

Supreme Court, Monroe County, New York.

In the Matter of Robert D. O'CONNELL, Petitioner,
v.
Ann M. TADDEO, as Family Court Judge,
Respondent.

Aug. 25, 1997.

Contemner filed proceeding to challenge summary contempt order issued by family court judge. The Supreme Court, Monroe County, Cornelius, J., held that: (1) family court judge improperly failed to allow contemner opportunity to make statement; (2) delay of summary contempt adjudication until conclusion of underlying hearing constituted fatal error; (3) fact that family court judge required extrinsic evidence to prove contemner had violated prior court order precluded finding that conduct constituted summary contempt committed in "immediate view and presence" of family court; and (4) family court judge failed to comply with statutory requirements that mandate of commitment or signed contempt order contain particular facts or circumstances of contemner conduct constituting basis for finding of summary contempt.

Order of contempt and mandate of commitment annulled, set aside, and vacated.

West Headnotes

[\[1\] Contempt](#)  51.1
[93k51.1 Most Cited Cases](#)

Before imposition of summary contempt, contemner must be accorded opportunity to make statement, and judge must be careful in language utilized to extend right because this may be misinterpreted as attempt to elicit admission.

[\[2\] Contempt](#)  52
[93k52 Most Cited Cases](#)

[\[2\] Contempt](#)  66(7)
[93k66\(7\) Most Cited Cases](#)

Family court judge's delay of summary contempt adjudication until conclusion of hearing constituted fatal error, in light of purpose of summary contempt

to prevent disruption or threatened disruption of courtroom; delay in adjudication of contempt and imposition of sanctions indicated that there was no immediate need for summary contempt in first instance.

[\[3\] Contempt](#)  20
[93k20 Most Cited Cases](#)

[\[3\] Contempt](#)  52
[93k52 Most Cited Cases](#)

Disobedience of lawful mandate of court, which may constitute criminal contempt or civil contempt, may also constitute summary contempt, but only if mandate and disobedience occur before judge and as part of same proceeding and without interruption; if hearing is required to determine whether or not contemner has violated order previously issued by court, such procedure would be inconsistent with concept of summary contempt. [McKinney's Judiciary Law § 750](#), subd. A, pars. 1, 3.

[\[4\] Contempt](#)  52
[93k52 Most Cited Cases](#)

Words "immediate view and presence," as contained in criminal contempt statute must be interpreted to encompass conduct within actual knowledge of court, without necessity of taking testimony or conducting a hearing, and thus, if hearing is required in order for court to ascertain conduct, notwithstanding that it may have occurred inside courtroom and in presence of judge, then conduct could not form basis for summary criminal contempt adjudication. [McKinney's Judiciary Law § 750](#), subd. A, par. 1.

[\[5\] Contempt](#)  63(4)
[93k63\(4\) Most Cited Cases](#)

[\[5\] Contempt](#)  64
[93k64 Most Cited Cases](#)

[\[5\] Contempt](#)  66(8)
[93k66\(8\) Most Cited Cases](#)

Adjudication of summary contempt had to be annulled and set aside based on family court judge's failure to comply with statutory requirements that mandate of commitment or signed order contain particular facts or circumstances of contemner's conduct which may have constituted basis for finding of summary contempt. [McKinney's Judiciary Law § 752, 755](#).

[\[6\] Contempt](#)  [66\(7\)](#)
[93k66\(7\) Most Cited Cases](#)

Review of summary contempt is limited to declaration of facts contained in mandate of commitment and/or contempt order, and thus, may not include consideration of affidavits later submitted to support summary contempt ruling.

****723 *111** Dibble & Miller, P.C., Rochester ([Gerald W. Dibble](#), of counsel), for petitioner.

Dennis C. Vacco, Attorney General, Brooklyn ([Carlos Rodriguez](#), of counsel), for respondent.

[RAYMOND E. CORNELIUS](#), Justice.

This proceeding was commenced, pursuant to [Judiciary Law, Section 755](#) and [Civil Practice Law and Rules, Section 7805](#), for the purpose of reviewing a summary contempt order issued against the Petitioner by the Respondent, a Family Court Judge of the County of Monroe. The order was issued on April 25, 1997, and directed that the Petitioner be sentenced to 30 days in the Monroe County Jail, together with payment of a fine in the amount of \$1,000.00. This Court, by Order, dated May 7, 1997, directed the Respondent to show cause why the summary contempt order should not be annulled, and stayed execution of the penalty pending resolution of these proceedings. The order to show cause was initially made returnable on May 12, 1997, and prior thereto, the Attorney General, on behalf of the Respondent, submitted a motion to dismiss upon objections in point of law. One of the objections related to the alleged failure to obtain personal jurisdiction over the Respondent because of the manner of service. Oral argument on the underlying petition and motion to dismiss, was adjourned until May 19, 1997. On that date, the Court issued another order to show cause, returnable May 27, 1997, which was properly served upon the Respondent, and therefore, the issue of personal jurisdiction has become moot.

This case now becomes the latest in a long series of litigation involving the obscure and somewhat archaic provisions of ***112** Article 19 of the Judiciary Law. This statute, which covers the law of contempts, has become a proverbial landmine for members of the Judiciary. Initially, one seeming contradiction is the fact that this proceeding, which involves a Family Court Judge, must be decided by

this Court, whereas a contempt order, issued by a County Court Judge or Supreme Court Justice, would be required to be initiated in the Appellate Division. [CPLR Section 506\(b\)\(1\)](#); also see, [Nolan v. Lungen](#), [61 N.Y.2d 788](#), [473 N.Y.S.2d 388](#), [461 N.E.2d 874 \(1984\)](#); [Juracka v. Severson](#), [115 A.D.2d 102](#), [494 N.Y.S.2d 912 \(3rd Dept.1985\)](#), *motion for leave to appeal denied* [67 N.Y.2d 603](#), [499 N.Y.S.2d 1028](#), [490 N.E.2d 864 \(1986\)](#); [Panas v. Traficanti](#), [147 A.D.2d 795](#), [537 N.Y.S.2d 667 \(3rd Dept.1989\)](#); [Muka v. Livingston](#), [113 A.D.2d 963](#), [492 N.Y.S.2d 1022 \(3rd Dept.1985\)](#); [State v. Quigley](#), [59 A.D.2d 825](#), [399 N.Y.S.2d 734 \(4th Dept.1977\)](#); [Berkman v. Family Court](#), [146 Misc.2d 733](#), [552 N.Y.S.2d 521 \(1990\)](#). Accordingly, this Court will attempt to set forth the requisite guidelines for summary contempt, within the context of the facts of the pending case.

The Petitioner is a graduate of Harvard Law School, and is admitted to the practice of law in the State of New York. However, the matter, for which he appeared in the Monroe County Family Court, was based upon petitions filed against him, personally, involving two children and for the most part, he appeared in that court, pro se. The initial proceeding was commenced in October 1996, based upon a petition, filed by the mother, requesting a determination of paternity for one of the children and an order of custody. Later, the litigation included issues involving family offense allegations, as well as child support. On February 28, 1997, Mr. O'Connell appeared before the Respondent Family Court Judge, and after some colloquy, admitted that he had consumed alcoholic beverages on that day. The Respondent stated that, in her opinion, Mr. O'Connell could not participate in any hearing, on this appearance, and she would decline to take any admission from him. Accordingly, there was an adjournment of the scheduled hearing, and Mr. O'Connell was given the following admonition:

****724** If you come to Court on the next occasion and you've taken a drug or an alcoholic drink, you will be in contempt of Court. We'll have a hearing, and probably, you'll go to jail. I will also have you arrested for public intoxication under Section 240 of the Penal Law. Do you understand that, Mr. O'Connell?

A subsequent hearing was conducted on April 25, 1997. There was some preliminary discussion concerning the fact that the Petitioner had missed a previous court date, and also had met, in the courthouse, with his two daughters. This had been done with the permission of their mother and other parties, ***113** but in violation of an order of

protection. [\[FN1\]](#) The transcript discloses, early in the proceedings, the following verbal exchange between the Court and Petitioner:

[\[FN1\]](#) The parties had consented to this meeting because the Petitioner had apparently not seen his 14-year-old daughter since on or before December 19, 1996. On that date, this child became the subject of a nationwide search when she absconded with a 22-year-old Air Force deserter, whom she had met through the Internet. After appearances on national television shows by the mother, the couple was located in Marion, Illinois in April and the child was thereafter returned to her home in Rochester, New York. The airman was subsequently sentenced to 4 years imprisonment by a military court on rape and sodomy charges, and reportedly received a bad conduct discharge from the military.

THE COURT: Well, I have information that you have taken not only cocaine today, but alcohol; is that true?

RESPONDENT ROBERT O'CONNELL: Your Honor, am I on trial here?

THE COURT: Well, I told you on one prior occasion that if you came to court and you were under the influence or had taken anything before you came to court, that you'd be arrested. And I have information, and it's hearsay, but that person is here and can give me the information, that people have seen you ingest drugs today.

So you didn't say yes; you didn't say no. If you don't answer the question, I assume--I have to assume it's true.

The Petitioner then persisted in declining to make any admission concerning the intake of drugs or alcohol. A lengthy colloquy, primarily between the Court and Petitioner, then followed concerning the issue of custody of the two children. At the conclusion, thereof, the Court made a directive concerning custody, and also continued the order of protection, subject to an evaluation of the Petitioner for substance abuse and completion of any recommended treatment. The Respondent then addressed a person by the name of Norma Jean Robinson, who has been described as a "housekeeper/secretary" for the Petitioner. The transcript discloses the following:

THE COURT:--is this: Miss Robinson, would you mind standing.

Miss Robinson, I understand you gave some people information that you had personal knowledge of Mr. O'Connell having drugs and alcohol today; is that true?

NORMA JEAN ROBINSON: Yes.

THE COURT: Would you swear to me under oath if that is true?

*114 NORMA JEAN ROBINSON: Yes, ma'am.

THE COURT: What did he take? How do you know?

NORMA JEAN ROBINSON: Well, I was at the house this morning.

THE COURT: And what happened?

NORMA JEAN ROBINSON: Well, I saw Bob. He had alcohol, drank some beer. I saw that. I don't know what it was on the tray, but I think it was powder, cocaine.

THE COURT: What did he do with it?

NORMA JEAN ROBINSON: (Indicating.) He sniffed it.

THE COURT: He sniffed it?

NORMA JEAN ROBINSON: Yes.

THE COURT: Now, Mr. O'Connell, you have acted in an irrational manner and behaved in an unusual manner today.

The person who lives in your home has told me what I need to hear, and I find you in contempt of Court.

I warned you on prior occasions, if you came to Court and if you ingested [sic] drugs and alcohol, I would find you in contempt.

I am sentencing you to thirty days in jail and fining you one thousand dollars. That's the basis of my ruling.

**725 In addition to the foregoing, the Respondent issued a written contempt order, dated April 25, 1997. This order, in relevant part, recites that Mr. O'Connell was found in contempt of court, pursuant to [Judiciary Law, Section 750\(A\)\(1\)](#), and sentenced in accordance with [Judiciary Law, Section 751\(1\)](#), based upon his "... disorderly, contemptuous, and insolent behavior.... committed during a proceeding before this Court, in the Court's immediate view and presence, and directly tending to impair the respect due to the Court's authority, ...". The behavior is described as follows:

During preliminary discussions prior to the hearing, Respondent, who is himself a licensed attorney, and was appearing pro se, was acting in an erratic, irrational and aggressive manner. The Court heard sworn testimony from respondent's housekeeper/secretary that she had witnessed respondent ingesting alcohol and cocaine just prior

to appearing in Court. Respondent had previously appeared before this Court under the influence of alcohol, by his own admission, and had been admonished, on the record, that if he appeared in Court in such a condition in the future he would be found to be in contempt.

The Family Court Judge also signed an order of *115 commitment, which directed that the Petitioner, herein, be sentenced to jail for a period of 30 days, but which was otherwise silent as to the specific acts constituting the contempt.

Generally, there are two forms of contempt--criminal ([Judiciary Law, Section 750](#)) and civil ([Judiciary Law, Section 753](#)). Although the primary purpose of criminal contempt is to preserve a Court's authority, as compared to protecting against prejudice to rights of a party in a civil contempt, there may be circumstances where the same act could constitute both forms of contempt, such as the disobedience of a lawful mandate of the Court. See, e.g., [Judiciary Law, Section 750\(A\)\(3\)](#); [753\(A\)\(1\)](#). Unlike criminal contempt, the procedure for a civil contempt proceeding is set forth in some detail in the Judiciary Law. See [Judiciary Law, Section 753, 756](#). Nevertheless, the statute does generally require that a person charged with criminal contempt be notified of the accusation and be afforded a reasonable time to make a defense. [Judiciary Law, Section 751\(1\)](#). The one exception to this rule involves punishment for summary contempt, which is committed within the "immediate view and presence" of the Court. [Judiciary Law, Section 751\(1\)](#). The authority for imposing summary, criminal contempt is found in [Judiciary Law, Section 750\(A\)\(1\)](#), which reads as follows:

A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

The circumstances, under which a court may impose summary contempt, have been specifically set forth by court rule in the First and Second Departments and are generally described as "exceptional and necessitous". *Rules of App.Div., 1st Dept.* [22 NYCRR] [Section 604.2\(a\)\(1\)](#); *Rules of App.Div., 2d Dept.* [22 NYCRR] [Section](#)

[701.2\(a\)](#). These rules appear to have been adopted by case law, in the Third Department. See [Matter of Doyle v. Aison](#), 216 A.D.2d 634, 627 N.Y.S.2d 485 (3rd Dept.1995), [motion for leave to appeal denied 87 N.Y.2d 807, 641 N.Y.S.2d 829, 664 N.E.2d 895 \(1996\)](#). Furthermore, these rules impose certain procedural requirements upon a court before someone may be held in summary contempt. These include warnings or admonishments, the opportunity to desist, and the opportunity to make a statement in their defense or in extenuation of their conduct. 22 NYCRR [604.2a\(3\)](#); [22 NYCRR 701.2\(c\), 701.4](#). Many of the reported *116 decisions, from the First and Second Departments, focus upon compliance with these requirements. See, e.g., [Matter of Spain v. Braatz](#), 217 A.D.2d 661, 630 N.Y.S.2d 928 (2nd Dept.1995), [motion for leave to appeal denied 87 N.Y.2d 802, 638 N.Y.S.2d 425, 661 N.E.2d 999 \(1995\)](#); [Matter of Werlin v. Goldberg](#), 129 A.D.2d 334, 517 N.Y.S.2d 745 (2nd Dept.1987), [motion for leave to appeal denied 70 N.Y.2d 615, 524 N.Y.S.2d 677, 519 N.E.2d 623 \(1988\)](#); [**726Mangiatordi v. Hyman](#), 106 A.D.2d 576, 483 N.Y.S.2d 82 (2nd Dept.1984), [appeal dismissed 64 N.Y.2d 1040, 489 N.Y.S.2d 1029, 478 N.E.2d 212](#). Indeed, the failure to adhere to these procedural requirements has served as a basis, in part, at least, for a determination of discipline against a judge. See *Matter of Sharpe, New York State Commission on Judicial Conduct, Annual Report, March 1984*, pg. 134.

[1] In the pending case, the Petitioner was not afforded a right to a hearing, an attorney, or an adjournment, but these are not requirements upon a summary contempt adjudication. [Matter of Katz v. Murtagh](#), 28 N.Y.2d 234, 321 N.Y.S.2d 104, 269 N.E.2d 816 (1971). However, because the case arises in the Fourth Department, the Respondent was not bound by the procedural rules of the First and Second Departments, and therefore, not required to give warnings to the Petitioner nor grant him an opportunity to desist from the conduct, which may have been the subject of the contempt. Nevertheless, before the imposition of summary contempt, a contemner, in the State of New York, must be accorded an opportunity to make a statement. [Rodriguez v. Feinberg](#), 40 N.Y.2d 994, 391 N.Y.S.2d 69, 359 N.E.2d 665 (1976); [Matter of Katz v. Murtagh, supra](#). Of course, a judge must be careful in the language utilized to extend this right to a contemner, because this may be misinterpreted as an attempt to elicit an admission. See [Matter of Katz v. Murtagh, supra](#).

In any event, the record, in the pending case, is devoid of any opportunity afforded to the Petitioner to make any such statement before he was found in contempt and ordered to pay a fine and be confined to jail for a period of thirty days.

[2] Another fatal error, which appears on the record, is the fact that the Respondent delayed the summary contempt adjudication until the conclusion of the hearing. This may be viewed as a somewhat technical or procedural issue, but in reality, relates to the very essence of the reason for summary contempt powers being vested in the courts. The purpose is to prevent the disruption or threatened disruption of the courtroom, and a delay in the adjudication of contempt and imposition of sanctions indicates that there is no immediate need for summary contempt in the first instance. See *Matter of Doyle v. Aison*, *supra*; *Breitbart v. Galligan*, 135 A.D.2d 323, 525 N.Y.S.2d 219 (1st Dept.1988). For example, the verbal abuse of a *117 judge, including an accusation that he was a "disgrace to the bench", was held to be disruptive to a calendar call, and therefore, properly subject of a summary contempt order. *Kunstler v. Galligan*, 168 A.D.2d 146, 148, 571 N.Y.S.2d 930 (1st Dept.1991), *affirmed* 79 N.Y.2d 775, 579 N.Y.S.2d 648, 587 N.E.2d 286 (1991). In this type of situation, where a summary contempt adjudication occurs during a trial or other proceeding, rather than at the conclusion thereof, there is no requirement for a hearing. *Matter of Werlin v. Goldberg*, *supra*; *Mangiatordi v. Hyman*, *supra*.

In the pending matter, a hearing was conducted at the close of the proceedings, during which the Petitioner's "housekeeper/secretary" answered certain questions posed by the Court. Counsel for the Petitioner first contends that the Court's query to Norma Jean Robinson--"Would you swear to me under oath if that is true?"--is insufficient to constitute an oath under CPLR Section 2309(b). This section provides that "An oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs." There is no established form of an oath, although it has been noted that "the ceremony should be 'solemn ... an unequivocal act of assent to tell the truth.'" *Siegel, New York Practice, Second Edition, Section 388, at 584*, citing Second Prelim. Report of Advisory Comm. on Practice and Procedure, 1958 N.Y.Legis.Doc. No. 13, p. 204. This Court holds that reference to a divine being (e.g., "So help you God"), or alternatively, an

affirmation in lieu of an oath based upon religious reasons, is not necessary, and a statement to the same effect as made by the Respondent Judge in open court would be sufficient to meet the criteria of CPLR Section 2309(b). However, notwithstanding that an oath was administered to Ms. Robinson, Mr. O'Connell was not accorded the right to cross-examine or otherwise participate during the testimony. Furthermore, and perhaps **727 more significant, in this Court's opinion, the holding of a hearing, although generally required before imposition of a criminal contempt, pursuant to Judiciary Law, Section 751(1), would be inconsistent with an adjudication of summary contempt under Section 750(A) 1.

[3] In the seminal case of *Douglas v. Adel*, 269 N.Y. 144, 146-147, 199 N.E. 35 (1935), the Court, after reviewing the inherent power of courts to punish someone summarily for contempt of court, under common law and statute, stated as follows: A criminal contempt in the "immediate view and presence" of the court may be punished summarily if the acts constituting such contempt are seen or heard by the presiding judge so *118 that he can assert of his own knowledge the facts constituting the contempt in the mandate of commitment. In that case, no proof need be given. The knowledge of the judge takes the place of proof and his recital in the mandate of commitment of the facts upon which the adjudication of contempt is based is sufficient. *People ex rel. Barnes v. Court of Sessions of Albany County*, 147 N.Y. 290, 41 N.E. 700; Judiciary Law, § 755.

If, however, the acts constituting the contempt are not committed within his hearing or he does not see them and is, therefore, unable to so state in the mandate of commitment, it is necessary that the offender be given an opportunity to be heard after notice. Judiciary Law, § 751; *People ex rel. Choate v. Barrett*, 56 Hun, 351, 9 N.Y.S. 321, *affirmed*, 121 N.Y. 678, 24 N.E. 1095. In the first case, the judge acts upon his own knowledge to vindicate the dignity of the court. In the other, he acts upon proof submitted after an opportunity has been given the offender to answer.

In the present case, the Attorney General, on behalf of the Respondent, argues that the violation of the previous order, directing Mr. O'Connell not to appear at a hearing, after having consumed alcoholic beverages or taken drugs, did occur within the "immediate view and presence" of Respondent. There are applicable decisions in which an adjudication of summary contempt has

been upheld where the contemner violates a lawful directive of the court, but most involve situations where the order and violation are part of the same proceeding, and occur without interruption. See, e.g., *Kunstler v. Galligan*, supra; also see *Matter of Brostoff v. Berkman*, 79 N.Y.2d 938, 582 N.Y.S.2d 989, 591 N.E.2d 1175 (1992); *Matter of LaDuca v. Bergin*, 86 A.D.2d 983, 448 N.Y.S.2d 318 (4th Dept.1982); *People v. Sanders*, 58 A.D.2d 525, 395 N.Y.S.2d 190 (1st Dept.1977). Conversely, violation of a court order, made at a prior time, and which requires testimony to establish the violation, does not occur within the "immediate view and presence" of the Court. *Sassower v. Signorelli*, 65 A.D.2d 756, 409 N.Y.S.2d 762 (2nd Dept.1978). This Court, therefore, holds that disobedience of a lawful mandate of the Court, which may constitute a criminal contempt under Judiciary Law, Section 750(A)(3), or a civil contempt, under Section 753(A)(1), may also constitute a summary contempt under Judiciary Law, Section 750(A)(1), but only if the mandate and disobedience occur, before the judge, as a part of the same proceeding, without interruption. If a hearing is required to determine whether or not a contemner has violated an order, previously issued by the Court, such procedure would be inconsistent with the concept of a summary contempt.

*119 Counsel for both parties have cited and also relied upon the decision of *Matter of Williams v. Cornelius*, 76 N.Y.2d 542, 561 N.Y.S.2d 701, 563 N.E.2d 15 (1990), which involved the undersigned. In this case, a courtroom spectator had been held in summary contempt for a provocative remark made to a court officer, which occurred during the course of a calendar call and was then reported to the Judge at the bench. The case, for which the spectator was present, involved a defendant, who was a member of the "G-Boys", a well-known youth gang, and whose bail had been revoked because of witness intimidation. A proceeding, under Article 78 of the CPLR, was dismissed, as moot, by the Appellate Division. However, the Court of Appeals reversed this determination, reinstated the Petition and remitted the case to permit the Respondent to answer the Petition on the merits. After discussing the mootness issue, Judge Bellacosa, writing for the Court, stated that Petitioner had emphasized "... **728 in her petition that the Judge did not hear the alleged epithet," and if her transcript was correct, "... the conduct did not take place in the court's 'immediate view and presence' " (at 547, 561 N.Y.S.2d 701, 563

N.E.2d 15). The decision then contained the following statement:

There is nothing in the record, prepared solely from petitioner's side at this pleadings stage, showing that the Assistant District Attorney and the court officer were sworn and gave any statement as to what actually lead up to the contempt adjudication or what was said between themselves and to the Judge.

The obvious question is what difference it would make whether or not the witnesses were sworn, and their statements recorded, if the Petitioner's conduct had not occurred in the "immediate view and presence" of the Court because the Judge did not personally overhear her remark. Presumably, in relying upon this language, the Attorney General, on behalf of the Respondent, emphasizes that Norma Jean Robinson was sworn, and the transcript records her statements to the Court.

[4] First, it should be noted that the above quoted language from *Matter of Williams v. Cornelius*, supra, is perhaps dictum because the case was actually decided on the basis of the mootness issue, and by necessity, remanded to accord the Respondent "... his full procedural entitlements, including the opportunity to answer on the merits" (at 547, 561 N.Y.S.2d 701, 563 N.E.2d 15). [FN2] It should also be recognized that conduct, which is not subject to summary *120 contempt powers, may, nevertheless, form the basis for some other form of contempt adjudication, such as some "... disturbance, directly tending to interrupt its (court's) proceedings." See Judiciary Law, Section 750(A)(2). In any event, this Court has concluded and holds that the words "immediate view and presence", as contained in Judiciary Law, Section 750(A)(1), must be interpreted to encompass conduct within the actual knowledge of the Court, without the necessity of taking testimony or conducting a hearing. Otherwise stated, if a hearing is required in order for the Court to ascertain the conduct, notwithstanding that it may have occurred inside the courtroom, and in the presence of the Judge, it could not form the basis for a summary contempt adjudication.

[FN2] Following remand to the Appellate Division, the undersigned issued an order, sua sponte, which vacated, annulled and set aside the mandate of commitment because it did not comply with the requirements of Judiciary Law, Section 752. Thereafter,

upon concession that the mandate of commitment was legally insufficient, the Appellate Division vacated the judgment of contempt on the merits. Accordingly, there were no further proceedings or hearing.

[5] Finally, the adjudication of summary contempt should be annulled and set aside because of the failure to comply with the provisions of [Judiciary Law, Section 752](#). This statute requires that the mandate of commitment contain the "particular circumstances" of the offense constituting any form of criminal contempt. Similarly, [Judiciary Law, Section 755](#) provides that, in the case of a summary contempt, an order must be issued by the court, "... stating the facts which constitute the offense and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor." Both the mandate of commitment, under [Section 752](#), and an order under [Section 755](#), are reviewable only by a proceeding, pursuant to Article 78 of the Civil Practice Law and Rules.

As already discussed, the mandate of commitment, in the pending case, failed to contain any facts or circumstances of Mr. O'Connell's conduct, which may have constituted the basis for a finding of summary contempt. Historically, the requirement pertaining to mandates of commitment, as set forth in [Section 752](#), may have been premised upon the need to provide a record of the proceedings. See [People ex rel. Barnes v. Court of Sessions](#), 147 N.Y. 290, 41 N.E. 700 (1895). Although proceedings are now stenographically or electronically recorded, and notwithstanding the fact that clerical personnel frequently prepare the mandates of commitment, failure to comply with this section will result in the commitment being considered defective. See, e.g., [Foster v. Morgenthau](#), 115 A.D.2d 375, 495 N.Y.S.2d 403 (1st Dept.1985), *appeal dismissed* **72967 N.Y.2d 828, 501 N.Y.S.2d 658, 492 N.E.2d 786 (1986); [Matter of Sickmen v. Goldstein](#), 59 A.D.2d 731, 398 N.Y.S.2d 583 (2nd Dept.1977).

*121 The Respondent did issue a signed order, and this Court would certainly not require that the particular circumstances of the offense be set forth in the mandate of commitment, issued pursuant to [Judiciary Law, Section 752](#), if properly included in an order issued under [Section 755](#). See [People ex rel. Barnes v. Court of Sessions](#), *supra*; [In re Berkon](#), 180 Misc. 659, 43 N.Y.S.2d 334 (1943), *reversed on the grounds* 268 A.D. 825, 49 N.Y.S.2d 551 (1944),

affirmed 294 N.Y. 828, 62 N.E.2d 388 (1945). The order, in part, describes Mr. O'Connell as "... acting in an erratic, irrational and aggressive manner". The description of Petitioner's conduct is conclusory in nature, and furthermore, cannot necessarily be equated with "disorderly, contemptuous, or insolent behavior", which is the *sine qua non* of conduct subject of summary contempt. [Judiciary Law, Section 750\(A\)\(1\)](#). As a minimum, the conduct of Petitioner would be required to be described in a manner to meet such standard. See [In re Rotwein](#), 291 N.Y. 116, 51 N.E.2d 669 (1943); [Petition of Boasberg](#), 286 A.D. 951, 143 N.Y.S.2d 272 (4th Dept.1955). Furthermore, assuming that the Petitioner acted in a "insolent, discourteous and contemptuous manner", such characterization may be insufficient without the precise manifestations being set forth in the order. See [People ex rel. Bernstein v. LaFetra](#), 171 A.D. 269, 157 N.Y.S. 386 (1st Dept.1916).

[6] Extensive affidavits, verified by Respondent, have been submitted in response to the Petition. These affidavits seek to amplify the alleged contemptuous behavior of the Petitioner. For example, he is described as "rude", "argumentative", "disheveled", "insolent", "loud and boisterous", "jittery", "insulting and down right disrespectful", and "rambling". However, a summary contempt is only reviewable by a certiorari proceeding, which is now embodied in Article 78 of the CPLR. The review is therefore limited to the declaration of facts contained in the mandate of commitment and/or contempt order, and again, this requires more than a mere conclusion. [Waldman v. Churchill](#), 262 N.Y. 247, 186 N.E. 690 (1933). The failure to set forth the particular conduct, which formed the basis for the contempt, in either the mandate of commitment or order, deprives this Court of the ability to review such determination in a proceeding under Article 78 of the CPLR.

The signed order also makes reference to the testimony of Ms. Robinson, and the failure of Mr. O'Connell to comply with the Court's previous order. This may serve as a basis for a criminal and/or civil contempt on the basis of failure to adhere to a lawful mandate, but, for reasons already discussed, cannot serve as a basis for a summary contempt committed in *122 the "immediate view and presence" of the Court, if extrinsic evidence is required to establish the violation.

Based upon the foregoing reasons, it is hereby

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(Cite as: 174 Misc.2d 110, 662 N.Y.S.2d 722)

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ORDERED, that the order of contempt, under [Judiciary Law, Section 750\(A\)\(1\)](#), together with the mandate of commitment is hereby annulled, set aside and vacated, without prejudice, to commence a proceeding under [Section 750\(A\)\(3\)](#) and/or [Section 753\(A\)\(1\)](#).

END OF DOCUMENT