Mr. Owen

Nos. 13512, 13513

In the United States Court of Appeals for the Sixth Circuit

ALONZO BULLOCK, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

FREDERICK JOHN KASPER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

BRIEF FOR APPELLEE

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STATEMENT OF THE QUESTIONS INVOLVED

1. Was it proper to amend the original order of attachment and to substitute therefor an amended order of attachment? The District Court said, "Yes." Appellee says, "Yes."

2. Was the District Court justified in denying appellant Kasper's motion for a Bill of Particulars? The District Court said, "Yes." Appellee says, "Yes."

3. Was the District Court justified in denying appellants' request for pre-trial inspection of statements given by potential witnesses to the Federal Bureau of Investigation, and in withholding at the trial those portions of statement which were not of events related in the testimony? The District Court said, "Yes." Appellee says, "Yes."

4. Was the injunction issued in violation of Rules 17 and 65 of the Federal Rules of Civil Procedure? The District Court said, "No." Appellee says, "No."

5. Is the injunction which appellant Kasper was found to have violated repugnant to the First Amendment? The District Court said, "No." Appellee says, "No."

6. Was appellant Kasper twice put in jeopardy by being tried in the instant case because he had been found guilty of a previous contempt of the order of the District Court? The District Court said, "No." Appellee says, "No."

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7. Was appellant Kasper denied the right to a speedy trial as guaranteed by the Sixth Amendment? The District Court said, "No." Appellee says, "No."

8. Was appellant Kasper denied the effective assistance of counsel by not being transferred to a penal institution near Washington, D. C., so he could consult with his Washington attorney? The District Court did not rule on this contention. Appellee says, "No."

9. Did the District Court have jurisdiction to issue the injunction? The District Court said, "Yes." Appellee says, "Yes."

10. Did the Court, in using in its charge the words "good deed" in reference to Reverend Turner, invade the province of the jury? The District Court said, "No." Appellee says, "No."

11. Did the District Court adequately charge the jury with respect to appellants Bullock et al. that the prosecution must prove beyond a reasonable doubt the agreement or agreements between said appellants and Kasper? The District Court said, "Yes." Appellee says, "Yes."

12. Was the District Court right in refusing to instruct the jury that they must draw an inference unfavorable to the Government from the failure of the Negro students at Clinton High School to testify? The District Court said, "Yes." Appellee says, "Yes."

13. Was it error to distribute to the members of the jury the "Handbook for Jurors"? The District Court said, "No." The Appellee says, "No."

14. Was the District Court right in refusing to grant a new trial merely because a juror viewed a television program in which no opinion was expressed as to the guilt or innocence of any of these appellants but which was restricted to portraying this particular juror as a citizen of honesty and integrity who could be depended upon to render an honest verdict? The District Court said, "Yes." Appellee says, "Yes."

15. Was the verdict of the jury finding Kasper guilty supported by the evidence? The District Court said, "Yes." Appellee says, "Yes."

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF FACTS[1]

1. The injunction

On January 4, 1956, the District Court for the Eastern District of Tennessee issued an order in *McSwain* v. *Board of Education of Anderson County,* an action by a group of Negroes for admission to the schools

[1] Because of the consolidation of the two cases for briefing by the appellee, and the fact that appellant Kasper's statement of facts is somewhat fragmentary, appellee herein recites the entire factual picture, without, however, repeating matters adequately explained by appellants.

of Anderson County, Tennessee, on a non-discriminatory basis, directing that desegregation begin in the high schools in Anderson County by the fall term of 1956 (16a).[2] The instant proceedings arose out of measures taken by the District Court to prevent interference with that order.

In obedience to the court's order, several Negro students were registered for the 1956 fall term; and when school opened in August 1956 twelve Negroes and approximately 800 white students were enrolled (23b). On August 25, 1956, appellant Kasper arrived in Clinton. While there, he attempted to recruit persons for his program of ousting Negroes from the high school (33b). Because an atmosphere of fear, tension, and anxiety had been created, the principal of Clinton High School, one of the members of the Board of Education of Anderson County, two attorneys in the desegregation case and an Assistant Attorney General for the 19th Judicial Circuit of the State of Tennessee, on August 29 petitioned the District Court for injunctive relief (Kasper's App. 2a). In their verified petition, they alleged that appellant Kasper had organized a movement to impede, obstruct and intimidate the defendants in the desegregation suit from complying with the District Court's order and that he was leading a movement to intimidate parents of both races from sending their children to

[2] Hereinafter the pages in the Appendix for appellant in 13512—*Bullock* v. *United States* will be referred to as "1a, 2a," etc.; those in the Appendix for appellant in 13513—*Kasper* v. *United States* will be referred to as "Kasper's App. 1a, 2a," etc.; and those in the Appendix for appellee will be referred to as "1b, 2b," etc.

Clinton High School, with full knowledge of the District Court's desegregation order. The petitioner further alleged that appellant Kasper, certain other named persons, "and other persons who join them in their contemptuous attitude toward the orders" of the court would continue to attempt to prevent and impede the petitioners from carrying out the orders of the court. They prayed for an injunction enjoining appellant Kasper, the specifically named persons, and all other persons who join with them from doing any act to obstruct or impede by intimidation or oppression the efforts of the petitioners to comply with the order of the District Court (Kasper's App. 2a–9a).

On the same day the District Court *ex parte* issued a temporary restraining order prohibiting the appellant Kasper, the other persons specifically mentioned, and "their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them" from "hindering, obstructing, or in any wise interfering with the carrying out of the aforesaid order of this Court, or from picketing Clinton High School, either by words or acts or otherwise" (Kasper's App. 9a–11a). The temporary restraining order was served on petitioner on August 29. Thereafter a hearing was had and a preliminary injunction issued (29a). After further hearing before the District Court, on September 6, 1957, the injunction was made permanent (29a–30a).

2. The attachment

On December 5, 1956, the United States Attorney filed a petition for prosecution of criminal contempt

against appellants Bullock, Brakebill, Brantley, Cook, Currier, Till, and certain named others, alleging in substance that these persons had committed a number of specified acts designed to prevent and frustrate the orders of the court, and that accordingly they should be punished for criminal contempt of court (16a–18a). On the same day, the court issued an order of attachment for the persons named, ordering their apprehension and trial (19a–22a). Bond was fixed and pleas and motions were filed in due course (2a–4a).

On February 25, 1956, the court, *ex parte,* issued an amended order of attachment (22a–26a), which recited the fact of the petition of August 29, 1956, and the pertinent language of the permanent injunction of September 6, 1956; the fact that the appellants herein and certain other persons had actual notice of the injunction; the fact that these persons during November and December 1956 entered into an agreement or agreements to violate the permanent injunction; and the fact that all of these persons other than Kasper in active concert and participation with Kasper violated the injunction by hindering, obstructing and interfering with the carrying out of the order directing desegregation issued by the court on January 4, 1956, in several respects: (1) On November 27, 28, 29, 30 and on December 3 and 4, 1956, appellants Bullock, Brantley, Brakebill, Cook, Currier, Till, and others congregated in a threatening manner along the route to Clinton High School taken by the Negro students and intimidated these students from entering the school, and (2) on December 4, 1956, when Reverend Paul Turner escorted the Negro students to

the school, he was villified and attacked and badly beaten by Bullock, Brantley, Brakebill, Cook, Currier, and others.[3] The amended order of attachment further recited that a writ of attachment had previously been issued for the appellants other than Kasper and it ordered the attachment and trial on criminal contempt charges of Kasper and Gates (22a–26a).

A number of motions were filed and acted upon during April, May and June 1957 (6a–9a), and the trial started on July 8 (9a).

3. Trial testimony

The testimony adduced on behalf of the United States at the trial showed the following:

On August 29, 1956, the temporary restraining order prohibiting interference with desegregation at Clinton High School was issued by the District Court (27a). It was served on appellant Kasper on the same day by the United States Marshal for the Eastern District of Tennessee (5b–6b). The latter read a portion of the order to Kasper but Kasper took it from him, stating that he would want to read it himself. "I know what it is. It is an injunction prohibiting me from interfering here in this school business" (6b).

On August 30, 1956, the restraining order was continued in effect in the form of a preliminary injunction (29a), and on September 6, 1956, this preliminary injunction was made permanent (29a–30a).

[3] A third specification was subsequently eliminated when defendant Gates died.

With respect to the question of notice of the injunction the testimony showed[4] that the *Clinton Currier News,* the *Oak Ridger,* the *Knoxville Journal,* all other local newspapers, and all area radio and television stations, for approximately 30 days after the issuance of the restraining order, and in the early and the latter part of November 1956, carried stories and bulletins widely publicizing the restraining order and the injunction (12b–18b).

Further, there was testimony indicating that Cook was specifically informed about the injunction and requested not to violate it on at least two occasions (20b–21b), and that he received notice of this injunction in other ways as well (10b, 13b–14b, 19b–20b). On other occasions, the injunction was explained to Bullock (34b–35b, 37b–38b) and to Currier (35b, 38b–40b) and Bullock gained further information concerning it from other sources, too (20b). Brakebill was present at meetings of the Anderson County School Board at which the injunction was discussed (7b–11b), and so was Till (6b–12b).

Ample testimony was adduced with respect to the concert of action between Kasper and the other appellants (18b, 21b–22b, 25b–32b, 40b–45b, 62b–64b).

The following was testified to with respect to the specific overt acts referred to in the amended order of attachment. During the week following August 27,

[4] Only brief mention is made here of the proof of notice to appellants of the injunction and of that concerning concert of action between Kasper and the other appellants since none of the latter challenge the sufficiency of the evidence to support the verdict.

1956, there was a considerable disturbance outside the school and enrollment dropped greatly (24b) but thereafter, and until November, the problems subsided and attendance went back up (24b. On November 27 or 28 appellants Brakebill, Brantley, and Bullock, with a number of others, stationed themselves at the street intersection which the Negro children had to pass to get from their homes to the high school (59b–60b). They remained until 8:30 or 8:45 a. m., school starting at 8:30 a. m. (60b). These appellants repeated this pattern of conduct every day for the remainder of the week (61b). The Negro children did not come to school (60b). The appellants mentioned did not appear Saturday or Sunday, but on Monday, December 3, they were again present at the same place (61b–62b). That morning Cook was there, too, and he and Bullock made heckling remarks to Reverend Turner who was known to have the intention of accompanying the Negro children to the school (48b). Bullock also stated in a loud and belligerent tone that if the Negro children were not taken out of the school, someone would get killed (46b).

On December 4, many cars were again parked in the area of the road leading from the Negro section to the school. Bullock and Cook were present near the school and Cook told the Reverend Turner that they wouldn't let him get away with escorting the Negro children to the school (33b–34b). The chief of police asked Bullock to leave before there was trouble, but he refused, stating, "You want me to leave so you can bring those colored children down here to school"

(62b). Bullock said to others that "he was up there to keep us 'nigger lovers' from taking those 'niggers' to school" (36b), and that he would keep the white school white and there would be trouble (39b).

Later on that morning, Reverend Turner with two other men escorted the Negro children through the crowd to the school. Bullock, Cook, Brantley, Currier and Brakebill were there (49b). Bullock stated that Turner should keep his nose out of this matter (49b–50b). Brakebill, Cook, and Currier were by aggressive, saying ugly and threatening words to the Negro children and the men with them (36b–37b). Cook and Bullock followed Turner and the children down the hill. Brantley was close by (45b–46b, 49b). Obscene remarks were made (49b). Brakebill was still there (47b–49b). Bullock, too, followed Turner 46b–48b). After Turner had escorted the Negro children to the school and he came back out, there again was heckling (50b). Brakebill, Brantley and Currier were among the hecklers (50b–51b). Turner walked on further and Cook "jumped" on him (51b). Turner backed all the way across the street. Five or six people were yelling and following him across the street (57b). Turner was trying to get away from the people but he was stopped in front of a building (58b). Several of the people converged on him and Cook was the first to strike a blow (58b). He hit Turner on nose with his fist. Turner's hands were in his pocket; he was not armed (52b). Three or four others of the group then attacked Turner (54b). Turner begged

the crowd not to strike him (57b). He managed to push his way through the crowd, Cook in front of him, against an automobile (52b). He and Cook were next to the fender of the car for about two minutes during which time Turner was being pounded on his back by fists. He went down on his knees, his head being bounced against the fender of the car (54b). The mob was shouting "kill him" (55b). Ultimately, the police arrived and they arrested Cook (52b). Currier was present at the time of the arrest. When Turner went to the police station appellant Currier was still outside looking very angry (55b). When he left the station Currier and another woman walked behind him (55b–56b).

With this, the Government concluded its case. A motion was made for a motion of acquittal on behalf of Bullock et al. and a motion for a judgment of acquittal or for directed verdict on behalf of Kasper. These motions were denied (64b).

The testimony adduced on behalf of the appellants indicated that appellant Till had stated at meetings before the Board of Education that he would expect no one to violate the injunction; that he was trying legal means to do it (64b). It was further shown that the White Citizens Council had many members and that they did not believe in violence (64b), and there never was any violence at their meetings (64b). When the temporary restraining order was served on Kasper, the United States Marshal read only a portion of it to Kasper, and then Kasper took it from him to

read the remainder himself (65b). Everything was quiet in Clinton until the Negro children decided to go back to school (65b), and there was no trouble until Reverend Turner decided to bring the Negro children down to school (65b).

At the conclusion of the case for the defense, the motion for judgment of acquittal was renewed on behalf of all appellants and denied (11a). After oral argument by counsel, the court instructed the jury in considerable detail (38a–56a) and gave an additional instruction in response to a defense request (67b.)

The jury found appellants guilty, acquitting several of their co-defendants (68b).

In due time all appellants filed motions for new trial (12a–13a). A three day hearing was conducted. During this hearing testimony was taken on the question of distribution of a handbook to jurors and on a television program which had been viewed by one juror. The evidence showed that it had been the practice in that court to distribute to the jury pamphlets prepared by the Judicial Conference entitled "A Handbook for Petit Jurors Serving in the United States District Courts" (83a), and that each juror in this case received such a handbook (86a–87a).

The evidence further indicated that during the trial one juror (May) had viewed a television program which concerned the Clinton trials. On this program the announcer interviewed two of May's neighbors, both of whom indicated that they had confidence in May's honesty and integrity. Nothing was said about

the defendants or the evidence in the case (104a–122a).

After the hearing the court overruled the motions for a new trial (14a).

This appeal followed (14a–15a).

ARGUMENT

I

Procedural questions

1. Was it proper to amend the original order of attachment and to substitute therefor an amended order of attachment? The District Court said, "Yes." Appellee says, "Yes."

The appellants other than Kasper contend that the court below erred in substituting for the order of attachment issued on December 5, 1956, an amended order dated February 25, 1957, and to impose judgment on this amended order. It appears to be appellants' further contention that by the amendment a new offense was charged and that this prejudiced their defense. These points are not well taken.

Criminal contempt actions are *sui generis*. In many respects they are not governed by the rules applicable to criminal prosecutions. Thus, as concerns the instant problem, criminal contempt actions are initiated neither by indictment nor by information but by a simple notice, as provided in Rule 42 (b) of the Federal Rules of Criminal Procedure. It is clear from the decisions construing the Rule that this requirement of notice is less strict and less technical than the equivalent proceedings by which criminal cases are instituted. See *Reich* v. *United States,* 239 F. 2d 134 (1st Cir. 1956), *cert. denied,* 352 U. S. 1004 (1957); *MacNeil* v. *United States,* 236 F. 2d 149 (1st Cir. 1956), *cert. denied,* 352 U. S. 912; *United*

States v. *United Mine Workers,* 330 U. S. 258, 296–7 (1947). By the standards of these decisions—which upheld notices much less precise and much less removed in time from the trial—clearly Rule 42 was complied with and appellants have no just cause for complaint.

However, even if—as appellants suggest—a standard comparable to that provided for in Rule 7 (e) of the Federal Rules of Criminal Procedure were applicable, it would not help them here. That Rule provides that an information may be amended at any time before the verdict if (1) no additional or different offense is charged and (2) the substantial rights of the defendants are not prejudiced. It will be noted that an amendment under the Rule is permitted up to the very time of the verdict. In the instant case the amendment of the order of attachment took place over four months prior to the trial, a significant circumstance when the questions of error and prejudice are assayed.

Appellants themselves suggest (Br. 15) that the Government could even now file a superseding order of attachment. Appellants' position under such an order would be no better than what it was after the amended order of February 25, 1957 issued.

The suggestion is made that the amendment violated the mandate of Rule 7 (e) that no additional or different offense be charged in the amendment. The original order of attachment charged criminal contempt and so did the amended order of attachment. True, there was some change in language—but

the essentials remained: both orders charged contempt of the desegregation injunction of the District Court by interference with this injunction.[5] And as far as the appellants who raise this point are concerned, they were cited in both the original order and the amended order: Kasper, who does not complain in this regard, was the only appellant added by the amendment (Compare 20a–21a with 24a).

Even more, appellants can point to no real cognizable injury because of the amendment. Two matters are mentioned in the brief: (1) that the bonds originally required would have been reduced had a new attachment been issued, and (2) that appellants' right to ask for a bill of particulars was cut off. Even if it were true that a lower bond than that provided for in the original attachment would have been set had the amended attachment been termed a "new" attachment, it would not help appellants now. It can hardly be argued seriously that a verdict and judgment should be set aside because during an early phase the bond was excessive.[6] Moreover, the Government cannot agree with the assumption that bond under a "new" attachment would have been lower

[5] *United States* v. *Personal Finance Co.*, 13 F. R. D. 306 (S. D. N. Y. 1952), the only case cited by appellants in support of this Argument, is not in point because in that case, unlike here, the District Court found that the amendment would have charged violation of two entirely different sections of a regulation under the Defense Production Act than had been charged by the original information.

[6] The proper procedure for testing the amount of the bond is by motion for reduction of bail and appeal from order denying such motion. *Stack* v. *Boyle*, 342 U. S. 1 (1951).

than that fixed under the original one. The criminal contempt charged by the amended attachment was no less grave than that related in the original attachment, and there is no basis whatever for supposing that had a "new" attachment—different in caption but identical in substance with the amended attachment—issued a different bond would have been set. True, bond of only $1,000 was fixed after the trial, but this is no criterion for the question raised here since this was an appeal bond, and since by that time it was known that only minimal sentences had been imposed.

The only other injury alleged is that appellants' right to ask for a bill of particulars was cut off by the amendment. However, the charge herein was so specific and detailed that no particulars were required (see also Argument 2, *infra,* at pp. 15–16.) Also, there is nothing in the record to indicate that appellants made any attempt to demand a bill of particulars. Had they made such a request and had the judge felt that on the merits they were entitled to further particulars, he would surely have required particulars to be furnished notwithstanding the time element. No attempt having been made, there is no record basis for the present claim of prejudice.[7]

In substance, the amendment in the instant case did not raise a new and different charge, it took place long prior to the hearing and it afforded appellants such ample opportunity to prepare themselves for that hearing on the basis of the amended attachment

[7] Appellant Kasper moved for a bill of particulars on April 1, 1957 (Kasper's App. 17a) and his motion was received and disposed of by the court (Kasper's App. 19a).

that by no stretch of the imagination can the fact of the amendment be deemed to have been prejudicial.

2. Was the District Court justified in denying appellant Kasper's motion for a Bill of Particulars? The District Court said, "Yes." Appellee says, "Yes."

Kasper cites nothing whatever in support of the bare allegation that his motion for a bill of particulars should have been granted, either factually or legally or in respect to what harm or prejudice, if any, occurred as a result of the denial of the motion.

The amended order of attachment, issued on February 25, 1957, is particular as to the acts charged, the dates of their occurrence and the persons alleged to be guilty of committing them. It lists several specific overt acts (24a–26a). It amply satisfied the requirements of notice.

Appellant's motion below sought in effect to have the United States give him a detailed statement of all the evidence that would be introduced at the trial.[8] This need not be furnished. Cf. *Kansas City Star Co.* v. *United States,* 240 F. 2d 643 (8th Cir. 1957), *cert. denied,* 354 U. S. 923. A bill of particulars is designed to inform a defendant of the charges against him with sufficient particularity for him adequately to prepare his defense and to protect him from a possible second prosecution for the same offense; it is not intended, even in a criminal case, to give him a right prior to trial to demand the Government's evidence. *Wong Tai* v. *United States,* 273 U. S. 77, 82 (1927); *Landay* v. *United States,* 108 F. 2d 698, 703 (6th Cir. 1939) *cert. denied,* 309 U. S. 681; *John-*

[8] In addition to requests for legal information.

son v. *United States,* 207 F. 2d 314, 320 (5th Cir. 1953), *cert. denied,* 347 U. S. 938 (1954).

This appellant was scarcely taken by surprise at the trial. At least he makes no such allegation now. A bill of particulars will not be granted to particularize facts of which defendants already have knowledge. *United States* v. *Gouled,* 253 Fed. 239 (S. D. N. Y. 1918); *Zito* v. *United States,* 64 F. 2d 772 (7th Cir. 1933); *Roberson* v. *United States,* 249 F. 2d 737 (5th Cir. 1957); *United States* v. *Lang,* 40 F. Supp. 414 (E. D. N. Y. 1941).

Finally, the granting of a bill of particulars is addressed to the sound discretion of the court. Since no evidence of abuse of such discretion has been shown, or even alleged, this court cannot be expected to overrule the judgment of the District Court in that regard. *Wong Tai* v. *United States, supra*; *Himmelfarb* v. *United States,* 175 F. 2d 924 (9th Cir. 1949) *cert. denied,* 338 U. S. 860; *Sawyer* v. *United States,* 89 F. 2d 139 (8th Cir. 1937).

3. Was the District Court justified in denying appellants' request for pre-trial inspection of statements given by potential witnesses to the Federal Bureau of Investigation, and in withholding at the trial those portions of statement which were not of events related in the testimony? The District Court said, "Yes." Appellee says, "Yes."

Appellants complain that the court erred in not allowing pre-trial discovery of statements given to the Federal Bureau of Investigation by witnesses or potential witnesses in the case. There is no hint in *Jencks* v. *United States,* 353 U. S. 657 (1957) that such pre-trial production is required. In fact, the Court's holding on this point expressly limited the

principle to inspection at the time of trial (353 U. S. at 668):

> We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and when orally made, as recorded by the F. B. I., touching the events and activities as to which they *testified at the trial.* [Emphasis supplied.]

Not only was the trial court's refusal of pre-trial discovery not error under *Jencks,* but it constituted a proper exercise of discretion within the limited application of criminal discovery under Rules 16 and 17 (c), F. R. Crim. P. Rule 16 permits discovery only of documents obtained "by seizure or by process" and so is inapplicable to statements made voluntarily to the Government. Rule 17 (c) permits pre-trial inspection of subpoenaed materials after good cause is shown by the defendant, but is applicable only to evidentiary material. *Bowman Dairy Co.* v. *United States,* 341 U. S. 214 (1951); *United States* v. *Iozia,* 13 F. R. D. 335 (S. D. N. Y. 1952); *United States* v. *Palermo,* 21 F. R. D. 11 (S. D. N. Y. 1957). FBI statements could not become evidentiary at the pre-trial stage for purposes of impeaching the credibility of a witness until after such witness had in fact testified.

Certainly if the Court in *Jencks* meant to require pre-trial discovery of these reports, some mention would have been made of Rules 16 or 17 (c). In point of fact the subsequent legislation clarifying the situation created by the *Jencks* decision (18 U. S. C.

3500) (1b) not only expressly prohibits such discovery, but the legislative history indicates that the statute is in full accord with *Jencks* in this respect. Thus, the Senate Report on the bill indicates that the provision prohibiting pre-trial disclosure[9] was inserted to avoid the misinterpretation of *Jencks* which had occurred in some court decisions—a matter which was surprising to the Committee particularly when the "overwhelming judicial thought * * * [is that *Jencks*] does not apply to pre-trial production." S. Rept. No. 981, 85th Cong. 1st Sess., Appendix p. 8; see also H. Rept. No. 700, 85th Con. 1st Sess., pp. 6–7. Pre-trial discovery of such material as was sought in the instant case has been denied in numerous cases, many of which post-date *Jencks*. *United States* v. *Rosenberg,* 154 F. Supp. 654 (E. D. Pa. 1958); *United States* v. *Grossman,* 154 F. Supp. 813 (D. N. J. 1957); *United States* v. *Anderson,* 154 F. Supp. 374 (E. D. Mo. 1957); *United States* v. *Grado,* 154 F. Supp. 878 (W. D. Mo. 1957); *United States* v. *Papworth,* 156 F. Supp. 842, 850 (N. D. Tex. 1957); *United States* v. *Benson,* 20 F. R. D. 602 (S. D. N. Y. 1957); *United States* v. *Palermo,* 21 F. R. D. 11 (S. D. N. Y. 1957) and cases cited therein. Contra: *United States* v. *Hall,* 153 F. Supp. 661 (W. D. Ky. 1957).

[9] This is 18 U. S. C. 3500 (a) which provides: "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

Accordingly appellants' contention in this matter is without merit.

Appellants also assert that the District Court erred in examining some of the statements made by witnesses to the FBI and in declining to make portions thereof available to the defense. In *Jencks* the Court disapproved of the practice of the trial judge's screening the reports to determine admissibility—"*e. g.,* evidentiary questions of consistency, materiality and relevancy" (353 U. S. at 669)—in a factual setting which had seen the judge summarily refuse all reports without stating any reason therefor. However, the court did not prohibit all screening by the trial judge—far from it. A showing of inconsistency between the testimony and the statements or reports is no longer a prerequisite to a successful demand for production. But a foundation for inspection must still be laid, in that it must be established that the reports are "of the events and activities related in [the] testimony" (353 U. S. at 666).[10] It is abundantly clear from the opinion that the trial court still has the duty of determining whether the statement, or portions thereof, touch on the events and activities about which the witness testified. If the statement contains matter about which the witness did not testify, the court may refuse inspection and still comply

[10] Elsewhere, the court reiterated that relevancy and materiality for the purposes of inspection are established "when the reports are shown to relate to the testimony of the witness" (353 U. S. at 669).

with the ruling and the spirit of *Jencks*.[11] His duty in that regard is especially clear where, as here, the Government asserted that portions of the statements had no bearing upon the activities about which the witness testified.

It is difficult to see how the rule could be otherwise. Obviously, the mere fact that a person becomes a witness and testifies to occurrence A hardly provides an excuse for the inspection of all statements and reports he might have made with respect to occurrences B, C, D, or X. If the contrary were true, no agent of the FBI, for example, could ever take the stand without having extracted from him and through him all reports he made at any time in his career on any matter which might have come to his attention, thus jeopardizing all the work he had ever done for the Government. Clearly this is not required. Compare, *Soto* v. *United States*, —— F. 2d —— (7th Cir. May 6, 1958).

It may be argued that perhaps the portions of statements here involved are not as alien to the cause of action as in the hypothetical example. But that approach merely points up the fact that the trial court must have the initial responsibility of determining in any given case whether or not the statements or reports in question relate to the testimony of the witness. If not, they need not be produced. Cf.

[11] This necessarily is so, for *Jencks* proceeds on the theory—and, incidentally, so did appellants in the instant case—that the statements might contain matter inconsistent with the testimony of the witness and might accordingly be useful for impeachment purposes. Matters about which the witness has not testified may of course not be used for such purpose.

United States v. *Sheba Bracelets*, 248 F. 2d 134, 143–4 (2d Cir. 1957), *cert. denied*, 355 U. S. 904.

The District Court in the instant case did no more than screen the statements on that basis, and the question posed by appellants thus is reduced to the simple query of whether, in excising portions of the statements as germane neither to the testimony of the witness nor usable for impeachment purposes, the court erred. It is submitted that the statements, which are before this Court as exhibits, abundantly show that the court below did not err and did not abuse its discretion.[12]

Keeping in mind that the Court in *Jencks* stated that "Relevancy and materiality for the purpose of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness" (353 U. S. at 669), it may be proper to review briefly the procedure used by the court in the instant case.

In general, Judge Taylor allowed the signed statements of the witness to be turned over to the defendants without any screening whatever, and many times this was done prior to the direct examination of the witness (*e. g.*, 32b–33b). This action was even more favorable to the defendants than that required under *Jencks*.

Specifically *all* FBI reports in possession of the Government were given to the defense with respect to written and/or oral statements made by the following witnesses: Crossno (7b), Shanlever (11b), McKay

[12] That a question of discretion is involved is demonstrated in the very thorough discussion provided in *Indiviglio* v. *United States*, 249 F. 2d 549, 554–60 (5th Cir. 1957).

(14b–15b), Woodward (21b), King (23b), French (25b), Hutton (31b), Way (31b), Burnett (32b–33b), Davis (34b) (excised portion was either subsequently given to defense or was not requested), Miller (46b), Burris (46b), Vaught (47b), Turner (48b), Hounshell (52b), Allison (53b–54b), Shoopman (54b–55b), Turnbill (56b), Johnson (56b–57b), Hutsell (57b–58b), and Moore (58b–59b). In a large majority of these cases the reports were produced prior to direct examination. All statements were similarly produced with respect to the following witnesses except that portions were excised by the court on the ground that the particular fragment was unrelated to the testimony of the witness:[13] Burkhart (8b–10b), Wells (14b), Brittain (24b–25b), Braden (39b, 45b), Kesterson (53b), Samuel L. Davis (55b–56b). The excised portions were sealed and filed as Exhibits 4, 6, 23, 27, 28 and 30, respectively.[14]

This recital of what transpired in the trial court indicates that in a large majority of the cases counsel for the defense were given all of the statements made by the witness to the FBI—and they were given these

[13] It is significant that Judge Taylor ruled that he did not wish even to see the reports prior to production unless the Government asserted that they were not related to the testimony (46b).

[14] In appellants' (Bullock, et al.) brief at p. 19 it is also stated that a continuance was necessary in nearly every instance to allow the defense to inspect the FBI reports. This assertion is not only unsupported by any record or appendix reference, but it is factually incorrect. Many times appellants were allowed to inspect the reports prior even to direct examination of the particular witness (*e. g.*, 32b–33b), and in most other instances there was no request whatever for a continuance for a study of the statements.

statements prior to direct examination and without any prior screening, which is more liberal a practice than *Jencks* requires. And in the few instances where portions of oral statements were excised by the court it was justified in so doing, for in each case it held that the excised portions did not relate to matters about which the witness had testified. This, as indicated above, fully complies with the holding in *Jencks*.

Even if it be assumed, *arguendo,* that the *Jencks* decision has a meaning broader than what has been suggested hereinabove, it still would not constitute cause for reversal of the judgment, for a number of reasons.

In the first place, any language in the opinion going beyond the problem of whether or not the defendants in *Jencks* were entitled to have the FBI reports turned over to the court for screening constituted dictum, for neither the relief requested nor the error claimed in *Jencks* went beyond that. See *Indiviglio* v. *United States, supra.* Moreover, the very odd factual situation underlying *Jencks,* with the reports of the admitted perjurer Matusow as the prime target of the demand for inspection, is in no way comparable to the facts involved in the instant case.

Secondly, as this Court will find upon a review of the excised portions of the statements, the appellants were not prejudiced by the court's rulings.[15] In

[15] Incidentally, very little, if any, use was made by appellants of the statements they did receive for impeachment purposes, a fact which throws some light on any present claim of prejudice in connection with the few fragments of statements they did not receive.

United States v. *Miller,* 248 F. 2d 163 (2d Cir. 1957), *cert. denied,* 355 U. S. 905, the court stated that it could find no reversible error because the excised portions of the reports were not in the record and it could not presume prejudice from the mere fact that there were such excised portions. The obvious implication is that reversal would not be proper unless the court found prejudice after reviewing what was withheld (if, as here, it is in the record). The innocuous material withheld in the instant case could hardly be regarded as so vital that it might have made a difference in the result. Hence, no prejudice.

Finally, the new procedural requirements of 18 U. S. C. 3500, legislation passed to clarify the problems raised by the *Jencks* decision, support this view. Under this statute, if the United States claims that certain portions of a report do not relate to the subject matter about which the witness testified, the trial court "shall excise the portions of such statement" which do not have this relationship. 18 U. S. C. 3500 (1b). In *United States* v. *Miller, supra,* the court in effect held that (assuming error under *Jencks*) since a retrial would be governed by 18 U. S. C. 3500, it would determine whether the error persisted under the standard as clarified in the new legislation. If not, it would not reverse for a futile new trial. Indeed with respect to the applicability of 18 U. S. C. 3500 the court in *United States* v. *Tomaiolo,* 249 F. 2d 683 (2d Cir. 1957) (reversing on other grounds) refused even to consider the contention that certain FBI reports were withheld because it felt the new statute was applicable. It is significant that in that

case the statute was passed after oral argument but prior to the decision. And in *United States* v. *Papworth,* 156 F. Supp. 842 (N. D. Tex. 1957) the court, in a well-reasoned opinion, considered that the new statute was applicable, though the crime was committed prior to its enactment. The court said that the retroactive effect of the statute was not violative of the constitutional ex post facto principle because the change was merely procedural and did not violate any vested right of the defendant.

Thus, this Court should not be unmindful of 18 U. S. C. 3500 when considering prejudice, for though the new statute may not be necessary to the decision, it would in any event constitute a full answer to appellants' claims.

In sum, therefore, the action of the trial court in this case was consistent with the holding of the *Jencks* case, appellants were not prejudiced on the facts, and, if a reversal were granted and a new trial had, they would not be able to obtain the portions of the reports sought.

4. Was the injunction issued in violation of Rules 17 and 65 of the Federal Rules of Civil Procedure? The District Court said, "No." Appellee says, "No."

Appellant Kasper complains that a violation occurred of Rule 17 of the Federal Rules of Civil Procedure in that the action to obtain the restraining order and the temporary and permanent injunctions was not prosecuted in the names of the real parties in interest.

The petition applying for these orders actually looked toward an action in criminal contempt, so that the applicability of the civil real party in interest

rule is not clear. The petitioners, invoking 18 U. S. C. 401 (3), requested a show cause order based on Kasper's alleged interference with the court's original desegregation order, a restraining order and temporary and permanent injunctions. The court issued the temporary restraining order which Kasper then immediately violated.

The same petitioners then filed a petition for contempt for violation of this restraining order. As to their standing the District Court held, in the previous *Kasper* case, that in criminal contempt "it is only necessary for some reputable party or parties to make known to the Court that a prima facie case exists that the Court's order is being violated".[16] The court found that petitioners were properly before the court and that the procedure in citing Kasper to appear was regular and proper. This Court on appeal upheld the conviction without even referring to that particular issue.[17] Since this Court has sanctioned the petitioners' standing in the first contempt proceeding *a fortiori* they still have that standing now. Since appellant did not appeal the order of injunction he is now estopped to raise the question. *Jennings,* 264 Fed. 399 (8th Cir. 1920).

[16] *McSwain* v. *Board of Education*, Civil No. 1555, E. D. Tenn. August 31, 1956, 1 Race Relations Law Reporter 1048 (1956); see also, *Jennings* v. *United States*, 264 Fed. 399 (8th Cir. 1920); *Hammond Lumber Co.* v. *Sailors' Union*, 149 Fed. 577 (9th Cir. 1906) *cert. denied*, 208 U. S. 615; *MacNeil* v. *United States*, 236 F. 2d 149 (1st Cir. 1956), *cert. denied*, 352 U. S. 912.

[17] *Kasper* v. *Brittain*, 245 F. 2d 92 (6th Cir. 1957), *cert. denied*, 355 U. S. 834.

In reply to the merits of appellant's contention, however, it is clear that petitioners' interest was very real indeed. The persons filing the petition of August 29, 1956, were the principal of Clinton High School, a member of the Board of Education of Anderson County, two attorneys involved in the desegregation litigation concerning Clinton High School, and an Assistant Attorney General for the Nineteenth Judicial Circuit for the State of Tennessee (Kasper's App. 2a–3a). These parties filed a petition in view of their official connection with the desegregation litigation of Clinton High School and in their concern for the maintenance of "respect for the laws of Tennessee and the United States and respect for the District Court and the Supreme Court of the United States" (Kasper's App. 3a).

Appellant argues that the Board of Education should have petitioned in its official capacity, as in the *Hoxie* case.[18] It is interesting to note that in *Hoxie* the members of the board and the superintendent were named in their individual capacities as well as in their official capacities. Moreover, it would appear that appellant's failure to move for a joinder of what he now considers the real party in interest, *viz,* the school board, constitutes a waiver of his objection. See 3 Moore's Federal Practice, p. 1331, supplementary note 6; *McLouth Steel Corp.* v. *Mesta Machine Co.,* 116 F. Supp. 689 (E. D. Pa. 1953), *aff'd,* 214 F. 2d 608 (3rd Cir. 1954). Finally, Rule 17 (b) merely permits but does not require an unincorporated as-

[18] *Brewer* v. *Hoxie School District*, 238 F. 2d 91 (8th Cir. 1956).

sociation such as the school board to sue in its common name.

Principal Brittain and board member Burkhardt were named in the original desegregation order and are bound thereby, and their attorneys are of course also bound.[19] Their substantive interest can scarcely be denied since they might well have been guilty of criminal contempt and perhaps even of a violation of 18 U. S. C. 242 had they succumbed to appellant's pressure to resegregate the schools. Having a duty to enforce they had a correlative right to prevent interference with this duty.[20]

Clearly, appellant's point lacks merit.

Kasper further complains that the injunction herein was issued in violation of Rule 65 of the Federal Rules of Civil Procedure, in that there was no allegation or showing in the petition for the temporary restraining order that immediate and irreparable injury would be sustained by the petitioners and too, in that the injunction is binding only on the parties to the action and those persons in active participation with them who receive actual notice of the order.

Rule 65 (b) provides that no temporary restraining order be granted without notice unless it clearly appears from the specific facts pleaded that immediate and irreparable injury or loss or damage would result to the applicant before notice and hearing. The verified petition in the instant case (2a–9a) pleads such facts in abundance. The petition alleges that appellant brought scurrilous literature attacking

[19] Rule 65 (d), F. R. Civ. P.

[20] *Brewer* v. *Hoxie*, *supra* note 18.

the courts, advocated a radical following to ignore the court order and impede integration, and arranged for picket lines at the school. It alleges that large and threatening crowds kept students from the school, that at least one Negro child was removed by her parents, and that an attack was made upon at least one other Negro child. The petition further claims that appellant and other named parties would continue such action unless enjoined (Kasper App. 7a). Surely this is amply indicative of immediate and irreparable injury. And the November and December incidents which led to appellant's second arrest, particularly the violence in the Reverend Turner incident (54b), confirm and justify the District Court's belief at the time of issuing the injunction in September that, in the language of Justice Frankfurter in another case[21] "the momentum of fear generated by past violence would survive."

Even assuming, however, *arguendo,* that the temporary restraining order was illegally issued, it does not follow, appellant's contention to the contrary notwithstanding, that the preliminary and permanent injunctions were likewise illegal. A full hearing was had with respect to these two orders. Under those circumstances, a defect in the issuance of the temporary restraining order becomes immaterial. Even if the injunction were invalid for any reason, appellant was properly chargeable with criminal contempt for violating it. *United States* v. *United Mine Workers,*

[21] *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 294 (1941).

330 U. S. 258 (1947); *Howat* v. *Kansas,* 258 U. S. 181, 189–90 (1922); *Reich* v. *United States,* 239 F. 2d 134, 138 (1st Cir. 1956), *cert. denied* 352 U. S. 1004 (1957); *Smotherman* v. *United States,* 186 F. 2d 676, 678 (10th Cir. 1950); *Woods* v. *Fliss,* 168 F. 2d 612, 614 (7th Cir. 1948), *cert. denied* 335 U. S. 886; *Carter* v. *United States,* 135 F. 2d 858 (5th Cir. 1943); *Alemite Mfg. Corp.* v. *Staff,* 42 F. 2d 832 (2d Cir. 1930); and see *Poulos* v. *New Hampshire,* 345 U. S. 395, 408–9 (1953). See also *Maggio* v. *Zeitz,* 333 U. S. 56, 69 (1948); *Amalgamated Clothing Workers* v. *Richman Bros.,* 211 F. 2d 449, 452 (6th Cir. 1954), *aff'd,* 348 U. S. 511 (1955).

An injunction must be obeyed unless and until it is vacated by orderly process of law, and one who presumes to judge its validity and act in violation of it does so at his peril.

As concerns appellant's complaint that Rule 65 (d) was violated and that the injunction could not be binding on him because he was not a party to the action, it is obviously without merit.[22] He was a party to the September injunctive action, having been named in paragraph III of the petition and a prayer for relief having been issued in paragraph IV of that petition (Kasper's App. 2a–9a). Whether or not he was a party to the original desegregation suit is, of course, wholly immaterial. *Reich* v. *United States,* 239 F. 2d 134 (1st Cir. 1956), *cert. denied,* 352 U. S. 1004 (1957); *Garrigan* v. *United States,* 163 Fed. 16 (7th Cir. 1908), *cert. denied,* 214 U. S.

[22] The same point is made again, in slightly different form, in Kasper's Argument 2b on p. 9 of his brief.

514 (1909). He was not here charged with violating the order of January 4, 1956—he was charged with and found guilty of violating the permanent injunction issued on September 6, 1956 (Kasper's App. 36a). As above indicated, he was a party to the proceedings involving that order, it was served upon him, and he had actual notice thereof.

There was full compliance with the Rules.

II

Constitutional and jurisdictional questions

5. Is the injunction which appellant Kasper was found to have violated repugnant to the First Amendment? The District Court said, "No." Appellee says, "No."

In support of his argument that the injunction issued by the District Court shows on its face that it is so broadly worded that it is repugnant to and violative of the policy of the First Amendment (Br. 3), appellant Kasper cites a number of decisions having but a very remote relationship to the factual and legal situation existing in the instant case. Thus the Court is referred to a case in which an ordinance required a prior license for those seeking to solicit membership in certain organizations;[23] to a case in which an ordinance, while punishing as a breach of the peace speech which "stirs the public to anger, invites dispute, brings about a condition of unrest * * *," was broad enough to include within its prohibition speech not calculated to bring about violence or actual breaches of the peace;[24] and to a case in which, to

[23] *Staub* v. *City of Baxley,* 355 U. S. 313 (1958).

[24] *Terminiello* v. *Chicago,* 337 U. S. 1 (1949).

quote appellant's own words (Br. 5), the speech complained of "clearly remained in the realm of advocacy." [25] In none of these cases was there any question of exerting pressure upon persons to violate a court order. Certainly, the disturbances at Clinton, as revealed by the record herein, bear eloquent testimony to the effectiveness with which Kasper's advocacy was translated into action. It is therefore difficult to see the applicability of these cases.

Strangely enough, appellant fails to cite the most relevant of all precedents; *i. e.,* the opinion of this Court in the prior *Kasper* case. *Kasper* v. *Brittain, supra,* note 17. That case involved the same injunction to which appellant objects here. On his previous appeal appellant also objected to the injunction on First Amendment grounds and this Court held:

> The right to speak is not absolute and may be regulated to accomplish other legitimate objectives of government. The First Amendment does not confer the right to persuade others to violate the law. Giboney v. Empire Storage Company, 336 U. S. 490, 502. The speech here enjoined was clearly calculated to cause a violation of law and speech of that character is not within the protection of the First Amendment, Dennis v. United States, 341 U. S. 494; Feiner v. New York, 340 U. S. 315; Beauharnais v. Illinois, 343 U. S. 250; Chaplinsky v. New Hampshire, 315 U. S. 568.

[25] *Yates* v. *United States*, 354 U. S. 298 (1957).

No reason is cited why the Court should now reverse itself; and it is therefore submitted that the previous decision fully disposes of the issue.[26]

In any event, the criteria then applied by the Court are still applicable now; *i. e.,* the clear and present danger of the continuation of disturbances, such as the mob violence which followed Kasper's speech and which this Court cited in upholding the finding of contempt of the restraining order. The District Court justifiably anticipated such possibilities in making the order permanent and this anticipation was amply borne out by the events involved in this litigation—the obstruction of integration by intimidation of Negroes and the attack on Reverend Turner.

Appellant Kasper cries with alarm that "under the permanent injunction issued in this case, freedom of speech and freedom of assembly and the right to petition for redress of grievances on this subject are all snuffed out in Anderson County, Tennessee" (Br. 5). It is impossible to read such dire consequences into the words of an injunction which merely enjoins certain persons and their accomplices from hindering, obstructing, or interfering with a lawful decree of a court. Surely, this involves no impediment to free speech or assembly; it does no more than legitimately to preserve the integrity of the judicial process.

[26] While on the first appeal Kasper raised the First Amendment issue primarily in conjunction with his courthouse speech, he did also question the validity of the injunction itself (Brief in No. 13,046, *Kasper* v. *Brittain*).

6. Was appellant Kasper twice put in jeopardy by being tried in the instant case because he had been found guilty of a previous contempt of the order of the District Court? The District Court said, "No." Appellee says, "No."

Appellant Kasper's contention that he has again been convicted on the basis of the same conduct for which he was formerly convicted is not valid. The first finding of guilty was for an individual act of contempt which occurred August 29, 1956, in violation of the restraining order. The present judgment was for a second separate contempt at a later date. As stated in the amended order of attachment (Kasper's App. 13a), Kasper and his co-defendants were charged with violation of the permanent injunction by having, in November and December, 1956, "entered into an agreement or agreements to violate and to cause others to violate the said permanent injunction issued September 6, 1956." It is a simple chronological conclusion that the speech of August 29 and the conspiratorial agreements of November and December constitute two separate occurrences, hence two separate contempts.

The fact that Kasper was found guilty of one contempt of court did not immunize him from punishment for subsequent contemptuous conduct. To hold otherwise, would permit him to interfere with and frustrate the orders of the court forever after on the theory that to punish him would be to put him again in jeopardy. Appellant was no more immune from a second finding of contempt of the orders of the court below than a narcotics peddler is immune from two convictions for two sales of heroin made several months apart.

There is no doubt that successive and separate contempts are punishable as separate offenses.[27] The cases cited by appellant are readily distinguishable since their holdings concern examination of recalcitrant witnesses and stand only for the principle that the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry. This is a vastly different situation from that presented by the instant case. The jury found from the evidence that Kasper committed contempt in November and December of 1956.[28] This contempt was neither charged nor punished in *Kasper* v. *Brittain.*

Accordingly, there was no second jeopardy.

7. Was appellant Kasper denied the right to a speedy trial as guaranteed by the Sixth Amendment- The District Court said, "No." Appellee says, "No."

Appellant Kasper further contends that the elapse of four months from the time the amended order of attachment issued to the time trial was had resulted in a denial of his right to a speedy trial as guaranteed by the Sixth Amendment.

In the first place, there is considerable doubt that

[27] *Jennings* v. *United States*, 264 Fed. 399 (8th Cir. 1920); *Tobin* v. *Pielet*, 186 F. 2d 886 (7th Cir. 1951); 43 C. J. S. *Injunctions* § 265; The Fair Labor Standards Act, for example, even anticipates such possibility in providing for imprisonment after a second offense against an injunction issued under the act. 29 U. S. C. 216 (a).

[28] As to whether this evidence was sufficient to sustain the verdict of the jury, see Argument 15, at pp. 69–72, *infra.* Suffice it to say here that Kasper's involvement with the beating and the other interference administered by his co-conspirators was substantiated below by evidence much less ethereal than the remarks on "mental telepathy" and "remote control" (Br. 11) would suggest.

this question is properly before the Court on this appeal. It has been held that the proper way to test a ruling of a trial court denying a motion for a speedy trial is by a petition for a writ of mandamus filed with the Court of Appeals. *Miller* v. *Overholser,* 206 F. 2d 415, 418 (D. C. Cir. 1953); *Fowler* v. *Hunter,* 164 F. 2d 668 (10th Cir. 1947), *cert. denied,* 333 U. S. 868 (1948); *Frankel* v. *Woodrough,* 7 F. 2d 796 (8th Cir. 1925); *McDonald* v. *Hudspeth,* 113 F. 2d 984 (10th Cir. 1940) *cert. denied,* 311 U. S. 683. Where a defendant fails to use this remedy it may well be too late to assert violation of the right by appeal from the ultimate judgment.

In any event, the point is not well taken. In *Beavers* v. *Haubert,* 198 U. S. 77 (1905), the Supreme Court indicated that the right to a speedy trial was necessarily relative. The guarantee is that of a speedy trial, not of an immediate trial. "It secures rights to a defendant. It does not preclude the rights of public justice" (198 U. S. at 87).

Appellant argues as if the effect of the mandate of the Amendment were that of a statute of limitations which automatically cuts off the possibility of prosecution by the mere lapse of time. But the Sixth Amendment is less rigid. The existence—or at least the probability—of prejudice is a key factor. *United States* v. *Holmes,* 168 F. 2d 888 (3d Cir. 1948). Appellant shows no prejudice whatever,[29] yet the result he postulates would in effect simply cut off

[29] Also there is no suggestion that the delay was purposeful. Cf. *Pollard* v. *United States,* 352 U. S. 354 (1957).

rights of the public, without securing any rights to him.

The requirement of a speedy trial must be read in the context of the practical administration of justice; each case depending upon its facts and circumstances. *Kyle* v. *United States,* 211 F. 2d 912 (9th Cir. 1954); *Shepherd* v. *United States,* 163 F. 2d 975 (8th Cir. 1947); *United States* ex rel. *Hanson* v. *Ragen,* 166 F. 2d 608 (7th Cir. 1948), *cert. denied,* 334 U. S. 849.

This case was complex. From either the point of view of the prosecution or that of the defense some time was needed to marshal the evidence, to prepare legal argument on motions, etc. Similarly the court was confronted with voluminous pre-trial motions and requests, all of which had to be heard, considered, and acted upon.

Since the fixing of a date for criminal trial is largely a matter of discretion of the trial judge, whose judgment will not be disturbed unless arbitrary, oppressive, or vexatious delay is shown, *Chinn* v. *United States,* 228 F. 2d 151 (4th Cir. 1955), it is apparent that in the instant case—involving neither prejudice nor arbitrary action—there is no cause for a reversal of the action of the District Court.

8. Was appellant Kasper denied the effective assistance of counsel by not being transferred to a penal institution near Washington, D. C., so he could consult with his Washington attorney? The District Court did not rule on this contention. Appellee says, "No."

Appellant Kasper further contends that he was denied due process of law under the Fifth and Sixth Amendments in that he was denied the effective assistance of counsel by the refusal of the Attorney

General and the Director of the Bureau of Prisons to transfer him from a federal prison in Tallahassee, Florida, to a prison in or near Washington, D. C. It is his position that since his attorney was located in Washington, D. C., he was unlawfully denied an opportunity for personal consultation with his attorney in the preparation of this appeal.

This contention states no ground for appeal. No order or action of the lower court is challenged. The District Court never ruled on this issue, nor has this Court ever been requested, by motion or otherwise, to intervene on appellant's behalf.

However, even properly raised, the contention is totally without merit. Kasper has not alleged facts which show that he has been denied the effective assistance of counsel. Appellant does not say that he was not permitted to contact his attorney. Nor does he charge that his attorney was not permitted to visit him for consultation. Cf. *Wallace* v. *United States,* 174 F. 2d 112 (8th Cir. 1949), *cert. denied,* 337 U. S. 947; *Miller* v. *Sanford,* 150 F. 2d 637 (5th Cir. 1945) *cert. denied,* 326 U. S. 787. He simply argues for a rule which would guarantee every prisoner serving a lawfully imposed sentence in a federal institution the right to be moved to or near the office of his attorney on appeal, no matter in what part of the country that office might be located.[30] To state the proposition is to demonstrate its absurdity.

[30] In this case, appellant's desire was not limited to transfer to or near the place where the contempt occurred; but some third city, many hundreds of miles away, was chosen as the only place of incarceration which would assure him the effective assistance of counsel.

Furthermore, it has been held that the Constitutional guarantee of the right to assistance of counsel even in a criminal case does not extend beyond the trial. *Thompson* v. *Johnston,* 160 F. 2d 374 (9th Cir. 1947) *cert. denied,* 331 U. S. 853; *Gargano* v. *United States,* 137 F. 2d 944 (9th Cir. 1943); *Lovvorn* v. *Johnston,* 118 F. 2d 704 (9th Cir. 1941) *cert. denied,* 314 U. S. 607. See Annotation 19 A. L. R. 2d 818 (1951).

9. Did the District Court have jurisdiction to issue the injunction? The District Court said, "Yes." Appellee says, "Yes."

There can hardly be any serious question as to a court's jurisdiction to enforce and to prevent violations of its own orders.[31] The restraining order and the injunctions specifically refer to the January 1956 order and enjoin the violation thereof. Courts, of course, possess ancillary power to effectuate their decrees. 28 U. S. C. § 1651; *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 239 (1934); *Julian* v. *Central Trust Co.,* 193 U. S. 93, 112 (1904); *Root* v. *Woolworth,* 150 U. S. 401, 410–413 (1893). See also *Steelman* v. *All Continent Corp.,* 301 U. S. 278, 288–9 (1937); *Dugas* v. *American Surety Co.,* 300 U. S. 414, 428 (1937); *Moore* v. *N. Y. Cotton Exchange,* 270 U. S. 593 (1926); *Looney* v. *Eastern Texas R. R. Co.,* 247 U. S. 214 (1918). And this ancillary jurisdiction extended to appellant even though he was not a party to the original suit which resulted in

[31] Appellant Kasper's Argument 5 (Br.) refers in the caption also to the question of whether the court had jurisdiction over his person. However, the matter is not pressed in the body of the Argument. Moreover, the problem is discussed and, we believe, adequately answered, in our Argument 4, *supra,* at pp. 30–31.

the desegregation order and irrespective of whether the lower court would have had independent federal jurisdiction to issue the restraining order. *Dickey* v. *Turner,* 49 F. 2d 998 (6th Cir. 1931); *Reich* v. *United States, supra; Local Loan Co.,* v. *Hunt, supra; Julian* v. *Central Trust Co., supra; Lamb* v. *Schmitt,* 285 U. S. 222, 227 (1932); *Towle* v. *Donnell,* 49 F. 2d 49 (6th Cir. 1931); *Brewer* v. *Hoxie School District, supra,* note 18.[32]

In further support of his contention of lack of jurisdiction, Kasper (Br. 11–16) attempts to relitigate the original Clinton school desegregation case.[33] This Court stated in the previous *Kasper* case:[34]

> The question whether the district court had jurisdiction of the controversy and the power to enforce its order by the injunctive process need give us little trouble. In Brown v. The Board of Education, 347 U. S. 483, the Supreme Court concluded that in the field of public education segregation is a denial of equal protection of the laws. The constitutional principle there decided was implemented by the mandate for decree in Brown v. Board of Education,

[32] This should dispose also of Kasper's contentions that the court had no jurisdiction over his co-appellants (Br. 28), and that only the state authorities had power to deal with him (Br. 18, 20). As to the remainder of Kasper's Argument 8, that he should have been indicted rather than proceeded against by contempt, see *Green* v. *United States,* 356 U. S. 165 (1958).

[33] Elsewhere in his brief, he goes even further afield. Thus, at pp. 16–18 of his brief, he attempts to relitigate the decision of the Supreme Court in *Brown* v. *Board of Education,* 347 U. S. 483 (1954) (the original school desegregation case). Obviously this attempt is frivolous.

[34] *Kasper* v. *Brittain, supra* note 17.

> 349 U. S. 294, wherein the cases there considered were remanded to the district courts to take such proceedings and enter such orders and decrees consistent with the opinion, as are necessary and proper to admit the parties to the cases to the public schools on a racially nondiscriminatory basis, with all deliberate speed. By the holdings there announced, we were bound in reversing the McSwain case and the district court was, likewise, bound to issue its injunctional order, requiring the School Board to desegregate the High Schools of Anderson County. Moreover, in directing this to be done, the district judge acted with all deliberate speed, in conformity with our decision and the decision of the Supreme Court, when he commanded the School Board to desegregate by the fall term of 1956. It would seem that the Brown case, its associated cases, and our own judgment in McSwain would be a conclusive response to the appellant's arguments, without further rationalization. There is also available to us, however, the exhaustive and scholarly opinion of Circuit Judge Woodrough, speaking for the Court of Appeals of the Eighth Circuit in Brewer v. Hoxie School District No. 46, 238 F. 2d 91, 98, wherein it was held that the jurisdiction of the Federal Courts and the application of its remedies to protect rights safeguarded by thee Constitution is now so well established that no one may question it. The Brewer case is completely documented and we have benefited much from the thoroughness of the research there disclosed.

In the light of such holding appellant is certainly foreclosed from collateral attack on the McSwain

decree,[35] but we shall answer briefly his contentions.

Appellant contends that mandamus, an action at law, would have been the exclusively appropriate procedure. Such a contention is nothing short of frivolous. The original school segregation cases were brought as class actions in equity[36] and the Supreme Court's implementation decree remanding them to the district courts stated:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.[37]

As to the "political matters" argument, certainly the right to the equal protection of the laws is not within this category. The functions of the school board do indeed derive from State law, and public education is indeed a state function but, if offered by the state, such education must meet federal Constitutional standards, as the *Brown* case, *supra*, holds.[38]

[35] It is perhaps relevant, too, that this particular Argument is taken almost verbatim from an unsuccessful petition for rehearing Kasper filed in this Court in the earlier case involving him. See Petition for Rehearing in No. 13,046, *Kasper* v. *Brittain*, at pp. 3–9.

[36] *Brown* v. *Board of Education*, *supra* note 33.

[37] 349 U. S. at 300.

[38] *Williams* v. *Dalton*, 231 F. 2d 646 (6th Cir. 1956), the decision emphasized by appellant, deals with a situation for which 28 U. S. C. 2254 required exhaustion of state remedies and which plaintiff tried to circumvent by misuse of the civil rights statute 42 U. S. C. 1983.

Finally, on the argument that equity jurisdiction is confined to proprietary rights,

> * * * jurisdiction of the federal courts to issue injunction to protect rights safeguarded by the Constitution is well established. See Philadelphia Co. v. Stimson, 223 U. S. 605; Hays v. Seattle, 251 U. S. 233; Pennoyer v. McConnaughy, 140 U. S. 1; City Railway Co. v. Citizens' Railroad Co., 166 U. S. 557; City of Mitchell v. Dakota Telephone Co., 246 U. S. 396, 407; and Bell v. Hood, supra, at 684. * * * where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. An injunction will issue wherever necessary "to afford adequate protection of Contsitutional rights," Spielman Motor Co. v. Dodge, 295 U. S. 89, 95. Federal courts have the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available. (*Brewer* v. *Hoxie*, *supra* at 98.)

Clearly, the judgment is not jurisdictionally defective.[39]

[39] As for the contention that the injunction is invalid as enjoining crimes, see *Green* v. *United States*, *supra* note 32; *In re Debs*, 158 U. S. 564, 594 (1895).

III

Jury questions

10. Did the Court, in using in its charge the words "good deed" in reference to Reverend Turner, invade the province of the jury? The District Court said, "No." Appellee says, "No."

Appellants argue that by instructing the jury that Reverend Turner's deed was a well-intentioned contribution from the standpoint of integration, and referring to it as a "good deed," the court usurped the province of the jury and denied appellant a fair jury trial.

The original charge read as follows (53a):

> *From the standpoint of integration what he did was a well-intentioned contribution.* Now the jury is called upon to determine whether his being afterwards beaten had the retroactive effect of *undoing the good deed* done by him earlier in the morning. The beating of the minister is without significance in this proceeding, unless it is clear beyond a reasonable doubt in the minds of the jury that the assault and battery retroactively destroyed the good deed and thus hindered, obstructed and interfered with integration in the school [Emphasis added].

It will be noted that the mention of a "well-intentioned contribution" is qualified by the phrase "from the standpoint of integration," and that the term "good deed" is in *pari materia* with "well-intentioned contribution," a synonymous expression still qualified by the "standpoint of integration" phrase. Accordingly, the statement by the court was no more than a perfectly proper comment on the evidence. In the light of the very liberal federal court rule allowing

such comment[40] it is difficult to see the pertinence of appellant's objection.

Additionally, when at the conclusion of the charge defense counsel objected that the intent was a matter to be left to the jury and requested that the reference to the "good deed" be eliminated (66b–67b), the court charged[41] (67b):

> Ladies and gentlemen of the Jury, I said to you in the course of the charge that from the standpoint of integration what Reverend Turner did was a well-intentioned contribution. *From the standpoint of segregation it might not be considered a well-intentioned contribution.* Reverend Turner's intention on the occasion in question is immaterial unless it had a bearing on whether or not what was allegedly done to him on the occasion in question was one of the overt acts charged in the amended order of attachment that interfered with the integration of that school. If his intention had any bearing on that question, his intention on the occasion in question is a *question of fact for the jury to determine, as well as all other questions of fact in this case.* [Emphasis added].

This more than protected appellants;[42] and despite their contention that this amended instruction was ineffective to undo the alleged damage, it is clear that the matter was squarely placed before the jury as an

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[40] *Bernal-Zazueta* v. *United States*, 225 F. 2d 60 (9th Cir. 1955); *Garber* v. *United States*, 145 F. 2d 966 (6th Cir. 1944); 9 Wigmore On Evidence § 2551 (3d ed.).

[41] This was the only request for supplemental instructions that was granted.

[42] See *Petro* v. *United States*, 210 F. 2d 49 (6th Cir. 1954), *cert. denied*, sub nom. *Sanzo* v. *United States*, 347 U. S. 978.

issue of fact for their decision.[43] Moreover, when the court asked if there were any further objection to the charge both defense counsel replied, "No" (68b). Since appellants at the time failed to object to the charge as supplemented they are foreclosed from so doing on appeal.[44]

11. Did the District Court adequately charge the jury with respect to appellants Bullock et al. that the prosecution must prove beyond a reasonable doubt the agreement or agreements between said appellants and Kasper? The District Court said, "Yes." Appellee says, "Yes."

Essentially appellants Bullock et al. under Question III of their brief make two points: First, that there was error because the amended attachment order did not set out, and the charge to the jury did not require the jury to find, that there was an agreement between Kasper and these appellants to do the specified overt acts. Second, that the court's charge to the jury directed them that concert of action raised a presumption of conspiracy.

At the outset it must be recognized that this was a case of criminal contempt—not a criminal conspiracy prosecution predicated on an agreement to commit a specified crime. For discussion of the distinction between conspiracy and criminal contempt, see *Kelton* v. *United States,* 294 Fed. 491 (3rd Cir. 1924).

However, the more basic flaw in appellants' argument is that the act committed pursuant to the conspiracy which constituted the contemptuous conduct was neither the congregating on the road, nor the

[43] Cf. *Neeper* v. *United States*, 93 F. 2d 409 (8th Cir. 1937), *cert. denied*, 303 U. S. 644 (1938); *Glasser* v. *United States*, *infra*, p. 47; *Goldstein* v. *United States*, 63 F. 2d 609, 613 (8th Cir. 1933).

[44] Rule 30, F. R. Crim. P.

attack on Reverend Turner, but rather it was the act of disobedience of a lawful court injunction. The agreement to disobey the injunction—*i. e.,* to hinder or obstruct desegregation of the Clinton school—is the agreement which had to be proved beyond a reasonable doubt. The means whereby this particular agreement was accomplished did not have to be part of the agreement. In all probability precisely what means would be employed to hinder desegregation of the school was not wholly formulated by appellants until the opportunity arose.

The Supreme Court in *Glasser* v. *United States,* 315 U. S. 60 (1942) was confronted with a contention than an indictment for criminal conspiracy was defective in that it did not charge the giving or receiving of bribes. In answer, the Court stated (315 U. S. at 67), quoting the *Manton* case, *infra:*

> It [the indictment] charges a conspiracy * * * to defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense.

See also *United States* v. *Manton,* 107 F. 2d 834 (2d Cir. 1939), *cert. denied,* 309 U. S. 664; *United States* v. *Klein,* 247 F. 2d 908 (2d Cir. 1957), *cert. denied,* 355 U. S 924 (1958).

In this case both the attachment order and the court's charge to the jury set out fully that the agreement for which the appellants were charged and the agreement which had to be proved by the Government beyond a reasonable doubt was an agreement to hin-

der or obstruct the integration of the Clinton High School in violation of the decree of the District Court. The only wrongful act agreed to which had to be proved was the act of obstructing or hindering integration and proof of the agreement to do this act consummated the conspiracy. Any further specification as to the means used was but evidence, which admittedly must be proved—but not as part of the agreement. *Braatelien* v. *United States,* 147 F. 2d 888 (8th Cir. 1945). Such specification need not even be made in the charging part of the order of attachment (though it is proper to do so). *Culp* v. *United States,* 131 F. 2d 93 (8th Cir. 1942); *Rose* v. *United States,* 149 F. 2d 755 (9th Cir. 1945). Additional specifics, may, in a proper case, be the object of a bill of particulars. *Glasser* v. *United States, supra.*[45]

Judge Taylor explained carefully to the jury the importance of the specified acts and their relationship to the agreement to obstruct the court's order in the following terms (48a):

> In order to establish guilt of the defendants or any of them, beyond a reasonable doubt, the prosecution must establish the following:
>
> * * * * *
>
> Third: That the overt acts allegedly committed by them had the operative effect of hindering, obstructing, or interfering with integration in Clinton High School.

[45] In this case no bill of particulars was necessary because the specific means whereby the unlawful objective of the conspiracy was accomplished were set out in the order of attachment in three numbered paragraphs (25a).

This was what was required; no more was necessary.

Appellants' other contention that the court charged the jury that concert of action raises a presumption of conspiracy is similarly without merit. Appellee urges the Court to read the entire charge to the jury most of which appears in appellants' (Bullock et al.) Appendix at pp. 38a to 56a. This charge not only shows that Judge Taylor did not fall into the error which appellants claim, but further it stands as an example of excellent and most carefully prepared instructions.

Specifically, appellants claim prejudicial error also because of this sentence in the court's charge: "Concert of action presupposes conspiracy between John Kasper and the other defendants." It should be noted that appellants are not in a position to assert error in connection with this matter. They did object to several portions of the charge; indeed, they objected to that part of the charge "which dealt with the conspiracy" (66b). But this objection was not the one now made; it arose in a wholly different context. No objection having been made, error cannot now be argued. And even if it were assumed, *arguendo,* that the objection which counsel made contemplated the error here asserted, failure specifically to point out to the court that portion of the charge which was objectionable and to state the reasons therefor precludes challenge on appeal. See Rule 30, F. R. Crim. P.; *Jackson* v. *United States,* 179 F. 2d 842 (6th Cir. 1950), *cert. denied,* 339 U. S. 981

Marbs v. *United States,* 250 F. 2d 514, 517 (8th Cir. 1957).

In any event, the instruction did not erroneously state the law. The sentence appellants cite is wrenched from the context of the whole charge and also from the context of the paragraph in which it appears.

Judge Taylor repeatedly told the jury that there were three elements which had to be proved beyond a reasonable doubt before the jury could find appellants guilty of contempt: (1) notice of the injunction, (2) acts committed in concert with Kasper, (3) that the acts so committed had the effect of obstructing integration in violation of the court's injunction. *E. g.,* 48a, 53a. He explained further that the second element—concert of action—(which is the expression used in the injunction) had several facets, each of which in turn also had to be proved; and he defined a conspiracy as an agreement whereby two or more persons act together to accomplish their agreed-upon unlawful objective. The jury was required under the charge to find proof beyond a reasonable doubt of each of these elements before they could convict. Thus stated in context the sentence mentioned by appellants takes on a slightly different meaning, as follows (49a):

> Re-examination of the language of the injunction emphasizes the further requirement which must be proved before the injunction becomes operative against these defendants * * *. Applied with particularity here, they are forbidden to act in concert with John Kasper to hinder, obstruct or interfere with integration in the High School in Clinton.
>
> Concert of action presupposes a conspiracy between John Kasper and the other defendants. A conspiracy of a criminal nature arises where two or more persons agree to accomplish an illegal objective or accomplish a lawful objective in an unlawful manner, which conspiracy becomes a crime in fact when an overt act is committed by one or more of the conspirators in pursuit of the agreed objectives.

Actually this charge placed a heavier burden of proof on the Government than that which is required by the specific wording of the injunction. For it informed the jury that they must be satisfied beyond a reasonable doubt that a conspiracy, as defined, existed before the second element of the contempt charge—acts committed in concert—could be found to have existed.

Appellants' construction of the court's language would be tenable only on the absurd theory that the court meant to vitiate its lengthy explanation of all the elements that had to be proved simply by saying that conspiracy is presumed on a showing of concert of action. Such an interpretation would be most unreasonable—and it would be equally unreasonable to suppose that the jury in this case so understood it.[46]

Accordingly, no error was committed with respect to this portion of the charge.

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[46] Nor did counsel. For, as indicated above, none objected to the language now found obnoxious.

12. Was the District Court right in refusing to instruct the jury that they must draw an inference unfavorable to the Government from the failure of the Negro students at Clinton High School to testify? The District Court said, "Yes." Appellee says, "Yes."

Appellants argue that the court should have instructed the jury to draw an inference unfavorable to the Government from the fact that the Negro students at Clinton High School were not called to testify. In order to be entitled to the requested instruction, it would have been necessary for the appellants to show that the absent witnesses were peculiarly within the power of the Government to produce. In *McGuire* v. *United States,* 171 F. 2d 136 (D. C. Cir. 1948), the trial court was requested to instruct the jury in a manner similar to the instruction requested in the instant case. The absent witnesses had been subpoenaed by the Government, but they had not been called to testify. Said the Court of Appeals (171 F. 2d at 137):

> The instruction was properly denied. There was not a scintilla of evidence to show that the witnesses were peculiarly within the power of the Government to produce. True they were under Government subpoena but there is nothing to show that they were not equally subject to subpoena by defendant or that defendant, if he deemed that their testimony would be favorable to him, could not have put them on the stand even though they were under subpoena by the Government.

Appellants have not alleged or shown that the Negro students whose testimony, they say, "was vital to the defense of these alleged co-conspirators," were not available to them. If these Negro children were

vital to appellants they could, of course, have been subpoenaed by appellants. The Government is under no duty to produce witnesses for the defense. *Zammar* v. *United States,* 217 F. 2d 223 (8th Cir. 1954); *Miller* v. *United States,* 53 F. 2d 316 (7th Cir. 1931).

Where the witnesses are available to both parties, it is not error for the trial court to refuse to instruct the jury as to inferences to be drawn from their absence. *Shurman* v. *United States,* 233 F. 2d 272 (5th Cir. 1956) (absent witness was a Government informer who was on parole); *United States* v. *LaRocca,* 224 F. 2d 859 (2d Cir. 1955) (absent witness in jail).[47]

There was no need for the Government to call these Negro children to prove its own case. The children were not present when the overt acts charged in the amended order of attachment were committed. They could have contributed nothing even if they had been present, for their testimony would merely have been cumulative to that of the many witnesses who testified as to the events in question. There was no allegation that the children had been intimidated other than by the public events which were proved in considerable detail, so that with respect to the question of intimidation, too, they had nothing to contribute.[48] And, of course, there is no charge that the Government suppressed evidence. Cf. *Morton* v. *United States,* 147

[47] Appellants rely in part on *Milton* v. *United States,* 110 F. 2d 556 (D. C. Cir. 1940) and *Clayton* v. *United States,* 152 F. 2d 402 (9th Cir. 1945), both of which were concerned with argument by counsel, not jury instructions.

[48] They would hardly have been allowed to testify as to their state of mind had they been called.

F. 2d 28 (D. C. Cir. 1945); *United States* v. *Coletti,* 245 F. 2d 781 (2d Cir. 1957), *cert. denied,* 355 U. S. 874.

The trial of this case lasted twelve days. It was necessary for the Government to be selective in its witnesses in order not to prolong the trial unduly. To accept appellants' theory would be to require the Government to produce every available witness in every case to avoid an unfavorable inference.

13. Was it error to distribute to the members of the jury the "Handbook for Jurors"? The District Court said, "No." Appellee says, "No."

Appellants contend that it was prejudicial and reversible error for the lower court to permit the court clerk to issue to each member of the jury panel a pamphlet entitled "Handbook for Jurors Serving in the United States District Courts," and to deny their motion for a new trial based on this fact. A number of theories are advanced in support of this contention.

It is argued that the issuance of the handbook alters the statutory manner of selecting jurors. However, the jurors were selected in the statutory manner before the pamphlet was issued. The jurors were not required to read it, and there is no assertion that they would have been disqualified for not reading it.

For the proposition that the contents of the pamphlet constitute instructions to the jury which are given contrary to statutory provisions appellants cite the California case of *People* v. *Weatherford,* 27 Cal. 2d 401, 160 P. 2d 210 (1945). But in a later decision in *People* v. *Lopez,* 32 Cal. 2d 673, 197 P.

2d 757 (1948), the Supreme Court of California, in considering the use of a jurors' handbook said, "Even a cursory reading of these 'General Instructions' shows that they are not, and should not be considered to be the instructions which the codes require to be given to the jury at the close of a trial," and added, "The Constitution does not contemplate keeping prospective jurors in a state of ignorance about matters of general information and concern to them, and neither the letter nor the spirit of the Constitution prohibits the giving of general, preliminary information which will make them better able to perform their duties in deciding cases" (197 P. 2d at 759).

The handbook of which the appellants complain is not and does not purport to be a charge to the jury. It is merely a booklet of general information, designed to acquaint its readers with some of the rudiments of jury service. No one who reads it would consider it a treatise on federal procedure. Of course, it is not all-inclusive—it could not be. It is not a charge to the jury—it was not intended to be. And no one could seriously consider it to be more than an orientation booklet. More extensive discourses on law have been held to be general information rather than charges to the jury. *People* v. *Lopez, supra* (text of handbook appended).

The Handbook for Jurors was published by authorization of the Judicial Conference of the United States and prepared by the Committee on Operation of the Jury System. The members of this Committee were trial judges representing great length and variety

of experience on the federal bench. Each of them over the years conducted many jury trials. They knew the use for which the booklet was intended. That use was a broad orientation of jurors or prospective jurors without relation to any specific case or cases.[49] There is no showing that the jurors thought it was more than that.

The appellants further contend that the issuance of the pamphlets deprived them of their constitutional right to be represented by counsel at all stages of the trial and to object to instructions given to the jury. But this contention assumes the very issue at hand—namely, whether or not the information in the pamphlet constitutes the court's instructions to the jury. Obviously it does not. As previously indicated, the handbook contains orientation information concerning jury duty. The handbooks were in the nature of general instructions given to the entire panel at the beginning of a term; and the right which appellants allegedly were denied does not extend to this stage of the proceedings. Thus, in upholding a conviction challenged on the ground that the giving of general instructions to the jury panel by the judge in the defendant's absence deprived him of his right to be present at all stages of the trial, the Superior Court of Pennsylvania said:[50]

> An accused's right to be present pertains to the trial itself, and may be said to extend to every part and stage of the trial proper. But it seems

[49] Incidentally, the distinguished auspices of the handbook surely give it a cast of reflection and consideration.

[50] *Commonwealth* v. *Katz*, 138 Pa. Super. 50, 10 A. 2d 49 (1939).

> according to reason that this right does not extend to matters which cannot be related to or connected with the subsequent trial of the accused, and if therefrom no harm or prejudice can be said to result to him whereby he may be deprived of a fair trial by an impartial jury. The general charge now before us was not made applicable to appellants' trial by anything said therein, or by any reference thereto at any stage of his trial; it was not incompatible with the specific instructions given appellants' jury as to their duties and as to the facts and the law of the case; and we can discover nothing therein that might have influenced the verdict against him, and which would justify a reversal of his conviction.

In the *Lopez* case, *supra,* the court also considered and rejected the contention that by reason of the distribution of the handbook the defendant had been denied the right to be present at all stages of the trial.

It is appellants' further argument that the handbook brings to the jurors futile and inaccurate information. For example, they object to such statements as that "The procedure in a criminal case in a United States District Court is very similar in many respects to that in a civil case except that the United States government always begins the case," and that, "What has been said in this handbook about the procedure in civil cases applies in a general way to criminal trials." Appellants feel that their case has been prejudiced by these statements because the handbook fails to instruct the jury as to the burden of proof in a criminal case. However, it should be noted that the handbook says nothing of the burden of proof

in a civil case either. Therefore, the statements could not have misled the jurors in this respect. Moreover, in its charge to the jury the court repeatedly emphasized the fact that the Government had the burden of proving guilt beyond a reasonable doubt (40a, 41a, 55a).

Appellants also claim error in the statement that "The defendant has a right to present his evidence at the trial in open court before the judge and the petit jury," in that this did not inform the jury that the defendant is not required to present any evidence, and that no inference can be drawn from the fact that he does not testify. The handbook does not deal with the question of whether or not a defendant should take the stand. It merely states that he may present his side of the case in open court—which these apellants did.

All of these matters were fully covered in the court's charge in very explicit terms (39a–40a):

> It has been observed by the jury that the defendants did not take the stand in their own defense. That is a fact of passing interest only. Failure of a defendant to testify in his own behalf has no evidentiary significance, and no unfavorable inferences should be drawn from such failure. It is strictly a defendant's privilege to testify or not to testify, as he likes. Each defendant entered the trial with a presumption of innocence in his favor; it was the prosecutor's duty to overthrow it in order to warrant a finding of guilt.
>
> * * * * *

> That presumption of innocence is to be borne in mind by the jury throughout their deliberations on the case. It protects the defendant from a verdict of guilty unless, after the jury has carefully weighed all the evidence in the case and considered it, that evidence satisfies the jury of the defendant's guilt, and satisfies you so clearly, as to the guilt of the defendant, as to have in your mind no reasonable doubt of his guilt.

Appellants wholly fail to show that their case was prejudiced in any way by the jurors' reading of the handbook. It is obviously a booklet of general instructions and could not be construed by anyone to be the controlling law of any particular case. This would be evident to anyone who—like the jurors here—had heard the court charge them in detail as to the applicable legal principles. In this connection the following passages from the handbook should be noted:

> (a) The judge determines the law to be applied in the case while the jury decides the facts (70a).
>
> (b) The law is what the judge declares the law to be (74a).
>
> (c) The verdict is reached without regard to what may be the opinion of the judge as to the facts, though as to the law his charge controls (75a).
>
> (d) The jury in a criminal case must determine what are the true facts and the judge tells the jury what is the law (77a).
>
> (e) In both civil and criminal cases, it is the jury's duty to decide the facts in accord-

ance with the principles of law laid down by the judge in his charge to the jury (77a).

(f) Each juror should give close attention to the testimony. He is sworn to discard his prejudices and follow the court's instructions (78a).

(g) They [jurors] violate their oath if they render their decision on the basis of the effect their verdict may have on other situations (80a).

The object of such pamphlets is to give the jurors a general picture of court procedure, a matter which they could equally learn from such general sources as political science textbooks, encyclopedias, etc. If it appears that a juror had received information covering courts and court procedure in that manner, would that be grounds for a new trial? To argue, on the one hand, that a handbook should be simple enough for the layman to understand and, on the other, that it should contain every technical refinement, is to argue against handbooks altogether. Even the case of *People* v. *Schoos,* 399 Ill. 527, 78 N. E. 2d 245, 2 A. L. R. 2d 1096 (1948), principally relied on by appellants, conceded that a proper pamphlet could be drafted.[51] The use of such guides has been urged for some time. See 9 Texas L. Rev. 37 (1930); 23 Ore. L. Rev. 5 (1943); Miner, *The Jury Problem,* 41 Ill. L. Rev. 183, 187 (1946). The *Lopez* and *Schoos* cases were rendered in the same year. The commentary on the cases was overwhelmingly in favor of the use of handbooks and critical of the *Schoos*

[51] The pamphlet in that case drastically differs from the one here involved.

decision. Comment, *Pre-Trial Education of Jurors,* 38 Jour. of Crim. Law and Criminology, 620 (1948); Note, 38 Calif. L. Rev. 340 (1950); Note, 62 Harv. L. Rev. 139 (1948); Note, 22 So. Calif. L. Rev. 313 (1949); Note, 2 Okla. L. Rev. 520 (1949); Note 2 Vand. L. Rev. 313 (1949).

Finally, assuming, *arguendo,* that the use of the handbook was not proper, it is clear that the procedure for raising a question as to the prejudicial nature thereof is by a challenge for cause on the *voir dire* examination. *United States* v. *Gordon,* 253 F. 2d 177 (7th Cir. 1958).[52] If the ability of a juror to decide impartially the issues to be tried before him is seriously affected by an outside source, such juror may, of course, be removed for cause. However, the failure on the part of a party to detect and challenge possible disqualifying factors constitutes a waiver of his right thereafter to complain. The same "Handbook for Jurors Serving in the United States District Courts" was the subject of the *Gordon* case, *supra.* The defendant raised the question of the handbook by a challenge to the array, and the Court of Appeals said:

> Assuming, *arguendo,* that the entire panel read the handbook and that the handbook did contain statements inimical to a defendant in a criminal case, the defendant had the right of challenge to the polls. On *voir dire* examination he had the right, unless he desired to waive it, and it was his duty, to ascertain the true

[52] This decision represents a reversal by the Court, sitting *en banc,* of the decision of the panel which is cited in both of the briefs filed by the appellants in the instant case.

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> facts. In the event any member had read the handbook and for that reason could not give him a fair and impartial trial he had the right to challenge the juror for cause. Failure of the court to sustain such a proper challenge would constitute reversible error and defendant's right to a fair and impartial trial would be preserved. Under the law he could assert that right in no other manner.[53]

That the appellants may not have known of the handbook until after the jury had been sworn is of no consequence. This handbook had been given out to jury panels for several years (82a). It was the standard practice of the court. The use of the pamphlet instructions was not kept secret from the appellants. It is the responsibility of the parties to determine on *voir dire* examination whether or not a juror is biased or prejudiced. The failure to do so constitutes a waiver, see 39 Am. Jur., *New Trial,* § 44, for jurors cannot be challenged for bias by a motion for a new trial. Cf. *Frazier* v. *United States,* 335 U. S. 497 (1948).

14. Was the District Court right in refusing to grant a new trial merely because a juror viewed a television program in which no opinion was expressed as to the guilt or innocense of any of these appellants but which was restricted to portraying this particular juror as a citizen of honesty and integrity who could be depended upon to render an honest verdict? The District Court said, "Yes." Appellee says, "Yes."

Appellant Kasper contends that the failure of one of the jurors to follow the instructions of the court not to view television programs having to do with the case constitutes reversible error.

[53] 253 F. 2d at 185.

The testimony adduced on the motion for new trial revealed that juror May viewed a television program during the progress of the trial in which a report on the Clinton trials occupied about 5 minutes (109a). Specifically the program involved an interview between the announcer and May's next door neighbor, and also an interview with May's minister (32a). The subject matter was May as an individual; no mention of the trial proceedings, evidence, or defendants was made (115a). Both of the men interviewed responded favorably to questions concerning May and each stated that he believed May would render an honest decision in the trial at hand (110a, 114a).

Appellant Kasper maintains that the theme of the program was "will a Southern Jury convict," yet May himself did not not recognize this as the theme (115a).[54] The theme of the program and the importance attached thereto in determining prejudice were for Judge Taylor, who assiduously sought every detail concerning this matter and carefully sifted the

[54] Appellant's statement (Br. 22) that a disinterested witness testified that such was the theme is not only unsupported by an appendix reference, but it also suffers from the graver infirmity that this person can hardly be termed "disinterested." She stated that she would be influenced by her pastor's views on integration or segregation even if she were a juror (68b) and that she came to be a witness by contacting a person solely because he was known to her as a segregationist (68b–69b). Other than that, there was no proof as to the alleged "theme," since the affidavit reprinted on p. 22 of appellant Kasper's brief is no more than an argumentative conclusion.

evidence. He was mindful of all aspects when he denied the motion for a new trial.[55]

Kasper asserts that a presumption of prejudice arises from this matter, and he relies upon *Remmer* v. *United States,* 347 U. S. 227 (1954) in support of this proposition. In that case the Supreme Court remanded the cause to the District Court for a hearing to determine the prejudicial effect of (1) a suggestion to a juror that the defendant had plenty of money and that he (the juror) should make a deal, and (2) an FBI investigation of the incident. Certainly there is no factual relationship between the *Remmer* case and this case. The Court there held that "*private* communication, contact, or tampering" was presumptively prejudicial (347 U. S. at 229) (emphasis supplied). It is significant that even when the question concerned a private communication the Court remanded to the District Court for a hearing to determine prejudice.

The general rule which is applicable when the question involves *public* media of communication, was enunciated by Mr. Justice Holmes in *Holt* v. *United States,* 218 U. S. 245 (1910). Speaking for the Court and recognizing the probability that jurors who are

[55] Actually, it is difficult to ascertain what appellant Kasper means when he asks this Court to take judicial notice of the great public interest generated over the issue "Will a Southern Jury Convict." Perhaps the impact of such issue is what he is trying to point out. It is indeed anomalous that a person who has been deliberately seeking publicity and notoriety and who has succeeded in achieving it as a segregationist, should now claim possible prejudice because of the fact that a great public debate, which he played no little part in precipitating, was generated.

allowed to separate would see reports of the trial in public print he stated (218 U. S. at 251),

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.

In modern times, even more so than when Mr. Justice Holmes wrote, jurors inevitably read newspaper accounts or hear reports on radio and television concerning trials, despite admonitions of trial judges. See *United States* v. *Catalano,* 231 F. 2d 67 (2d Cir. 1956). Even Judge Taylor, recognizing this possibility despite the many admonitions during the trial, included in his charge to the jury directions to decide the case only on the evidence and to "disregard completely any impressions or information [the jury] may have received from other sources such as radio, television, or newspaper articles" (56a). This is not to say that such conduct by jurors is to be condoned, but rather it emphasizes the fact that courts are likely to be confronted with this type of alleged prejudice almost every day.

To say that the presumption of prejudice does not arise in cases involving mass media of communication is not to say that the duty of the trial judge is lessened to satisfy himself fully that no prejudice was in fact involved. He must still determine whether or not a new trial is necessary in the interest of justice—but by the same token his decision should not be lightly overturned unless the circumstances are extremely unusual.

The policy underlying the discretionary power of the trial judge in either granting or denying a new trial is clear. He is eminently qualified to evaluate the fairness of the proceedings, because he has first-hand knowledge of the trial and the temper of local public opinion with respect thereto. He is in a position to observe carefully the general conduct and deportment of the jurors. Indeed, Rule 33 of the Federal Rules of Criminal Procedure implicitly recognizes that the trial judge is so qualified, for it states that a new trial "may" be granted if required in the "interest of justice."

The cases are legion which involve allegedly prejudicial accounts of trials, and each demonstrates the process whereby the trial judge, whose judgment more often than not is deferred to by the appellate courts, satisfies himself whether a new trial should be had. In each of these cases the question was precisely what it is here: was the article—here the program—prejudicial, and what was its possible influence on jurors who had read such accounts. See *Gicinto* v. *United States,* 212 F. 2d 8 (8th Cir. 1954), *cert. denied* 348 U. S. 884 (information that defendant had been previously tried and acquitted for robbery and had also been indicted in another city; no prejudice); *United States* v. *Allied Stevedoring Corp.,* 241 F. 2d 925 (2nd Cir. 1957) *cert denied,* 353 U. S. 984 (seven jurors read account of association of defendant with another man who had been indicted for the same offense; no prejudice); *Reining* v. *United States,* 167 F. 2d 362 (5th Cir. 1948) *cert. denied,* 335 U. S. 830 (newspaper account reported that defendant's

accomplice was dead and that he had said he would rather take his life than face prosecution; refusal to grant mistrial proper); *Miller* v. *Commonwealth,* 40 F. 2d 820 (6th Cir. 1930) (court said that no prejudice was shown when the newspaper articles of the trial were not inaccurate); *Briggs* v. *United States,* 221 F. 2d 636 (6th Cir. 1955) (newspaper accounts that judge had issued bench warrants for two witnesses in case charging them with perjury; prejudice). For collection of cases see 31 A. L. R. 2d 417.

This record reflects a deep concern on the part of Judge Taylor in this matter. After reviewing the evidence he stated his findings with respect to the effect of the television program (157a):

> There is nothing in the record to indicate that [the two persons interviewed on the program] intended to do anything wrong. There is nothing to indicate that either of these parties intended to or did in any manner influence juror May in rendering a fair and impartial verdict. Mr. May says he was not influenced in any respect in his verdict by reason of what he heard or saw in this television program.
>
> The court is of the opinion that he told the truth and that he was not influenced, but that does not solve the problem. The further question arises as to whether or not he was put in a position that was calculated to influence his judgment in rendering a fair and impartial verdict. If he was put in a position that was calculated to affect his verdict, such would be sufficient in the opinion of this Court to vitiate the verdict.

> The Court is of the opinion and holds that the television program heretofore mentioned, or anything connected with it, did not place Juror May in a position calculated to interfere with him in rendering a fair and impartial verdict.

Such a careful and concerned judgment, in an area which is principally within the discretionary prerogative of the trial judge should not be overturned.

Furthermore, it is clear that before a communication to a juror can be held to constitute prejudicial error it would necessarily have to have a tendency to subject such juror to unreasonable pressures. If from the external evidence and an examination of the juror, to the extent to which it is permitted, the judge finds no prejudice in fact, a motion for a new trial is properly denied. It is inconceivable that a television program which reflects the local respect for a juror as an individual, and asserts faith in his honesty and integrity with regard to the trial at hand, could possibly be considered prejudicial. If this were to constitute prejudice it would mean that integrity disqualifies for jury service. Certainly such a contention should not be countenanced, for our whole system of jury trial is predicated upon the proposition that jurors as individuals and juries collectively are capable of fair and impartial judgment. Information coming to May's attention that two of his local contemporaries believed that he was honest and capable of impartial judgment can hardly be regarded as a pressure that would hinder this capability in any respect.

In sum, the conduct of May in no way prejudiced appellant Kasper. The facts in this case would not

even warrant the conclusion that the "mere possibility of prejudice" existed. See *Holt* v. *United States, supra.* Furthermore, even if it be assumed that a presumption of prejudice arose from his viewing of the program, the evidence adduced on the motion for new trial was more than enough to rebut such presumption.

15. Was the verdict of the jury finding Kasper guilty supported by the evidence? The District Court said, "Yes." Appellee says, "Yes."

Appellant Kasper contends that the evidence adduced in the trial below failed to establish his guilt beyond a reasonable doubt (Br. 19), and that the verdict was contrary to the evidence and the weight of the evidence (Br. 21). Neither of these contentions is supported by any specification as to what defects appellant finds in the evidence, a factor which presents some difficulty to one attempting to frame a reply. Moreover, contrary to the requirements of Rule 16 (e) of the Revised Rules of this Court, appellant has included no material whatever in the Appendix to his brief bearing upon these points. Accordingly, it is respectfully submitted that these points are not adequately presented by appellant and should be disregarded by the Court.

In any event, there is no merit to the contentions. The Government was required to prove three main elements to the satisfaction of the jury: (1) that Kasper had notice of the injunction (2) that one or more of the appellants acted in concert with him to interfere with the court's order; and (3) that one or more overt acts were committed by one or more of his co-conspirators. The verdict of a jury even in a criminal case must

be upheld if, considering the evidence in the light most favorable to the Government, it is found that there is substantial evidence to support it. *Henderson* v. *United States,* 202 F. 2d 400, 403 (6th Cir., 1953); *Sharp* v. *United States,* 195 F. 2d 997, 998 (6th Cir. 1952); *Ross* v. *United States,* 197 F. 2d 660, 665 (6th Cir. 1952), *cert. denied,* 344 U. S. 832; *Glasser* v. *United States,* 315 U. S. 60, 80 (1942). Judged by that standard, what did the evidence show?

That Kasper knew of the injunction against him, of that there can be no doubt. He was one of the defendants named in the original injunction proceeding (27a–30a); copy of the restraining order was served upon him; part of it was read to him and he read the remainder himself; and he actually acknowledged, "I know what it is. It is an injunction prohibiting me from interfering here in this school business" (5b–6b). See also (32b).

The second element likewise was proved beyond any reasonable doubt. From the evidence presented, the jury could well find that Kasper masterminded the interference with the order of the court, using his co-conspirators as instruments of his campaign to resegregate Clinton High School. Kasper, with Cook, Brantley, Brakebill, and Till, helped organize the Tennessee White Youth at the high school (25b–31b). Kasper, with Bullock, led a segregationist meeting (18b–19b). With Cook and three others, Kasper organized the Tennessee White Citizens' Council (22b–23b). Kasper frequently met with the other appellants, and with students of the high school, in the cafes of Clinton (21b), at times in back rooms, to organize groups designed to resist desegregation (40b–44b).

Kasper made attempts to recruit other persons as well to his program of ousting Negroes from the high school (33b). Kasper threatened that he would get the principal of Clinton High out of the school if that principal would obey the law (23b–24b). Until Kasper reentered the scene, there had been no internal trouble in the school (23b–24b). Kasper, a man who made no secret of his aim to create trouble for those attempting to carry out the orders of the court, throughout the period which preceded the eruption of violence consistently met with, counseled with, and cooperated with those persons who became the leaders in the commission of the overt acts.[56] There was substantial evidence that he was working with and through the other appellants to achieve his purpose. Compare *Galatas* v. *United States,* 80 F. 2d 15 (8th Cir. 1935); *cert. denied,* 297 U. S. 711; *Marx* v. *United States,* 86 F. 2d 245 (8th Cir. 1936); *Marbs* v. *United States,* 250 F. 2d 514 (8th Cir. 1957); *Wellman* v. *United States,* 227 F. 2d 757 (6th Cir. 1955).

Also, it is patently clear that overt acts did result from this conspiracy. From November 27 to December 3, Kasper's co-conspirators were out, forming a menacing mob directly along the route the Negro children had to take to reach the school (59b–62b). On those days they succeeded in preventing the children from attending classes (60b–61b). Then, on December 4, when the Reverend Turner helped the children get to school in safety, he was brutally beaten (54b, 58b), so as to make it abundantly clear to all that compliance with the orders of the court was most un-

[56] See also references to appellee's appendix at p. 6 of the Counterstatement of Facts.

wise and that those who intended to maintain segregated schools in definance of these orders were in control of the streets. It is noteworthy with respect to this element, that if any *one* of his co-conspirators were found guilty of the acts charged, the "hub of the wheel"[57]—Kasper—would be guilty. In point of fact six of his co-conspirators were found guilty.

These overt acts were the means whereby the conspiracy to violate the court injunction was furthered and the jury had a right to find that Kasper was a co-conspirator with a heavy share of the responsibility for this lawlessness. Accordingly, there is no merit to the contention that the evidence did not sustain the verditct.[58]

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[57] *Kotteakos* v. *United States*, 328 U. S. 750 (1946).

[58] In conjunction with this point Kasper also contends generally that the court's charge to the jury was prejudicial in that it permitted the jury to conjecture and speculate and find appellant guilty on the basis of *prior association* with other defendants (emphasis added). Since he furnishes no specific examples of what he considers prejudicial in the charge and since three of his requested instructions were included in the charge (65b–66b), it is difficult to see wherein the alleged prejudice lies.

Naturally, if a conspiracy existed and overt acts resulted therefrom, Kasper's association and acquaintance with the other defendants had to be *prior* to the overt acts committed in furtherance of the alleged conspiracy. On the basis of the evidence regarding the fruits of this association the jury found that Kasper was the hub of a conspiracy which resulted in overt acts designed to interfere with the court order and impede desegregation. Conspiracy to violate judicial decrees cannot very well be equated with "guilt by association."

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed as to all appellants.

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