Alabama Rules of Criminal Procedure

Rule 33. Contempt.

Rule 33.2. Summary disposition of direct contempts.

(a) FINDING. The court may summarily find in contempt any person who commits a direct contempt, immediately notifying the person of such finding. The judge shall cause to be prepared a written order reciting the grounds for the finding, including a statement that the judge observed the conduct constituting the contempt. The order shall be signed by the judge and entered of record.

(b) MITIGATION. The court shall apprise the person of the specific conduct on which the finding is based and give that person a reasonable opportunity to present evidence or argument regarding excusing or mitigating circumstances. No decision concerning the punishment to be imposed shall be made during the course of the proceeding at which the contempt occurs, unless prompt punishment is imperative to achieve immediate vindication of the court's dignity and authority.

(c) SENTENCE. Sentence shall be pronounced in open court, in the presence of the contemnor, unless presence has been waived under Rule 9.1(b), not later than the latter of seven (7) days after completion of all proceedings under this rule, or the completion of the proceeding during which the contemptuous conduct occurred, unless pronounced under section (b).

Committee Comments

Rule 33.2 provides for summary disposition of direct criminal contempt. It is based on Rule 42(a), Fed.R.Crim.P.

Direct contempt is contempt committed in the actual presence of the court. Although it has been held that a court in session "is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses," *Ex Parte Savin*, 131 U.S. 267, 277, 9 S.Ct. 699, 692, 33 L.Ed. 150 (1889), under this rule "presence of the court" means within view of the trial judge. The trial judge must be able to state that he observed the incident. *Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925).

The most comprehensive definition of "direct contempt" in the Alabama decisions is that quoted by the Alabama Supreme Court in *In re Tarpley*, 293 Ala. 137, 300 So.2d 409 (1974), quoting Dangel, 7 Contempt § 14:

> " ' "A direct contempt consists of disorderly or insolent behavior committed during the session of the court, and in its immediate view and presence,

such as the unlawful and willful refusal of any person to be sworn as a witness, or the refusal to answer any legal or proper question, or the giving of false testimony, or any breach of the peace, noise or disturbance so near to the court as to interrupt its proceedings." ' "

293 Ala. at 141, 300 So.2d 409. (Emphasis in original.) See also *Ex parte Graham v. City of Sheffield*, 292 Ala. 682, 299 So.2d 281 (1974).

In *Ex parte Hennies*, 33 Ala.App. 377, 381, 34 So.2d 22 (1948), the court of appeals observed that "[i]n many situations the line of demarcation between direct and constructive [or indirect] contempt is tenuous …. Whenever there is doubt as to the character of the alleged contempt … that doubt should be resolved [by finding the contempt to be indirect.]" Thus, if persons engage in disorderly conduct in the courtroom but the judge, without aid from another source, is unable to discern who in fact was a participant, the contempt would be indirect.

Rule 33.2(a) permits the court to make a summary finding of contempt as to any person who commits a direct contempt. The language of the first sentence is derived from Rule 42(a), Fed.R.Crim.P. The federal rules permit summary punishment as well as summary finding; the Alabama rule authorizes only summary finding. A summary finding is one made without formal notice and with no right to respond or to present evidence, although the last part of the first sentence requires the court to notify the contemnor as soon as possible that he has been found in direct contempt.

The second sentence of Rule 33.2(a) requires the trial judge to file a formal statement reciting the grounds for the contempt citation.

Alabama case law is to the contrary. *Hancock v. Bell*, 274 Ala. 390, 149 So.2d 842 (1963); *Ex parte Morris*, 252 Ala. 551, 42 So.2d 17 (1949); *Easton v. State*, 39 Ala. 551 (1865). In *Hancock*, the Alabama Supreme Court wrote:

"It is settled that when the contempt is committed in the face of the court, the offender may be instantly apprehended and punished … without any further proof or examination. …

"A judgment of sentence for contempt is valid, without any recital of the conduct or facts which constitute the contempt."

274 Ala. at 391, 149 So.2d at 843 (citations omitted). In spite of this authority against such procedure, it is thought that maintaining a formal record of the contempt citation is the better practice in that it protects the validity of the court's action. Rule 42, Fed.R.Crim.P., requires that the court's action be entered on the record.

Rule 33.2(b) forbids the imposition of punishment for contempt in a summary fashion. This differs from prior Alabama practice.

Section (b) provides the contemnor with significant procedural rights in determining punishment in every case. Even if prompt punishment is imperative, the contemnor must be given notice of the charges and an opportunity to say something in mitigation of punishment, as required by the first sentence of Rule 33.2(b).

The "unless" clause at the end of the second sentence is added to clarify when immediate punishment would be permissible. The language is taken from *Harris v. United States*, 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240 (1965), where the United States Supreme Court specified when the summary procedure authorized by Rule 42(a), Fed.R.Crim.P., is to be invoked. Expressing concern over the possible abuse of the contempt power, the Court observed that Rule 42(a) was reserved for "exceptional circumstances," such as "acts threatening the judge or disrupting a hearing or obstructing court proceedings," so that "speedy punishment may be necessary in order to achieve summary vindication of the court's dignity and authority" and to protect the judicial institution itself. The Alabama Supreme Court adopted this language from the *Harris* case in *In re Tarpley*, supra.

In *Harris*, a witness, invoking the Fifth Amendment privilege against self-incrimination, refused to answer certain questions before a grand jury, even after being granted immunity. He was taken before the district court and again refused to answer the same questions. The United States Supreme Court said that the delay necessary for a hearing would not have imperiled the grand jury proceedings, and that merely bringing the witness before the court and repeating the questions he had previously refused to answer and continued to refuse to answer did not change the nature of the contempt into one committed in the court's presence such as to bring it within the scope of Rule 42(a).

In *Ex parte Morris*, 252 Ala. 551, 42 So.2d 17 (1949), a member of the Ku Klux Klan refused to produce records and to identify the membership of the organization before a grand jury. He was then taken before the circuit court where he again refused to comply with the demand for information. The court adjudged him guilty of direct contempt (a criminal contempt) and sentenced him to imprisonment in the county jail. In upholding the circuit court's action, the Alabama Supreme Court stated that a court is vested with the power of summary punishment for contempt, if the contempt is in the presence of the court "*and of such character as to disrupt the orderly administration of justice and such flagrant defiance of the person and presence of the judge before the public as, if not summarily dealt with, would result in demoralization of the court's authority before the public*." 252 Ala. at 555, 42 So.2d at 21. (Emphasis added.)

Justice Lawson dissented on the ground that the decision in *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), limited the power of a court to summarily punish for contempt to the very narrow class of cases described in the underscored language above, and the refusal to deliver the requested information to the grand jury did not fall within that class, even though the refusal was in the presence of the court. *Ex parte Morris*, supra, 252 Ala. at 557, 42 So.2d 17 (Lawson, J., dissenting).

In cases in which prompt punishment is not imperative, the pronouncement of punishment is postponed until the proceeding is completed. Section (c) provides that in no event shall the punishment decision be postponed beyond seven (7) days after final disposition of the criminal prosecution under these rules. The court may enter punishment, in open court, at any time prior to the expiration of the seven-day limitation. The principal reason for requiring a time delay between citation and the imposition of sentence in ordinary cases is to provide a mandatory cooling-off period in the relations between the judge and the contemnor. Although Rule 33.5 does not permit a judge to rule in a case where the contempt involves a personal attack upon him, there is an inherent personal element in all contempt situations. See, e.g., *Cooke v. United States*, supra; *Offutt v. United States*, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954). A delay between citation and punishment gives all parties a chance to reacquire their objectivity. Also, it allows the contemnor time to discuss the matter with an attorney and to prepare a statement in his behalf.

Although the Alabama decisions permit an absolutely summary procedure, see, e.g., *Hancock v. Bell*, supra; *Easton v. State*, supra, the Advisory Committee considers such a procedure undesirable in many instances.