that Sassower engaged in professional misconduct that obstructed justice and damaged his client by continuing to litigate after he was disqualified. *Id.* at 36, col. 3.

On January 30, 1985, the state court proceedings leading to this proceeding began when the receiver moved in Supreme Court, New York County, for an order punishing Sassower for criminal contempt for violating court orders in the Puccini litigation. Sassower received a notice of motion informing him that the receiver would move 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." The notice also informed him that his failure to appear could result in his arrest and imprisonment for contempt of court, that the purpose of the hearing was to punish him for contempt of court, and that punishment could consist of a fine, imprisonment, or both.

The supporting affidavits identified documents, marked with Sassower's name, signature, and litigation back, that he had filed in state court in violation of court orders disqualifying him from representing Raffe and enjoining him from filing law suits against the receiver or his law firm, and in violation of the referee's directives regarding procedures in the Puccini dissolution proceeding.

Sassower filed three cross-motions for dismissal and four affidavits in opposition to the contempt motion. Although he stated that he was pleading "not guilty", he did not deny that he had filed the offending papers, but argued instead that the contempt proceeding was procedurally barred, that he was being denied equal protection, that he was being arbitrarily and discriminatorily prosecuted, that he was not disqualified, and that his activities were intended to expose the perjury, conspiracy, larceny and corruption of the receiver, the receiver's law firm, the attorney general's office, and the judiciary. Affidavit of George Sassower, *In re Barr*, No. 1816-1980 (Sup. Ct. N.Y. Co. December 16, 1985). He also indicated that he would continue to violate the orders by stating, "deponent has his own professional and moral obligations, which will be obeyed" and "deponent does not negotiate with criminals and barbarians, even those that hold law degrees!" *Id.* at 8. *See In re Barr*, 503 N.Y.S.2d 392, 392 (1st Dep't), *appeal dismissed*, 68 N.Y.2d 807 (1986).

After Judge Evans referred the contempt motion to a special referee, Sassower was notified by the attorney for the receiver that he was required to appear before the referee for proceedings on the criminal contempt motion and cross-motions. Consistent with his behavior in prior contempt proceedings, Sassower claimed that the referee was disqualified from adjudicating the contempt proceedings and failed to appear.

The referee determined that the affidavits, motions, and cross-motions raised no issue of fact requiring a hearing, and in a 71-page report, he concluded that all of the arguments presented by Sassower's papers had been raised and rejected in prior proceedings and actions. Report of the Special Referee, *In re Barr*, No. 1816-1980, at 8 (Sup. Ct. N.Y. Co. May 1, 1985). He found that Sassower's wilful violation of court orders was "documented by the filing of court papers and matters that appear on the record, in court proceedings," and noted that Sassower did not dispute or deny any of the facts forming the basis for the receiver's motion. *Id.*

Noting further that Sassower made "repetitive, sham, frivolous motions [and] commence[d] baseless actions" for the sole purpose of inflicting oppressive litigation costs upon the receiver in order to obtain a favorable economic settlement, the referee concluded:

> The motion-in-chief sets forth in clear, concise language the charges of contempt, identifying each charge [by] the use [of] a separate consecutive number. No affidavit or paper is submitted in opposition containing a specific denial of any single charge. No facts are alleged disputing the detailed charges made by the movant.
>
> Instead, three separate cross-motions are made with the supporting papers [asserting] the same conclusory claims that had been raised on prior applications to the courts.

Id. at 6-7.

Based on these findings and on his personal knowledge acquired during the course of this litigation, the referee sustained 63 of the 64 counts of contempt, *id.* at 15, and recommended that Sassower's pecuniary motives for his actions warranted the imposition of a 30-day sentence and a fine of $250 for each offense. *Id.* at 70.

In opposing the receiver's motion to confirm the report, Sassower once again failed to dispute the facts underlying the charges. Judge Evans confirmed the report but did not impose punishment, reasoning that Sassower would be deterred from continuing his misconduct by a recent incarceration on a different contempt conviction. The receiver's motion to renew, based on evidence that Sassower had continued to violate the courts' orders even after his release from incarceration, was denied by Judge Evans.

The New York Appellate Division reversed Judge Evans' denial of the motion to renew and modified his order by imposing a 30-day sentence, concluding that the lower court "abused its discretion by its failure to impose a sanction in light of the continuing contempts and [Sassower's] stated intention to continue to do so." *In re Barr*, 121 A.D.2d 324, 324, 503 N.Y.S.2d 392, 392 (1st Dep't), *appeal dismissed*, 68 N.Y.2d 807 (1986). Two state court judges denied habeas relief, *see Sassower v. Sheriff of Westchester Co.*, No. 13503/86 (Sup. Ct. Westchester Co. Aug. 4, 1986) (order); *Sassower v. Westchester Co.*, No. 13503/86 (2d Dep't Aug. 16, 1986) (endorsed memorandum in chambers), and Justice Thurgood Marshall denied interim relief, *see Sassower v. Feltman*, No. A-248 (U.S. Sept. 30, 1986) (order in chambers).

When Sassower filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District, Judge Edelstein referred the petition to Magistrate Gershon, who found that the procedures afforded to Sassower violated the fourteenth and sixth amendments of the United States Constitution because Sassower did not receive a full evidentiary hearing or public trial and because there was "no indication that the determination of guilt was based on a finding that the evidence proved petitioner's guilt * * * beyond a reasonable doubt." *Sassower v. Sheriff of Westchester Co.*, 651 F. Supp. 128, 133 (S.D.N.Y. 1986) (report and recommendation of Nina Gershon, United States Magistrate, Nov. 24, 1986). Although the receiver had offered to testify regarding Sassower's waiver of his right to a hearing, the magistrate did not address that issue.

The State of New York intervened pursuant to 28 U.S.C. § 2403 on the ground that the report raised an issue of the constitutionality of N.Y. Jud. L. § 751.

While Judge Edelstein was on vacation, Judge Sand released Sassower subject to his reconfinement by Judge Edelstein, who subsequently adopted the magistrate's findings without addressing the issue of Sassower's waiver of his right to a hearing. *See id.*

DISCUSSION

Although Sassower's position on appeal is not easily deciphered, we interpret his claim below as resting on two grounds: first, that N.Y. Jud. L. § 751 is unconstitutional on its face and second, that § 751 is unconstitutional as it was applied him. The district court did not address the first basis for Sassower's claim but decided, on the second basis, that the procedures afforded Sassower prior to his conviction pursuant to § 751 were constitutionally deficient.

On this appeal, New York State, out of an abundance of caution, urges the constitutionality of § 751, which authorizes a maximum penalty of $250 or 30 days, or both, and provides that when a contempt is committed outside the view of the court, "the party charged must be notified of the accusation, and have a reasonable time to make a defense." N.Y. Jud. L. § 751 (McKinney 1975). We have no difficulty accepting the state's position on this issue and note further that New York courts have experienced no difficulty in construing § 751 to be consistent with the requirements of due process. *See, e.g., County of Rockland v. Civil Service Employees Association, Inc.*, 62 N.Y.2d 11, 16-17, 475 N.Y.S.2d 817, 819-20 (1984); *Koota v. Colombo*, 17 N.Y.2d 147, 151, 269 N.Y.S.2d 393, 395, *cert. denied*, 384 U.S. 1001 (1966); *State University of New York v. Denton*, 35 A.D.2d 176, 180-81, 316 N.Y.S.2d 297, 302-03 (4th Dep't 1970).

We conclude, as well, that the district court erred by failing to distinguish petty contempt from serious crime for the purpose of evaluating the constitutionality of the procedures afforded to Sassower. The constitutional standard governing criminal contempt proceedings is not derived from the specific requirements of the sixth amendment. *See Taylor v. Hayes*, 418 U.S. 488, 498-500 & n.9, 94 S. Ct. 2697, 2703-04 & n.9 (1974); *Levine v. United States*, 362 U.S. 610, 616, 80 S. Ct. 1038, 1042, *reh'g denied*, 363 U.S. 858, 80 S. Ct. 1605 (1960). Rather, the accused is entitled to the fairness that is guaranteed by the due process clause of the fifth and fourteenth amendments, 418 U.S. at 500, 94 S. Ct. at 2704 n.9; 362 U.S. at 616, 80 S. Ct. at 1042-43, and must therefore receive notice and an opportunity to be heard. *See United States v. Lumumba*, 741 F.2d 12, 16 (2d Cir. 1984) (explaining that contempts committed in the view of the court may be punished instantly but contempts committed outside the view of the sentencing judge are "nonsummary contempts" to which due process requirements apply) (citation omitted). *See also United States v. Lumumba*, 794 F.2d 806, 815 (2d Cir.), *cert. denied*, 107 S. Ct. 192 (1986) (where attorney was cited for criminal contempt during trial, but adjudication and punishment occurred after trial, he was entitled to notice and " 'a reasonable opportunity to defend or explain his actions or present arguments in mitigation,' " but was not entitled to a " 'full-blown trial' ") (citations omitted). For reasons outlined below, we conclude that the due process standard was met, and the application of § 751 to Sassower was constitutional.

Although we are bound by *Bloom v. Illinois*, 391 U.S. 194, 201, 88 S. Ct. 1477, 1481 (1968), to recognize that "[c]riminal contempt is a crime in the ordinary sense," the distinction between petty criminal contempt and serious contempt crimes has remained vital since that case was decided. In *Bloom*, where a defendant was sentenced to 24 months imprisonment upon his conviction of contempt, the Court held that defendants charged with serious criminal contempts are entitled to trial by jury. *Id.* at 1480. In so holding, the Court confirmed that "criminal contempt is a petty offense unless the punishment makes it a serious one." *Id. See Taylor v. Hayes*, 418 U.S. 488, 495, 94 S. Ct. 2697, 2701 (1974) (contempt of court is a petty offense that may be tried without a jury when "penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute"); *accord Musidor, B.V. v. Great American Screen Designs*, 658 F.2d 60, 65-66 (2d Cir. 1981), *cert. denied*, 455 U.S. 944, 102 S. Ct. 1440 (1982). *See also Young v. United States ex rel. Vuitton et Fils S.A.*, 55 U.S.L.W. 4676, 4680 (U.S. May 26, 1987) ("While contempt proceedings are sufficiently criminal in nature to warrant the imposition of many procedural protections, their fundamental purpose is to preserve respect for the judicial system itself.").

The circuit courts continue to recognize the vitality of the constitutional distinction between serious crimes and criminal contempt. *See, e.g., United States v. Martinez*, 686 F.2d 334, 343 (5th Cir. 1982) ("[c]riminal contempts have retained their unique status as quasi-criminal sanctions" to which the due process guarantee of fundamental fairness, rather than the provisions of the Bill of Rights, apply); *United States v. Nunn*, 622 F.2d 802, 803 (5th Cir. 1980) ("[n]othing in *Bloom* signalled an abandonment of the doctrine that attributes 'special constitutional status' to contempt proceedings"); *United States v. Bukowski*, 435 F.2d 1094, 1101 (7th Cir. 1970) ("The procedural protections which have gradually surrounded imposition of criminal contempt penalties * * * represent the accretions of 'fundamental fairness' rather than application of provisions of the Bill of Rights."), *cert. denied*, 401 U.S. 911, 91 S. Ct. 874 (1971). At least two circuits have rejected the argument that due process requires indictment by grand jury for criminal contempts. *See Nunn*, 622 F.2d at 804; *Bukowski*, 435 F.2d at 1099-1102.

"The guarantees of due process call for a 'hearing appropriate to the nature of the case.' " *United States v. Raddatz*, 447 U.S. 667, 677, 100 S. Ct. 2406, 2413 (1980) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The following factors "determin[e] whether the flexible concepts of due process have been satisfied: (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve." *Id.* at 2413 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed.2d 18 (1976)).

In this case, Sassower's interest in liberty for 30 days is outweighed by the virtually nonexistent risk of an erroneous determination and by the strong public interest in halting this costly litigation and in deterring Sassower's continued abuse of our legal system. Moreover, the opportunity for a hearing that was afforded was appropriate under the circumstances.

First, Sassower received adequate notice when he was served with a notice of motion and supporting papers that clearly informed him in detail of the nature of the charges, the facts underlying them, the possible penalties, and the results of his failure to appear.

Sassower was also given a reasonable opportunity to be heard, an opportunity that he chose to pursue by filing three cross-motions and four affidavits in opposition to the contempt motion. Although he pled not guilty, Sassower never denied filing the papers offered in support of the contempt charges. Indeed, his response to the contempt motion merely reasserted his untenable procedural claims and his refusal to yield to the authority of any court.

We agree with New York cases holding that where the affidavits in a contempt proceeding raise a disputed issue of material fact, due process requires an evidentiary hearing. *See Ingraham v. Maurer*, 334 N.Y.S.2d 19 (3d Dep't 1972) (criminal contempt); *State University of New York v. Denton*, 316 N.Y.S.2d 297, 303 (4th Dep't 1970) (criminal contempt); *New York v. East Coast Auto*, 472 N.Y.S.2d 1010, 1013 (Sup. Ct. N.Y. Co. 1984) (civil and criminal contempt). *See also Agur v. Wilson*, 498 F.2d 961, 965 (2d Cir.) (rejecting appellant's challenge to the constitutionality of New York's civil contempt statutes on the ground that they allow the court to hold the defendant in contempt without a hearing and noting that New York courts generally construe them to require a hearing where the affidavits reveal a genuine issue of fact), *cert. denied*, 419 U.S. 1072, 95 S. Ct. 661 (1974). Nevertheless, where it is clear from unchallenged documentary evidence before the court that the defendant has continually and wilfully disobeyed court orders, a full-blown hearing is not required before the defendant may be held in contempt under N.Y. Jud. L. § 751. *See* 472 N.Y.S.2d at 1012.

Sassower had a reasonable opportunity to raise a triable issue of fact or to dispute the documentary evidence presented by the receiver, but he wilfully failed to do either. In this case an evidentiary hearing was not only unnecessary, but would have provided Sassower with but a further opportunity to prolong, manipulate, and abuse the judicial process.

Furthermore, even if Sassower would have been entitled to an evidentiary hearing, he waived that right by failing to appear. The standard applicable to waiver of a constitutional right in a criminal proceeding is that it be voluntary, knowing, and intelligently made. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468 (1970). *See Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S. Ct. 780, 786 (1971) ("the hearing required by due process is subject to waiver"), *cited in Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 92 S. Ct. 775, 782 (1972) (due process rights to notice and hearing are waivable in both civil and criminal contexts). The *Brady* standard for waiver was clearly satisfied in this case.

First, since Sassower was an attorney, surely he was aware by virtue of his experience and education, of the consequences of nonappearance. In addition, the notice of motion that Sassower received explicitly warned him of the consequences of his failure to appear before the referee. His failure to appear was therefore knowing and intelligent.

Second, Sassower's waiver of his right to a hearing was voluntary. There is no suggestion in the record that his nonappearance was the result of threats, violence, or undue influence. *See Brady*, 397 U.S. at 753, 90 S. Ct. at 1471 (citing *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183 (1897)). His failure to appear in three prior contempt proceedings has resulted in adjudications against him, *see* Transcript of proceedings before Magistrate Gershon at 23, *Sassower v. Sheriff of Westchester Co.*, 86 Civ. 7403 (S.D.N.Y. Nov. 24, 1986), and he has repeatedly refused to appear before Referee Diamond. This is not a case where the defendant cannot be said to have voluntarily waived a right because he was unaware of either the duties imposed by the court's orders or the consequences of nonappearance. *See Holtzman v. Beatty*, 468 N.Y.S.2d 905, 907-08 (2d Dep't 1983). In light of this record, Sassower's demand for a "speedy trial" and "a plenary hearing, with the aid of subpoenas" is empty and manipulative rhetoric.

We reject the district court's conclusion that Sassower's conviction was not supported by a finding of guilt beyond a reasonable doubt. The referee analyzed in detail both the evidence supporting the motion and Sassower's objections, and concluded that no issue of fact was raised. His report, which was confirmed by Judge Evans when he held Sassower in criminal contempt, was clearly a determination of guilt beyond a reasonable doubt as required by *Bloom*, 391 U.S. at 205, 88 S. Ct. at 1484. In the context of this record, we give no weight to the fact that the express words "guilt beyond a reasonable doubt" were not used.

We agree with the New York Appellate Division that "[i]t is well settled that criminal contempt is established when there is a clear and definite order of the court, the contemnor knows of the order, and he willfully disobeys it." *Holtzman v. Beatty*, 468 N.Y.S.2d at 907 (citing *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980); *Chapman v. Pacific Tel. & Telegraph Co.*, 613 F.2d 193, 195 (9th Cir. 1979)). This case presents the most unequivocal establishment of criminal contempt that this court can imagine.

Simultaneously with filing this opinion, we have denied Sassower's motion for affirmance in light of *Young v. United States ex rel. Vuitton et Fils S.A.*, 55 U.S.L.W. 4676 (U.S. May 26, 1987), because the plurality decision in that case does not control Sassower's state court contempt proceeding. In *Young*, the Court exercised its supervisory power over federal prosecutions in the federal courts and held that counsel for a party that is the beneficiary of a court order may not be appointed by a federal court to prosecute a contempt action based on an alleged violation of that order. *Id.* at 4677, 4683. Only one Supreme Court justice thought that a constitutional question was raised in *Young*. *See id.* at 4684 ("I would go further * * * and hold that the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process.") (Blackmun, *J.*, concurring).

Furthermore, even if *Young* applied to state contempt proceedings, it is distinguishable on its facts. While reaffirming the authority of courts to initiate prosecutions for nonsummary criminal contempt, *id.* at 4680, the Court concluded that it was a fundamental error that "undermines confidence in the integrity of the criminal proceeding," *id.* at 4683, for a court to appoint an attorney for an interested party as a special prosecutor where that prosecutor exercises broad discretion to decide (1) who and how to investigate; (2) what evidence to gather; (3) who to call as a witness and who to charge with what offense; (4) whether and on what terms to enter into plea bargains; and (5) who should receive immunity. In this case, the attorney for the referee merely moved for an order holding Sassower in contempt and notified him that he was required to appear before the referee. Thus, this case does not involve the appointment of a special prosecutor by the court, but simply concerns the routine New York State practice of bringing contempts to the attention of the court by motion. No investigation or other prosecutorial activity was required, because the court already had before it all the facts needed to establish Sassower's commission of the multiple contempts.

We are also denying Sassower's second motion for summary affirmance. The motion is frivolous and for making it we impose a sanction on Sassower, pursuant to Fed. R. Civ. P. 11, in the sum of $250 to be paid to the clerk of the second circuit and we direct the clerk to refuse to file or process any new appeals or proceedings submitted by Sassower until the sanction has been paid.

The State of New York has raised the issue of whether the district court lacked jurisdiction to entertain the habeas corpus petition because Sassower's custodian was not named as respondent. Although the general rule is that the person who holds the prisoner in custody must be named as respondent, *see Billiteri v. United States Board of Parole*, 541 F.2d 938, 948 (2d Cir. 1976), rigid adherence to technical requirements is not mandated in this case. *See Demjanjuk v. Meese*, 784 F.2d 1114 (D.C. Cir. 1986) (Bork, *J.* in chambers) (refusing to transfer habeas petition for lack of jurisdiction over actual custodian and denying petition on merits). *Cf. Granberry v. Greer*, 107 S. Ct. 1671 (1987) (interests of comity and judicial efficiency may be served if circuit court disposes of nonmeritorious petition without reaching nonexhaustion issue). Because we have determined that the petition should be denied, it is unnecessary to encourage Sassower to bring yet another meritless petition by dismissing this one on technical grounds.

The judgment of the district court granting Sassower's petition for habeas corpus relief is reversed and the case is remanded to the district court with a direction to deny the petition.