Powell
v.
Alabama
287 U.S. 45

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

Nos. 98, 99 & 100

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, and OLEN MONTGOMERY, *Petitioners,*

—vs.—

THE STATE OF ALABAMA, *Respondent.*

HAYWOOD PATTERSON, *Petitioner,*

—vs.—

THE STATE OF ALABAMA, *Respondent.*

CHARLIE WEEMS and CLARENCE NORRIS, *Petitioners,*

—vs.—

THE STATE OF ALABAMA, *Respondent.*

PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI

WALTER H. POLLAK,
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Supreme Court of the United States

OCTOBER TERM, 1931.

Nos. 981; 982; 983.

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, and OLEN MONTGOMERY,

Petitioners,

vs.

THE STATE OF ALABAMA.

HAYWOOD PATTERSON,

Petitioner,

vs.

THE STATE OF ALABAMA.

CHARLIE WEEMS and CLARENCE NORRIS,

Petitioners,

vs.

THE STATE OF ALABAMA.

PETITIONS FOR WRITS OF CERTIORARI.

May it please the Court:

The petitions of Ozie Powell, Willie Roberson, Andy Wright, and Olen Montgomery; and of Haywood Patterson; and of Charlie Weems and Clarence Norris, respectfully show to this Honorable Court:

A.

Summary statement of the matter involved.

Petitioners apply for certiorari upon the ground that their conviction and sentence to death for the crime of rape constituted in the circumstances of this case a deprivation of liberty and life without due process of law and a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment and a violation of their rights under this Amendment asserted in the courts of the State of Alabama and considered and denied by the Supreme Court of the State,—as appears hereinafter.

The facts are fully set forth in the statement of the case in the accompanying brief. In summary form they are as follows:

The petitioners are negroes. All were at the time of the trial and conviction of immature years (Po., 84; Pa., 115; W., 81*). All are ignorant or illiterate (Po., 84, 87; Pa., 115, 118; W., 81, 84). All are non-residents of the county in which they were tried and of the State of Alabama (Po., 33, 36, 37, 39; Pa., 36; W., 52, 55). They were confined in prison and under military guard from the day of the occurrence which caused their prosecution until and after the termination of their trials two weeks later (Po., 80, 172; Pa., 111-2; W., 78). They were without opportunity to communicate with their parents or with friends or relatives (Po., 80; Pa., 112; W., 78). They were without opportunity to employ counsel and in fact employed none (Po., 83; Pa., 114; W., 80). On the day all cases were set for trial, a lawyer in the court room—

*The abbreviation Po. refers to the Record in the Powell case (No. 981 on this Court's docket), in which the Alabama Supreme Court wrote its principal opinion; Pa. refers to the Patterson Record (No. 982); W. to the Weems Record (No. 983).

who had not prepared the cases in any way—professed a willingness to aid in the defense of petitioners; the court, without consultation with petitioners, accepted the offer and made no appointment of his own (Po., 88-91; Pa., 78-82; W., 85-9). All petitioners were in fact tried on that day or on the next day or on the day thereafter (Po., 2-3; Pa., 2; W., 3). The cases of petitioners were not and could not be prepared and were not and could not be adequately presented.

Sensational and damaging articles appeared in the local press which both assumed and asserted the guilt of the petitioners (Po., 5-17; Pa., 5-17; W., 5-18). Threatening crowds gathered the day of the arrest and were present in the immediate vicinity of the court throughout the trials (Po., 84; Pa., 115; W., 81). A situation of such emergency existed that the Governor of the State called out the National Guard, which remained continuously on duty from the day of the occurrence to the conclusion of the last of the trials (Po., 65-7; Pa., 86-9; W., 93-5). The military force guarding the court during the trials was equipped with machine guns and tear gas bombs (Po., 121; Pa., 144; W., 116). The judge of the court instructed the commander of the guard to search all citizens coming into the court room or the court house grounds for arms (Po., 97; Pa., 87; W., 94). He denied to petitioners a change of venue (Po., 98; Pa., 89; W., 96). The crowds around the court house, in the court house, and in the court room, burst into applauding demonstration when verdict imposing the death penalty was returned (Pa., 140).

The juries which reported the successive verdicts were composed entirely of members of the white race; there were many negroes qualified by law for jury service in the county, but they were excluded from the juries pursuant to custom of long standing (Po., 84; Pa., 115; W.,

82). Jurors were not interrogated concerning the presence or absence of race prejudice and were in fact swayed by prejudice against defendants so that they could not and did not weigh the evidence with calmness and deliberation (Po., 86; Pa., 117; W., 83).

A fair and impartial trial was impossible at the time and place, and there was no fair and impartial trial; the right to counsel was denied; petitioners were the victims of discrimination on account of race; due process and equal protection were withheld.

B.

Reasons relied on for the allowance of the writ.

The same constitutional rights were asserted by all petitioners and asserted in the same way. Petitioners in the three cases, while therefore filing separate records, print as a single document their petitions and brief. The rights under the Federal Constitution asserted and the reasons why the denial of those rights call, as petitioners submit, for the allowance of the writ, are as follows:

> The trial of petitioners in circumstances already indicated in the summary statement of the matter involved and more fully set forth in the statement of the case in the brief hereto attached—which circumstances included circumstances of mob domination—, their conviction and confinement, the jury's imposing the death penalty, and the judge's sentencing them to death (which judgment and sentence were affirmed by the court of last resort of the state), constituted a deprivation of liberty and life in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States

and a denial of the equal protection of the laws to petitioners.

The refusal to petitioners of a change of the venue of trial and the conviction of petitioners and their confinement, the jury's imposing the death penalty, and the judge's sentencing them to death (which judgment and sentence were affirmed by the court of last resort of the state), constituted a deprivation of liberty and life in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and a denial of the equal protection of the laws to petitioners.

The failure to postpone the trial of petitioners and the bringing of them to trial and the conviction and confinement of petitioners, the jury's imposing the death penalty, and the judge's sentencing them to death (which judgment and sentence were affirmed by the court of last resort of the state), constituted a deprivation of liberty and life in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and a denial of the equal protection of the laws to petitioners.

The denial of access to counsel and consultation with counsel and the failure to make a genuine appointment of counsel or, until the day for which all trials were set and the day on which the first trial was commenced, any appointment, and the denial to petitioners through counsel of opportunity to prepare and properly to present their cases and the absence of preparation and the inadequate presentation of the cases and the resultant conviction and confinement, the jury's imposing the death penalty, and the judge's sentencing petitioners to death (which judgment and sentence were affirmed by the court of last

resort of the state), constituted a deprivation of liberty and life in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and a denial of the equal protection of the laws to petitioners.

The systematic exclusion, pursuant to longstanding custom, of negroes from juries in the county where trial was had and the conviction of petitioners, their confinement, the imposition of the death penalty by juries from which negroes were systematically excluded, and the judge's sentencing them to death (which judgment and sentence were affirmed by the court of last resort of the state), constituted a denial of the equal protection of the laws to petitioners and a deprivation of life and liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.*

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Alabama commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, full and complete transcripts of the records and all proceedings in the cases numbered and entitled on the docket of the Supreme Court of the State of Alabama respectively 8 Div., 322 (*Powell, et al.,* vs. *State of Alabama*); 8 Div., 320 (*Patterson* vs. *State of Alabama*); 8 Div.,

*That these points under the Constitution of the United States were raised in the state courts and in accordance with the state practice and denied by the courts of the state, including the highest court, see Po., 109-117, 137, 145-71; Pa., 102-111, 161, 167-79; W., 106-13, 144, 152-63.

For a full showing of the preservation of the Federal rights in the State Courts see the accompanying brief, *Jurisdiction.*

321 (*Weems, et al.*, vs. *State of Alabama*), and that the said judgments of the said Supreme Court of Alabama may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just and your petitioners will ever pray.

OZIE POWELL
WILLIE ROBERSON
ANDY WRIGHT
OLEN MONTGOMERY

HAYWOOD PATTERSON

CHARLIE WEEMS
CLARENCE NORRIS

By WALTER H. POLLAK,
Counsel for Petitioners.

Supreme Court of the United States

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OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, and OLEN MONTGOMERY,

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THE STATE OF ALABAMA.

BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

I.

Opinions of the court below.

The opinions below have not yet been reported officially (or unofficially). They were all rendered on March 24, 1932. They appear at Po., 145; Pa., 167 and W., 152.

The chief opinion in all the cases—the only opinion that expressly alludes to the whole set of records—is in the Powell case (see Po., 170; see also W., 163).

The majority of the Alabama Supreme Court affirmed the convictions in all cases in which *certiorari* is sought.*

Anderson, C. J., dissented in all the cases,—with opinion in the Powell case (Po., 171) and without opinion in the other cases.

II.

Jurisdiction.

1.

The statutory provision sustaining the jurisdiction is Judicial Code, §237-b, as amended by Act of February 13, 1925, 43 Stat., 937.

2.

The date of the judgment to be reviewed is in all the cases March 24, 1932, on which date the Supreme Court of Alabama handed down its opinions of affirmance (Po., 145; Pa., 166; W., 151).

Petitions for rehearing were made in all cases and were in all cases denied by the Alabama Supreme Court on April 9, 1932 (Po., 179; Pa., 188; W., 171).**

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*In the Powell case the Alabama Court reversed as to one Eugene Williams, who was appellant in that Court, finding that upon the uncontradicted evidence he was under the age of 16 and under the Alabama statutes subject to prosecution only in the Juvenile Court.

**The Alabama Court in all cases fixed May 13, 1932, as the date of execution (Po., 144; Pa., 166; W., 151). The whole Court has since joined with the Chief Justice in staying execution but granted a stay only until June 24, 1932 (Po., 184; Pa., 192; W., 175),—leaving open the question of a further stay if this Court has not passed upon this application in the meantime.

3.

The nature of the case and the rulings below were such as to bring the case within the jurisdictional provision of §237-b, *supra,* as appears from the following:

(a)

The Alabama Code (§6088)* authorizes the defendant in a criminal case to include in his bill of exceptions to the appellate court the failure to grant a new trial upon grounds recited in the motion therefor, and requires that the appellate court consider a ground of error so assigned. All petitioners moved for a new trial (as fully appears under "b" hereinafter) upon the grounds, among others, that the trials and convictions constituted a denial of due process and equal protection in the respects herein urged.

The trial judge in all the cases certified that the defendants "separately and severally" filed "a true and correct bill of exceptions" and did this "within the time prescribed by law." "The same is accordingly signed and allowed of record as such by me" (Po., 137; Pa., 161; W., 144; see also Certificates of Appeal, *ibid.*).

(b)

The specific statement of federal constitutional rights appears at pages 109-113 (see also pp. 55, 83-4, 85-6) of the Powell record; 102-8 (see also pp. 57-60, 114-5, 116-7) of the Patterson record; 106-110 (see also pp. 66-8, 80-2, 83, 84) of the Weems record. The claims are:

That the denial of "a fair and impartial trial before an unbiased and unprejudiced jury" constituted a violation of rights under the Fourteenth Amendment (Po., 111; Pa., 104; W., 108); that the refusal of a change

*The Code sections appear in the Appendix—which is bound with this petition and brief—in their numerical order in the 1928 compilation.

of venue was "a denial to the defendants of their rights under the Constitution of the United States, Amendment Fourteen, Section 1" (Po., 110; Pa., 104; W., 108); that the demonstration and excitement attending upon the trial constituted a denial of due process (Po., 83-4; Pa., 114-5; W., 80-1); that the overawing of the jury constituted a denial of due process (Po., 85; Pa., 116-7; W., 83); "that the defendants were compelled to go to trial represented by attorneys, who by their own admission in open Court, stated that they were not prepared," and that this was a denial of due process (Po., 83; Pa., 114; W., 80; see for an elaborate statement of the denial of counsel, Po., 110-1; Pa., 104-5; W., 108-9); that "this is especially true because in fact the defendants were neither represented by counsel retained by them or anyone on their behalf authorized to make such retainer" (Po., 83; Pa., 114; W., 80); that the trial of the defendants before juries from which qualified negroes were "by reason of custom of long standing" (Po., 84; Pa., 115; W., 82) systematically excluded was a denial of rights under the Fourteenth Amendment (Po., 113; Pa., 108; W., 110).

(c)

The Alabama Supreme Court considered in terms whether "any right guaranteed to the defendants under the Constitution of the United States" had been "denied to the defendants in this case." It said that "the record shows that every such right of the defendants was duly observed and accorded them" (Po., 163-4).*

*For further reference in the Court's opinion to the Federal Constitution, see Po., 149.

As we have already said, the Powell opinion is the principal and comprehensive opinion. The fact is that the briefs of all the present petitioners in the Alabama Supreme Court elaborately asserted the right to due process and equal protection.

The dissenting opinion of the Chief Justice below goes expressly upon the point that the proceedings constituted a denial of the right to a fair trial (Po., 171-4).

4.

The following cases, among others, sustain the jurisdiction:

Moore vs. *Dempsey* (261 U. S., 86) establishes that the right to a fair and impartial trial here asserted is protected by the due process of law provision of the Fourteenth Amendment; *Cooke* vs. *United States* (267 U. S., 517) settles it that due process of law requires that there be an effective right to counsel; *Tumey* vs. *Ohio* (273 U. S., 510) shows that where the record below raises these issues this Court has jurisdiction to review the decision of the state court upon direct attack.

III.

Statement of the cases.

The application is made upon undisputed facts. It is made upon the records of the proceedings and upon allegations in the petitions for new trial and in the affidavits submitted in support thereof. These petitions and affidavits the prosecution had the opportunity to contradict by filing affidavits in opposition. Upon many points not concerned with those facts upon which the constitutional issues rest the prosecution did file such affidavits.* In the occasional instances where there is

*The rule is recognized in Alabama that uncontradicted statements in affidavits for a new trial are to be accepted as true (Po., 168). It was upon the uncontradicted showing that the Williams boy was under 16 that his conviction was reversed (Po., 168-9).

some disagreement relevant to the constitutional issues between witnesses called at the trial or upon the motion for new trial and the affidavits we take those minimum facts about which there is no conflict.

Outline of course of events.

As a preliminary to the consideration of particular matters—the publications in the press, the role of the military, the demonstrations at the trial—bearing upon the fairness of the trial or the existence of an effective right to counsel, etc., we first state the course of events in chronological outline.

On the afternoon of March 25, 1931, a freight train going south from Chattanooga into Alabama had on it 7 white boys, the 9 negro boys from Tennessee and Georgia who were brought to trial below,* and some other negro boys,—according to all accounts at least 3 more, according to some still more (Po., 27, 36, 38, 41; Pa., 41, 47; W., 29, 50, 54). Both sets of boys were in a "gondola," or open, car (Po., 22, 26, 33, 38, 41). There were also on the train two white young women, Mrs. Victoria Price and Miss Ruby Bates, clad in overalls (see *e. g.*, Po., 24). According to their testimony they were also in the gondola car (Po., 22, 26).

The negro boys and the white boys began fighting, and the white boys, with the exception of a boy named Gilley were thrown off the train. A message was sent by "wire"—either by telegraph or telephone—"to get

*The Alabama Supreme Court, as already stated, reversed the conviction of the Williams boy because he was under the age of 16; Roy Wright, who was 14 (see Pa., 39) was not brought to trial with these other defendants and was not convicted (see Pa., 173). The original 9 defendants have thus been reduced to 7 petitioners in this Court.

every negro off of the train" (Po., 46). The message said nothing about any molestation of the girls but did report the fight between the two sets of boys (Pa., 33; W., 40).*

At the way-station of Paint Rock, southwest of Scottsboro, a sheriff's posse met the train "and got the bunch that was on the train" (Po., 46).** Certainly on that day, and apparently by that time, and before any reference to the girls had come into the matter, special deputy sheriffs were appointed (Po., 46).

At Paint Rock the notion got abroad that some injury had been done to the girls. They were examined by two physicians,—according to the girls' accounts "within an hour and a half of the occurrence," perhaps in a less time (W., 32, 33). They told the doctors substantially what they subsequently testified to,—that each of them was raped by six negroes. The doctors found minor bruises but no contusions, no lacerations, and no hysteria or even nervousness (Po., 28-30; Pa., 30-32; W., 33-8).

Scottsboro is the county seat of Jackson County, Alabama, and the negro boys were taken back to Scottsboro the same afternoon. As the story got abroad the excitement was naturally intense. According to the next day's local newspaper "a great crowd," "a threatening crowd" gathered (Po., 8; Pa., 7; W., 7). The "Mayor and other local leaders plead for peace and to let the law take its course" (Po., 8; Pa., 7; W., 7). According to another

*The message was apparently a telegram (Po., 46, but see Pa., 33). It was not produced at the trial but there was no dispute as to its contents.

**That is, the posse seized all who were on the train at that time. Mrs. Price and Miss Bates testified all through the trials that they were raped by all the 9 negroes apprehended and by 3 others,—6 boys assailing each one. The other 3 were not apprehended or brought to trial. According to other witnesses there were 14 or more negroes on the train at the time of the fighting between the two sets of boys (*supra*, p. 13).

contemporaneous newspaper account it was due to the sheriff and a band of deputies that the crowd did not enter the jail and seize the negroes (Po., 17; Pa., 16; W., 17).

The sheriff on the same day requested the Governor to call out the National Guard (Po., 8; Pa., 7; W., 7). At 9 o'clock in the evening the Adjutant General, acting by the Governor's order, telephoned from Montgomery to Major Starnes at Guntersville to take hold of the situation with his men (Po., 96; Pa., 87; W., 94). Major Starnes with other officers and 3 companies of the National Guard arrived at Scottsboro within 3 hours after the call (Po., 8; Pa., 7; W., 7).

Thereafter the prisoners were continuously under Major Starnes' guard. For their protection he employed "picked men" (Po., 96; Pa., 87; W., 94). They were confined until the trial in prison at Gadsden (Po., 97; Pa., 87; W., 94-5). They had no communication with their friends or families (Po., 80, 76-7; Pa., 112, 98-9; W., 78).

On March 26 Circuit Judge Hawkins summoned the Grand Jury to reconvene and called a special session of the Circuit Court (Po., 139-41; Pa., 162-4; W., 147-9). All subsequent proceedings were by a special Grand Jury,* a special venire of the petit jury and at a special session of the Circuit Court of Jackson County.

On March 31 all defendants were indicted (Po., 1; Pa., 1; W., 1). They were all subsequently brought to trial for an alleged rape on Victoria Price, effected in concert. Four indictments were, however, at this time placed against each defendant: this collective indict-

*No objection "can be taken to the formation of a special grand jury summoned by the direction of the court" (Alabama Code, §8630, Appendix).

ment in the Price case; a similar collective indictment in the Bates case, and two individual indictments in the cases respectively of Mrs. Price and Miss Bates. (For a summary of this day's proceedings see Po., 10-14; Pa., 9-13; W., 9-13).

There was a form of arraignment on March 31 (Po., 141; Pa., 164; W., 149), and allusion is made thereto in the opinions of the majority (Po., 149; Pa., 170; W., 152). At all events, as we shall see, the defendants were definitively arraigned on April 6, the day the first of the trials commenced.

"For the purpose of arraigning the defendants," Judge Hawkins purported to appoint all the members of the Scottsboro bar (Po., 88; Pa., 79; W., 86).* He "anticipated" "them to continue to help them if no counsel appears" (Po., 88; Pa., 79; W., 86).

The appointment was invalid under the Alabama law, which permits an appointment of "not exceeding two" (Alabama Code, §5567, quoted in Appendix). Indeed, it is said in affidavits, and not contradicted, that the Judge "released" all these lawyers from this appointment (Po., 83; Pa., 114-5; W., 81). And it is shown by the record that one of the lawyers—a member, according to the Chief Justice, of "one of the leading, if not the leading, firm" (Po., 172)—thereafter joined the pros-

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*The minutes of March 31 show the indictment of that date but there is no reference to an appointment of counsel; there is a recital of appearance "represented by counsel" (Po., 141; Pa., 164; W., 149). That definitely the defendants never *employed* any counsel until after the trials were over and that the only proceedings that even in the view of the majority of the court below constituted an *appointment* of counsel occurred on April 6, see *infra*, pages 17-18; that after these proceedings of April 6 defendants were arraigned over again, see W., 99, 3; Pa., 2; Po. 3.

ecution as special counsel and actively participated in all the trials.*

On March 31 the Court set the trial of all cases for April 6 (Po., 141; Pa., 164; W., 149).

The same day a writ of arrest issued (Po., 2; Pa., 1-2; W., 2). The sheriff was directed to serve the jurors for trial on the 6th and to make a return showing the service. This return he made on Saturday, April 4 (Po., 142; Pa., 165; W., 150).

All the cases as just stated were set for trial on Monday, April 6. None of the defendants had up to that time employed counsel or had any opportunity to employ counsel. Nor had the parents of any of them (Po., 80, 83, 76; Pa., 111-2, 114-5, 98; W., 78, 80).

The only way fully to get the flavor of the proceedings—crucially important upon this petition—in relation to the appointment of counsel on April 6, is to read them in full. They appear in identical language at Po., 87-92; Pa., 78-82; and W., 85-9:

There had evidently been some notion that a Mr. Roddy of Chattanooga might appear for the boys (Po., 11-12; Pa., 10-11; W., 11). Because of this the Court hesitated to "impose" upon local counsel (Po., 89; Pa., 79; W., 86). Mr. Roddy, however, declared, "I don't appear as counsel," but "I would like to appear along with counsel that your Honor has indicated you would appoint." He explained: "They have not given me an opportunity to prepare the case and I am not familiar with the procedure in Alabama, but I merely came down here as a friend of people who are interested." "I think the boys would be better off if I stepped entirely out of the case." Mr. Roddy then said flatly,

*For Mr. Proctor's statement that he felt free to do this and the trial Court's acquiescence, see Po., 91; Pa., 81-2; W., 88-9.

"I would like for your Honor to go ahead and appoint counsel."

The Court, however, still hesitated, saying to Mr. Roddy, "If you appear for these defendants then I will not appoint counsel." A member of the local bar, Mr. Moody, then said that, "of course, if your Honor proposes to appoint us,* I am willing to go on with it." Mr. Roddy repeated that he would not assume the responsibility of trial, but "if there is anything I can do to be of help to them, I will be glad to do it." Mr. Moody said, "I am willing to go ahead and help Mr. Roddy in anything I can do under the circumstances," and the Court answered, "All right, all the lawyers that will."

Mr. Roddy handed up a half-page petition for a change of venue with exhibits setting forth articles in the Jackson County Sentinel published in Scottsboro, and in a Chattanooga and a Montgomery paper (Po., 92, 4-17; Pa., 82, 3-17; W., 89, 4-18). The Court heard upon this question only two persons, both of whom happened to be present in the court room,—Sheriff Wann and Major Starnes of the National Guard (Po., 18-21; Pa., 17-20; W., 18-21).** Judge Hawkins inquired whether there was "anything else for the defendants" (Po., 98; Pa., 89; W., 96) and Mr. Roddy said, "No." The Court then ruled: "Well, the motion is overruled, gentlemen" (Po., 98; Pa., 89; W., 96). The defendants excepted (Po., 21, 98; Pa., 20, 89; W., 22, 96).

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*Both Mr. Moody and the Court, even on April 6, seemed to have had the notion that a general appointment of the whole body of members of the local bar might be valid. See the Court's reference to "imposing on you all" (Po., 89; Pa., 79; W., 86).

**For the same testimony set forth more fully in question and answer form, see Po., 93-8; Pa., 83-9; W., 90-5,—exhibits on motion for new trial.

The prosecutor asked the defense whether it "demanded" a severance, and Mr. Roddy said, "No" (Po., 99; Pa., 89; W., 96).*

The Court then inquired of the prosecutor whether *he* wished a severance, and the prosecutor asked for one and in the Court's discretion obtained it (W., 96-7).** In the subsequent trials the defense again demanded no severance (Pa., 20; Po., 21). But the prosecution did get a severance of the case of Patterson, the leader of the boys, from the others (Pa., 20), and also got a severance of the case of Powell and his four co-defendants from that of the 14-year-old Roy Wright (Po., 21).

There was, as we have said, some sort of arraignment on March 31. But each defendant was separately and "duly arraigned" at the beginning of his trial,—on April 6, 7 and 8 (W., 99, 3; Pa., 2; Po., 3).

There was no motion for a continuance in any of the cases. The trial of Weems and Norris was commenced on April 6 and concluded on April 7 (W., 3; Pa., 2, 27); the trial of Patterson was commenced on the 7th and was concluded on the 8th (Pa., 2, 41; Po., 3-4); the trial of Powell and his four co-defendants was commenced and concluded on the 8th (Po., 3-4).

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*The Alabama Code (§5570) provides that "when two or more defendants are jointly indicted, they may be tried either jointly or separately, as they may elect." Practice Rule 31 is concerned with the mechanics of this right (both appear in the Appendix; see also Po., 150).

**The prosecutor elected to try in the first case two of the older boys, Norris and Weems. His first desire was to try Roy Wright with them. This boy was, as we have said, 14 years old, and his youth was apparent. The Court, in order to avoid a delay while the boy's age was being definitely established, suggested that he be tried later. And he was not in fact tried with any of these defendants (Po., 99; Pa., 89-90; W., 96-7).

There were verdicts of guilty in all the cases, and the juries imposed the death penalty upon all the boys.*

The juries that found these verdicts and imposed these penalties were composed exclusively of members of the white race. Although "a large number of negro landowners were qualified jurors," "there was not one negro selected for the entire trial,"—the exclusion being "by reason of a custom of long standing" (Po., 84, not denied; Pa., 115, not denied; W., 82, not denied).

The record does not show what interrogation, if any, was given to the jurors before they were accepted for service. It does, however, show that the jurors were not, as a regular thing certainly, asked whether they entertained a prejudice against negroes. This fact is flatly charged both in the petition for a new trial (Po., 112-3; Pa., 107-8; W., 110) and in the affidavits in support thereof (Po., 86; Pa., 117; W., 83). It is undenied in the answering affidavits. Upon a hearing held in open court on the motion for a new trial, at which those jurors who participated in the third trial were called as witnesses, the State systematically and successfully objected to the question whether they were interrogated about race prejudice (Po., 123-4, 125, 126, *et seq.;* Pa., 147, 148, 150, *et seq.;* W., 119, 120, 122, *et seq.*).**

There are a handful of exceptions to rulings on evidence in the Weems case,—in every instance but one to

*The penalty for rape in Alabama may be, "at the discretion of the jury," from 10 years imprisonment to death (Alabama Code, §5407; Appendix; and see the reference to this matter in the dissenting opinion of Anderson, C. J., in the Powell case, Po., 173).

**It could be stated unqualifiedly that *no* juror was interrogated upon this subject, were it not for the fact that the juror Elkins intimated a contrary recollection (Po., 119; Pa., 142; W., 114). He added, however, that he "couldn't say positively who asked that question" and "I don't remember just what the question was about."

the sustaining of objection to a question put on cross-examination; there are 4 exceptions in the Patterson case; there are 2 in the Powell case.*

The only witnesses for the defense called in any of the cases were negroes under indictment for the crime charged. In the two cases first tried the calling of witnesses themselves under prosecution resulted in surprise damaging to the cause of one defendant or of the sole defendant. Norris testified in the Weems case that there had been raping by the other negro boys (W., 56);** the boy Roy Wright gave like testimony in the Patterson case (Pa., 38-41).

The defense, according to Mr. Roddy's statement, served certain persons whom it intended to call as witnesses (W., 97; Pa., 90-1; Po., 100). He expressed a desire to be assured that these witnesses would be produced. And the Court purported to give him what assistance it could, except in the case of one person, Mr. Ames, who seemed to be personally known to the Judge and whom the Judge understood to be ill (W., 97; Pa., 91; Po., 100). There is no further allusion to these witnesses nor any explanation for their non-appearance.

The record makes no reference to any opening address for the defense in any case, nor to any closing address. In two cases the record shows affirmatively that the defense, in the presence of the jury, elected not to sum up to the jury (Po., 48; W., 59). In the first case "defendant's counsel stated to the Court that they did not care to argue the case to the jury, but counsel for the State stated that they did wish to argue the case to the jury." "At the conclusion of said argument of

*The opinions discuss these exceptions respectively at W., 153-8; Pa., 171, and Po., 160.

**He subsequently recanted this testimony (W., 130-5).

counsel for the State to the jury, counsel for defendants stated that they still did not wish to argue the case to the jury," and the Court "permitted counsel for the State to further argue the case to the jury."

The Court's charges in the three cases were stereotyped and practically identical (W., 60-3; Pa., 50-3; Po., 48-53). He told the first jury: "Let me have your attention for a few moments and then you will have this case" (W., 60). So too he asked the second jury to "let me have your attention for a few moments and we will finish the trial of this case" (Pa., 50).

In no case did counsel who purported to appear for defendants take any exceptions to the charge or submit any charges of their own (W., 63; Pa., 53; Po., 53).

On April 9 all defendants were sentenced to death. None of them said anything as a reason why sentence should not be imposed upon him,—not even the 14 year old boy Williams, nor Mr. Roddy or Mr. Moody in his behalf (Po., 3; Pa., 3; W., 3).* Execution was set for July 10 in all cases (Po., 3; Pa., 3; W., 3). But appeal was on April 9 taken to the Alabama Supreme Court and the sentences were suspended pending its disposition (Po., 3; Pa., 3; W., 3). Mr. Roddy and Mr. Moody at this time filed a motion of two paragraphs to set aside the verdict and for a new trial (Po., 53; Pa., 53-4; W., 63-4).

The death warrants were written on April 18 (Po., 3; Pa., 3; W., 3).

In the course of the next few weeks the families of defendants employed for them General Chamlee of Chat-

*Mr. Roddy did subsequently make an affidavit confirming that Williams was under the age of 16 (Po., 117).

tanooga (Po., 75; Pa., 97; W., 73). "By permission of the Court" the motion theretofore made for a new trial was amended by General Chamlee and a new motion with copious affidavits filed on May 6 (Po., 53-7; Pa., 54-63; W., 64-8).

On June 5 the application for a new trial was somewhat expanded and a second amended motion filed (Po., 108-17; Pa., 102-111;* W., 106-113). This motion in-motion and some others. It was the amended motions for a new trial that asserted, and the petitions and supporting affidavits that laid the factual foundations for, the claims of constitutional right.

The defense at various dates after June 5, submitted numerous affidavits in opposition (Po., 136; Pa., 160; W., 143). The State's affidavits were essentially concerned with the character of the girls,—specifically with the point whether or not they had, as charged in the moving affidavits (Pa., 63-77, 133-7; Po., 102-5; W., 99-103), committed acts of prostitution with negro men and had the reputation of having done so (Pa., 156-60; Po., 132-6; W., 127-30, 135-7).** The prosecution also interposed affi-

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*The second amended motion for a new trial in the Patterson case was filed on May 19 (Pa., 102).

**The Alabama rules on this subject (as expounded in *Story* vs. *State*, 178 Ala., 98, collecting earlier authorities, and in the opinions below) are as follows:

Recognizing that "in other jurisdictions the rule is different" (178 Ala., at 101), the Alabama court holds that evidence of particular acts of unchastity will not be received. Nor will cross examination of the prosecutrix concerning particular acts be permitted. It was in fact denied in the cases at bar and the ruling held not error (Pa., 171; see also W., 154-5). Evidence of general reputation for unchastity will however be received.

The *Story* case moreover noted in forceful language that a white woman's committing acts of prostitution among negroes argued a peculiar depravity, and evidence of a reputation therefor had a high rele-

(*Footnote continued on next page.*)

davits denying charges of maltreatment of defendant Norris in prison (W., 137-43).* The prosecution thus, as we have said, left wholly uncontradicted the allegations in the petition and moving affidavits on which were rested the contentions that fair trial had been withheld, the right to counsel denied and race discrimination practiced.

On June 22 "the final hearing of said motion for new trial as last amended" was had (Po., 136; Pa., 160; W., 143). On the same day the motion was in all the cases denied (Po., 137; Pa., 161; W., 144); appeal was taken from the denial (Certificate of Appeal, Po., 137; Pa., 161; W., 144).

We have stated in general outline the course of proceedings. It is, as we have noted, against the background of other facts—the quality and circumstances of the defendants themselves; the atmosphere of the place at the time as reflected in the press, in the crowds, in the display of military force; the effect of these matters upon the jury—that the question arises whether or not their trial was in the constitutional sense fair and the right to counsel in an effective sense maintained. To the development of these matters we now turn.

(*Footnote continued from p.* 23.)

vancy. It accordingly reversed a conviction of a negro for alleged rape upon a white woman because of the exclusion of such evidence.

The *Story* decision indicated that such evidence was admissible only on the issue of consent, and in the cases at bar the court below definitively so held. It therefore ruled that evidence of acts of prostitution on the part of the two girls with negroes was immaterial because the negroes denied all intercourse with the white women (Po., 163; Pa., 179; W., 163).

*The defense filed on these motions an affidavit by one Ricks, who was on the train throughout the whole trip from Chattanooga south. He said that the girls were not in the open gondola car in which they said they were, in which the colored boys were, and in which the fight between the boys occurred, but were in a closed box car (Po., 107-8; Pa., 139; W., 105). The prosecution made no attempt to impeach Mr. Ricks or his affidavit.

Petitioners and the circumstances of their confinement before and during the trials.

Petitioners are, most of them, illiterate, all of them ignorant (Po., 5, 84; Pa., 4, 115; W., 4, 81). All of them are "immature in years" (Po., 84; Pa., 115, 99; W., 81). Just how immature we do not in all cases know. Of those whose ages we have, the oldest was at the time of the trial 19 (Pa., 42, 43). Patterson who seems to have been the recognized leader (Pa., 42, 47), and who as such was tried separately, was "under 21 years of age" (Pa., 99).

None of the defendants lived in Scottsboro, in Jackson County or in the State of Alabama. Patterson and Wright had their homes in Chattanooga (Pa., 36; Po., 37); Roberson in Memphis (Po., 36); Weems, Norris and Powell in Atlanta (W., 52, 55; Po., 33); Montgomery in Monroe, Ga. (Po., 39).

All were continuously in confinement under military guard from the evening of March 25, to and through the trials,—for a day in Scottsboro, and generally in Gadsden (Po., 80; Pa., 111-2; W., 78).

Petitioners thus describe their condition on the day trial started: They "had no opportunity to employ counsel and no money with which to pay them and had no chance to confer with their parents, kinsfolks or friends and had no chance to procure witnesses and no opportunity to make bond or to communicate with friends on the outside of the jail" (Po., 80; Pa., 112; W., 78).* The father of the Patterson boy, the mother of the Williams boy and the mother of the two Wright boys recite that they "were

*The prosecution had abundant opportunity to contradict allegations concerning the circumstances of the prisoners' confinement, and did in numerous affidavits purport to contradict allegations much less significant concerning the supposed maltreatment of a particular prisoner (see the succession of affidavits appearing in W., 137-43).

not permitted to see" their sons during their confinement (Po., 77; Pa., 99). They were "afraid to go to Scottsboro" and "afraid to go to Gadsden" (Pa., 99, 100, 102; Po., 77, 78, 79; W., 74, 75, 77).

Sentiment of community and atmosphere of trials.

The charged crime was rape. It was rape upon white girls by negroes. "The character of the crime was such as to arouse the indignation of the people, not only in Jackson and the adjoining counties, but everywhere, where womanhood is revered and the sanctity of their persons is respected" (Po., 156).

The press. The articles in the local newspaper, beginning on March 26, the day after the occurrence, and culminating in an editorial on April 3, the Friday before the Monday on which the trials commenced, both reflect and could not have failed to intensify local feeling (W., 5-18; Po., 5-17; Pa., 5-17). Because the Court will, as we believe, read them—and because the Alabama Supreme Court recognized and indeed declared their quality as "sensational and damaging" (Po., 153)—we refrain, in the interest of brevity, from extended quotation or even summary here. But observe the implications of the sentences in the first article—under a 7 headline spread—declaring that "this crime stands without parallel in crime history" and continuing:

> "Calm thinking citizens last night realized that *while* this was the most atrocious crime charged in our county, that the evidence against the negroes was so conclusive as to be almost perfect and that the ends of justice could be best served by legal process" (Po., 8-9; Pa., 8; W., 8; our italics).

Crowds. "Such a happening," as the Alabama Supreme Court remarks (Po., 154), "made the basis of the charge against the defendants, was calculated to draw to Scottsboro on the occasion of the trial, large crowds. It would be surprising if it did not." Sheriff Wann testifying on April 6, was put this question and gave this answer concerning conditions as they existed the day the trials commenced:

> "Q. And there is a great throng around this court house right now that would come in if you did not have the troops?
>
> A. Yes, sir; they are from different counties here today" (Po., 95; Pa., 85; W., 92).*

Numbers are notoriously difficult to estimate. The only clear facts as to the size of the crowd at the trials are the following:

Scottsboro had in 1930 a population of 2,304.** The statement in the motion for new trial that a crowd of 10,000 was gathered in Scottsboro at the trials is not contradicted in the opposing affidavits (Po., 111; Pa., 105; W., 109). Mr. Venson, a demonstrator of Ford cars, called as a witness for the State in opposition to the motion for a new trial, knows "there was a big crowd." He "doesn't think there were 10,000." He "wouldn't guess there was 5,000 people at any one time on the street; I don't think so, but I don't know." "There was a crowd around the court house" (Po., 131; Pa., 154-5; W., 126).

Certain it is that the Ford Motor Company found it worth while on Monday, the 6th, to order Mr. Venson

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*The Sentinel on March 26 applied the same adjective, *"great,"* to "the crowd gathered at the jail" on March 25 (Po., 8; Pa., 7; W., 7). For the trial it predicted a *"tremendous* crowd" (Po., 15; Pa., 14; W., 16).

**15th Census, Vol. I, page 85.

to bring on, for Tuesday, a demonstration of "about 28 trucks,"—"a Ford caravan of commercial trucks" (Po., 130-1; Pa., 154; W., 126).

The *temper* of the crowd is revealed:

The Sentinel of March 26—speaking of the day before, the day of the alleged occurrence and of the arrest—tells us not only that the crowd "gathered at the jail," which Mayor Snodgrass and other local leaders addressed, was a "great crowd" but that it was a "threatening crowd" (Po., 8; Pa., 7; W., 7).* The Montgomery Advertiser, also writing of the events of March 25, declared in an editorial that but for the sheriff's prompt action "those 300 Jackson County citizens might have opened the jail at Scottsboro, and seized the nine or twelve negroes who were charged with criminal assault upon two white girls" (Po., 17; Pa., 16; W., 17).**

The estimate that the responsible officials at the time put upon the temper of the crowds is known and shown:

Mayor Snodgrass of Scottsboro "plead for peace"; Sheriff Wann of Jackson County called upon the Governor of the State to order out the National Guard; Judge Hawkins of the Circuit Court instructed the commanding officer of the National Guard unit at the trial to search for arms citizens coming into the court room,—even into the court house grounds (Starnes, Po., 96-7; Pa., 128; W., 94).

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*"The Mayor and public officials had to make speeches to try to persuade the mob to adjourn" (Po., 84; Pa., 115; W., 81). There is no denial from the Mayor or from any public official or from anybody.

**The Alabama Supreme Court concluded that because of the absence of formal proof that Chattanooga papers or even papers published in Montgomery, Alabama, circulated in Jackson County, such publications were, in the consideration of the motion for change of venue, entitled to "little weight" (Pa., 168). But the editorial published in the capital of the state is on any theory significant as a contemporaneous estimate of the situation.

The military. "Every step that was taken from the arrest and arraignment to the sentence was accompanied by the military," says the Chief Justice,—and he finds the circumstance profoundly significant (Po., 172). Alabama legislation certifies that the Chief Justice was right in his appraisal:

> "The trial judge may, with the consent of the defendant, ex mero motu, direct and order a change of venue as is authorized in the preceding section, whenever in his judgment there is danger of mob violence, and it is advisable to have a military guard to protect the defendant from mob violence" (Alabama Code, §5580; Appendix).*

The following summarizes the state of the record as to "the danger of mob violence" and the need of "protecting the defendants":

Sheriff Wann on the day the trials commenced was asked and answered as follows:

> "Q. You deemed it necessary not only to have the protection of the Sheriff's force but the National Guard?
>
> A. Yes, sir" (Po., 94; Pa., 125; W., 91).

Major Starnes—also on the day the trials commenced—was asked whether his "units of the National Guard have protected" the defendants, and "have been with them on every appearance they have made in this court house." "That is correct," he answered. "Every time it was necessary" (Po., 97; Pa., 128; W., 94).**

The record shows the size and equipment of the military force. "A picked group of twenty-five enlisted men

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*See also the strong declaration of the significance of the military's being called out in a rape case in *Thompson* vs. *State*, 117 Ala., 67.

**And see the reference in the Powell opinion to the Sheriff's testimony that the guard was called "to protect the defendants" (Po., 151).

(*Footnote continued on next page.*)

and two officers from two of my companies" was employed "to bring these defendants over for arraignment," Major Starnes tells us (Po., 96; Pa., 127; W., 94). April 6, the day the trials commenced, Major Starnes had with him about 10 officers and over 100 enlisted men. There were "five units represented" (Starnes, Po., 96; Pa., 127; W., 93).

The situation was no less tense on the last day, April 8. A member of the third jury says of the trial, "I think there were eight machine guns around here." "There were some boxes of tear bombs sitting around" (Po., 121; Pa., 144; W., 116).*

Demonstrations. The National Guard did successfully prevent overt acts of violence against the prisoners. It could not prevent demonstrations of public feeling. The verdict in the Weems case determined the result as to two defendants. It foreshadowed the result as to Patterson, then on trial, and the five defendants to be tried the next day. Upon the report of the jury imposing the death penalty "there was a demonstration in the court house by citizens clapping their hands and hollering and shouting and soon thereafter a demonstration broke out on the streets of Scottsboro," say the affidavits in support of the motion for a new trial (Po., 81; Pa., 112; W., 79). These statements are not contradicted. They are on the contrary confirmed by Major Starnes and Captain Fricke,—who was in immediate charge of the military in the court room and who heard

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(*Footnote continued from p. 29.*)

So too, the Special Deputy Sheriffs, who united in an affidavit in opposition to the motion for a new trial, explained that their function was "to protect the prisoners from annoyance and harm of any kind" (W., 142).

*The Guard did not confine itself to police duty in scattered squads. It had guard mount in the evening (Po., 131; Pa., 155; W., 126).

"the applause in the court room" (Pa., 141). They are confirmed too by the testimony of persons waiting to be called as jurors in the third trial,—persons who were in fact called as jurors in that trial (Po., 118, 120, 124, 125, *et seq.;* see *infra,* p. 34).

These statements, thus confirmed, were accepted by the majority opinion of the Alabama Supreme Court in the Patterson case (Pa., 177).*

One of the few points at which there is controversy over the facts concerns the part played by a band on the afternoon the Weems verdict—the first of the verdicts—came in. We rest the argumentation in this brief, as we have already said, upon facts undisputed and therefore where there is dispute upon minimum facts. We summarize however the discordant statements in order to make clear what the minimum facts are:

The defense in the affidavits supporting its motions for a new trial set forth in detail that at the time the Weems jury reported, the Hosiery Mill band paraded and played such tunes as "Hail, Hail, the Gang's All Here" and "There'll be a Hot Time in the Old Town Tonight" (Pa., 113; Po., 82; W., 80). The State's affidavits did not contradict or qualify these statements. Upon the hearing in open court upon the motion for new trial the State produced no witness from the band. It did produce Mr. Venson, the demonstrator of Ford cars. He testified that while there was noise on this occasion, it was caused by his use of a gramophone with an amplifier. The Hosiery Mill band did play, he said, but it was later in the afternoon,—at six o'clock when the National Guard had its guard mount (Pa., 154-5; Po., 130-1; W., 126-7).

*The Court, however, adopts a rule of practice which precludes the proving of such matters by "evidence *aliunde,*" and therefore disregards the affidavits and evidence.

The minimum facts thus are that there was music in the streets when the verdict came in; that the Hosiery Mill band did perform that afternoon; that the tunes played were tunes like the tunes named or the very tunes.

Atmosphere is elusive,—difficult after the event to recapture. We have tried so far as possible to classify the direct evidence. It remains to note the significance of certain circumstances or events that we have not found it possible to group under particular captions.

The defendants were boys on trial for their lives. The press was full of the danger of their position. Yet no member of their families visited them in Scottsboro or even in Gadsden, 40 miles away. "Colored people," they were "afraid to go to Scottsboro," "afraid to go to Gadsden" (*supra,* p. 26).*

Major Starnes had, on April 6, a large force in Scottsboro with machine guns and tear gas bombs. He had a "picked group" for the immediate protection of the prisoners. With all these precautions it was thought wise to carry the prisoners from Gadsden in the quietest hours of the night—they "arrived here at 5:15 this morning" (Starnes, April 6, Po., 97; Pa., 88; W., 95).

Unofficial and even official expression asserted or—what for our present purpose is more significant—*assumed* the guilt of the defendants:

It was because the evidence, as early as March 25, was accepted as "so conclusive as to be almost perfect" that "calm thinking citizens" came to the conclusion

*These affiants requested that even the motion for a new trial be heard elsewhere than in Scottsboro (Po., 79-80; Pa., 102; W., 77).

"that the ends of justice could be best served by legal process" (*supra*, p. 26).*

Major Starnes had it as his duty to protect the prisoners and did protect them. But even this official on the morning of April 6, before one item of evidence had been presented in open court, referred in testimony publicly given to "the attack" as having "occurred" (Po., 96; Pa., 87; W., 94).

Community sentiment shared by juries and reflected in verdicts.

Jackson County is a rural community of about 35,000 inhabitants (15th Census, vol. 1, p. 76). A jury drawn from a community so small and so closely knit must reflect community feeling. And there is affirmative evidence that the regular jury and the special venire—making a total of just 100—drawn for these cases did reflect community feeling.

No safeguards were thrown around the jurors (Po., 85; Pa., 116; W., 83, not denied). They were allowed—even after trial began—to read the newspapers (Po., 85; Pa., 116; W., 83). And there was a particular reason why, well before the trial, the Jackson County jurors must have had their attention called to the Jackson County Sentinel's articles. All the 100 had their names printed on April 2 in the same article in the Sentinel that described how the negroes had been "indicted on the most serious charges known on the statute books of Alabama, rape",—the same article that explained that "the matter will," unless it "becomes necessary to try each defendant separately," "be made brief" (Po., 12; Pa., 11-12; W., 11-12). Upon the hearing of the motion

*For a like statement in the Sentinel of April 2, see Po., 11; Pa., 10; W., 10-11.

for a new trial the only juror that any one bothered to ask whether he read the newspapers, said he did. He "read the Scottsboro papers about the attack on these girls." He believed, too, that he "read the Chattanooga papers. I think those papers said these men, or some of them, had confessed their guilt" (Po., 119; Pa., 142; W., 114).*

We have noted the applause that greeted the rendition of the verdict in the first case. Captain Fricke of the National Guard testified that when this verdict came in and "the applause in the court room" broke out. the jury that was then hearing the second case was in the jury room,—about 30 feet away (Pa., 141). The transom was partly open (Pa., 141).

The defense upon the hearing of the motion for a new trial requested the production of the members of this second jury. Through some misunderstanding it was the members of the third jury who were in fact produced. That jury was not as a body present at the rendition of the first verdict. But one juror recalls "hollering" (Po., 120; Pa., 143; W., 116); another remembers "whoopee" (Po., 118; Pa., 142; W., 114); another remembers "a lot of noise, hollering and shouts" (Po., 125; Pa., 149; W., 121). A fourth says flatly:

> "It was generally understood by everybody" that the bringing in of the verdict "was the reason for the demonstration" (Po., 127; Pa., 150; W., 122).

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*For references in the newspapers to some negro boys implicating others, see Po., 7, 17; Pa., 6, 16; W., 6, 18).

All the jurors were summoned for April 6. Most or all must have been there when Major Starnes in advance of the production of evidence referred to "the attack" as an established fact.

The question here is not of "the petitioners' innocence or guilt." It is "solely the question whether their constitutional rights have been preserved" (*Moore* vs. *Dempsey,* 261 U. S., 87-8). The consideration that the results reached in trials wholly unprepared and essentially undefended were—as tested even by their own records—wrong results is not as such material. But "there must be calmness and deliberation or at least the fair opportunity for them" (Cardozo, writing of *Moore* vs. *Dempsey* in *The Paradoxes of Legal Science,* p. 123). And the Chief Justice of the Alabama Court properly found a basis for his conclusion that the trial was not in the constitutional sense "fair and impartial" in the circumstance that the jury's action revealed "no discrimination" (Po., 173).

The records afford the following major indicia that the juries' action *was* without discrimination and the reverse of deliberate and calm:

(1) The physicians that examined the girls were scientific men. The prosecution called them and vouched for their quality. These doctors made their examination within an hour and a half or less after the occurrence to which the girls testified (W., 32, 33),—an occurrence that if it took place would be unspeakably harrowing. Doctor Bridges said the girls were not "hysterical over it at all" (Pa., 31). They were not even "nervous" (Pa., 31).

Doctor Lynch confirmed Doctor Bridges (W., 38).

(2) The story was that 6 persons had intercourse with each girl. But the doctors found in Ruby Bate's case that there was only the deposit normal to a single act

of intercourse (W., 33, 34, 37-8; Pa., 31; Po., 29).* In Victoria Price's case they found even less,—much less (W., 37-8; Pa., 31; Po., 29).

(3) Victoria Price testifies that she resisted. "I fought back at them" (W., 30). "They hit me on the head" with a gun (W., 27). But neither doctor testified to finding any head wound or any contusion anywhere. Both doctors testified that there were no lacerations, and neither girl showed evidence of bleeding (W., 36, 37, 38).

(4) The crime charged was a crime said to have been committed in an open gondola car in broad daylight on a train that passed through several towns and villages,—Woodville, Hollywood, Scottsboro and Larkinsville. The prosecution was able to produce five witnesses that saw a fight on the train, including two who saw girls on it (Po., 31, 32; Pa., 33, 34; W., 48, 50). It produced none that said they saw a rape. No flagman or signal man, no railway employee at any station was produced as a witness at any trial. No affidavit from any such person was introduced in opposition to the motion for a new trial, The only person on the train or connected with its operation—except the prosecuting witnesses and the defendants—that at any time told what happened on that train that afternoon, was Mr. Ricks.** In support of the motion for a new trial he made affidavit that he saw the girls get into a *box* car at Stevenson and that "they were in it when he last

*Ruby Bates expressly testified that she was not a virgin (W., 43; see also Dr. Bridges at Po., 30).

**The Gilley boy in one case in rebuttal identified the boys as being in the gondola car (Po., 47). But he was not called to give evidence of the rape and was not permitted in rebuttal to testify one way or the other about it.

saw them until they got to Paint Rock" (Po., 107-8; Pa., 139; W., 105).

(5) There were seven white boys on the train. They obviously had a story to tell:

"We had spoken a few words with the white boys," Mrs. Price herself says (W., 28), though she adds, "but that wasn't in no loving conversation" (W., 28). The colored boys "shot five times over the gondola where the [white] boys were" (Po., 26). "While the defendant Montgomery was having intercouse with me and the other one held me", the colored boys told the white boys that "they would kill them, that it was their car and we were their women from then on" (Po., 23). Thurman, a white boy, was hit on the head with a gun, according to Mrs. Price (W., 28). Falling, he "looked back and seen the one sitting behind defendants' counsel grab me by the leg and jerk me back in the gondola" (W., 28). "There was one white boy on the car that seen the whole thing, and that is that Gilley boy" (Price, W., 27); he was "in the gondola all the time the ravishing was going on" (W., 33).

There was no difficulty about producing the white boys. Their names were printed as early as March 26 in the Sentinel (Po., 6; Pa., 6; W., 6). They were kept in the prosecution's "control" (Po., 115; Pa., 110; W., 112). But no white boy other than Gilley was called in any case; Gilley was called in one case only, the last, and in that case in rebuttal only; his testimony comes to nothing more than that he had seen the defendants (Po., 47).*

(6) The negro boys "had their knives and pistols on them when they stopped the train at Paint Rock"

*No affidavit from Gilley or any of the white boys was produced in opposition to the motion for a new trial.

(W., 47). Both girls were able to testify even to the calibre of the pistols (W., 23; Pa., 29; Po., 24). Two pocket knives, one admitted by one of the boys to be his (Po., 41), another disputed (W., 58-9), were introduced in evidence. No pistols.*

(7) The juries accepted the stories of Victoria Price and Ruby Bates and accepted them as to all defendants,—no matter how flimsy in the case of a given defendant the evidence of the prosecutrices themselves might be. Take, as an illustration, the case of Roberson, one of the defendants in the Powell group. His testimony was that he was not in the gondola car at all but lay seriously sick in a box car (Po., 36-7, 43-4); other negroes, who admitted the fight with the white boys and their own participation in it, confirmed that Roberson was not in the car (Po., 38, 42); a white witness who was one of the posse that met the train at Paint Rock confirmed that he saw some one get off that part of the train where Roberson said he had been (Po., 45); a doctor called by the State who had examined Roberson confirmed that he was sick and added that his condition was such as to make participation in a rape "painful" (Po., 29).

Yet Victoria Price said he had been "with the other girl" (Po., 25). Ruby Bates in general terms included

*No explanation of the failure to produce the pistols was given. (For affirmative evidence of searching the boys, see W., 58.)

Similarly, Mrs. Price testified that her undergarments "were torn off," "pulled apart" (W., 29, 23). The garments were not produced, nor explanation given.

Both Mrs. Price and Miss Bates—although of course as Mrs. Price testified "there were no charges against us" (Po., 43)—were "held in jail since the 28th of March last month." "They kept us locked up in the jail, both of us locked up there" (Po., 43; for like testimony, see W., 31). And the purpose of confining them was that they might be "witnesses in these cases" (Po., 43). (That Mrs. Price on several occasions while she was in jail saw the defendants, see her testimony at Pa., 24.)

Roberson as among the five Powell defendants all of whom she said were in the car,—but she did not separately identify him and did not recall that incident of her being herself raped by him to which Victoria Price testified (Po., 26). The Gilley boy, too, did not identify Roberson separately but said "I saw all the negroes were in that gondola" (Po., 47).*

Roberson was convicted.

(8) The *punishments* in the cases of all defendants were the same. The death penalty was inflicted alike upon Patterson, the supposed leader, and upon his followers. It was inflicted upon the Williams boy, not 15, if that (Pa., 43; Po., 117), and, to the observation of the jury, small. Victoria Price identified him to the jury as "the little bit" of a boy (W., 29).

For the significance that Anderson, C. J., found in the fact that the jury as to every one of the defendants imposed the "extreme" penalty, see Po., 173.

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*The state called in rebuttal in the Powell case four witnesses besides Gilley for the purpose of identifying the defendants of the Powell group. None of them added anything to the identification of Roberson:

The two who mentioned Roberson by name testified that they first saw him after he had been taken off the train and was in the group with the other negroes under guard (Latham, Po., 44; Keel, Po., 47). The two others referred to a negro sitting "on the end of the front row": One recognized *that* negro as one of those he had seen coming out of the gondola "when the train came around the curve right below town" (Rousseau, Po., 44-5); the other said, "I think I saw that negro" "on the top of the gondola car" (Brannon, Po., 45). But there is no suggestion that the negro referred to was Roberson. On the contrary Roberson had been pointed out by Victoria Price not as sitting "on the end of the front row" but as "third" from the end (Po., 25).

One of these two witnesses as we have said confirmed Roberson's story by giving the testimony as to seeing someone get off the rear of the train.

The issue of identification was the more obviously crucial because—although the orders were "to get every negro off of the train" at Paint Rock—upon the testimony of all witnesses there were at least 3 negroes on the train who were not apprehended or tried (*supra*, p. 13).

If the trained and experienced judge is swayed by the feelings of the community the circumstance is evidence that the jury is carried away,—evidence and cause. To us the conclusion is unescapable that the trial judge *was* swayed by the emotion of the occasion, and we deem it our duty to note the more obvious indications.

He first made an "appointment" of counsel invalid under the statutes of the State, and that if valid would have been obviously insufficient to lay a specific responsibility upon any individual attorney. If ever he made an appointment that was even in form effective, he did so on the last possible occasion,—on the day for which all trials were set, the day the first trial commenced. He acted with declared reluctance,—with an apology that made the duty an "imposition."*

The judge summarily denied a change of venue. This he did although a statute of the State—the military being present—authorized him to change the place of trial on his own initiative and without motion by defendants. The judge knew the military were there and knew the need for the military. He had himself ordered the commander of the unit to intensify his precautions,—to search citizens for arms. Yet he did not act of his own initiative, and denied the relief when the defense took the initiative.

In the first case and again in the second, with lives at stake, the judge by his opening sentence notified the jury that all he demanded was their "attention for a few moments."

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*Contrast the following statement by Judge Cooley:

The duty resting upon assigned counsel "is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of crime" (1 *Con. Lims.*, 8th Ed. [1927], 700).

In three capital cases, involving eight defendants, the judge made his decision upon motions for new trial resting upon voluminous affidavits and raising far-reaching issues under the Constitution of the United States the day the motions were submitted. Denying the motion for a new trial in every case and as to every defendant he sustained the death penalty even when inflicted upon a boy shown by evidence uncontradicted to be under 16,— in opposition to "the plain mandatory terms of the statute" (Po., 168).

IV.

Errors below relied upon here; summary of argument.

The Alabama practice does not call for assignments of error but simply for a bill of exceptions (Code, §3258, Appendix). There are no assignments in these records.

The errors the State Court, in the denial of federal constitutional rights, committed and the points we urge are in summary form as follows:

I. There was no fair and impartial trial and there was therefore a denial of due process. The decision of the State Court is not in accord with the decision of this Court in *Moore* vs. *Dempsey,* 261 U. S., 86.

II. Due process of law includes the right to counsel with its accustomed incidents of consultation and opportunity for preparation for trial and for the presentation of a proper defense at trial. That right was denied. The decision of the State Court is not in accord with the decision of this Court in *Cooke* vs. *United States,* 267 U. S., 517, and not in accord with the whole line of decisions upon notice and opportunity to defend beginning with *Pennoyer* vs. *Neff,* 95 U. S., 714.

III. The systematic exclusion pursuant to custom of long standing of qualified negroes from the juries and the trial of members of the negro race and their conviction by juries thus composed is a denial of the equal protection of the laws. Objection to the exclusion was—allowance being made for the circumstances—reasonably taken. The decision of the State Court is not in accord with the line of decisions in this Court from *Neal* vs. *Delaware*, 103 U. S., 370, through *Martin* vs. *Texas*, 200 U. S., 316.

IV. The State Court's analysis of the issues of due process and equal protection is at all points either irrelevant or mistaken.

POINT I.

The trial was not fair and impartial, and the conviction, confinement and death sentence constitute a deprivation of liberty and life without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

The decision of the state court is not in accord with Moore vs. Dempsey, 261 U. S., 86.

"Where a state court has decided a federal question of substance" "in a way probably not in accord with applicable decisions of this Court" there is a typical case for certiorari. *Moore* vs. *Dempsey* (261 U. S., 86) is the applicable decision. We compare, therefore, the facts of the records at bar as we have summarized them, with the facts as shown by the *Moore* opinion and record,—collating under separate heads (1) items of obvious identity; (2) items shown in the *Moore* case and not here shown or not here shown so explicitly; (3) items absent in the *Moore* case and here present.*

(1)

(a) A "Committee of Seven and other leading officials" reminded the Governor of Arkansas a year after the event that at the time they "'gave our citizens their solemn promise that the law would be carried out'" (261 U. S., at 89).

In the cases at bar the day of the offense—as we learn from the newspaper of the next day—"Mayor Snodgrass

*Mr. Justice Holmes in the *Moore* case in certain instances read—as anyone dealing with a problem of the sort must read—between the literal lines of the record in order to seize the spirit of the proceedings in the Arkansas court. It is partly for this reason, and also for the further reason that certain facts in the record are not mentioned in the opinion, that we make constant reference to the Moore *record.*

and other local leaders addressed the threatening crowd and plead for peace and to let the law take its course" (Po., 8; Pa., 7; W., 7). "Calm thinking citizens" "realized that while this was the most atrocious crime charged in our county, that the evidence against the negroes was so conclusive as to be almost perfect and that the ends of justice could be best served by a legal process" (Po., 8; Pa., 8; W., 8).

(b) "The petitioners were brought into Court and informed that a certain lawyer was appointed their counsel" (261 U. S., at 89). "They were given no opportunity to employ an attorney of their own choice" (*Moore,* Rec., 5).

(c) Appointed counsel "had had no preliminary consultation with the accused" (261 U. S., 89).

(d) Moore and the rest "were placed on trial before a white jury—blacks being systematically excluded" (261 U. S., 89).

(e) "Counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials" (261 U. S., at 89).

Counsel in the cases at bar did venture to hand up "a single copy" of a half-page petition for a change of venue, with newspaper exhibits (Po., 4-5, 92; Pa., 4, 82; W., 4, 89). But counsel did not have opportunity to make that examination upon which a genuine exposition of the sentiment of the community depended.

Counsel in these cases too did not "demand delay."

We can be certain there was no challenge to any juryman. For on the motion for a new trial the State successfully interposed objection to the inquiry whether

even that question which in the circumstances of this case was the most obvious was put to jurymen (Po., 123, 125, 126, *et seq.;* Pa., 147, 148, 150, *et seq.;* W., 119, 120, 122, *et seq.*).*

In these cases too the defense did not "ask for separate trials,"—although its right thereto was absolute under the statute and although the prosecution, whose right was merely discretionary, asked for a severance in every case and obtained just the severances it wanted.**

(f) The *form* of trial was observed in the *Moore* case. The appointed counsel "cross-examined the witnesses, made exceptions and evidently was careful to preserve a full and complete transcript of the proceedings" (261 U. S., at 96, dissenting opinion).***

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*There was certainly no clear reference to the absence of challenges in the *Moore* record, if indeed any reference. There is merely a statement that there was no "objection to the organization of the grand jury" and "no objection to the petit jury or any previous proceedings" (p. 7). But the conclusion that there were no challenges was irresistible in the *Moore* case as it is in the cases at bar, and for the same reasons.

**The psychological effect of the order of trials was identical in the *Moore* case and in the cases at bar:

Frank Hicks, who was supposed to have fired the shot that killed Clinton Lee, was tried by the prosecution first and alone; immediately thereafter the other 5 defendants were brought to trial together (see *Moore,* Rec., 81, 106).

The Alabama prosecutor first tried Weems, one of the older boys (Pa., 23; Po., 24) and with him Norris, who to the surprise of the defense (W., 57), declared that there was raping by colored boys though not by himself; it next tried Patterson, the leader of the colored boys in the fight with the white boys, and tried him alone (Pa., 20); it then tried 5 more, leaving out only the 14-year-old Roy Wright.

***The following pages of the *Moore* record illustrate this statement: 29; 31; 32; 36; 37; 41; 43; 47; 49; 50; 54. Seven witnesses were called.

(2)

(a) There is only one concrete respect in which the *Moore* record went beyond these records in the demonstration that *only* the forms were observed. The petition in the *Moore* case recited that the trial lasted less than an hour and that the jury's verdict was brought in in a few minutes (*Moore,* Rec. 5). The *Moore* case was upon demurrer and this Court, of course, accepted these statements of the petition.

The practice in Jackson County does not, as the records show, take note of the time a jury goes out and returns. Mr. Roddy and Mr. Moody had no part in the affidavits challenging the fairness of the trial and raising the constitutional issues of due process and equal protection.* The ignorant and frightened boys who were the defendants were hardly in a position to make estimates concerning the length of the trials or of the jury's "deliberations." What is certain is that if there had been extended deliberation the prosecution would have shown the fact. For it would have been at least as easy to procure affidavits from the prosecuting officers themselves, as, let us say, from sheriffs and deputy sheriffs (compare W., 137, 139, 140, 142),—not to speak of out-

*Compare *Downer* vs. *Dunaway* (53 F. [2d], 586; December, 1931),—a decision of the Circuit Court of Appeals in the Fifth Circuit reversing the District Court and granting, on the authority of *Moore* vs. *Dempsey,* a petition for *habeas corpus* in a situation like that presented in the *Moore* case and in the cases at bar. Speaking of counsel assigned on the day of trial to defend a negro accused of rape, Bryan, C. J., says:

> "Counsel who represented appellant may have construed their appointment as covering only the actual trial, such as impaneling the jury, examining and cross-examining the witnesses, and making arguments in the case; and not as including the making of motions for continuance, change of venue, and a new trial" (p. 589).

siders like the editor of the Jackson County Sentinel (Po., 134; Pa., 158; W., 135).

The clear facts are the gross facts:

All three trials were commenced and concluded in three days.

The Powell case, involving 5 defendants, was started on the last day *after* 6 witnesses had testified in the Patterson case, and *after* the judge had charged the jury in that case (Pa., 42, *et seq.;* Po., 2-53). Yet the Powell jury found time the same day to bring in a verdict that all defendants were guilty and that all defendants should suffer the extreme penalty.

(b) The only other matters that could even be suggested as pointing to a more flagrant denial of the essentials of due process in the actual course of the *Moore* trials than in the trials at bar are matters of mere conclusion, and are indeed stated in the *Moore* record as matters of conclusion. There were general statements that "there never was a chance for the petitioners to be acquitted;" that "no juryman could have voted for an acquittal and continued to live in Phillips County;" that "if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob" (261 U. S., 89-90).

It is hardly necessary to say that this Court noted the merely conclusory quality of these declarations. It quoted them with the prefatory phrase, "according to the allegations and the affidavits" (261 U. S., at 89).*

*As we shall see in more detail (*infra*, pp. 73-74), peculiarly where the issue is as to matters of community sentiment statements of conclusion and opinion are to be disregarded. Such allegations cannot be compared for real substance to concrete facts like the prisoners being carried to court at night under military guard; their parents fearing to come to Scottsboro or even to Gadsden; applause in the court room on the rendition of the death verdict, etc.

We pass now from circumstances of obvious and often of verbal identity and from circumstances at most of unessential difference, if of any, to those facts and features that make the great decision in *Moore* vs. *Dempsey* authority *a fortiori* in support of the petitions at bar.

(3)

(a) The crime in the *Moore* case was on October 1, 1919 (*Moore,* Rec., 1); the trial was on November 3 (261 U. S., at 89; *Moore,* Rec., 27). More than a month elapsed between the occurrence and the trial.

(b) There were mob gatherings in the *Moore* case, too. But the outbreaks were definitely over in the *Moore* case by about the 10th of October at the latest (*Moore,* Rec., 15; 89; 3).* The military accordingly played no such part in the *Moore* case as in the cases at bar. The Governor of Arkansas did not call out the National Guard. The Governor did, on October 2, call on the commander at Camp Pike to send United States soldiers (*Moore,* Rec., 95) and some were at that time sent. But these soldiers promptly put an end to the disturbances (*Moore,* Rec., 2) and there is no suggestion that any soldiers, Federal or State, were around at the time of the *Moore* trials.**

*So, too, the opinion notes that "*shortly after the arrest* of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops" (261 U. S., at 88). And the dissenting opinion alludes to "the disorders of *September,* 1919" (at 101).

**For affirmative indication that soldiers were not around, see *Moore,* Record, 98.

This is the situation in the cases at bar as Chief Justice Anderson summarized it:

"Every step that was taken from the arrest and arraignment to the sentence was accompanied by the military. Soldiers removed the defendants to Gadsden for safekeeping, soldiers escorted them back to Scottsboro for arraignment, soldiers escorted them back to Gadsden for safekeeping while awaiting trial, soldiers returned them to Scottsboro for trial a few days thereafter, and soldiers guarded the court house and grounds during every step in the trial and, after trial and sentence, again removed them to Gadsden. Whether this was essential to protect the prisoners from violence or because the officials were over apprehensive as to the condition of the public mind, matters little as this fact alone was enough to have a coercive influence on the jury" (Po., 172).

(c) It was alleged in general terms in the *Moore* petition (*Moore,* Rec., 3) and accepted by this Court (261 U. S., at 88) that "inflammatory articles" appeared day by day. But the *Moore* record contains only one article, which appeared on October 7 or nearly a month before the trial (*Moore,* Rec., 11-14). And that article—highly colored as it was—carries no suggestion of lynch law and makes no charge and gives no intimation of the individual guilt of any of the negroes who were subsequently brought to trial,—let alone of all of them. The articles in the cases at bar refer not only to "a crime without parallel" but to evidence essentially "conclusive," evidence "almost perfect,"—to "confessions."*

(d) "The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous

*There is mention in the article which appears as an exhibit in the *Moore* record of "confessions" by certain negroes. But no one of the negroes subsequently brought to trial is named as making these confessions or as being implicated by them.

consequences to anyone interfering with the desired result" (261 U. S., at 89).

In the cases at bar on March 25 "a great crowd gathered at the jail,"—a "threatening crowd" (Po., 8; Pa., 7; W., 7); on March 31 a "great crowd was present or tried to get into the court room" (Po., 11; Pa., 10; W., 10); for April 6 a "tremendous crowd" was predicted (Po., 15; Pa., 14; W., 16); on April 6 the sheriff testified that "right now" there was present a "great throng" (Po., 95; Pa., 85; W., 92).

There is no suggestion in the *Moore* opinion or record that the crowd around the court room or any member of it was armed or that there had been any use of firearms by anyone since the quelling of the disturbance about a month before the trial (*supra*, p. 48). In the cases at bar the commander of the military found it necessary to "issue orders to his men" not to permit citizens to "come in the court house or court house grounds with arms." The situation existed "on every appearance of the defendants." It "exists right now,—" on April 6. The precaution was adopted "under orders of the court" (Po., 97; Pa., 87; W., 94).*

(e) There is no reference in the *Moore* opinion or record to any applause in the court room or the court house or the court house grounds or anywhere when

*The Powell opinion contains the following (Po., 154):

> "It should be stated that the judge of the court did not direct the sheriff to call for the militia, nor did the judge of the court make any request upon the Governor for the militia."

The militia were called out on March 25, before the judge called a session of the court or even came to Scottsboro (see Po., 8; Pa., 7; W., 7). What is indisputable is that finding the militia already there, the judge gave orders making even more drastic the precautions that the sheriff and the military officers had adopted.

either one of the verdicts in the Arkansas prosecutions was rendered.*

(f) Counsel in the *Moore* case "called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand" (261 U. S., at 89).

That was a bad situation for the defendants in the *Moore* case. The situation of the defendants in the cases at bar was worse: As the several cases came to trial, other negroes against whom the same indictments lay—and like the actual defendants bearing the odium of "a crime without parallel"—were called as witnesses for the defense. The *only* witnesses for the defense in any case were persons under indictment. And in two of the cases—in the first case, which foreshadowed the result in the subsequent cases, and in the second case—these witnesses for the *defense* went back upon their co-defendants (W., 55-8; Pa., 39-41).**

(g) Neither side summed up to the jury in the *Moore* case (*Moore,* Rec., 51). But consider the cases at bar. No feature is more eloquent of the general atmosphere

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**Frank* vs. *Mangum,* 237 U. S., 309, attests the extreme importance of such evidence. Two of the justices in the *Frank* case thought that proved instances of applause and feeling in the court room, standing substantially alone, established a denial of due process.

***The essential situation as disclosed in the *Moore* case and in the cases at bar was the same,—with the important difference noted above that the defense in the *Moore* case did not have the experience of being surprised by having its own witnesses go back on it. In the *Moore* case, too, the supposed guilt of the negro defendants was established by the testimony of negro witnesses,—in that case called by the prosecution (*Moore,* Rec., 31-45).

In the *Moore* case these negro witnesses subsequently signed affidavits declaring that the testimony they gave had been enforced by torture (*Moore,* Rec., 15-19). For a like affidavit by Norris, the witness who went back on Weems, see W., 130.

than the following extract from the Weems Record, already partially quoted:

> "After both sides had closed their testimony, defendants' counsel stated to the court that they did not care to argue the case to the jury, but counsel for the State stated to the court that they did wish to argue the case to the jury, and one of counsel for the State proceeded to argue the case to the jury. At the conclusion of said argument of counsel for the State to the jury, counsel for defendants stated that they *still* did not wish to argue the case to the jury, and objected separately and severally on behalf of the defendants to any further argument of the case to the jury by counsel for the State, on the ground that after counsel for defendants had declined to argue the case to the jury any further argument on behalf of counsel for the State to the jury would be contrary to the law and the rules of practice of this court, and would be harmful and prejudicial to the interest of the defendants. The court overruled said objection and permitted counsel for the State to further argue the case to the jury, to which action of the court defendants separately and severally reserved an exception" (W., 59).*

(h) Moore and his fellow petitioners "were citizens and residents of Phillips County, Arkansas." They were tried in Phillips County (*Moore,* Rec., 1). The petitioners for certiorari, sentenced to death in Alabama, were all residents either of Tennessee or Georgia (*supra,* p. 25).

*For an incident hardly less striking at the conclusion of the Powell case, see Po., 48.

(i) Moore and his companions were "poor and ignorant and black" (dissenting opinion, at 102). But they were grown men. They were moving spirits in an elaborate organization,—in the words of a witness of their own race "the head leaders" (*Moore,* Rec., 40; see also 31). The leader in the cases at bar was a boy under 21; in so far as the records show the ages, they show affirmatively that all the others were under 21 (*supra,* p. 25).

This Court, in a cardinal opinion, recognized that the reason for the Fourteenth Amendment's adoption was that the prior experience of the then emancipated negro race had left them "mere children" (*Strauder* vs. *West Virginia,* 100 U. S., 303, 306). It cannot, we submit, overlook, upon the issue whether process was due or protection equal—whether the trial was fair, whether the right to counsel was respected—, the youth of the negroes that were here on trial for their lives.

* * *

With the facts of the *Moore* record thus laid bare there can be no distinction between the *Moore* case and the cases at bar,—certainly no distinction against the petitioners.

The grounds on which the Arkansas Court unanimously sustained the conviction of Moore and the rest are the same grounds on which the majority of the Alabama Court proceeded in the cases at bar:*

"Eminent counsel," the Arkansas Court said, "was appointed to defend appellants" (*Moore,* Rec., 66), precisely as the Alabama Court certified that Mr. Moody was "an able member of the local bar" (Po., 170).

The complaint of discrimination against Moore and his fellow petitioners by reason of the systematic exclusion

*The opinion of the Arkansas Court besides appearing in the *Moore* record is reported *sub nom. Hicks* vs. *State* in 143 Ark., 158.

of negroes from the jury, the Arkansas Court "answered by saying that the question was raised in the motion for a new trial, and it, therefore, comes too late to be now considered" (*Moore,* Rec., 65). The Alabama Court said the same thing (Po., 162).

"The trials were had according to the law," the Arkansas Court went on, "the jury was correctly charged as to the law of the case, and the testimony is legally sufficient to support the verdicts returned" (*Moore,* Rec., 66). The majority of the Alabama Court, too, affirmed the convictions because they found no exceptions well taken upon points of law.

The Alabama Court mentioned the *Moore* case but declined to apply it (Po., 158). It said that the cases at bar were different but it stated not one circumstance of distinction. The Alabama Court mentioned, too, the case so recently decided by the Circuit Court of Appeals in the Fifth Circuit (*Downer* vs. *Dunaway,* 53 F. [2d], 586),—giving relief upon the authority of the *Moore* case to a negro tried for rape and hurried to conviction in circumstances like those in the cases at bar. In this connection, too, it mentioned not one circumstance of distinction (Po., 158). Chief Justice Anderson in dissenting reasoned in the same way as did this Court in the *Moore* case and to the same conclusion,—that the accumulation of circumstances and considerations establishes that the trial was not fair and the process not due.

* * *

This Court, which in the *Moore* case granted relief even by the extraordinary remedy of *habeas corpus*—a remedy whose basis is a challenge of the state court's jurisdiction—, should not, we submit, in the cases at bar close the door to direct attack.

POINT II.

Due process of law includes the right to counsel and its accustomed incidents. This right in all effective sense was denied defendants. The decision of the state court cannot be reconciled with the definition of the right to counsel given in Cooke vs. United States, 267 U. S., 517, and with the requirement of notice and opportunity to defend set up in Pennoyer vs. Neff, 95 U. S., 714 and subsequent decisions.

"With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel (1 *Cooley, Con. Lims.* [8th ed., 1927], p. 700, collecting authorities).

The right to counsel is of the essence of the right to due process and included within the due process provisions. "Due process of law," declared Taft, C. J., in *Cooke* vs. *United States* (267 U. S., 517, 537), "includes the assistance of counsel, if requested, and the right to call witnesses to give testimony." As the Pennsylvania Supreme Court—setting aside a conviction that carried a 9 months' prison sentence and $1,000 fine because trial was had the day counsel was obtained, and citing the *Cooke* case and many others in this Court (*Commonwealth* vs. *O'Keefe,* 298 Pa., 169)—noted, the principle of the Cooke decision is but a particular application of a general requirement of notice and opportunity to defend running through a line of decisions that began at least as far back as *Pennoyer* vs. *Neff* (95 U. S., 714).

Nor is there question as to the scope of the constitutional right to counsel:

"In guaranteeing to parties accused of crime the right to the aid of counsel, the Constitution secures it with

all its accustomed incidents" (1 *Cooley, Con. Lims.* [8th ed., 1927], p. 700). "The right to the aid of counsel includes the right to communication and consultation with him" (*ibid.*, footnote 5, collecting numerous cases). "The constitutional guarantee that one shall have the right to be represented by counsel means nothing if it does not mean that he shall have reasonable time in which to state the facts of his case to counsel after they are employed or appointed, and to be advised" (*Jackson* vs. *Commonwealth,* 215 Ky., 800, 802).

Russell, C. J., in *Sheppard* vs. *State* (165 Ga., 460, 464 [1928]), wrote:

> "Benefit of counsel either means something or it means nothing. To promise the benefit of counsel and then render the service ineffective is, as Judge Blandford once remarked, 'to keep the word of promise to the ear and break it to our hope.' The intense strain involved in the responsibility of defending one whose life is at stake is such as can scarcely be described in words; and altogether aside from inquiry into the facts of the case and legitimate inquiry so far as possible into the character of the jurors, as much time and thought are required to consider and determine what course of action shall be pursued in defending one whose life is at stake as in important civil cases where many thousands of dollars are involved."*

*Sheppard was forced to trial in a capital case a week after the crime and the day counsel was appointed. His conviction was reversed.

Report No. 11 of the National Commission on Law Observance and Enforcement, *Lawlessness in Law Enforcement* (Government Printing Office, Washington, 1931) analyzes numerous cases (pp. 273-8). It quotes with approval the foregoing extract from Mr. Justice Russell's opinion.

The law is in no dispute. We turn to its application to the facts.

The extent of defendants' *own* capacity for the preparation and presentation of their case can be measured by obvious facts. "The defendants had no opportunity to prepare their defense, as they were kept in close custody from their arrest until the trial" (*Mitchell* vs. *Commonwealth,* 225 Ky., 83, 84 [1928]).* They were "ignorant,"—nearly or quite "illiterate" (*People* vs. *Nitti,* 312 Ill., 73, 89, followed in *Sanchez* vs. *State,* 199 Ind., 235, 246).**

Defendants' families were hardly in better case. With their sons about to be on trial for their lives or actually on trial for their lives, the parents were "afraid to go to Scottsboro" or to Gadsden (*supra,* pp. 25-6). "Parents, kinsfolks or friends" had no communication with the boys (*supra,* p. 25).

If then anything was to be done for the boys it was only counsel that could do it. We have summarized the facts as to the "appointment" of counsel:

The appointment of March 31 was invalid. The statute permits the appointment of not more than two. All the

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*The Kentucky Court, in circumstances much like those in the cases at bar—the National Guard had been called out, etc.—reversed the conviction of a negro charged with killing a white man and tried a week after the alleged offense and a few days after "he had *employed* an attorney."

**There were no questions of mob domination in the *Nitti* and *Sanchez* cases, in which the convictions were reversed by reason of inadequate representation by counsel. The defendants in both cases were foreigners. That at least as much allowance is to be made for negroes in a case where "race prejudice has been aroused and public excitement prevails" compare *Mitchell* vs. *Commonwealth, supra,* 225 Ky., at 85.

lawyers were to "defend" all the boys. "The court did not name or designate particular counsel, but appointed the entire Scottsboro bar, thus extending and enlarging the responsibility and, in a sense, enabling each one to rely upon others" (Anderson, C. J., Po., 172). Of course such an appointment would be in the constitutional sense no appointment even if local statute permitted instead of forbidding it. Everybody's business, it is proverbial wisdom, is nobody's business.

This is defendants' situation upon the crucial day—April 6—, as it stands uncontradicted and unqualified upon the record: "They did not know who would be their counsel and they had been in jail ever since they were arrested, March 25, 1931, and had no opportunity to employ counsel and no money with which to pay them and had no chance to confer with their parents, kinsfolks or friends and had no chance to procure witnesses" (Po., 80; Pa., 111-2; W., 78; see also Po., 83; Pa., 114; W., 80).

As to April 6 the facts are so familiar that a few comments will suffice:

(a) The boys were not asked whether they had counsel or what counsel they wanted. They were at most, "informed that a certain lawyer was appointed their counsel" (261 U. S., at 89).

Nor would a suggestion to the boys that they or their families employ counsel of their own have been an empty formality. The plain and conclusive fact, which Chief Justice Anderson points out (Po., 172-3), is that they were subsequently able to procure counsel of recognized standing.

(b) Even on April 6 there was not so much as the form of an *appointment.* The judge exercised no dis-

cretion in the selection of counsel. He simply said that "all the lawyers that will" help Mr. Roddy, may do so (Po., 91; Pa., 81; W., 88). When one lawyer spoke up and expressed his readiness to "help Mr. Roddy in anything I can do about it under the circumstances," the Court at once accepted that lawyer. "All right," he said (Po., 91; Pa., 81; W., 88).*

(c) Nothing was done to stimulate the zeal of the counsel thus not appointed by the Court but accepted by the Court. The Court in terms and twice over characterized what should have been a call to duty as an "imposition."

(d) The counsel who was recognized as chief counsel and whom the local lawyer appeared only to help, was a counsel "not familiar with the procedure in Alabama",—a counsel who had not had "an opportunity to prepare the case" and who "had not prepared this case for trial" (Po., 59; Pa., 80; W., 87); a counsel "here just through the courtesy of your Honor" (Po., 59; Pa., 80; W., 87); a counsel who urged "Your Honor to go ahead and appoint counsel;" a counsel who stated:

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*The lawyer whose offer was accepted had not, so far as appears, even seen the boys before April 6.

Evidently referring to the proceedings of March 31—for it is uncontradicted that no lawyer saw the boys either in the Scottsboro jail or in Gadsden prison (*supra*, p. 58)—Mr. Moody says:

> "*Most* of the bar have been down and conferred with these defendants in this case; *they* did not know what else to do" (Po., 58; Pa., 79; W., 86).

The italicized words indicate that Mr. Moody had *not* been one of the lawyers that saw the boys at the time of the indictment on March 31 and the abortive arraignment had on that day.

"I think the boys would be better off if I step entirely out of the case" (Po., 59; Pa., 80; W., 87).*

The authorities settling it that the right to counsel is constitutional and that it is included in the due process concept, impose no requirement that the defendant affirmatively show that his case, properly prepared, would have been different in character or in result. No defendant who has *not* prepared a case—who has *not* had ample time for consultation, investigation and the procuring of witnesses—can tell what case he *might* have made. No one—to pass from the general proposition to the particular situation—can tell what a jury, not confined to members of one race, meeting at a later time, in another place and with a different atmosphere, aided by prepared and informed counsel, deliberating upon a different record, would have done.

Although there thus is and can be no requirement that one complaining of the denial of the constitutional right to counsel concretely show the effects of the deprivation, certain indications are in these records so patent that we list them. By the records we shall show (1) the effect of the absence of preparation upon those proceedings which normally come in advance of trial; (2) the effect at the trial of the absence of preparation and of the lack of zeal on the part of lawyers, one of whom had no official connection and the other of whom heard the work defined by the judge as an "imposition." We shall see concretely how right the Alabama Chief Justice was in his declaration:

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*Addressing itself directly to Chief Justice Anderson's dissent, the majority of the Court "think it a bit inaccurate to say Mr. Roddy appeared only as *amicus curiae*" (Po., 170). But the fact is uncontradicted that the only lawyer any of the defendants at any time *employed* was General Chamlee (Po., 75-6; Pa., 98; W., 73). Nor did the court in Alabama purport to *appoint* a lawyer from Tennessee.

"The record indicates that the appearance was rather *pro forma* than zealous or active" (Po., 173).

(1)

Consider first one or two of the motions that normally have to be made before a capital case comes to trial:

An objection to the constitution of a grand jury "based on allegations of facts not appearing in the record" "if controverted by the attorney for the State, must be supported by evidence on the part of the defendant" (*Carter* vs. *Texas*, 177 U. S., 442, 447).* An attorney whose declaration of willingness to help, appears 10 pages before the plea to the indictment has no opportunity to get such evidence.

Every lawyer knows that the preparation of papers in support of a motion for a change of venue is no easy task. The Alabama Code requires that the defendant "set forth specifically the reasons why he cannot have a fair and impartial trial in the county" (Code, §5579; see Appendix). And the Alabama Court in these cases said that "the burden of proof was upon the defendants to show that they could not get a fair and impartial trial in Jackson County, before the court would have been justified in granting the change of venue moved for" (Po., 157). It takes time to discharge this burden.

*The Alabama practice is particularly strict against objections to an indictment. Any objection to the formation of the grand jury must be taken "in all cases before a plea to the merits" (Code, §5203, Appendix; see also §5202 purporting to wipe out all objections to the constitution of a special grand jury). That such restrictions of "local practice" (*American Railway Express Co.* vs. *Levee*, 263 U. S., 19, 21) are not binding upon the federal courts upon an issue of due process and equal protection, see *Rogers* vs. *Alabama*, 192 U. S., 226, cited in *American Railway Express Co.* vs. *Levee*, 263 U. S., 19.

The Kentucky Court in a late opinion (*Estes* vs. *Commonwealth,* 229 Ky., 617, 620) dealing with the very issue of mob domination, shows why—for the right to a change of venue to be effective—there must be *time* to prepare the motion. " 'It may happen that the strong feeling against the defendant in a county which prevents his having a fair trial may prevent him from obtaining witnesses to so testify on his motion for a change of venue.' "

The Alabama practice, too, permits "witnesses" to be called on a motion for a change of venue. But the only witnesses that Mr. Roddy and Mr. Moody called, or doubtless in the circumstances could call, were two witnesses—the Sheriff and the Major of the National Guard—who were physically present in court. There was no opportunity to "*obtain*" witnesses.

The refusal of the defendants' motion for change of venue was held not error by the Alabama Supreme Court because defendants did not "meet and discharge" "this burden of proof" (Po., 158). They did not have time to do the things necessary to discharge the burden.

Counsel in advance of a trial have not only to make motions. They have to prepare the case for trial. They have to find out the facts and discover the witnesses to the facts.

The situation in the cases at bar was as follows:

The crime charged was a crime in a moving train that had covered 50 miles while the offenses were supposed to be occurring, and had passed through a number of towns and villages. Counsel appointed on the morning of trial could not make an investigation along this route and in these places.

The defendants were all non-residents. Counsel appointed on the morning of trial and remaining in court in Alabama, could not hunt up character witnesses in Georgia and Tennessee.

The character of the prosecutrix and her reputation were not, as the Alabama Court held, in these cases at issue.* But the movements of the girls on the night before the alleged rape had—in view of medical testimony given without qualification by the State's witnesses (Po., 29; Pa., 30-1; W., 34-8)—a *specific* relevancy. These girls that came on a freight train from Chattanooga, which was not the home of either of them, gave hazy reports of their doings in that city on the night of March 24-25. They remembered only the street on which they stayed, but not the number of the house; they could not describe the street (W., 26, 43; Pa., 25, 29; Po., 27). Investigation was essential. But there was and could be no investigation.

The actual upshot was the inevitable upshot:

The only witnesses any of the defendants had were negroes,—and negroes under indictment for "a crime without parallel."**

We have already made reference to the affidavit of Mr. Ricks on the motion for a new trial. Its importance here is as a demonstration that—precisely as, time only being allowed, defendants could have had counsel at the trial equipped and prepared—so they could have had witnesses against whom no indictment stood and to whom no odium attached.

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*See *supra*, pages 23-24.

**That this Court may take judicial notice of the likelihood of prejudice against negro testimony compare *Aldridge* vs. *United States*, 283 U. S., 308.

(2)

The demonstration we have already given ends all doubt, not only that the right to counsel was denied, but that the denial was damaging. For if appointment is made so late as to preclude "inquiry into the facts of the case"—so late as to *preclude preparation*—, then indeed, in Judge Russell's phrase, "the benefit of counsel" is "promised" but "the service rendered ineffective" (*Sheppard* vs. *State, supra,* 165 Ga., at 464). It is worth while rehearsing, however, a few of the indications supplied by the records themselves that the cases thus not prepared were for practical purposes not presented.

We know how perfunctory was the petition for change of venue,—there was no argument in support; we know there was no motion for continuance of trial made by lawyers charged on the very day of trial with responsibility for the cases; we know there was no demand for severance although the issue of identification was cardinal and the right of the defense to separate trials absolute.

There was no opposition in any case to the severance the prosecution requested (W., 22, 96-7; Pa., 20; Po., 21). And this was the result:

The prosecution first tried Weems, "that old big boy" (Po., 24; Pa., 23), and with him Norris who implicated Weems.

The prosecution next tried Patterson, the leader, alone.

The prosecution finally tried Andy Wright, a declared member of the Patterson gang,—who had got on the train, as he said, with Patterson (Po., 38). With him—after two verdicts imposing the death penalty had been brought in—there were also tried four other defendants whose cases in other circumstances would obviously have had elements of peculiar strength with the jury: Powell who, Victoria Price said, did not rape her and who was not identified by either Victoria Price or Ruby Bates as

having raped Ruby Bates (Po., 25, 27); Roberson,—seriously sick, and upon the testimony of various witnesses not even in the car where the fight took place (*supra,* p. 38); Montgomery,—weak in one eye, the other eye "out" (Pa., 46), he, too, on the testimony of various witnesses not in the car (Pa., 45-6, 47, 49; Po., 39-40, 38, 42); Eugene Williams, the "little bit of a boy."

There could be of course, as Judge Russell points out in the extract we have quoted and requoted, no "legitimate inquiry into the character of the jurors." We do not know absolutely that there was no challenge to any juror. But for reasons already given we may be morally certain. It is not easy to imagine a lawyer on April 6—with the crowd so moved by feeling against the black defendants that the Guard searched its members for arms—asking white jurors whether they entertained a prejudice against negroes accused of raping white women.

We have seen that the defense had no time to obtain witnesses except from its own ranks. From among its own members the defense in the first case called, as we know, a witness that gravely damaged its cause. The slightest preparation would have avoided the blunder. For it was well known—it was shown by one of the very newspapers that the defense itself on the morning of April 6 filed as an exhibit in support of its motion for a change of venue (W., 5)—that "one of the negroes had been taken out by himself" and had "confessed to the whole matter but said 'the others did it'" (W., 6). No such person would have been called by prepared counsel as a witness in any case except possibly his own,—and then only after a severance of his case.

The terrible mistake made in the first case was repeated in the second. Patterson was tried alone, but Roy Wright was called as a witness in his defense and

told a story of raping by negro boys other than himself. And it was precisely against such testimony from Roy Wright that informed counsel would have known that precaution had to be taken. For Roy was only 14 years old, and according to the Jackson County Sentinel—according to the defenses's own exhibit—it was "one of the *younger* negroes" that had been "taken out by himself" and had said that " 'the others did it' " (Pa., 6).

There were few exceptions in the first case, fewer in the second, fewer still in the third (*supra*, pp. 20-1).

The record shows no opening address in behalf of any defendant. It shows no closing address in behalf of any defendant. In the first case and in the last it shows affirmatively that there was no such address. It shows further that defendants' counsel did not, as a condition of waiving a right profoundly important to their clients, obtain a countervailing waiver from the prosecution.*

In no case was a single instruction to the jury proposed to the Court. In none was a single exception taken to the instructions given.

* * *

We saw in our first point that there was in the constitutional sense no trial. We have seen in this point that there was in the constitutional sense no representation by counsel. Boys tried upon charges that imperiled their lives did not have "reasonable opportunity to meet them" (*Cooke* vs. *United States*, 267 U. S., at 537).

*The Alabama Chief Justice has had nearly forty years continuous experience as a judge of the courts of his State. For the profound significance he attaches to the circumstance that summing up was waived by the defense and a countervailing waiver by the prosecution not executed, see Po., 173.

POINT III.

The trial of petitioners before juries from which qualified members of their own race were—because of their race—systematically excluded and their conviction by such juries, was a denial of the equal protection of the laws. Objection to the exclusion was—allowance being made for the circumstances—seasonably made.

The decision of the state court is not in accord with a long line of decisions in this Court going back as far as Neal vs. Delaware, 103 U. S., 370.

(1) "An accused is entitled to demand, under the Constitution of the United States," said Mr. Justice Harlan, speaking for an unanimous court, that "in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them because of their race or color" (*Martin* vs. *Texas,* 200 U. S., 316, 321).

To the same effect

> *Virginia* vs. *Rives,* 100 U. S., 313, 321;
> *Rogers* vs. *Alabama,* 192 U. S., 226, 231;
> *In re Wood,* 140 U. S., 278, 285.

(2) It matters not how the State works the exclusion,—"whether through its legislature, through its courts, or through its executive or administrative officers." If "all persons of the African race are excluded solely because of their race or color," then a defendant of that race may say "the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States" (*Carter* vs. *Texas,* 177 U. S., 442, 447, collecting earlier authorities).

In accord are

Rogers vs. *Alabama, supra;*
Martin vs. *Texas, supra;*
Neal vs. *Delaware,* 103 U. S., 370.

(3) Where the fact is established that there is a considerable colored population and a regular practice of excluding colored men from juries, there is "presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and the laws of the United States" (*Neal* vs. *Delaware,* 103 U. S., 370, 397).

(4) The fact of systematic exclusion is shown in the cases at bar precisely as it was shown in the *Neal* case: "By reason of a custom of long standing there was not one negro selected for the entire trial, throughout the whole county with a population of 30,000 people when a large number of negro landowners were qualified jurors, or for jury service" (Po., 84; Pa., 115; W., 82).

(5) The *fact* of exclusion is tacitly admitted by the Alabama Supreme Court. All that that Court contends is (a) that the *statute*—the jury law of Alabama—works no exclusion, and (b) that "by failing to object to the personnel of the jury the defendant must be held to have waived all objections thereto" (Po., 162).

This Court has overruled both arguments:

(a) The precise point that it is immaterial whether the exclusion be by legislative enactment or in defiance of legislation by systematic official action was, as we know, decided over and over again in the whole line of cases from *Neal* vs. *Delaware* through *Carter* vs. *Texas* and *Rogers* vs. *Alabama* to *Martin* vs. *Texas.*

(b) "The law of the United States cannot be evaded by the forms of local practice" (*American Railway Express Co.* vs. *Levee,* 263 U. S., 19, 21, citing *Rogers* vs. *Alabama,* 192 U. S., at 230). Again, "the question whether a right or privilege, claimed under the Constitution or laws of the United States," was "brought to the notice of the State Court, is itself a federal question." This Court "in the decision" of this question "is not concluded by the view taken by the highest court of the State" (*Carter* vs. *Texas,* 177 U. S., at 447). In the precise case of the composition of juries the proposition has over and over again been declared, that the federal right to equal protection is not to be impaired by any principle of state practice—whether founded in statute or in judicial decision—clogging its assertion or exercise.

In re Wood, supra;
Rogers vs. *Alabama, supra;*
Carter vs. *Texas, supra.*

The defendants could not in any practical and human sense "have objected to the personnel of the jury." They were without counsel and without opportunity to prepare. By failing to assert their right to equal protection at a time they could not assert it, they did not lose the right. Due process and equal protection "overlap" (*Truax* vs. *Corrigan,* 257 U. S., 312, 332). It cannot be that—in a situation where a mob dominates and the effective right to counsel is withheld, where in every sense there is a deprivation of rights without due process—the failure to assert the right to equal protection is a forfeiture of that right.

* * *

In *Moore* vs. *Dempsey,* too, no statute worked exclusion. In that case, too, there was no objection to the composition of the juries, grand or petit. But these things did not cause this Court—when it vindicated Moore's constitutional rights—to overlook the fact that the jury was "white" and that "blacks were systematically excluded."

POINT IV.

The state court's analysis of the issues of due process and equal protection is at all points either irrelevant or mistaken.

The issues of due process and equal protection were, as we know, raised in the Alabama Courts and raised in the same form in which we have here urged them (*supra*, pp. 10-12). They were pressed upon the Supreme Court of Alabama. That Court stated its conclusions upon these points rather than the reasoning by which it reached them. It will readily appear that the discussion of federal constitutional issues is either (A) irrelevant to the problems as they are defined in this Court or (B) mistaken.

(A)

The Alabama Court disposes of the issue as to demonstrations at the rendition of the verdict by saying that evidence of such matters will not be received *aliunde;* of the issue as to the time of trial by saying that no motion for a continuance was made; of the issue as to the exclusion of negroes from the jury by saying that the motion was not made in time (Po., 161, 162; Pa., 177-8).

These are all rulings on points of local practice, and "local practice" cannot stand in the way of "the

law of the United States'' (*American Railway Express Co.* vs. *Levee, supra*).*

The questions are whether there was a real trial and an effective right to counsel. Where those *are* the questions it is circular and fallacious reasoning to say that rights are foregone by the failure to make motions or to make them in a particular form. Moore's counsel made no motions. This Court's deduction was not that he had thereby forfeited his right to due process. Its deduction was on the contrary that the trial had been unfair and that due process had been withheld.**

(B)

The following errors upon specific aspects of the constitutional issues may be noted:

(1) As to *due process* generally the inclusive mistake is in taking the various issues of place, of time, of the right to counsel, etc., *distributively*. The question is whether in the *aggregate* the combination of events and

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*On like principles this Court, "examining the entire record" will "determine" for itself "whether what purports to be a finding [by the state court] upon questions of fact is so involved with and dependent upon questions of [federal] law as to be in substance and effect a decision of the latter" (*Kansas City Southern Railway* vs. *Albers Com. Co.*, 223 U. S., 573, 591; *Norfolk & Western Railway Co.* vs. *West Virginia*, 236 U. S., 605, 610, collecting authorities).

**In *Downer* vs. *Dunaway*, "no motion was made for a continuance or change of venue" (53 F. [2d], at 588-9). The Court cited these facts as evidence that there was no real trial and specifically no real representation by counsel.

Judge Bryan remarked that a lack of zeal in assigned counsel "cannot be attributed to appellant who had no choice in the selection of his counsel." *Neal* vs. *Delaware* (103 U. S., at 396) is in accord:

> "Indulgence"—where the issue is of constitutional right—must be "granted to a prisoner whose life was at stake, and who was too poor to employ counsel of his own selection."

influences made fair trial impossible. So this Court in *Moore* vs. *Dempsey* recognized. So the Chief Justice forcibly pointed out below (Po., 174).

(2) As to the *place* of trial, the Alabama Court concludes that the judge's discretion may have been properly exercised because no threats of actual violence were recited in the venue petition and because there was opinion evidence that a fair trial could be had.

Neither point has merit:

To the first proposition, the whole course of events supplies the refutation.

Whether or not the petitioners—under military guard and locked in prison—heard threats, there is no doubt that the crowds were, and ever since March 25 had been, "threatening." All the military precautions show this, and the judge's order that they be strengthened confirm it.*

It was the opinion evidence of the sheriff and the National Guard commander that a fair trial could be had in Jackson County, or at least about as fair a trial as in any of the adjoining counties. The Kentucky Court has exposed the fallacy of relying, on an issue of this sort, upon "the mere opinion statements of witnesses." The witnesses "themselves might be influenced one way or

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*The Alabama Supreme Court itself wrote an opinion which is thus headnoted (*Thompson* vs. *State,* 117 Ala., 67; 23 So., 676):

> "It is error to deny a motion for a change of venue of an indictment for rape where the evidence showed that a special term of court was convened to try defendant, to satisfy a public demand for his speedy punishment, and that the public were so aroused against him that it required prompt executive and military action to prevent mob violence and his summary execution."

(It may be worth adding that, of course, changes of venue are granted all the time in communities and in circumstances where there is no threat or thought of mob violence,—on the simple ground that pervasive community feeling renders a fair trial impossible.)

other because of the prevailing sentiment" (*Estes* vs. *Commonwealth,* 229 Ky., 617, 619-620 [1929].).

"The proven and undisputed circumstances in the case," it concluded, "speak louder and more convincingly."*

(3) As to the *time* of trial—an issue as the Chief Justice points out more important in the circumstances of this case even than the issue of place—virtually the sole reliance of the Alabama Court is upon the circumstance that no motion for a continuance was made. There is only the faintest suggestion that had such a motion been made, its denial could have been defended.** That in the circumstances of the cases at bar the failure to make the motion is immaterial *Moore* vs. *Dempsey* decides.

(4) As to *equal protection* the Alabama Court remarks, as we know, that no *statute* stands in the way of negroes serving on juries. The point is immaterial so long as "custom of long standing" works the same result (*Rogers* vs. *Alabama,* and other cases, *supra,* p.).

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*For a curt declaration to the same effect, see *Brown* vs. *State,* 83 Miss., 645, 646.

The principle applies with particular force to the two witnesses called, the sheriff and the commander of the Guard,—who were not shown to have made a survey of sentiment in the county but who merely happened to be in the court room.

**That suggestion is contained in the reference to the Czolgosz case (Po., 164). The reference itself shows, however, that there is not analogy between the cases but antithesis:

Czolgosz's crime was, as the Court says, "committed in the presence of thousands of citizens." The issue in the cases at bar was whether "the evidence is to be believed."

Since the present Constitution of New York was adopted, "there has been but one capital case in New York which was not appealed to the Court of Appeals—that of Czolgosz" (The Committee on Amendment of the Law of the Association of the Bar of the City of New York, Bulletin 1 of 1924, pp. 5-6).

* * *

The issue here is of due process in the germinal sense,—of the simple requirement that the law's own *process* be due. The issue again is of equal protection to the race for whose benefit the Fourteenth Amendment was adopted. The issue is of just that persecution and discrimination in matters affecting the liberty and life of the citizen that the Amendment forbids. The issue is an issue that *Moore* vs. *Dempsey* decides.

The Chief Justice of the State Court concluded that "these defendants did not get that fair and impartial trial that is required by the Constitution" of the State. No less exacting are the standards set, and the requirements of due process and equal protection laid down, by the Constitution of the United States.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that rights under the Constitution of the United States be preserved and that to such an end writs of certiorari should be granted and this Court should review the decisions of the Supreme Court of Alabama and finally reverse them.

WALTER H. POLLAK,
Attorney for Petitioners.

WALTER H. POLLAK,
CARL S. STERN,
on the Brief.

APPENDIX.

ALABAMA CODE OF 1928.

"§3258. *Assignment or joinder of error unnecessary; duty of court.*—In cases taken to the supreme court or court of appeals under the provisions of this chapter, no assignment of errors or joinder in errors is necessary; but the court must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands. But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant."

* * *

"§5202. *Objections to indictment for defect in grand jury; when not available; exceptions.*—No objection can be taken to an indictment, by plea in abatement or otherwise, on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law; and neither this objection nor any other can be taken to the formation of a special grand jury summoned by the direction of the court."

* * *

"§5203. *When such plea filed; is sustained, new indictment preferred; limitation of prosecution.*—A plea to an indictment, on the ground that the grand jurors by whom it was found were not drawn in the presence of the officers designated by law, must if accused has been arrested be filed at the session at which the indictment is found, and if accused has not been arrested, it must be filed at the first session at which it is practicable after defendant's arrest; and in all cases before a plea to the merits; if sustained, the defendant must not be discharged, but must be held in custody or bailed, as

the case may be, to answer another indictment at the same or the next term of the court; and the time elapsing between the first and second indictments, in such case, must not be computed as a part of the period limited by law for the prosecution of the offense."

* * *

"§5407. *Punishment of rape.*—Any person who is guilty of the crime of rape must, on conviction, be punished, at the discretion of the jury, by death or imprisonment in the penitentiary for not less than ten years."

* * *

"§5567. *When Counsel appointed for defendant in capital case.*—If the defendant is indicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours."

* * *

"§5570. *Trial, joint or several, at the election of either defendant.*—When two or more defendants are jointly indicted, they must be tried, either jointly or separately as either may elect."

* * *

"§5579. *Change of venue; trial removed on defendant's application, etc.*—Any person charged with an indictable offense may have his trial removed to another county, on making application to the court, setting forth specifically the reasons why he cannot have a fair and impartial trial in the county in which the indictment is found; which application must be sworn to by him and must be made as early as practicable before the trial, or may be made after conviction, on new trial being granted. The refusal of such application may, after final judgment, be reviewed and revised on appeal, and the supreme court or court of appeals shall reverse and remand or render such judgment on said application, as it may deem right, without any presumption in favor of the judgment or ruling of the lower court on said

application. If the defendant is in confinement, the application may be heard and determined without the personal presence of the defendant in court."

* * *

"§5580. *Trial judge may ex mero motu order change of venue.*—The trial judge may, with the consent of the defendant, ex mero motu, direct and order a change of venue as is authorized in the preceding section, whenever in his judgment there is danger of mob violence, and it is advisable to have a military guard to protect the defendant from mob violence."

* * *

"§6088. *Appeals from decision on motions for new trials.*—Whenever a motion for a new trial shall be granted or refused by the circuit court or probate court, in any civil or criminal case at law, either party in a civil case, or the defendant in a criminal case may except to the decision of the court and shall reduce to writing the substance of the evidence in the case, and also the decision of the court on the motion and the evidence taken in support of the motion and the decision of the court shall be included in the bill of exceptions which shall be a part of the record in the cause, and the appellant may assign for error that the court below improperly granted or refused to grant a new trial, and the appellate court may grant new trials, or correct any error of the circuit court and court of like jurisdiction, or probate court in granting or refusing the same. And no presumption in favor of the correctness of the judgment of the court appealed from, shall be indulged by the appellate court."

* * *

"§8630. *Objections to indictments; how taken.*—No objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an

indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same; and neither this objection, nor any other, can be taken to the formation of a special grand jury summoned by the direction of the court."

* * *

"§8631. *Plea in abatement; when filed.*—Any plea in abatement to an indictment must be filed at the first session at which the indictment was found, if the accused has been arrested, or if the accused has not been arrested, such plea in abatement must be filed at the first session at which it is practicable after the defendant has been arrested and in all cases such plea in abatement must be filed before the plea to the merits."

* * *

"§8649. *Two or more capital cases set for the same day; juries for.*—Whenever the judge of any court trying capital felonies shall deem it proper to set two or more capital cases for trial on the same day, said judge may draw and have summoned one jury or one venire facias of petit jurors for the trial of all such cases so set for trial on the same day."

* * *

"Rule of Practice 31. *Severance in criminal cases.*—Where two or more persons, charged with a capital offense, are jointly indicted, either of them is entitled to demand a severance; but such right shall be considered as waived, unless claimed at or before the time of arraignment, or, at latest, when the court, at any term, sets a day for the trial of the case, and makes an order to summon a special venire. In other than capital offenses, a severance may be demanded at any time before the case regularly goes to the jury" (Rules of Practice of the Circuit and Inferior Courts of Common Law Jurisdiction, Alabama Code of 1928, p. 1938).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

Nos. 98, 99, & 100

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, OLEN MONTGOMERY, EUGENE WILLIAMS, *Petitioners,*

—vs.—

THE STATE OF ALABAMA, *Respondents.*

HAYWOOD PATTERSON, *Petitioner,*

—vs.—

THE STATE OF ALABAMA, *Respondent.*

CHARLIE WEEMS and CLARENCE NORRIS, *Petitioners,*

—vs.—

THE STATE OF ALABAMA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

THOMAS E. KNIGHT, JR.,
Attorney General of the State of Alabama;

THOMAS SEAY LAWSON,
Assistant Attorney General of the State of Alabama,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

Nos. 981, 982 and 983

OZIE POWELL, WILLIE ROBERSON, ET AL.,
PETITIONERS,

vs.

THE STATE OF ALABAMA.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF IN OPPOSITION.

Opinion Below.

This case was appealed from the Circuit Court of Jackson County, Alabama. The Supreme Court of Alabama, in an opinion March 24, 1932, affirmed the judgment of the Circuit Court of Jackson County. The opinion is found on page 145 of the record.

Questions Presented.

I.

Whether or not the defendants were accorded a fair and impartial trial and were convicted by due process of law.

II.

Whether or not the accused were provided with counsel.

III.

Whether or not negroes, the defendants being of the negro race, were systematically excluded from the juries.

In short the defendants base their contention for review by this Court upon the question of whether or not their constitutional rights under the Constitutions of the State of Alabama and of the United States were violated, asserting that they were not convicted by due process of law nor were they extended equal protection of law in that,

1. There were hostile demonstrations at the scene of the trial.

2. They should have been granted a change of venue.

3. The case should have been continued.

4. They were not provided with counsel.

5. Negroes were excluded from the juries.

Statement of the Case.

The petitioners were indicted in the Circuit Court of Jackson County, Alabama, and were charged in said indictment with the offense of rape. The victim was Victoria Price, a white woman, who lived near the City of Huntsville, Alabama, and who at the time of the commission of the offense was riding on a freight train between Stevenson and Paint Rock in Jackson County, Alabama. The trial of the petitioners was had in the Circuit Court of Jackson County on April 8, 1931, and resulted in the conviction of these petitioners, then defendants, of the offense of rape as charged in the indictment. The death penalty was imposed and on April 9, 1931, each of the defendants was sentenced to death in accordance with the verdict of the jury. These sentences were suspended pending an appeal to the Supreme Court of the State of Alabama and were by that Court affirmed on the 24th day of March, 1932.

There was no motion made by the defendants or either of them to quash the indictment in this cause, neither was there a motion made for a continuance of the cause by the defendants or either of them.

Counsel to represent them at the arraignment and at the trial of the cause were duly appointed by the trial court which counsel did, at the arraignment and during the trial of the cause, represent the defendants according to their oath and in the discharge of their duty.

Motion was made for a change of venue in the cause, which said motion appears on page 4 of the printed record in this cause.

The motion for a change of venue was by the trial court overruled, the order overruling said motion appears at page 21 of the printed record of this cause.

After the verdict of the jury and sentence of the Court a motion was made for a new trial, which said motion was twice amended. Said motion, as amended, appears on pages 53, 54 and 109 of the printed record in this cause, which said motion, as amended, after having been heard and considered by the Court was overruled, the order overruling said motion appears at page 137 of the printed record in this cause.

The petitioners seek a review by this Court of the findings and proceedings in the trial court as affirmed by the Supreme Court of the State of Alabama.

ARGUMENT.

I.

THE TRIAL OF THIS CAUSE WAS FAIR AND IMPARTIAL AND THE SENTENCE OF THE COURT DOES NOT CONSTITUTE A DEPRIVATION OF LIFE AND LIBERTY WITHOUT DUE PROCESS OF LAW IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The case of *Moore* v. *Dempsey,* 261 U. S. 86, is not an authority for a review by certiorari of the proceedings and findings of the trial court, affirmed by the Supreme Court of the State of Alabama.

In the Moore case referred to by the petitioners, the facts urged in the petition were by the pleadings

admitted, when counsel for the State demurred to the petition for *habeas corpus.*

The admission of the allegations of the petitioners formed the basis of the opinion of Mr. Justice Holmes, as very positively stated by him.

When the same case was presented to this Court by a petition for writ of certiorari the writ was denied. *Frank Moore et al.* v. *State of Arkansas,* 254 U. S. 630.

In the present case none of the facts urged in the petition before this Court are admitted but on the contrary the trial court found them to be different than alleged and his findings have been affirmed by the Supreme Court of the State of Alabama.

The Moore case is only an authority for the petitioners' contention where those facts were admitted.

This Court is asked to review a ruling of a *nisi prius* court, who saw and heard the witnesses and evidence, had intimate knowledge of the conditions existing at the time of the trial and whose rulings have in all respects been affirmed by the court of last resort of the State of Alabama.

(*a*) The question as to the conditions existing at the time of the trial was presented in the defendants' motion for a change of venue and was reviewed, as a ground incorporated in the motion for new trial, by the Supreme Court of the State.

The offense committed was one calculated to arouse the curiosity of all persons in the community. It is true that there were a number of persons present when the defendants were tried and when they were arrested. It is also true that there were several news-

paper articles relative to the offense. It is also true that the military were present. However, the same was not judicially determined to be necessary to protect the defendants from violence. The military was summoned because the sheriff of the county was a cautious official and desired to accord the defendants an orderly trial. The newspaper articles did not encourage mob violence nor did they intimate that there should in any sense of the word be a miscarriage of justice. Furthermore, the record does not show that the circulation of the papers had aroused the populace unduly. It is true that the defendants were not residents of Jackson County, but it is also true that the victims were not residents of Jackson County.

The witnesses on a motion for change of venue offered by the defendants each testified that there had been no hostile demonstrations towards the accused. The Supreme Court of Alabama after a careful review of the facts properly decided that the conditions existing at the time of the trial did not warrant the granting of the motion and cited in support of their decision the cases of

Godau v. *State,* 179 Ala. 27, 60 So. 908.
McLain v. *State,* 182 Ala. 67, 62 So. 240.
Malloy v. *State,* 209 Ala. 219, 96 So. 57.

The Supreme Court of Alabama in its opinion found that the facts in the case of *Moore* v. *Dempsey,* 261 U. S. 86, did not resemble in the remotest degree any of the facts and circumstances that attended the trial of these petitioners.

(*b*) The record in the case duly discloses that the defendants were at the time of the trial and at the arraignment represented by counsel.

Counsel for the petitioners criticize the manner in which counsel who represented the petitioners at the trial conducted the case. The strategy used by counsel in the opinion of subsequently employed counsel cannot be made a basis of granting the writs prayed for in this cause. For aught that appears from the record, the counsel for the defendants on trial did not desire to continue the cause for no motion was made for a continuance. Whether this was proper strategy is not for this Court to decide. *Henry Ching* v. *United States,* 264 Fed. 639; certiorari denied, 254 U. S. 630.

II.

NEGROES WERE NOT SYSTEMATICALLY EXCLUDED FROM JURIES IN JACKSON COUNTY.

The jury laws of the State of Alabama provide that all male citizens, without regard to race or color, possessing certain other qualifications, shall be included in the jury rolls of a county. General Acts, State of Alabama, 1931, page 59.

The record fails to show that negroes were not included on the jury rolls of Jackson County. The record also shows that a motion was not made at the trial of the cause to quash the venire on this or any other grounds. It is only fair to assume that the defendants were satisfied with the venire as the same was constituted and that they desired to be tried by a jury selected therefrom.

In the absence of a motion to quash and evidence in the support thereof the question is not here presented for review. *Thomas* v. *Texas,* 212 U. S. 278. *Ex parte Virginia,* 100 U. S. 313. *Martin* v. *Texas,* 200 U. S. 316. *Smith* v. *Mississippi,* 162 U. S. 592. *Ragland* v. *State,* 56 So. 776 (and Ala.).

Summarizing, the evidence in the case was amply sufficient and convincing to warrant the conviction of these defendants and the punishment imposed by the jury and Court. The defendants had a fair and impartial trial. They were represented by counsel. They were not threatened with mob violence. The trial proceeded orderly and it is fair to assume that the defendants were satisfied with the conduct of the trial and with the order preserved, as the record discloses no motions were made by the defendants' counsel to declare a mistrial or discontinuance of the case.

A motion for a new trial was made, to which the Supreme Court of Alabama held the defendants were not entitled. The matters alleged in the motion were had and done within the presence of the Court and he, having an intimate knowledge of the facts happening in his presence, properly overruled the motion for a new trial on account of the alleged applause when a verdict was rendered in one of the companion cases.

Counsel of ability known to the Supreme Court of Alabama represented the defendants in the trial.

Under the system of laws of the State of Alabama and under the Constitution of the State a defendant is accorded means of obtaining a fair and impartial trial according to the Constitution of the United States.

In short, the petitioners in this cause would ask this Court to substitute itself for the trial court and for the Court of last resort of the State of Alabama and grant writs of certiorari on questions of fact presented to the trial court for original decision and to the Supreme Court of Alabama for review.

While the facts in this case have been found not to resemble the facts in the Frank Moore case, *supra*, in any sense of the word or to approach the facts in that case in the remotest degree, yet counsel for the petitioners ask this Court to recede from the decision in the case of *Frank Moore* v. *State of Arkansas*, 254 U. S. 630, wherein this Court took the position that the defendant was not entitled to the writ of certiorari.

Respectfully submitted,

THOMAS E. KNIGHT, JR.,
Attorney General of the State of Alabama.
THOMAS SEAY LAWSON,
Assistant Attorney General of the State of Alabama.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

Nos. 98, 99, 100

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, and OLEN MONTGOMERY, *Petitioners,*

—vs—

THE STATE OF ALABAMA, *Respondent.*

HAYWOOD PATTERSON, *Petitioner,*

—vs.—

THE STATE OF ALABAMA, *Respondent.*

CHARLIE WEEMS and CLARENCE NORRIS, *Petitioners,*

—vs.—

THE STATE OF ALABAMA, *Respondent.*

BRIEF FOR PETITIONERS

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Supreme Court of the United States

OCTOBER TERM 1932.

Nos. 98, 99, 100.

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, and OLEN MONTGOMERY,

Petitioners,

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HAYWOOD PATTERSON,

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vs.

THE STATE OF ALABAMA.

CHARLIE WEEMS and CLARENCE NORRIS,

Petitioners,

vs.

THE STATE OF ALABAMA.

BRIEF FOR PETITIONERS.

I.

Opinions of the court below.

The cases come to this Court pursuant to certiorari granted May 31, 1932 (Po., 187; Pa., 195; W., 179).

The opinion below in the Powell case is reported in 224 Alabama, 540; in the Patterson case in 224 Alabama,

531; in the Weems case in 224 Alabama, 524. The opinions appear in these records at Po., 145; Pa., 167; W., 152.

The chief opinion—the only opinion that expressly alludes to the whole set of records—is in the Powell case (see Po., 170; see also W., 163).

The majority of the Alabama Supreme Court in all the cases affirmed the convictions. Anderson, C. J., in all the cases dissented,—with opinion in the Powell case (Po., 171).

II.

Jurisdiction.

1.

The statutory provision sustaining the jurisdiction is Judicial Code, §237-b, as amended by Act of February 13, 1925, 43 Stat., 937.

2.

The date of the judgment to be reviewed is in all the cases March 24, 1932, when the opinions of affirmance below were handed down (Po., 145; Pa., 167; W., 151).

Petitions for rehearing were made in all the cases and on April 9, 1932, were denied (Po., 179; Pa., 188; W., 171).*

3.

The nature of the cases and the rulings below were such as to bring the cases within the jurisdictional provision of §237-b,—as appears from the following:

*The Alabama Supreme Court in all the cases fixed May 13, 1932, as the date of execution (Po., 144; Pa., 106; W., 151). It subsequently granted a stay pending certiorari proceedings here (Po., 184; Pa., 192; W., 175) and a further stay after certiorari had been allowed.

(a)

The Alabama Code (§6088)* authorizes the defendant in a criminal case to include in his bill of exceptions to the appellate court the ruling of the trial court denying a motion for new trial, and requires the appellate court to consider grounds of error specified in the motion.

The defendants in all the cases moved for new trial (as appears in detail under "(b)" below) and included as grounds, that the trials and convictions constituted denials of due process and equal protection in the respects here urged.

The defendants in all the cases "separately and severally" filed "a true and correct bill of exceptions," as the trial judge certified, and did this "within the time prescribed by law" (Po., 137; Pa., 161; W., 144; see also Certificates of Appeal, *ibid.*). The judge in all the cases "accordingly signed" the bills of exceptions and "allowed them of record as such" (*ibid.*).

The defendants in all the cases, upon appeal to the Alabama Supreme Court, included the motions for new trial in the bills of exceptions (Po., 53, *et seq.;* Pa., 53, *et seq.;* W., 64, *et seq.*).

(b)

The specific statements of federal constitutional rights in the motions for new trial appear at Po., 109-113 (see also pp. 55-6, 83-4, 85-6); Pa., 102-8 (see also pp. 57-60, 114-5, 116-7); W., 106-110 (see also pp. 66-8, 80-2, 83, 84).

The claims are:

That the denial of "a fair and impartial trial before an unbiased and unprejudiced jury" constituted a viola-

*The Code sections appear in the Appendix in their numerical order in the 1928 compilation. The Appendix is bound with this brief.

tion of rights under the Fourteenth Amendment (Po., 111; Pa., 104; W., 108); that the refusal of a change of venue was "a denial to the defendants of their rights under the Constitution of the United States, Amendment Fourteen, Section 1" (Po., 110; Pa., 104; W., 108); that the demonstration and excitement attending upon the trial constituted a denial of due process (Po., 83-4; Pa., 114-5; W., 80-1); that the overawing of the jury constituted a denial of due process (Po., 85; Pa., 116-7; W., 83); "that the defendants were compelled to go to trial represented by attorneys, who by their own admission in open court, stated that they were not prepared," and that this was a denial of due process (Po., 83; Pa., 114; W., 80); that "this is especially true because in fact the defendants were neither represented by counsel retained by them or anyone on their behalf authorized to make such retainer" (Po., 83; Pa., 114; W., 80; see also for an elaborate statement, Po., 110-1; Pa., 104-5; W., 108-9); that the trial of the defendants before juries from which qualified negroes were, "by reason of a custom of long standing" (Po., 84; Pa., 115; W., 82), excluded was a violation of the Fourteenth Amendment (Po., 113; Pa., 108; W., 110).

(c)

The Alabama Supreme Court considered in terms whether "any right guaranteed to the defendants under the Constitution of the United States" had been "denied to the defendants in this case." It said that "the record shows that every such right of the defendants was duly observed and accorded them" (Po., 163-4).*

*See also the reference to the Fourteenth Amendment at Po., 162.

4.

The following cases in this Court, among others, sustain the jurisdiction:

Moore vs. *Dempsey* (261 U. S., 86) establishes as an element of due process the right to an orderly and deliberate trial; *Cooke* vs. *United States* (267 U. S., 517) establishes as an element of due process an effective right to counsel; *Rogers* vs. *Alabama* (192 U. S., 226) condemns as a violation of the equal protection clause the trial of a defendant before a jury from which qualified members of his race are systematically excluded; *Tumey* vs. *Ohio* (273 U. S., 510) and *Martin* vs. *Texas* (200 U. S., 316, 319) illustrate that where the record in the state court raises such issues, this Court has jurisdiction to review the decision below upon direct attack.

III.

Statement of the cases.

The constitutional issues are presented upon undisputed facts. They are presented upon the records of the trial court, including the motions for new trial and the affidavits in support. Upon these issues the prosecution in its affidavits in opposition made no attempt at contradiction.*

In a single instance there is a shade of disagreement relevant to the constitutional issues between the affidavits upon the motions for new trial and the testimony of a witness heard upon the motions. We there take those minimum facts about which there is no dispute.

Course of events.

As a preliminary to the consideration of particular matters—newspaper publications, the rôle of the military, public demonstrations—bearing upon the issues of mob domination during trial, the denial of counsel, race discrimination, we first state the course of events in chronological outline.

On March 25, 1931, in the afternoon, there were on a freight train going south from Chattanooga into Alabama 7 white boys; the 9 negro boys who were subsequently brought to trial,—namely Patterson, the two Wrights and Williams, who were his associates and fol-

*Alabama recognizes the rule that uncontradicted statements in affidavits for a new trial are to be accepted as true (Po., 168). The Alabama Court reversed the conviction of a boy Eugene Williams, who was tried along with the other defendants in the Powell case, upon the showing in the new-trial affidavits that he was under 16 and therefore subject to prosecution only in the juvenile court (Po., 168-9).

lowers (Pa., 37, 39, 42, 44), and the 5 others;* a number of other negro boys,—according to all accounts at least 3 more, according to some still more (Po., 27, 36, 38, 41; Pa., 41, 47; W., 29, 50, 51, 54). Both the white and the black boys were in a "gondola," or open, car (Po., 22, 26, 33, 38, 41). There were also on the train two white young women, Mrs. Victoria Price and Miss Ruby Bates. According to their testimony they too were in the gondola car (Po., 22, 26).

The negro boys and the white boys began fighting, and the white boys, with the exception of one named Gilley, were thrown off the train. A message was sent by "wire" "to get every negro off of the train" (Po., 46). The message said nothing about any molestation of the girls but did report the fight between the two sets of boys (Pa., 33; W., 40).**

At the way-station of Paint Rock, southwest of Scottsboro, a sheriff's posse met the train "and got the bunch that was on the train" (Po., 46).*** Certainly on that day and apparently by that time, and before any reference to the girls had come into the matter, special deputy sheriffs were appointed (Po., 46).

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*The Alabama Supreme Court, as just stated, reversed the conviction of the Williams boy because he was under 16; Roy Wright, who was 14 (Pa., 39), was not brought to trial with the others and was not convicted (see Pa., 173). The original 9 defendants have thus been reduced to 7 petitioners in this Court.

**The message was apparently a telegram (Po., 46, but see Pa., 33). It was not produced at the trial but there was no dispute as to its contents.

***That is, the posse seized all that were still on the train. Mrs. Price and Miss Bates testified all through the trials that they were raped by all the 9 negroes apprehended and by 3 others,—6 boys assailing each. The other 3 were not apprehended or brought to trial. According to other witnesses there were 14 or more negroes on the train during the fight between the two sets of boys (Po., 27, 36, 38, 41; Pa., 41, 47; W., 29, 50, 54).

At Paint Rock the notion got abroad that some injury had been done to the girls. The girls and the prisoners were taken at once to Scottsboro, the county seat. Mrs. Price and Miss Bates were examined by physicians,—upon their own statements within two hours, or perhaps with an hour, of the "occurrence" (Po., 23-4; W., 32).

At Scottsboro the excitement became intense. According to the next day's local newspaper a "great crowd," a "threatening crowd," gathered (Po., 8; Pa., 7; W., 7); the "Mayor and other local leaders plead for peace and to let the law take its course" (Po., 8; Pa., 7; W., 7). According to another contemporaneous newspaper account it was due to the Sheriff and his band of deputies that the crowd did not enter the jail and seize the negroes (Po., 17; Pa., 16; W., 17).

The Sheriff on the same day requested the Governor to call out the National Guard (Po., 8; Pa., 7; W., 7). At 9 o'clock in the evening the Adjutant-General, acting by the Governor's order, telephoned from Montgomery to Major Starnes at Guntersville to take hold of the situation with his men (Po., 96; Pa., 87; W., 94). Major Starnes with other officers and 3 companies arrived at Scottsboro within 3 hours after the call (Po., 8; Pa., 7; W., 7).

Thereafter the prisoners were continuously under Major Starnes' guard. For their protection he employed "picked men" (Po., 96; Pa., 87; W., 94).

On March 26, the day after the supposed crime, Circuit Judge Hawkins summoned the Grand Jury to reconvene and called a special session of the Circuit Court (Po.,

139-41; Pa., 162-4; W., 147-9). All subsequent proceedings were by special Grand Jury,* a special venire of the petit jury and at a special session of the Circuit Court (see *e. g.*, Po., 1, 21).

On March 31 all defendants were indicted (Po., 1; Pa., 1; W., 1). They were all subsequently brought to trial only for an alleged rape on Victoria Price effected in concert. Four indictments were, however, at this time placed against each defendant: this collective indictment in the Price case; a similar collective indictment in the Bates case, and two individual indictments in the cases respectively of Mrs. Price and Miss Bates (for a summary of this day's proceedings see Po., 10-14; Pa., 9-13; W., 9-13).

There was a form of arraignment on March 31 (Po., 141; Pa., 164; W., 149; for allusion thereto in the opinions below, see Po., 149; Pa., 170; W., 152). But, as we shall see, the defendants were definitively arraigned only on April 6, the day trial commenced (*infra*, p. 12).

"For the purpose of arraigning the defendants" Judge Hawkins purported to appoint all the members of the Scottsboro bar (Po., 88; Pa., 79; W., 86).** He "antici-

*No objection "can be taken to the formation of a special grand jury summoned by the direction of the court" (Alabama Code, §8630, Appendix).

**The minutes of March 31 show the arraignment of that date but contain no reference to an appointment of counsel, though there is a recital of appearance "represented by counsel" (Po., 141; Pa., 164; W., 149). That definitely the defendants never *employed* any counsel until after the trials were over and that the only proceedings that even in the view of the majority of the Court below constituted an *appointment* of counsel occurred on April 6, see *infra*, pages 10-11, 18, 50-53.

pated them to continue to help them if no counsel appears" (Po., 88; Pa., 79; W., 86).

The appointment was invalid under the Alabama law, which permits the designation of "not exceeding two" (Alabama Code, §5567, quoted in Appendix). Indeed, it is said in affidavits, and not contradicted, that the Judge "released" all these lawyers from this appointment (Po., 83; Pa., 114-5; W., 81). And it is shown by the record that one of the lawyers—a member, according to the Chief Justice, of "one of the leading, if not the leading, firm" (Po., 172)—thereafter joined the prosecution as special counsel and actively participated at all the trials in behalf of the prosecution.*

On March 31 the Court set April 6 as the date of trial for all the cases (Po., 141-2; Pa., 164; W., 149). The same day a writ of arrest issued (Po., 2; Pa., 1-2; W., 2). The Court directed the Sheriff to serve the jurors for trial on the 6th and to make a return showing the service. On Saturday, April 4, the Sheriff made his return (Po., 142; Pa., 165; W., 150).

Monday, April 6, was, as just stated, the day set for the trial of all the cases. None of the defendants had up to that time employed counsel or had had any opportunity to employ counsel. Nor had the parents of any of them (Po., 80, 83, 76; Pa., 111-2, 114-5, 98; W., 78, 80-1, 73).

The only way fully to get the flavor of the proceedings—crucially important—in relation to the appointment of counsel on April 6, is to read them through; they appear in identical language at Po., 87-92; Pa., 78-82; W., 85-9:

*For Mr. Proctor's statement that he felt free to do this and the trial Court's acquiescence, see Po., 91; Pa., 81-2; W., 88-9.

There had evidently been some notion that a Mr. Roddy of Chattanooga might appear for the boys.* The Court did not wish to "impose" upon local counsel. Mr. Roddy, however, declared, "I don't appear as counsel," but "I would like to appear along with counsel that your Honor has indicated you would appoint." A member of the local bar, Mr. Moody, spoke up and said, "Of course if your Honor purposes to appoint us,** I am willing to go on with it." Mr. Roddy explained, "They have not given me an opportunity to prepare the case and I am not familiar with the procedure in Alabama, but I merely came down here as a friend of people who are interested." "I think the boys would be better off if I step entirely out of the case." Mr. Roddy therefore said,—"I would like for your Honor to go ahead and appoint counsel."

The Court, however, still hesitated, saying, "If Mr. Roddy will appear, I wouldn't of course, I would not appoint anybody." Mr. Roddy declared, "If there is anything I can do to be of help to them, I will be glad to do it; I am interested to that extent." Mr. Moody said, "I am willing to go ahead and help Mr. Roddy in anything I can do about it, under the circumstances." The Court ruled, "All right, all the lawyers that will."

Mr. Roddy handed up a half-page petition for a change of venue with exhibits setting forth articles in the Jackson County Sentinel published in Scottsboro, and in a Chattanooga and a Montgomery paper (Po., 92, 4-17; Pa., 82, 3-17; W., 89, 4-18). The Court took testimony

*See Po., 11-12; Pa., 10-11; W., 11.

**Both Mr. Moody and the Court, even on April 6, seem to have had the notion that a general appointment of the whole body of members of the local bar might be valid. Compare the Court's references to "imposing on you *all*" (Po., 89; Pa., 79; W., 86) and to "*all* the lawyers" (Po., 91; Pa., 81; W., 88).

from two persons, both of whom happened to be present in the court room,—Sheriff Wann and Major Starnes (Po., 18-21; Pa., 17-20; W., 18-21; for the same testimony set forth more fully in question and answer form, see Po., 93-8; Pa., 83-9; W., 90-5,—exhibits on motion for new trial). Judge Hawkins inquired whether there was "anything else for the defendants" (Po., 98; Pa., 89; W., 96), and Mr. Roddy said, "No." The Court decided: "Well, the motion is overruled, gentlemen" (Po., 98; Pa., 89; W., 96). The defendants excepted (Po., 21, 98; Pa., 20, 89; W., 22, 96).

The prosecutor asked the defense whether it "demanded" a severance.* Mr. Roddy said, "No" (Po., 99; Pa., 89; W., 96).

The Court then inquired of the prosecutor whether his side wished a severance, and the prosecutor asked for one and in the Court's discretion obtained it (W., 96-7).**

In the subsequent trials the defense again demanded no severances (Pa., 20-1; Po., 21-2). But the prosecution obtained a severance of the case of Patterson, the leader (W., 53, 55; Pa., 42), from the others (Pa., 20).

There was, as we have said, some sort of arraignment on March 31. But each defendant was separately and "duly arraigned" at the beginning of his trial,—on April 6, 7 and 8 (W., 99, 3; Pa., 92, 2; Po., 101, 3).

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*The Alabama Code (§5570) provides that "when two or more defendants are jointly indicted, they must be tried either jointly or separately, as either may elect." Practice Rule 31 is concerned with the mechanics of making the right good (both appear in the Appendix).

**The prosecutor elected to try in the first case two of the older boys, Norris and Weems. His first desire was to try Roy Wright with them. This boy had apparently given a statement implicating the other defendants (Po., 7; Pa., 6; W., 6; *infra*, pp. 14, 57-8). But he was 14 years old, and his youth was apparent. The Court, in order to avoid a delay while the boy's age was being definitely established, suggested that he be tried later. And he was not in fact tried with any of these defendants (Po., 99; Pa., 89-90; W., 96-7).

There was no motion for a continuance in any of the cases. The trial of Weems and Norris was commenced on April 6 and concluded on the 7th (W., 3; Pa., 2, 27); the trial of Patterson was commenced on the 7th and concluded on the 8th (Pa., 2, 41; Po., 2-4); the trial of Powell and his four co-defendants was commenced and concluded on the 8th (Po., 2-4).

The juries were composed exclusively of members of the white race. Although "a large number of negro land-owners were qualified jurors" "there was not one negro selected for the entire trial." The exclusion was "by reason of a custom of long standing" (Po., 84, not denied; Pa., 115, not denied; W., 82, not denied).

The record does not show what interrogation, if any, was given to the jurors before they were accepted for service. It does, however, show that the jurors were not, as a regular thing certainly, asked whether they entertained a prejudice against negroes. This fact is flatly charged both in the petition for new trial (Po., 112-3; Pa., 107-8; W., 110) and in the affidavits in support (Po., 86; Pa., 117; W., 83). It is undenied in the answering affidavits. Upon a hearing held in open court on the new-trial motion, at which those jurors who participated in the third case were called as witnesses, the prosecution repeatedly and successfully objected to the question whether they were interrogated about race prejudice (Po., 123-4, 125, 126, *et seq.;* Pa., 147, 148, 150, *et seq.;* W., 119, 120, 122, *et seq.*).*

*It could have been said without qualification that *no* juror was interrogated upon this subject had not the juror Elkins intimated a contrary recollection (Po., 119; Pa., 142; W., 114). He added, however, that he "couldn't say positively who asked that question," and "I don't remember just what the question was about."

The only witnesses the defense called in any of the cases were negroes under indictment for the crime charged. In the two cases first tried witnesses called by the defense gave testimony which undermined the cause of a co-defendant or of the sole defendant. Norris testified in the Weems case that there had been raping by negro boys other than himself (W., 56);* young Roy Wright gave like testimony in the Patterson case (Pa., 39-41).

The records show no opening address for any defendant and no closing address. In two cases the records show affirmatively that the defense, in the presence of the jury, elected not to sum up to the jury (Po., 48; W., 59). In the first case "defendants' counsel stated to the court that they did not care to argue the case to the jury, but counsel for the State stated to the court that they did wish to argue the case to the jury." "At the conclusion of said argument of counsel for the State to the jury counsel for defendants stated that they still did not wish to argue the case to the jury," but the Court "permitted counsel for the State to further argue the case to the jury."**

The Court's charges in the three cases were stereotyped and virtually identical (W., 60-3; Pa., 50-3; Po., 48-53). He told the first jury: "Let me have your attention for a few moments and then you will have this case" (W., 60). So too he asked the second jury to

*He subsequently recanted this testimony (W., 130-5).

**For the significance that the Alabama Chief Justice with his practical experience of litigation attaches to the circumstance that summing up was waived by the defense—and waived without a countervailing waiver from the prosecution—see Po., 173.

"let me have your attention for a few moments and we will finish the trial of this case" (Pa., 50).

In no case did counsel who purported to appear for the defendants take any exceptions to the charge or submit any charges of their own (W., 63; Pa., 53; Po., 53).

In all the cases and as to all the defendants the juries brought in verdicts of guilty. The punishment for rape may be anywhere from 10 years' imprisonment to death, "at the discretion of the jury" (Alabama Code, §5407, Appendix). Upon all the defendants the juries imposed the death penalty (Po., 3; Pa., 2; W., 3).

On April 9 all the defendants were sentenced. None of them said anything as a reason why sentence should not be imposed upon him,—not even the 14 year old boy Williams, nor Mr. Roddy or Mr. Moody in his behalf (Po., 3; Pa., 3; W., 3).* Execution was in all cases set for July 10 (Po., 3; Pa., 3; W., 3). But appeal was on April 9 taken to the Alabama Supreme Court, and the sentences were suspended pending its disposition (Po., 3; Pa., 3; W., 3). Mr. Roddy and Mr. Moody at this time filed a motion of two paragraphs to set aside the verdict and for new trial (Po., 53; Pa., 53-4; W., 63-4).

On April 18 the death warrants were written (Po., 3; Pa., 3; W., 3).

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*Mr. Roddy did subsequently make an affidavit confirming that Williams was under 16 (Po., 117).

In the course of the next few weeks the defendants' families retained for the boys General Chamlee of Chattanooga (Po., 75; Pa., 97; W., 73). On May 6 "by permission of the Court" the motion theretofore made for a new trial was amended by General Chamlee and a new motion with copious affidavits filed (Po., 53-80, 80-108; Pa., 54-102, 102-141; W., 64-77, 77-106); on June 5 the application for new trial was somewhat expanded and a second amended motion filed (Po., 108-17; Pa., 102-111;* W., 106-113). It was these amended motions for new trial that asserted—and the petitions and supporting affidavits that laid the factual foundations for—the claims of constitutional right.

The prosecution at various dates after June 5 submitted numerous affidavits in opposition (Po., 132-7; Pa., 155-60; W., 127-30; 135-144). The prosecution's affidavits were primarily concerned with the girls' characters,—specifically with the point whether or not they had, as charged in the moving affidavits (Pa., 63-77, 133-7; Po., 102-5; W., 99-103), committed acts of prostitution with negro men and had the reputation of having done so (Pa., 156-60; Po., 132-6; W., 127-30, 135-7).**

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*In the Patterson case the filing was on May 19 (Pa., 102).

**The Alabama rules on the subject are settled by *Story* vs. *State* (178 Ala., 98), and by the decisions below:

In the *Story* case the prosecution was of a negro for rape upon a white woman. There was a defense of consent. At the trial the general fact that the prosecutrix was a prostitute was "confessed" (178 Ala., at 101), but evidence was excluded that she had a specific reputation for unchaste conduct with negroes. The gist of the Alabama Supreme Court's decision in the *Story* case is: The infamy involved in a white woman's immorality with negroes is so great that no matter how clearly the general fact of prostitution be established, it will not be deduced that she might have been guilty of immoral conduct with negroes; the defense therefore had a right to show that the particular white woman had the reputation of misconducting herself with negroes; for the exclusion of the evidence the conviction was reversed.

In the cases at bar the Alabama Supreme Court ruled that because the negroes denied all intercourse with the white women there was no issue of consent on the part of the women and the whole question of

(*Footnote continued on next page.*)

The prosecution left unchallenged those allegations in the moving affidavits on which were rested the contentions that fair trial had been withheld, the right to counsel denied, and race discrimination practiced in violation of the Constitution of the United States.

On June 22 "the final hearing of said motion for new trial as last amended" was had (Po., 136; Pa., 160; W., 143). On the same day the motion was in all the cases denied (Po., 137; Pa., 161; W., 144). Appeal was taken from the denial (Certificate of Appeal, Po., 137-8; Pa., 161-2; W., 144-5).

We have stated in general outline the course of proceedings. It is in the light of accompanying facts—the quality and circumstances of the defendants; the atmosphere of the place at the time as reflected in the press, in the crowds, in the display of military force; the influence of these things upon the juries—that the questions arise whether in the constitutional sense the trial was fair, the right to counsel effective, and justice free from discrimination by reason of race.

The circumstances of defendants' confinement.

The defendants were all ignorant, all but one illiterate (Po., 5, 84; Pa., 4, 115; W., 4, 81). All were of "immature years" (Po., 84; Pa., 115, 99; W., 81). Just how immature we do not in all cases know. Of Patterson, the

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(*Footnote continued from preceding page.*)

their having a reputation for unchastity with negroes was immaterial (Po., 163; Pa., 179; W., 163). The Court approved too the ruling of the trial court sustaining the prosecution's objection to the question put to Victoria Price on cross-examination,—"Did you ever practice prostitution?" (Pa., 171, 26).

leader, we know only that he was "under 21 years of age" (Pa., 99). Of those whose ages we have the oldest was 19 (Pa., 42, 43).

None of the defendants lived in Scottsboro or in Jackson County or in Alabama: Patterson and Wright had their homes in Chattanooga (Pa., 36; Po., 37); Roberson in Memphis (Po., 36); Weems, Norris and Powell in Atlanta (W., 52, 55; Po., 33); Montgomery in Monroe, Ga. (Po., 39).

All the defendants were continuously in confinement under military guard from the evening of March 25 to and through the trials,—for a day in Scottsboro, generally in Gadsden (Po., 80; Pa., 111-2; W., 78).

The defendants thus describe their condition on the day trial started: They "had no opportunity to employ counsel and no money with which to pay them and had no chance to confer with their parents, kinsfolks or friends and had no chance to procure witnesses and no opportunity to make bond or to communicate with friends on the outside of the jail" (Po., 80; Pa., 112; W., 78). There is no contradiction or qualification.* And the father of the Patterson boy, the mother of the Williams boy and the mother of the two Wright boys unite in the declaration that—even to see their sons, awaiting trial or undergoing the ordeal of trial—they were "afraid to go to Scottsboro," "afraid" even "to go to Gadsden" (Pa., 99, 100, 102; Po., 77, 78, 79; W., 74-5, 76, 77).

*The prosecution had peculiar opportunity to contradict allegations concerning the circumstances of the prisoners' confinement, and did in numerous affidavits purport to contradict allegations concerning the alleged maltreatment of a particular prisoner (see the succession of affidavits appearing in W., 137-43).

Sentiment of community and atmosphere of trials.

The charge was the "most serious charge known on the statute books of Alabama, rape" (Jackson County Sentinel, April 2, Po., 10; Pa., 9; W., 9-10). The charge was of rape perpetrated upon white girls by blacks. It was of rape so perpetrated 12 times. "This crime stands without parallel in crime history" (Jackson County Sentinel, *ibid.*, Po. 8; Pa., 8; W., 8).

"The character of the crime was such as to arouse the indignation of the people, not only in Jackson and the adjoining counties, but everywhere, where womanhood is revered, and the sanctity of their persons is respected" (Powell Opinion, Po., 156).

The press. Publications in the Jackson County Sentinel, begining on March 26, the day after the occurrence, and including an editorial on April 3, the Friday before the Monday on which the trials commenced, reflect—and could not have failed to intensify—local feeling (W., 5-18; Po., 5-17; Pa., 5-17). This Court, we are sure, will read the articles and there is no need of extended quotation. But consider the implications of this sentence in the first article—under a 7-headline spread—, a sentence that immediately follows the "crime without parallel" reference:

> "Calm thinking citizens last night realized that *while* this was the most atrocious crime charged in our county, that the evidence against the negroes was so conclusive as to be almost perfect and that the ends of justice could be best served by a legal process" (Po., 8-9; Pa., 8; W., 8; our italics).

"Sensational and damaging" is the characterization the Alabama Supreme Court in its principal opinion accepted for these articles appearing in the County newspaper (Po., 153).

Crowds. "Such a happening," as the Court below remarks (Po., 154), "made the basis of the charge against the defendants, was calculated to draw to Scottsboro, on the occasion of the trial, large crowds. It would be surprising if it did not." Sheriff Wann, testifying on April 6, was put the following question and gave the following answer concerning conditions on that day,—the day the trials commenced:

> "Q. And there is a great throng around this court house right now that would come in if you did not have the troops?
>
> A. Yes, sir; they are from different counties here today" (Po., 95; Pa., 85; W., 92).*

Numbers are notoriously difficult to estimate. The only clear facts as to the *size* of the crowds at the trials are the following:

Scottsboro has a population of about 2,500.** The statement in the motions for new trial that a crowd of 10,000 was gathered in Scottsboro at the trials (Po., 111; Pa., 105; W., 109) is not contradicted in the opposing affidavits. Mr. Venson, a demonstrator of Ford cars, called as a witness for the prosecution in opposition to the new-trial motions, did not, indeed, "think there were 10,000." He "wouldn't guess there was 5,000 people at any one time on the street; I don't think so, but I don't know." But he agreed that "there was a big crowd," "a crowd in town all day," "a crowd around the court house" (Po., 131, Pa., 154-5; W., 126).

Certain it is that the Ford Motor Company found it worth while on Monday, the 6th, to order Mr. Venson

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*The Sentinel on March 26 applied the same adjective, *"great,"* to "the crowd gathered at the jail" on March 25 (Po., 8; Pa., 7; W., 7). For the trial it predicted a *"tremendous* crowd" (Po., 15; Pa., 14; W., 16).

**2304 in 1930 (15th Census, Vol. I, p. 85).

to bring on, for Tuesday, a demonstration of "about 28 trucks,"—"a Ford caravan of commercial trucks" (Po., 130-1; Pa., 154; W., 126).

The *temper* of the crowds is revealed:

On March 25—the day of the alleged occurrence and of the arrest—"the Mayor and public officials had to make speeches to try to persuade the mob to adjourn" (Po., 84; Pa., 115; W., 81). There is no denial from the Mayor or from any public official or from anyone. There is on the contrary overwhelming contemporaneous confirmation. The Sentinel of March 26 tells us not only that the crowd "gathered at the jail" on March 25 was a "great crowd" but in so many words that it was a "threatening crowd" (Po., 8; Pa., 7; W., 7). The Montgomery Advertiser, also writing of the events of March 25, declared in an editorial that but for the Sheriff's prompt action "those 300 Jackson County citizens might have opened the jail at Scottsboro, and seized the nine or twelve negroes who were charged with criminal assault upon two white girls" (Po., 17; Pa., 16; W., 17).

The feeling of the crowds was no different when trial commenced. On April 6 the "great throng," we have the Sheriff's word for it, would—but for the troops—have come into "this court house right now" (*supra*, p. 20).

The responsible officials showed by their actions the estimate that at the time they put upon the public's temper:

The Mayor of the town "plead for peace." The Sheriff of the County called upon the Governor to order out the Guard. The Judge of the Circuit instructed the commanding officer to search for arms citizens coming into the court room or even into the court house grounds (Starnes, Po., 96-7; Pa., 128; W., 94).

The military. "Every step that was taken from the arrest and arraignment to the sentence was accompanied by the military," says the Chief Justice,—and he finds the circumstance profoundly significant (Po., 172). The State's legislation certifies that he is right:

> "The trial judge may, with the consent of the defendant, ex mero motu, direct and order a change of venue as is authorized in the preceding section, whenever in his judgment there is danger of mob violence, and it is advisable to have a military guard to protect the defendant from mob violence" (Alabama Code, §5580; Appendix).*

The record shows the following concerning the "danger of mob violence" and the need of "protecting the defendants":

The Sheriff's regular force was insufficient to safeguard the prisoners. The Special Deputy Sheriffs —who explained in an affidavit submitted by the prosecution that their function was "to protect the prisoners from annoyance and harm of any kind" (W., 142)— were insufficient. Sheriff Wann—on the day the trials commenced—was asked and answered as follows:

> "Q. You deemed it necessary not only to have the protection of the Sheriff's force but the National Guard?
>
> A. Yes, sir" (Po., 94; Pa., 125; W., 91).

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*See also the strong declaration of the significance of the military's being called out in a rape case in *Thompson* vs. *State*, 117 Ala., 67, quoted *infra*, pp. 68-9.

Major Starnes—also on the day the trials commenced—was asked whether his "units of the National Guard have protected" the defendants, and "have been with them on every appearance they have made in this court house",—and answered, "That is correct." "Every time it has been necessary" (Po., 97; Pa., 128; W., 94).

The record shows the size and equipment of the military force. "A picked group of twenty-five enlisted men and two officers from two of my companies" was employed to bring the defendants over for arraignment, Major Starnes tells us (Po., 96; Pa., 127; W., 94). On the day the trials commenced this officer had with him about 10 other officers and over 100 enlisted men. There were "five units represented" (Starnes, Po., 96; Pa., 127; W., 93).

The Guard had their rifles of course. But they did not rely upon their rifles alone. "I think there were eight machine guns around here" on the day the trials were concluded, says a juror who served that day. "There were some boxes of tear bombs sitting around" (Po., 121; Pa., 144; W., 116).

Demonstrations. The Guard did successfully prevent overt acts of violence against the prisoners. It could not prevent demonstrations of public feeling. The verdict in the Weems case determined the result as to two defendants. It foreshadowed the results as to Patterson, on trial that day, and as to the five defendants to be tried the next day. Upon the report of the jury imposing the death penalty "there was a demonstration in the court house by citizens clapping their hands and hollowing and shouting." "Soon thereafter a demonstration broke out on the streets of Scottsboro" (Po., 81; Pa., 112; W., 79).

The foregoing statements are not contradicted. They are on the contrary confirmed by the testimony of persons who were waiting to be called as jurors in the third

trial and who were called as jurors (Po., 118, 120, 124, 125, *et seq.;* see *infra,* p. 27). These statements are further confirmed by the testimony of Major Starnes: "There was considerable demonstration in the court room when the jury rendered their verdict, by yelling and clapping of hands in the court room here" (Pa., 140).*

The only point bearing upon the issues here at which there is a shade of disagreement over the facts, concerns the part played by a band when the Weems verdict came in. We rest our argumentation, as we have already said, upon facts undisputed and therefore, where there is any element of uncertainty, upon minimum facts. We summarize however the different statements in order to determine what the minimum facts are:

The defense in its affidavits for a new trial set forth in detail that at the time the Weems jury reported, the Hosiery Mill band paraded and played such tunes as "Hail, Hail, the Gang's All Here" and "There Will Be a Hot Time in the Old Town Tonight" (Pa., 113; Po., 82; W., 80). The prosecution's affidavits did not contradict or qualify this statement. At the hearing in open court upon the new-trial motion the prosecution produced no witness from the band. It did produce Mr. Venson, the demonstrator of Ford cars. He testified that while there was noise on this occasion, it was caused by his use of a graphophone with an amplifier. The Hosiery Mill band did play, he said, but it was later in the afternoon,—at six o'clock when the National Guard had its guard mount (Pa., 154-5; Po., 130-2; W., 125-7).

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*Captain Fricke, an aide of Major Starnes, in immediate charge in the court room, testifies in express accord to "the applause in the court room" (Pa., 141).

The Alabama Supreme Court noted that the charge of demonstration in the court room was confirmed but adopted a rule of practice which precludes the proving of such matters by "evidence *aliunde*" (Pa., 177-8).

The minimum facts thus are: When the verdict came in there was music in the streets; the sound was amplified; the Hosiery Mill band performed the same afternoon; the tunes played were tunes like the tunes named or the very tunes.

Atmosphere is elusive,—difficult after the event to recapture. We have tried to classify the direct evidence. It remains to note the significance of certain circumstances or events that we have not been able to group under particular captions.

The defendants were boys on trial for their lives. The press was full of the danger of their position. Yet no member of their families visited them in Scottsboro or even in Gadsden, 40 miles off. "Colored people," they were "afraid to go to Scottsboro," "afraid to go to Gadsden."*

Major Starnes had, on April 6, a force in Scottsboro with machine guns and tear gas bombs. He had a "picked group" for the immediate protection of the prisoners. With all these precautions it was thought wise to carry the prisoners from Gadsden in the quietest hours of the night,—they "arrived here at 5:15 this morning" (Starnes, April 6, Po., 97; Pa., 88; W., 95).

Unofficial and even official expression asserted or—even more significant—*assumed* guilt. It was because, as early as March 25—the very day of the occurrence—the evidence was accepted as "so conclusive as to be almost perfect," that "calm thinking citizens" came to the conclusion "that the ends of justice could be best served by a legal process" (*supra,* p. 19).**

*The affiants requested that even the motion for new trial be heard elsewhere than in Scottsboro (Po., 79-80; Pa., 102; W., 77).

**For a like statement in the Sentinel of April 2, see Po., 11; Pa., 10; W., 10-11.

Major Starnes had it as his duty to protect the prisoners and did so. But even this official on the morning of April 6—before one item of evidence had been presented—referred, in testimony publicly given, to "the attack" as having "occurred" (Po., 96; Pa., 87; W., 94).

Community sentiment shared by juries and reflected in verdicts.

Jackson County is a rural community of about 35,000 inhabitants.* A jury drawn from a community so small and so closely knit must reflect community feeling. The juries did:

Of necessity the Jackson County jurors had their attention called to the articles in the Jackson County Sentinel. All the 100 had their names printed on April 2 in the article that explained that the negroes had been "indicted on the most serious charges known on the statute books",—an article that explained too that "the matter will" (unless it "becomes necessary to try each defendant separately") "be made brief" (Po., 12-14; Pa., 11-13; W., 11-13). The only juror that anyone, upon the hearing of the motion for new trial, bothered to ask whether he read the newspapers said he had. He "read the Scottsboro papers about the attack on these girls." He believed, too, that he "read the Chattanooga papers. I think those papers said these men, or some of them, had confessed their guilt" (Po., 119; Pa., 142; W., 114).**

*15th Census, Vol. I, page 76.

**For references in the newspapers to some negro boys implicating others, see Po., 7, 17; Pa., 6, 16; W., 6, 18.

No safeguards were thrown around the jurors during the trials, and they continued to read the newspapers (Po., 85; Pa., 116; W., 83).

* * * * * *

All the jurors were summoned for April 6. Most or all must have been there when Major Starnes in advance of the production of evidence referred to "the attack" as an established fact.

We have noted the applause that greeted the rendition of the verdict in the first case. That applause was heard by the jury then trying the second case. Captain Fricke, who was in immediate charge in the court room, testifies that when the Weems verdict came in and "the applause in the court room" broke out, the jury in the Patterson case was in the jury room; that the jury room was about 30 feet away (Pa., 141); that the transom was partly open (Pa., 141).

The defense requested that the members of the second jury be produced at the hearing of the motion for new trial. Through some misunderstanding it was the members of the third jury that were in fact produced. That jury was not as a body present at the rendition of the first verdict. But one juror remembers "hollering" (Po., 120; Pa., 143; W., 116); a second, "whoopee" (Po., 118; Pa., 142; W., 114); a third, "a lot of noise, hollering and shouts" (Po., 125; Pa., 149; W., 121). A fourth tells us flatly:

> "It was generally understood by everybody" that the bringing in of the verdict "was the reason for the demonstration" (Po., 127; Pa., 150; W., 122).

The question here is not of "the petitioners' innocence or guilt." It is "solely the question whether their constitutional rights have been preserved" (*Moore* vs. *Dempsey,* 261 U. S., 87-8). The consideration that the results reached in trials wholly unprepared and essentially undefended were—as tested even by their own records—wrong results, is not as such material. But if "jury and judge" (261 U. S., at 91) are to proceed in the constitutional sense fairly, they must proceed calmly, deliberately,—with discrimination. And the Alabama Chief Justice finding—with his experience of years at the bar of the State, of nearly 40 years on the bench of the State—that the juries' actions revealed "no dis-

crimination," correctly deduced that the trials were not in the constitutional sense "fair and impartial" (Po., 173, 174).

The juries did not exercise deliberation,—and the internal evidence shows it:

(1) The physicians that examined the girls were scientific men. The prosecution called them. The doctors made their examination within an hour, according to Mrs. Price's first estimate (W., 32)—within an hour and a half or two hours according to her later estimate (Po., 24)—of the "occurrence" (W., 32). The girls were not "hysterical over it at all" (Dr. Bridges, Pa., 31; Dr. Lynch, W., 38). They were not "nervous" (Pa., 31).

(2) Six persons, according to the prosecution, had intercourse with each girl. With respect to Ruby Bates the doctors found only the deposit normal to a single act of intercourse (W., 33, 34, 37-8; Pa., 31; Po., 29).* With respect to Victoria Price they found much less (W., 37-8; Pa., 31; Po., 29).

(3) "I fought back at them" (Price, W., 30). "They hit me on the head" with a gun (Price, W., 27). The doctors found no head wound, no lacerations anywhere, no evidence of bleeding (W., 36, 37, 38).

(4) "Everyone of the negroes had pocket knives" (Price, W., 27). "They had their knives and pistols on them when they stopped the train at Paint Rock" (W., 47). Both girls were able to testify even to the calibre of the pistols (W., 23; Pa., 29; Po., 24). The boys were searched of course (see *e. g.*, W., 58). Two pocket knives were introduced in evidence (W., 58-9; Pa., 43-4; Po., 42-3). No pistols.

*Miss Bates expressly testified that she was not a virgin and that she had had sex relations outside of those she charged against the defendants (W., 43; see also Dr. Bridges at Po., 30).

(5) Mrs. Price's undergarments "were torn off," "pulled apart" (W., 29, 23). She had these garments with her after the occurrence (Po., 23; Pa., 22; W., 23). She was kept in continuous confinement for the express purpose of being a "witness in these cases" (Po., 43). The garments were not produced.*

(6) Seven white boys were in the gondola car. Self-evidently they had a story to tell:

"We had spoken a few words with the white boys," Mrs. Price herself says (W., 28), though she explains that "that wasn't in no loving conversation" (W., 28). The colored boys "shot five times over the gondola where the [white] boys were" (Po., 26). "While the defendant Montgomery was having intercourse with me and the other one held me," the colored boys told the white boys that "they would kill them, that it was their car and we were their women from then on" (Po., 23). Thurman, a white boy, was hit on the head with a gun, according to Mrs. Price (W., 28). Falling, he "looked back and seen the one sitting behind defendants' counsel grab me by the leg and jerk me back in the gondola" (W., 28). "There was one white boy on the car that seen the whole thing, and that is that Gilley boy" (Price, W., 27); he was "in the gondola all the time the ravishing was going on" (W., 33).

There was no difficulty about producing the white boys. Their names were printed as early as March 26 in the Sentinel (Po., 6; Pa., 6; W., 6). They were kept in the prosecution's "control" (Po., 115; Pa., 110; W., 112). Gilley was called in one case only, the last, and in that case in rebuttal,—his testimony comes to nothing more than that he had seen the defendants in the gondola

*Both Mrs. Price and Miss Bates—although of course "there were no charges against us" (Po., 43)—were "held in jail since the 25th of March last month." "They keep us locked up at the jail, both of us locked up there" (Po., 43; see also W., 31).

(Po., 47-8). Thurman was not called as a witness in any case. None of the other five white boys was called as a witness in any case.*

(7) The charge was of a crime committed in an open car in broad daylight on a train that passed through Scottsboro and several other towns and villages. The prosecution was able to produce five witnesses that saw a fight on the train, including two that saw girls on the train (Po., 31, 32; Pa., 33, 34; W., 48-9, 50-1).** It produced none that said they saw a rape. In no case did the prosecution call as a witness for any purpose any trainman, flagman or signalman; any employee or official of the Scottsboro station or of any station; any person connected with the train or the road.***

(8) As to *all* defendants the juries accepted the stories of Victoria Price and Ruby Bates no matter how transparently insufficient might be the case against a given defendant. Upon the testimony of all witnesses there were several negroes on the freight train who were not apprehended or tried (*supra*, p. 7),—and an issue as to

*No affidavit from any of the white boys was produced in opposition to the motion for new trial.

**These two witnesses—one 30 yards (W., 48), the other 100 yards (Pa., 34), from a train moving 35 or 40 miles an hour (see *e. g.*, W., 48)—gave some vague suggestion of violence being done to the girls. But neither made any allusion to any sexual act. And it is clear that they did not feel the resentment that would have been inevitable had they suspected a rape or attempted rape: "I did not pay any attention to the colored men. I just saw that one grab her and throw her down" (Robbins, Pa., 34; see also Morris, W., 48-50).

***The only person on the train or connected with its operation—except the prosecuting witnesses and the defendants—that at any time told what happened on the train was a Mr. Ricks, who was there from beginning to end. In support of the motion for new trial he made affidavit that he saw the girls get into a *box* car at Stevenson and that "they were in it when he last saw them until they got to Paint Rock" (Po., 107-8; Pa., 139; W., 105). The prosecution made no attempt to impeach Mr. Ricks or his affidavit.

every defendant was whether *he* had a part in the crime charged. The case of Roberson, one of the defendants in the Powell group, is instructive upon the point whether or not the jurors "discriminated":

Roberson's testimony was that he was not in the gondola car but lay seriously ill in a box car (Po., 36-7, 43-4); other negroes, who admitted the fight with the white boys and their own participation in it, confirmed that Roberson was not in the gondola (Po., 38, 42); a white witness, called by the prosecution, who was a member of the posse that met the train at Paint Rock, confirmed that he saw some one get off that part of the train where Roberson said he had been (Po., 45); a doctor called by the prosecution testified that he had examined Roberson and confirmed that Roberson was sick,—his condition such as to make participation in a rape "painful" (Po., 29).

Yet Victoria Price said Roberson had been "one of them that was running up and down inside of the car," etc., and had been "with the other girl" (Po., 25). The Gilley boy inclusively declared, "I saw all the negroes in that gondola" (Po., 47),—although he did not separately identify Roberson. Ruby Bates likewise said in general terms that all the five Powell defendants were in the gondola (Po., 26),—although she, too, did not separately identify Roberson and did not recall that incident of being herself raped by him to which Victoria Price had testified (Po., 26-7).

Roberson was convicted.*

*In the Powell case the prosecution called in rebuttal four other witnesses for the purpose of identifying the several defendants. None of them added anything to the identification of Roberson:

The two that mentioned Roberson by name testified that they first saw him after he had been taken off the train and when he was in the group with the other negroes and under guard (Latham, Po., 44; Keel, Po., 47). One of the other two said, "I think that I saw that negro over there on the corner, on the end of the front row, on top of the gondola car" (Brannon, Po., 45). The fourth professed to identify the "negro on the end in front" as the man he saw "when the train was coming around the curve right below town"; "I could see them that far" (Rosseau, Po., 44-5).

(9) Over the penalties the juries had "discretion" (Code, §5407). In all cases and upon all accused the juries imposed the same penalty. "As to each of the eight defendants they went the extreme" (Anderson, C. J., Po., 173). In "leadership," in "age," there were "differences." The differences were ignored. The juries inflicted the death penalty alike upon the chief tried alone, upon his regular followers, and upon chance acquaintances first met upon the train,—upon Powell, whom no witness named as having intercourse with either girl (*infra,* p. 39). The juries meted out justice upon the same terms to "that old big boy" (Po., 24; Pa., 23) and to "the little bit of one" (W., 29).

If the trained and experienced judge is swayed by the feelings of the community, the circumstance is evidence that the jury is carried away,—evidence and cause. To us the conclusion is unescapable that the trial judge *was* swayed by the emotion of the occasion:

The judge first made an "appointment" of counsel that was invalid under the statutes of the State, and that if valid would have been insufficient to impose a specific responsibility upon any individual attorney. If ever he made an appointment even in form lawful, he did so on the last possible occasion,—on the day for which all trials were set, the day the first trial began. He acted with declared reluctance,—with an apology for the "imposition."*

*Contrast Judge Cooley's statement:

The duty resting upon assigned counsel "is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of crime" (1 *Con. Lims.,* 8th Ed. [1927], 700).

A statute empowered the judge of his own initiative—the military being present—to change the place of trial. The judge directed the commander to intensify the military precautions. But the judge did not of his own initiative change the place of trial. When the defense took the initiative the judge exercised his discretion against the relief.

In the first case and again in the second, with lives at stake, the judge by the opening sentence of his charge let the jury know that all he demanded was their "attention for a few moments."

In three capital cases, involving eight defendants, the judge decided motions for new trial resting upon voluminous affidavits and raising far-reaching issues under the Constitution of the United States the day the motions were submitted. Denying a new trial in every case and as to every defendant, he sustained the death penalty even when inflicted upon a boy shown by evidence uncontradicted to be under sixteen,—in defiance of "the plain mandatory terms of the statute" (Powell Opinion, Po., 168).

IV.

Errors below relied upon here; summary of argument.

"In cases taken to the supreme court" of Alabama "no assignment of errors or joinder of errors is necessary,"—only a bill of exceptions (Code, §3258, Appendix). There are no assignments of error in these records.*

The errors the Supreme Court of the State in the denial of federal rights committed, and the points we urge, are in summary form as follows:

I. There was no fair, impartial and deliberate trial and there was therefore a denial of due process. The decision of the State Court is erroneous upon the authority of *Moore* vs. *Dempsey,* 261 U. S., 86.

II. Due process of law includes the right to counsel with its accustomed incidents of consultation with counsel and opportunity for preparation for trial and for the presentation of a proper defense at trial. That right in all effective sense was denied. The decision of the State Court is erroneous upon the authority of *Cooke* vs. *United States,* 267 U. S., 517, and of the whole line of decisions upon notice and opportunity to defend running back to *Pennoyer* vs. *Neff,* 95 U. S., 714.

III. The trial of petitioners before juries from which qualified members of their own race were—because of their race—systematically excluded and their conviction by such juries, was a denial of the equal protection of the laws. Objection to the exclusion was—allowance

*There are bills of exceptions (Po., 4-137; Pa., 3-161; W., 3-144), and these bills include the motions for new trial in which petitioners asserted their rights under the Constitution of the United States (*supra,* pp. 3-4).

being made for the circumstances—seasonably taken. The decision of the State Court is erroneous upon the authority of the line of decisions from *Neal* vs. *Delaware*, 103 U. S., 370, through *Martin* vs. *Texas*, 200 U. S., 316.

IV. The State Court misconceived the principles that underlie the claims of federal constitutional right. Its rulings affirming the propriety of the place and time of trial proceed upon grounds irrelevant to the issues here and upon reasoning demonstrably erroneous.

POINT I.

There was no fair, impartial and deliberate trial and there was therefore a denial of due process. The decision of the State Court is erroneous upon the authority of Moore vs. Dempsey (261 U. S., 86).

Moore vs. *Dempsey* (261 U. S., 86) settles the principle. A trial in circumstances of mob domination—in circumstances that preclude deliberation—is not due process of law. Conviction, confinement and death penalty after a trial so conducted constitute deprivation of liberty and life contrary to the Constitution of the United States.

The only question is whether—tested by the opinion in the *Moore* case and the facts in the *Moore* record—there was during trial mob domination. The question is whether the conditions of time and place and feeling made impossible a trial fair and deliberate. To arrive at the answer, we juxtapose the facts of the records at bar and the facts as shown by the *Moore* opinion and record,—setting forth (1) features demonstrably identical; (2) circumstances of mob domination here presented and in the *Moore* case presented in less degree or not at all; (3) the single item that in the *Moore* case was shown with more exactness of measurement than in the cases at bar,—but in these cases as certainly presented.*

(1)

(a) A "Committee of Seven and other leading officials" reminded the Governor of Arkansas a year after the event that at the time they "'gave our citizens

*Mr. Justice Holmes in the *Moore* case in certain instances read—as anyone dealing with a problem of the sort must read—between the literal lines of the record in order to capture the spirit of the proceedings in the trial court. It is partly for this reason, and also for the further reason that certain facts in the Moore record are not mentioned in the opinion that we make constant reference to the *record*.

their solemn promise that the law would be carried out' " (261 U. S., at 89).

In the cases at bar the day of the offense—as we learn from the newspaper of the next day—"Mayor Snodgrass and other local leaders addressed the threatening crowd and plead for peace and to let the law take its course" (Po., 8; Pa., 7; W., 7). "Calm thinking citizens" "realized that while this was the most atrocious crime charged in our county, that the evidence against the negroes was so conclusive as to be almost perfect and that the ends of justice could be best served by a legal process" (Po., 8-9; Pa., 8; W., 8).

(b) "The petitioners were brought into Court and informed that a certain lawyer was appointed their counsel" (261 U. S., at 89). "They were given no opportunity to employ an attorney of their own choice" (*Moore*, Rec., 5).

(c) Appointed counsel "had had no preliminary consultation with the accused" (261 U. S., 89).

(d) Moore and the others "were placed on trial before a white jury—blacks being systematically excluded" (261 U. S., 89).

(e) "The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result" (261 U. S., at 89).

In Scottsboro on March 25 after the arrest "a great crowd gathered at the jail,"—a "threatening crowd" (Po., 8; Pa., 7; W., 7); on March 31 at the first arraignment a "great crowd was present or tried to get into the court room" (Po., 11; Pa., 10; W., 10); on April 6 the Sheriff testified that "right now" there was present a "great throng" (Po., 95; Pa., 85; W., 92),—a throng that only the military, with its machine guns and tear

gas bombs, held back from "the court house." In the presence of this throng—"under orders of the court"—the Alabama commander issued "orders to his men" not to permit citizens to "come in the court house grounds with arms." The situation existed "on every appearance of the defendants." It "exists right now."*

(f) "Counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials" (261 U. S., at 89).

Counsel in the cases at bar did venture to hand up "a single copy" of a half-page petition for a change of venue, with newspaper exhibits (Po., 4-5, 92; Pa., 4, 82; W., 4, 89). But counsel did not have opportunity to make that preparation upon which a comprehensive exposition of the sentiment of the community depended (see *infra,* p. 55).

Counsel in these cases too did not "demand delay."

We can be certain there was no challenge to any juryman. For on the motion for new trial the State successfully objected to the inquiry whether even that question, which in the circumstances of this case was the most obvious, was put to jurymen (Po., 123, 125, 126, *et seq.;* Pa., 147, 148, 150, *et seq.;* W., 119, 120, 122, *et seq.*).**

In these cases too the defense did not "ask for separate trials,"—although its right was by statute absolute and although the prosecution, whose right was merely

*In the *Moore* case there is no suggestion in the opinion or record that the crowd around the court room, or any member of it, was armed, or that there had been any use of firearms by anyone since the quelling of the disturbances nearly a month before the trials (*infra,* p. 43).

**There is no clear reference to the absence of challenges in the *Moore* record, if indeed any reference. There is merely a statement that there was "no objection to the petit jury or any previous proceedings" (p. 7). But the conclusion, which this Court drew, that there were no challenges was unescapable in the *Moore* case,—as for the same reasons the same conclusion is unescapable in the cases at bar.

discretionary, asked for the severances it wanted and obtained those severances.*

(g) The appointed counsel "cross-examined the witnesses, made exceptions and evidently was careful to preserve a full and complete transcript of the proceedings" (261 U. S., at 96, dissenting opinion).** In the *Moore* case as in the cases at bar there was the form of trial. In both cases there was only the form. In both cases the evidence was without discrimination found sufficient as to all defendants; in both cases the death penalty was imposed upon all defendants. "Jury and judge were swept to the fatal end by an irresistible wave of public passion" (261 U. S., at 91).

We pass now from circumstances of obvious and often of verbal identity to facts and features more strongly presented in the cases at bar than in the *Moore* case, or here presented and not presented in the *Moore* case.

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*The psychological effect of the successive trials was the same in the two sets of cases:

The Arkansas prosecutor first tried Frank Hicks, who was supposed to have fired the shot that killed Clinton Lee, and immediately thereafter the other 5 defendants together (see *Moore*, Rec., 81, 106).

The Alabama prosecutor first tried Weems, "that old big boy" (Po., 24, Pa., 23) and with him Norris, who implicated Weems (*supra*, p. 14). He next tried Patterson, the leader, alone. He finally tried Andy Wright, a regular member of the Patterson group (Po., 38). With Wright—after two verdicts imposing the death penalty had been rendered—the prosecutor brought to trial 4 other defendants, whose cases in other circumstances would have had particular strength: Powell,—who, Mrs. Price said, did not rape her (Po., 25) and who was not individually identified by either Mrs. Price or Miss Bates as having raped Miss Bates (Pa., 25, 27); Roberson,—seriously sick and declared by a number of witnesses not to have been in the gondola (*supra*, p. 31); Montgomery,—weak in one eye, the other eye "out" (Pa., 46), he too declared by various witnesses not to have been in the car (Pa., 45-6, 47, 49; Po., 39-40, 42); Williams,—the "little bit of one."

**The following pages of the *Moore* record illustrate this statement: 29; 31; 32; 36; 37; 41; 43; 47; 49; 50; 54. Seven witnesses were called.

The exceptions in the cases at bar (taken, as the Court will observe, ever more infrequently as the trials progressed) are discussed at W., 153-8; Pa., 171; Po., 160.

(2)

(a) Moore and his companions were "poor and ignorant and black" (261 U. S., at 102, dissenting opinion). But they were grown men. They were moving spirits in an elaborate organization,—in the words of a witness of their own race "the head leaders" (*Moore,* Rec., 40; see also 31). The leader in the cases at bar was a boy under 21; in so far as the records show the ages, they show affirmatively that all the others were under 21.*

(b) Moore and his fellow petitioners "were citizens and residents of Phillips County, Arkansas" (*Moore,* Rec., 1). They were tried in Phillips County. The defendants in the cases at bar, on trial for their lives in Alabama, were residents either of Tennessee or of Georgia.

(c) The interval between occurrence and trials was twice as long in the *Moore* case as in the cases at bar:

The crime in the *Moore* case was on October 1, 1919 (*Moore,* Rec., 1); the trial was on November 3 (261 U. S., at 89; *Moore,* Rec., 27).

(d) There was no showing in the *Moore* case comparable to the showing here of publications "sensational and damaging" in the local press:

It was alleged in general terms in the *Moore* petition (*Moore,* Rec., 3) and accepted by this Court (261 U. S., at 88) that "inflammatory articles" appeared day by day. One of the articles the Moore record sets forth. That article appeared on October 7,—nearly a month before the trials (*Moore,* Rec., 11-14). And that article—highly colored as it was—carries no suggestion of lynch law and makes no charge and gives no intimation of the

*For the significance that this Court has attached—upon an issue of a state court's denial of rights under the Fourteenth Amendment—to the quality and circumstances of the particular negro prisoner, compare *Neal* vs. *Delaware,* 103 U. S., 370, 396.

individual guilt of any of the negroes who were subsequently brought to trial,—let alone of all of them.*

The articles in the Jackson County Sentinel name the defendants in "a crime without parallel" and declare the evidence—which includes "confessions"—"conclusive," "almost perfect."

(e) Counsel in the *Moore* case "called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand" (261 U. S., at 89).

In the cases at bar the defense did call witnesses. But they were all negroes against whom the same indictments lay and bearing the odium of the same "crime without parallel." In the first case, which foreshadowed the result in the subsequent cases, and again in the second case, these witnesses went back upon their fellow defendants (W., 55-8; Pa., 39-41).**

(f) Neither side summed up to the juries in the *Moore* case (*Moore,* Rec., 51). But consider the cases at bar. Nothing more clearly reveals the atmosphere that overhung all phases of all the trials than the following extract from the record in the first case, already partially quoted:

> "After both sides had closed their testimony, defendants' counsel stated to the court that they *did not care* to argue the case to the jury, but counsel

*There is mention in the article of "confessions" by certain negroes. But no one of the negroes subsequently brought to trial is named as making these confessions or as being implicated by them.

**In the *Moore* case two negro witnesses testified to the guilt of the defendants; but they were witnesses called by the *prosecution* (*Moore,* Rec., 31-45).

> for the State stated to the court that they did wish to argue the case to the jury, and one of counsel for the State proceeded to argue the case to the jury. At the conclusion of said argument of counsel for the State to the jury, counsel for defendants stated that they *still did not wish* to argue the case to the jury, and objected separately and severally on behalf of the defendants to any further argument of the case to the jury by counsel for the State, on the grounds that after counsel for defendants had declined to argue the case to the jury any further argument on behalf of counsel for the State to the jury would be contrary to the law and the rules of practice of this court, and would be harmful and prejudicial to the interest of the defendants. The court overruled said objection and permitted counsel for the State to further argue the case to the jury * * *'' (W., 59).*

(g) Applause over the rendition of a death verdict has a double significance: as an expression, and—in relation to later cases—as a cause, of mob emotion.** There is no reference in the *Moore* opinion or record to any applause in court room or court house or court house grounds or anywhere. There was no ''hollering,'' ''shouting,'' ''whoopee''; no amplifier; no band.

(h) The military played no part during the *Moore* trials:

The Governor of Arkansas at no time called out the National Guard. He did, on October 2, call on the commander at Camp Pike to send United States soldiers

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*For an incident hardly less striking at the conclusion of the Powell case, see Po., 48.

***Frank* vs. *Mangum*, 237 U. S., 309, attests the importance of court-room incidents even where the feature of successive trials is not presented. Two of the justices thought that a strong showing of applause and feeling in the court room, standing substantially alone, established a denial of due process.

(*Moore*, Rec., 95), and some were at that time sent. But these soldiers promptly put an end to the disturbances (*Moore*, Rec., 2-3, 15, 89).* There is no suggestion that any soldiers, federal or state, were around at the time of the *Moore* trials. There is on the contrary affirmative indication that soldiers were not around (*Moore*, Rec., 98).

In the cases at bar the Chief Justice of the State had this to say:

"Every step that was taken from the arrest and arraignment to the sentence was accompanied by the military. Soldiers removed the defendants to Gadsden for safe-keeping, soldiers escorted them back to Scottsboro for arraignment, soldiers escorted them back to Gadsden for safe-keeping while awaiting trial, soldiers returned them to Scottsboro for trial a few days thereafter, and soldiers guarded the court house and grounds during every step in the trial and, after trial and sentence, again removed them to Gadsden" (Po., 172).

The Alabama Chief Justice has had better opportunity than any other man to get an insight into the way the minds of Alabama jurors work. His conclusion is:

"Whether this was essential to protect the prisoners from violence, or because the officials were over apprehensive as to the condition of the public mind, matters little as this fact alone was enough to have a coercive influence on the jury."

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*This Court's opinion notes that "*shortly after the arrest* of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops" (261 U. S., at 88). And the dissenting opinion alludes to "the disorders of *September*, 1919" (at 101).

(3)

There is but one concrete respect in which the *Moore* record went beyond these records in the demonstration that the prisoners had only the *form* of trial. The petition in the *Moore* case recited that the trial lasted less than an hour and that the jury's verdict was brought in in a few minutes (*Moore*, Rec., 5). The *Moore* case was upon demurrer and this Court accepted these allegations (261 U. S., at 87, 89).

In the cases at bar there is no such mathematically exact statement. As a practical matter there could be none:

The practice in Jackson County does not, as the records show (Po., 53; Pa., 53; W., 63), take note of the time a jury goes out or returns. The ignorant and frightened boys who were the defendants were in no position to estimate the length of the trials or of the juries' "deliberations." Mr. Roddy and Mr. Moody might indeed have done so. But they had no part in the affidavits that raised the constitutional issues.*

Plainly, if there had been extended deliberations, the prosecution would have had no difficulty in establishing such a fact. For it would have been at least as easy to procure affidavits from the prosecutors themselves, as, let us say, from sheriffs and deputy sheriffs (compare W., 137, 139, 140, 142),—not to speak of per-

*Compare *Downer* vs. *Dunaway* (53 F. [2d], 586; December, 1931),—a decision of the Circuit Court of Appeals in the Fifth Circuit granting, on the authority of *Moore* vs. *Dempsey*, a petition for *habeas corpus* in a situation like that in the *Moore* case and in the cases at bar. Speaking of counsel assigned on the day of trial to defend a negro accused of rape, Judge Bryan says:

> "Counsel who represented appellant may have construed their appointment as covering only the actual trial, such as impaneling the jury, examining and cross-examining the witnesses, and making arguments in the case; and not as including the making of motions for continuance, change of venue, and a new trial" (p. 589).

sons without official position like the editor of the Jackson County Sentinel (Po., 134; Pa., 158; W., 135). The prosecution attempted no such showing.

The gross facts are clear:

Three capital trials with 8 defendants were completed in three days.

The Powell case involved 5 defendants. *After* 6 witnesses had testified in the Patterson case, and *after* the judge had charged the jury in that case (Pa., 42, *et seq.;* Po., 2-53),—on that same day the Powell case commenced. And the Powell jury found time—still on the same day—to bring in a verdict that all defendants were guilty and that all defendants must suffer the extreme penalty.

The only other matters that could even be suggested as pointing to a more flagrant denial of the essentials of due process in the conduct of the Moore trials than in the conduct of the trials at bar are matters of mere conclusion. There were general statements in Moore's petition to the effect that "there never was a chance for the petitioners to be acquitted;" that "no juryman could have voted for an acquittal and continued to live in Phillips County;" that "if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob" (261 U. S., 89-90).

Such conclusions cannot be compared for substance to concrete facts like the prisoners, under military guard, being carried to court at night; their parents fearing to come to Scottsboro or even to Gadsden; applause in the court room on the rendition of the death verdict.*

*It is hardly necessary to say that this Court noted the merely conclusory quality of these declarations in the Moore petition. Observe the prefatory phrase in the opinion, "according to the allegations and affidavits" (261 U. S., at 89).

At the outset we stated—we have by minute analysis now demonstrated—the following as a summary formulation of the comparison between the cases at bar and the case upon which this Court has ruled:

In essentials the cases are identical; in many respects the showing of mob domination is clearer and stronger in the cases at bar,—some important points definitely established here were not shown in the decided case; in the only respect where the showing here is less mathematically precise, the difference is in the mechanics of proof concerning a fact whose existence is in no doubt.

The argumentation in the Alabama Supreme Court directed the Court's mind explicitly to the comparison of the *Moore* case and the cases at bar; for the briefs of all defendants cited the *Moore* opinion over and over again. And the State Court, although it approached the matter from a different angle, did turn to a comparison of the *Moore* case and the cases before it. But only by the *general* statement that difference there was did the majority below purport to reconcile its decision with the decision of this Court,—not one circumstance of distinction did it *specify* (Po., 158). The Chief Justice in his dissent reasoned in the same way as did this Court and to the same conclusion,—that the accumulation and combination of conditions and influences kept the trial from being fair and the process from being due (Po., 174).

The grounds on which the majority proceeded below are the same grounds on which the Arkansas Court unanimously sustained the conviction of Moore:

The Alabama Court affirmed the convictions essentially because it found no exceptions well taken (compare W., 154-5; Pa., 177; Po., 163). "The trials were had according to the law," said the Arkansas Court (*Moore*, Rec., 66). The point is irrelevant in the cases at bar as it was found to be in the *Moore* case. Whether or

not the local law as expounded by the local court justified the withholding, for example, of a change of venue, it remains true that conviction in the circumstances of the place and time constituted a deprivation of life and liberty in defiance of the Fourteenth Amendment. But neither Court grasped the due process requirement of the Constitution of the United States.

The Alabama Court certified that Mr. Moody was "an able member of the local bar" (Po., 170). The Arkansas Court remarked that "eminent counsel was appointed to defend appellants" (*Moore,* Rec., 66). Neither Court addressed itself to the question whether a designation coming on the day a series of capital trials commenced could be in the constitutional sense valid.

The Alabama Court concluded that, "having made no objection to the personnel of the jury on account of race or color, the defendants are in no position to put the court in error, in the contention made for the first time on motion for new trial" (Po., 162). The Arkansas Court decided the same issue the same way,—"the question was raised in the motion for a new trial, and it, therefore, comes too late to be now considered" (*Moore,* Rec., 65; and see 261 U. S., at 91). Neither court inquired whether the rule was applicable in circumstances that made earlier protest impracticable or impossible.

* * *

This Court in the *Moore* case granted relief by the remedy, collateral and extraordinary, of *habeas corpus,*—a remedy whose basis is a challenge to the jurisdiction (compare 261 U. S., at 91). It cannot, we submit, sustain the judgments at bar against direct attack.

POINT II.

Due process of law includes the right to counsel and its accustomed incidents of consultation with counsel and opportunity for preparation for trial and for the presentation of a proper defense at trial. This right was in all effective sense denied. The decision of the State Court is erroneous upon the authority of Cooke vs. United States, 267 U. S., 517, and of the whole line of decisions upon notice and opportunity to defend running back to Pennoyer vs. Neff, 95 U. S., 714.

"With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel" (1 *Cooley, Con. Lims.* [8th ed., 1927], p. 700, collecting authorities).

The principle is a due process principle. "Due process of law," declared Taft, C. J., "includes the assistance of counsel, if requested, and the right to call witnesses to give testimony" (*Cooke* vs. *United States*, 267 U. S., 517, 537). The underlying doctrine goes back to *Pennoyer* vs. *Neff* (95 U. S., 714).

The right to counsel is given with "all its accustomed incidents,"—this "the Constitution secures" (1 *Cooley, Con. Lims.* [8th ed., 1927], p. 700):

"The right to the aid of counsel includes the right to communication and consultation with him" (*Cooley,* footnote 5, collecting numerous cases). "The constitutional guaranty that one shall have the right to be represented by counsel means nothing if it does not mean that he shall have reasonable time in which to state the facts of his case to counsel after they

are employed or appointed, and to be advised" (*Jackson* vs. *Commonwealth,* 215 Ky., 800, 802). "Benefit of counsel either means something or it means nothing. To promise the benefit of counsel and then render the service ineffective is, as Judge Blandford once remarked, 'to keep the word of promise to the ear and break it to our hope'" (Russell, C. J., in *Sheppard* vs. *State,* 165 Ga., 460, 464 [1928]).

The right is broadest in a capital case. "The intense strain involved in the responsibility of defending one whose life is at stake is such as can scarcely be described in words; and altogether aside from inquiry into the facts of the case and legitimate inquiry so far as possible into the character of the jurors, as much time and thought are required to consider and determine what course of action shall be pursued in defending one whose life is at stake as in important civil cases where many thousands of dollars are involved" (*Sheppard* vs. *State, ibid.*).*

The right to counsel is "universal" and "constitutional." The right is included in due process. It is given

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*Sheppard was forced to trial in a capital case a week after the crime and the day counsel was appointed. His conviction was reversed.

Report No. 11 of the National Commission on Law Observance and Enforcement, *Lawlessness in Law Enforcement* (Government Printing Office, Washington, 1931) quotes with approval the passages we have quoted from Mr. Justice Russell's opinion.

with "all its accustomed incidents." It has its furthest scope where "life is at stake."*

It remains to apply these rules to the records.

The extent of defendants' *own* capacity for the preparation and presentation of their cases can be measured by obvious facts. "The defendants had no opportunity to prepare their defense, as they were kept in close custody from their arrest until the trial" (*Mitchell* vs. *Commonwealth,* 225 Ky., 83, 84 [1928]).** They were "ignorant,"—all but one "illiterate" (*People* vs. *Nitti,* 312 Ill., 73, 89, followed in *Sanchez* vs. *State,* 199 Ind., 235, 246).***

Defendants' families and friends were in no different case. With their sons about to be put on trial for their lives or actually on trial for their lives, the parents were afraid to go to Scottsboro,—afraid even to go to Gadsden. "Parents, kinsfolks" had no communication with their boys.

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*Clearly settled though these principles are, the Court below seems to have overlooked them altogether. It nowhere treats the right to counsel as constitutional.

A recent state court decision directly contrary to the decisions below is *Commonwealth* vs. *O'Keefe,* 298 Pa., 169. The day counsel was procured the accused was tried. He was convicted and a sentence of 9 months' imprisonment and $1,000 fine imposed. The Court declared "the real question" to be whether this treatment "deprived the defendant of his constitutional rights." Citing *Cooke* vs. *U. S.* and numerous other decisions here it held the proceeding a violation of the Fourteenth Amendment.

**The Kentucky Court, in circumstances much like those in the cases at bar—the National Guard had been called out, etc.—reversed the conviction of a negro charged with killing a white man and tried a week after the alleged offense and a few days after "he had *employed* an attorney."

***There was no question of mob domination in the *Nitti* and *Sanchez* cases. The defendants in those cases were foreigners; the convictions were reversed because representation by counsel was inadequate. For judicial recognition that at least as much allowance is to be made for negroes in a case where "race prejudice has been aroused and public excitement prevails" compare *Mitchell* vs. *Commonwealth,* 225 Ky., at 85, *supra.*

If then anything was to be done for the boys only counsel could do it. Never was there a case in which the need for counsel was greater. Never was there a case that called for standards more liberal in measuring the right to counsel and the scope of its necessary incidents.

The "appointment" of March 31 was void. The law allows the designation of not more than two. All the lawyers were to "defend" all the boys. "The court did not name or designate particular counsel, but appointed the entire Scottsboro bar, thus extending and enlarging the responsibility and, in a sense, enabling each one to rely upon others" (Anderson, C. J., Po., 172). Such a designation would not be, within the meaning of the due process clause of the Constitution of the United States, valid even if it were permitted—as in fact it was prohibited—by local statute. Everybody's business, it is proverbial wisdom, is nobody's business.

The only question then that merits even discussion is whether on April 6 there was an appointment constitutionally valid. Of the designation that day attempted all the following things are true:

(a) Defendants' utter helplessness continued right down to April 6. On that day "they did not know who would be their counsel and they had been in jail ever since they were arrested, March 25, 1931, and had no opportunity to employ counsel and no money with which to pay them and had no chance to confer with their parents, kinsfolks or friends and had no chance to procure witnesses" (Po., 80; Pa., 111-2; W., 78; see also Po., 83; Pa., 114; W., 80).

(b) The boys were not asked whether they had counsel or what counsel they wanted. They were at most, "informed that a certain lawyer was appointed their counsel" (261 U. S., at 89).

Nor would a suggestion to the boys that they or their families employ counsel—reasonable time being given—have been an empty formality. The conclusive fact, which Anderson, C. J., points out (Po., 172-3), is that the boys' connections subsequently procured counsel of their choice.*

(c) There was not so much as the form of a true *appointment.* The judge exercised no discretion in the selection of counsel. He said merely that "*all* the lawyers that will" assist Mr. Roddy might do so (Po., 91; Pa., 81; W., 88). When one lawyer declared his readiness to "help Mr. Roddy in anything I can do about it, under the circumstances," the Court at once accepted that lawyer (Po., 91; Pa., 81; W., 88).**

(d) The zeal of counsel thus not appointed—merely accepted—was not kindled. It was dampened. The Court in terms and twice over characterized what should have been a call to duty as an "imposition."

(e) The chief counsel—the local lawyer merely "helped"—was "not familiar with the procedure in Alabama;" had not had "an opportunity to prepare the

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*As a matter of fact General Chamlee had acted for the Patterson family in another connection and before the prosecution of their son (Po., 75; Pa., 98; W., 73).

**Mr. Moody, the lawyer whose offer was taken, had apparently not even seen the boys before April 6:

Evidently referring to the proceedings of March 31—for it is uncontradicted that no lawyer saw the boys either in the Scottsboro jail or in Gadsden prison (*supra,* p. 18)—Mr. Moody says:

> "*Most* of the bar have been down and conferred with these defendants in this case; *they* did not know what else to do" (Po., 58; Pa., 79; W., 86).

The italicized words indicate that Mr. Moody had *not* been one of the lawyers that saw the boys at the time of the indictment on March 31 and the abortive arraignment on that day.

case" and "had not prepared this case for trial" (Po., 89; Pa., 80; W., 87); was "here just through the courtesy of your Honor" (Po., 90; Pa., 80; W., 87). He urged "your Honor to go ahead and appoint counsel;" told the Court, "I think the boys would be better off if I step entirely out of the case" (Po., 90; Pa., 80; W., 87); and, at the end of the long colloquy, modified his position only thus far:

> "If there is anything I can do to be of help to them, I will be glad to do it; I am interested to that extent" (Po., 90; Pa., 81; W., 88).*

(f) Overwhelmingly important, the "appointment" was made the day that—in circumstances of prejudice, passion and extraordinary difficulty—the trial of three capital cases involving eight defendants was commenced.

The authorities settling it that the right to counsel is constitutional and that it is included in the due process concept, impose no requirement that the defendant show that his case, properly prepared and presented, would have been different in character or result. No defendant who has *not* prepared a case—who has *not* had time for consultation, investigation and the procuring of witnesses—can tell what case he *might* have made. No one—to pass from the general problem to the particular situation—can tell what the juries would have done had counsel had time and opportunity to find the facts and put the facts before them.

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*Addressing itself directly to Chief Justice Anderson's dissent, the majority of the Court "think it a bit inaccurate to say Mr. Roddy appeared only as *amicus curiae*" (Po., 170). But the fact is uncontradicted that the only lawyer any of the defendants at any time *employed* was General Chamlee (Po., 75-6; Pa., 98; W., 73). Nor did the court in Alabama purport to *appoint* a lawyer from Tennessee.

Although there thus is and can be no requirement that one complaining of the denial of the constitutional right to counsel concretely show the effects of the deprivation, certain indications are in these records so patent that we list them. By the records we shall show the effect of the absence of preparation (1) upon the proceedings and investigations that precede trial, (2) upon the trials. We shall see how right was the statement of the Alabama Chief Justice:

> "The record indicates that the appearance was rather *pro forma* than zealous and active" (Po., 173).

(1)

An objection to the constitution of a grand jury "based on allegations of facts not appearing in the record" "if controverted by the attorney for the State, must be supported by evidence on the part of the defendant" (*Carter* vs. *Texas,* 177 U. S., 442, 447).* Attorneys who only a few moments before pleading to the indictment declare themselves ready to "help," to "do anything I can about it, under the circumstances," cannot get such evidence.

*The Alabama practice is particularly strict against objections to an indictment. Any objection to the formation of the grand jury must be taken "in all cases before a plea to the merits" (Code, §5203, Appendix; see also §5202 purporting to wipe out all objections to the constitution of a special grand jury). While such restrictions of local practice are not binding upon the *federal* courts upon issues of due process and equal protection (*infra,* p. 62), it remains true that in order to maintain those rights that the *state* law gives their clients, counsel have to act with utmost promptness.

A defendant who moves for change of venue must "set forth specifically the reasons why he cannot have a fair and impartial trial in the county" (Code, §5579; see Appendix). "The burden of proof was upon the defendants to show that they could not get a fair and impartial trial in Jackson County, before the court would have been justified in granting the change of venue moved for" (Powell Opinion, Po., 157).

A "burden" so heavy it takes time to discharge. The Kentucky Court in a late opinion dealing precisely with mob domination, shows why—for the right to a change of venue to be effective—there must be *time* to prepare the motion. " 'It may happen that the strong feeling against the defendant in a county which prevents his having a fair trial may prevent him from obtaining witnesses to so testify on his motion for a change of venue' " (*Estes* vs. *Commonwealth,* 229 Ky., 617, 620).

The Alabama practice, too, permits witnesses to be called on a motion for change of venue. But the only persons that Mr. Roddy and Mr. Moody called as witnesses, or doubtless in the circumstances could call, were two men—the Sheriff and the Major of the Guard—who happened to be present in the court room. The lawyers could not "*obtain* witnesses."

The upshot is:

The Alabama Supreme Court found no error in the refusal of the defendants' motion for change of venue because they did not "meet and discharge" the burden of proof (Po., 158). Defendants had no time in which to do the things essential to discharge their burden.*

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*The following passage in the Patterson opinion well illustrates how the time factor stood in the way of defendants' motion for change of venue:

> "As to the publications appearing in The Montgomery Advertiser and the Chattanooga paper, there was no evidence showing

(*Footnote continued on next page.*)

Counsel in advance of a trial have not only to make motions. They have to find out the facts and discover the witnesses to the facts,—in the cases at bar, for lawyers whose connection began on the day of trial, a task impossible of accomplishment.

The charge was of a crime in a moving train that covered 50 miles while the assaults were supposed to be taking place, and that passed through a number of towns and villages. Counsel accepted on the morning of trial could not make an investigation along this route and in these places.

The defendants were all non-residents. Counsel present, from the moment trial began, in an Alabama court room, could not hunt up character witnesses in Georgia and Tennessee.

The character and reputation of the complaining witnesses were not, so the Alabama Court held, in these cases at issue, either directly or upon cross examination.* But the girls' movements on the night before the occurrence had—in view of the medical testimony (Po., 29; Pa., 30-1; W., 33-8)—a specific relevancy. These girls that in overalls (Po., 24) came on a freight train from Chattanooga—which was not the home of either (Po., 22, 26)—

(*Footnote continued from preceding page.*)

to what extent, if any, said papers were circulated in the county from which the jurors were to be drawn, and in the absence of such proof these publications were entitled to little or no weight" (Pa., 168).

Counsel—given a little time—would of course have been able to show that daily papers published in the capital of the State or in an important city near the state line circulated in the County (compare Po., 119, Pa., 142, W., 114).

*See *supra*, pp. 16-17.

gave hazy reports of their doings in that city on the night of March 24-25. They named the street on which they stayed, but could not describe the street. They could not remember the number of the house (W., 26, 43; Pa., 25, 29; Po., 27). The defense—had there been an effective right to counsel—would certainly have attempted to find out about the girls' comings and goings, and would likely have succeeded.* Counsel could not, while trial was in progress, attempt any such thing.

The result was that the only witnesses any of the defendants had were witnesses drawn from their own ranks. All the witnesses were negroes.** All were under indictment for "a crime without parallel."

The defense—even though it thus drew from its own ranks only—did not know what witnesses to call or what the witnesses it called would say. Take as a flagrant instance the witness Roy Wright. This boy was not a defendant in the case in which he was called or indeed in any of the three cases below. There was no tactical reason for putting him on the stand. There was on the contrary grave danger in using him,—a danger that the most elementary preparation would have uncovered. It was shown by an article in the Sentinel, filed by the defense itself on the morning of April 6 as an exhibit on the venue motion, that "one of the *younger* negroes"

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*Witness the vast amount of detail General Chamlee was later able to develop concerning the girls' past lives (Pa., 63-77, 133-137; Po., 102-105; W., 99-103).

**As an indication of community attitude toward the testimony of colored persons see the reference in an affidavit by the editor of the Jackson County Sentinel to "some affidavits which had been made by some negroes" (Po., 135; Pa., 158; W., 135); that this Court may take judicial notice of the likelihood of prejudice against negro testimony compare *Aldridge* vs. *United States*, 283 U. S., 308.

had been "taken out by himself" and had said that " 'the others did it' " (Po., 7; Pa., 6; W., 6). Roy was only 14,—the youngest of all the boys. Yet the *defense* called Roy,—and the testimony he gave was that there had been raping by the older negro boys (Pa., 38, 39, 41).

Of the right to counsel the incident most "necessary" is consultation. It is the incident from which the right takes its name. In a capital trial the lawyer for the defense calls a witness who may be expected to contradict the case for the defense and does contradict the case for the defense,—this can be only when between client and counsel there was no consultation, when the lawyer "had no preliminary consultation with the accused" (261 U. S., at 89).

(2)

The demonstration already given is conclusive, not only that the right to counsel was denied, but that the denial deprived the accused of all real defense. When appointment is made so late as to make impossible "inquiry into the facts of the case"—so late as to preclude preparation—, then indeed "the benefit of counsel" is "promised," but "the service rendered ineffective." It is worth while bringing together, however, the indications supplied by the records that the cases thus not prepared were for practical purposes not even *presented:*

The motion for change of the place of trial was perfunctory,—there was no argument in support; a motion for change of the time of trial was the most important and—to lawyers charged on the very day of trial with responsibility for the cases the most obvious—of all motions,—but it was not made; there was no demand for severances,—although the issue of identification was cardinal and the right of the defense to separate trials absolute; there was no opposition to the severances the

prosecution requested; there could be no "legitimate inquiry into the character of the jurors" (*Sheppard* vs. *State, supra*), and there were no challenges; there was no opening address for any defendant; there are a handful of exceptions to rulings on evidence in the first case, 4 in the second case, in the third with 5 defendants 2; in no case did counsel for the defense sum up for any client,—nor did they demand in return for the waiver of a right so fundamental a corresponding waiver by the prosecution; in no case did the defense submit a single instruction to the jury; in none did it take a single exception to the charge.

* * *

We saw in our first point that there was in the constitutional sense no trial. We have seen in this point that there was in the constitutional sense no representation by counsel. Boys tried upon charges that threatened their lives did not have "reasonable opportunity to meet them" (*Cooke* vs. *United States*). Their defense had only the semblance of presentation. It had no preparation.

POINT III.

The trial of petitioners before juries from which qualified members of their own race were—because of their race—systematically excluded and their conviction by such juries, was a denial of the equal protection of the laws. Objection to the exclusion was—allowance being made for the circumstances—seasonably taken. The decision of the State Court is erroneous upon the authority of the line of decisions from Neal vs. Delaware, 103 U. S., 370, through Martin vs. Texas, 200 U. S., 316.

(1) "An accused is entitled to demand, under the Constitution of the United States," that "in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color" (*Martin* vs. *Texas,* 200 U. S., 316, 321).

To the same effect

Virginia vs. *Rives,* 100 U. S., 313, 321;
Rogers vs. *Alabama,* 192 U. S., 226, 231;
In re Wood, 140 U. S., 278, 285.

(2) The Fourteenth Amendment is a prohibition upon the *state.* It matters not, therefore, how the state works the exclusion,—"whether through its legislature, through its courts, or through its executive or administrative officers." If "all persons of the African race are excluded solely because of their race or color," then a defendant of that race may say "the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States" (*Carter* vs. *Texas,* 177 U. S., 442, 447, collecting earlier authorities).

In accord

Rogers vs. *Alabama, supra;*
Neal vs. *Delaware,* 103 U. S., 370.
Martin vs. *Texas, supra;*

(3) Where the fact is established that the colored population is considerable and that colored men are never included in juries, there is "presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States" (*Neal* vs. *Delaware,* 103 U. S., 370, 397).

(4) The fact of systematic exclusion is shown in the cases at bar in the same way as it was shown in the *Neal* case: "By reason of a custom of long standing there was not one negro selected for the entire trial, throughout the whole county with a population of 30,000 people when a large number of negro landowners were qualified jurors, or for jury service" (Po., 84; Pa., 115; W., 82). The fact of exclusion is indeed tacitly admitted by the Supreme Court of the State (Po., 162-3).

(5) What the Alabama Court contends is (a) that the *statute* is unobjectionable: "The jury laws of Alabama do not exclude any man from jury service by reason of race or color" (Po., 162); (b) that "by failing to object to the personnel of the jury the defendant must be held to have waived all objections thereto" (Po., 162).

Neither point has merit:

(a) The precise proposition that it is immaterial whether the exclusion be by legislative enactment or by systematic official action was, as we have just noted, decided over and over again in the line of cases from *Neal* vs. *Delaware* through *Carter* vs. *Texas* and *Rogers* vs. *Alabama* to *Martin* vs. *Texas.**

*The unanimous Maryland Court very recently decided the point in a noteworthy opinion, by Bond, C. J., which reviews all the authorities in this Court. It reversed the conviction of a negro because the officer charged with drawing up the jury list never included negroes (*Lee* vs. *State* [July, 1932], 161 Atl., 284, not yet reported officially). The decision is directly contrary to the decisions below.

(b) "The law of the United States cannot be evaded by the forms of local practice" (*American Railway Express Co.* vs. *Levee,* 263 U. S., 19, 21, citing *Rogers* vs. *Alabama,* 192 U. S., at 230). "The question whether a right or privilege, claimed under the Constitution or laws of the United States," was "brought to the notice of a state court, is itself a Federal question" (*Carter* vs. *Texas,* 177 U. S., at 447). In the precise case of the composition of juries the principle has over and over again been applied that the federal right to equal protection is not to be defeated by any principle of state practice clogging the mechanics of its assertion.

In re Wood, supra;
Rogers vs. *Alabama, supra;*
Carter vs. *Texas, supra.*

In the cases at bar the defendants could not in any practical and human sense "have objected to the personnel of the jury." They were without counsel and without opportunity to prepare. By failing to assert their right to equal protection at a time they could not assert it, they did not lose the right. Due process of law and equal protection of the laws "overlap" (*Truax* vs. *Corrigan,* 257 U. S., 312, 332). It cannot be that where a mob dominates and all effective right to counsel is denied—that where, and essentially because, due process is withheld—the claim to equal protection is foregone.

In *Moore* vs. *Dempsey,* too, no statute worked exclusion. In that case, too, there was no objection to the composition of the juries. This Court did not close its eyes to the fact that the jury was "white",—"blacks being systematically excluded."

POINT IV.

The State Court misconceived the principles that underlie the claims of federal constitutional right. Its rulings affirming the propriety of the place and time of trial proceed upon grounds irrelevant to the issues here and upon reasoning demonstrably erroneous.

Proof that reasoning is mistaken reenforces the demonstration that results are unsound. In conclusion we analyze therefore the chief opinion and show:

I. The State Court does not arrive at the essentials of any of the three issues of federal constitutional right,—its treatment is in the literal sense negligible.

II. The long discussion of the place of trial is both irrelevant to the issues as here defined, and illogical.

III. The cursory reference to the time of trial is charged with errors that this Court has exposed.

I.

The State Court's misconceptions of federal constitutional rights.

"The record before us fails to show that any right guaranteed to the defendants under the Constitution of the United States was denied to the defendants in this case: on the contrary, the record shows that every such right of the defendants was duly observed, and accorded them" (Powell Opinion, Po., 163-164). The foregoing is the declaration of a conclusion merely. There is nowhere a statement of reasons. But it is not difficult to arrive at the State Court's basic conceptions or to expose its errors.

As to the right to orderly and deliberate trial: The Court considers the influences and incidents singly. It considers indeed only such matters as a motion made or an objection taken in conformity with local practice brings to its attention. The upshot is that it reduces the whole inclusive problem of fairness essentially to an issue concerning the motion to change the place of trial.

The error is in forgetting that a trial is a whole thing,—that the place, the time, the feeling, the demonstrations, the military force, the absence of prepared counsel, the composition of the jury in their effects converged.

As to the rights of counsel: The Court in truth gives no consideration. The only reference is in what really is a supplement addressed in terms to the dissenting opinion (Po., 169). The discussion does not rise above details and personalities: The Chief Justice's characterization of the Tennessee lawyer as an *amicus curiae* is called "a bit inaccurate;" the professional distinction of the Alabama lawyer is asserted (Po., 170).

The error is in ignoring that where in a capital case counsel are appointed or accepted the day trial begins, there can be no preparation,—of necessity there is denial of a right "universal" and "*constitutional.*"

As to equal protection: The Court confines its discussion to the words of the statute. It applies a rule of practice whose effect, in the circumstances of these cases, is to shut out the consideration that by systematic official action the statute was set at naught.

The error is in considering practice and form to the exclusion of fact.

As to no one of the three problems of federal constitutional right does the State Court so much as come to the issue.

II.

The reasoning as to place of trial.

The State Court—which on points of local practice eliminated other aspects of the issue of fairness of trial*—discusses at length the place of trial. But the discussion is (1) irrelevant to the issues as they are here defined and (2) illogical.

(1) *Irrelevant* the discussion is to the issues here because the State Court never envisages the question as one of constitutional right. It never asks,—Did the convictions in Scottsboro, in view of the circumstances of the time, the demonstrations, the presence of the military, etc., accord with due process? It asks only,—Was there as matter of local law error in denying the motion for change of venue?

The Court's reference to *Moore* vs. *Dempsey* makes strikingly clear the angle of its approach. The reference comes (Po., 158) in the discussion of "change of venue" (Po., 150-159). Upon issues under the Constitution of the United States the decision of this Court is not cited.

---

*It disposes of the issue as to the time of trial essentially by saying that no motion for continuance was made (*infra*, p. 69); it rules that demonstrations at the rendition of verdict cannot be shown by evidence *aliunde* (*supra*, p. 24).

(2) *Illogical* the discussion is, as witness the following:

(a) "The petition does not charge that any actual violence, or threatened violence, was offered the prisoners" (Po., 151). Whether or not petitioners—under military guard and locked in prison—heard threats, the uncontradicted fact is that the crowds were, and ever since March 25 had been, "threatening."

(b) " 'It is my *idea,* as sheriff of this county, that the sentiment is not any higher here than in any adjoining county' "; " 'I *think* the defendants could have as fair trial here as they could in any county adjoining.' " The Court quotes and invokes such statements as these by Sheriff Wann, and like statements by Major Starnes of what he " '*thought*' " and of his " '*judgment*' " (Po., 155-6). A trenchant decision has exposed the fallacy—where the issue is of community sentiment—of relying upon "the mere opinion statements of witnesses": Witnesses "themselves might be influenced the one way or the other because of the prevailing sentiment." "The proven and undisputed circumstances," the Kentucky Court concludes, "speak louder and more convincingly" (*Estes* vs. *Commonwealth,* 229 Ky., 617, 619-620 [1929]).*

*The Alabama Court in an earlier case made the same ruling as to the relative weight to be given to circumstances and opinions that the Kentucky Court made (*Seams* vs. *State,* 84 Ala., 410). A negro was indicted for the murder of a well-known white man. The trial was held while the prisoner was under military guard, and there were other circumstances of extreme pressure. He was convicted. The Court reversed for the denial of change of venue and said, with italics:

(*Footnote continued on next page.*)

The point applies—especially in view of the Court's insistence upon the presence or absence of violence as the test—with peculiar force to the two witnesses in question. The last persons to whom intimation of threatened violence would be given would be the two officials charged generally with maintaining order and specifically with protecting the prisoners.*

(c) "The judge of the court did not direct the plaintiff to call for the militia, nor did the judge of the court make any request upon the Governor for the militia",—the point "should be stated" (Po., 154). On the day of the occurrence the Governor, at the request of the Sheriff, called out the militia,—before the judge called the session of the court or even came to Scottsboro (see Po., 8; Pa., 7; W., 7-8), before it was possible for the judge to "make any request upon the Governor." What the *judge* did was this: With the militia there, and ready with rifles, machine guns and tear gas bombs, the judge gave "orders" making even more stringent the precautions the Sheriff and the military commander had adopted,—orders to the military to search citizens for arms.

(*Footnote continued from preceding page.*)

> "In arriving at a conclusion on this subject the court is to be governed more by the *facts* of the case, as proved or admitted, and legitimate inferences from them, than by the mere *opinions* of witnesses, which are unsupported by facts" (84 Ala., at 413).

For a terse statement of the same principle in a neighboring jurisdiction, see *Brown* vs. *State*, 83 Miss., 645. 646.

*One of the witnesses was for an additional reason obviously without authority to speak about sentiment in Jackson County. Major Starnes came into Jackson County from Guntersville in Marshall County. He stayed with his picked men at Gadsden in Etowah County. He himself in an extract that the Court quotes (Po., 156), speaks of his trips "over to Scottsboro in Jackson County."

It may be noted that the defense did not ask for opinion evidence from Sheriff Wann or Major Starnes; it interrogated these officers concerning concrete facts,—the forces under their command, etc. (Po., 93-4, 95-7; Pa., 83-4, 85-8; W., 90-1, 92-5). It was the prosecution that on what purported to be cross-examination (Po., 94-5, 98; Pa., 84-5, 88-9; W., 91-2, 95) elicited the statements that the Court made its own.

"Mere mistakes of law," as the *Moore* opinion remarks, are not here to be corrected (261 U. S., at 91). But the same opinion notes fallacy in the State Court's reasoning upon points of the sort.* It is relevant, therefore, to remind this Court that the State Court's decision upon the venue motion is contrary to precedents established in other jurisdictions, and to note that the decision is inconsistent too with earlier precedent in the same jurisdiction:

The gist of the decision is that in the Court's view threats were not shown. In other jurisdictions motions for change of venue are granted all the time—on the simple ground that against the defendant there runs a pervasive community feeling—in communities and on occasions in which there is no threat or thought of violence.

A generation ago the Alabama Supreme Court reversed—upon the sole ground that it was error to deny a change of venue—the conviction of a negro indicted for an atrocious rape upon a white girl. It said:

> "The crime charged was of a character to produce the greatest public indignation. The trial was had within a short time after the alleged commission of the offense came to the knowledge of the public—as soon as a special term of the court, called in obedience to a public demand for a speedy punishment, could be convened and held. And the affidavits and other evidence show that the public were so greatly aroused against the defendant that it required the promptest and most vigorous action of the executive officers of the State, from the Governor down, and including the

*The Arkansas Court's "answer to the objection that no fair trial could be had in the circumstances" is,—"it could not say 'that this must necessarily have been the case'" (261 U. S., at 91). The phrase Justice Holmes puts in quotation marks betrays the underlying fallacy of the State Court's opinion in the *Moore* case.

military, to protect the defendant from mob violence and summary execution; and further, that this state of feeling continued down to and through the trial, and must have had such effect upon the jury as that their verdict was little else than the registration of the common belief of the people that the defendant was guilty, and a mode of carrying out the public purpose to take his life. The trial was not and could not, under the circumstances then existing, have been fair and impartial. The court erred in denying the change of venue moved for by defendant, and for that error its judgment must be reversed" (*Thompson* vs. *State,* 117 Ala., 67, 68).*

III.

The reference to the time of trial.

The defendants were not ready on April 6. The issue of time is therefore even more important than the issue of place. The Chief Justice points this out (Po., 171-2). But the majority say very little about the issue of time.

(a) The essential reliance is upon the circumstance that no motion for continuance was made (Po., 161). Moore's counsel too made no such motion. This Court's deduction was not that the client had thereby lost his right to due process of law. Its deduction—drawn in large part from the very circumstance that motions ob-

*The majority opinion discusses the *Thompson* case. The opinion declares generally that distinction exists, but states no circumstance of distinction (Po., 157). In the same connection it discusses, and in the same way it dismisses, both *Moore* vs. *Dempsey* and the very recent decision of the Fifth Circuit in *Downer* vs. *Dunaway* (Po., 158; see *supra,* p. 46).

viously needful were not made—was on the contrary that the trial had been unfair and that constitutional rights had been denied.*

(b) The nearest the Court comes to a consideration of the *merits* of the time issue is in the reference to the Czolgosz case (Po., 164). There is not analogy between the Czolgosz case and the cases at bar; there is antithesis. Czolgosz's crime was "committed in the presence of thousands of citizens;" the issue in the cases at bar was whether "the evidence is to be believed" (Po., 164).**

The State Court's attitude toward premature trial is the opposite of the attitude this Court has expressed. The sole fact of hasty trial may, in an "extreme case," constitute "a denial of due process of law" (*Franklin* vs. *South Carolina,* 218 U. S., 161, 168).***

**Downer* vs. *Dunaway* is in accord. The Circuit Court of Appeals in the Fifth Circuit released on *habeas corpus* a negro tried for rape the day counsel was assigned. Judge Bryan cited the circumstance that "no motion was made for a continuance" as evidence that there was no real trial and no real representation by counsel (53 F. [2d], at 588-9).

Lack of zeal in assigned counsel, Judge Bryan said, "cannot be attributed to appellant who had no choice in the selection of his counsel." To like effect is the declaration by this Court in *Neal* vs. *Delaware* (103 U. S., at 396): "Indulgence"—where the issue is of constitutional right—must be shown to a negro "who was too poor to employ counsel of his own selection."

**An interesting bit of judicial history shows how anomalous were Czolgosz's crime and prosecution. Since the present Constitution of New York was adopted "there has been but one capital case in New York which was not appealed to the Court of Appeals,—that of Czolgosz" (Committee on Amendment of the Law of the Association of the Bar of the City of New York, Bulletin 1 of 1924, pp. 5-6).

***For the analysis of numerous state court decisions upon hasty trial, see Report No. 11 of the National Commission on Law Observance and Enforcement, *Lawlessness in Law Enforcement* (Government Printing Office, Washington, 1931), pp. 273-8.

* * *

Neither upon the point of place nor upon the point of time nor upon any aspect of the issues will this Court be bound by the construction the State Court put upon the facts. The cases come to this Court upon minimum facts which are in no dispute. The rights to orderly trial, to counsel, to protection against discrimination by reason of race, are guaranteed by the federal Constitution. The issues are of federal law. Upon such issues this Court—"examining the entire record" and applying to the facts as they there appear its tests of federal right—will make its own decision.*

---

*See, *e. g.*,

Kansas City Southern Ry. vs. *Albers Com. Co.*, 223 U. S., 573, 591;

Norfolk & Western Ry. vs. *West Virginia*, 236 U. S., 605, 610.

CONCLUSION.

The issue is of due process in the germinal sense,—of the Constitution's command that the law's own *process* be due. The issue is of the law's equal protection to the race for whose protection the Fourteenth Amendment was written into the organic law. The issue is of just that persecution and discrimination in matters of liberty and life that the Amendment forbids. The Chief Justice of the State found that "these defendants did not get that fair and impartial trial that is required by the Constitution" of the State. No less exacting are the standards set, and the requirements of due process and equal protection imposed, by the Constitution of the United States.

The judgments of the Alabama Supreme Court should be reversed.

Dated, September 16, 1932.

Respectfully submitted,

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WALTER H. POLLAK,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

Nos. 98, 99, 100

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, and OLEN MONTGOMERY, *Petitioners,*

—vs.—

THE STATE OF ALABAMA, *Respondent.*

HAYWOOD PATTERSON, *Petitioner,*

—vs.—

THE STATE OF ALABAMA, *Respondent.*

CHARLIE WEEMS and CLARENCE NORRIS, *Petitioners,*

—vs.—

THE STATE OF ALABAMA, *Respondent.*

BRIEF FOR RESPONDENT

THOMAS E. KNIGHT, JR.,
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THOMAS SEAY LAWSON,
Assistant Attorney General of Alabama,
On the Brief.

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THE STATE OF ALABAMA.

BRIEF FOR RESPONDENT

I

Opinions of the Court Below

The cases are before this Court pursuant to certiorari granted May 31, 1932. The opinions of the Supreme Court of Alabama are reported as follows:

Patterson vs. State, 141 So. 195, 224 Ala. 531;
Powell et al vs. State, 141 So. 201, 224 Ala. 540;
Weems et al vs. State, 141 So. 215, 224 Ala. 524.

The opinions of the Court below appear in these records on pages 167 of the Patterson record, 145 of the Powell record, 152 of the Weems record.

All the Court concurred in the opinions below with the exception of Anderson, Ch. J.

II

Jurisdiction

1. The jurisdiction of this proceeding is authorized by the Judicial Code, Section 237B as amended by an Act of February 13, 1925 (43 Stat. 937).

2. The opinions of the court below were returned on March 24, 1932 and applications for rehearing were denied on April 9, 1932.

3. Petitioners, in their motions for new trials claim that they were deprived of their constitutional rights in that (a) they were convicted without due process of law, (b) they were denied equal protection of the law.

III

Statement of the Case

The petitioners were convicted in the Circuit Court of Jackson County, Alabama of the crime of raping two young women, Victoria Price and Ruby Bates, residents of Huntsville, a city in Morgan County, Alabama. The crime is alleged to have taken place in a gondola car of a freight train while the train was traveling between the towns of Stevenson and Paint Rock. The young women, according to the testimony, boarded the train in Chattanooga, Tennessee and were en route to their home. The testimony shows that the petitioners, in order to effectuate their purpose, threw the white boys, with the exception of one, Gilly, off the train. A message was sent by wire to Paint Rock requesting that the petitioners be apprehended. At Paint Rock

the petitioners were taken off the train and carried to the town of Scottsboro, the county seat of Jackson County, the county in which the crime is alleged to have been committed. All of the above took place on March 25, 1931. On March 26, 1931 the Judge of the Circuit Court of Jackson County ordered the Grand Jury of that county to reconvene on March 30, 1931 and called a special session of the Circuit Court for April 6, 1931. The Grand Jury on March 31, 1931 returned indictments against these petitioners and defendants on that date were arraigned and counsel appointed to represent them. After conviction, motions for new trials were made and overruled. On an appeal to the Supreme Court of Alabama judgments of the said Court of Jackson County were affirmed.

IV

The Points Relied on by Petitioner

A

Due Process of Law

The trials of these cases were fair and impartial. Defendants were not denied due process of law in contravention of the 14th Amendment to the Constitution of the United States.

As this Court has oftentimes stated, it is impossible to give a correct and comprehensive definition of due process of law. The phrase "due process of law" antedates the establishment of our institutions and is endeared to our race by antiquity and historical association. It embodies one of the broadest and most far reaching guaranties of personal and property rights. It was incorporated into Section 1 of the 14th Amendment for the purpose of preventing states from denying to certain citizens or classes the same rights, protections and benefits as are given to others. It is necessary for the enjoyment of life, liberty and property that this constitutional guaranty be strictly complied with; however, it is imperative that this

Court under our system of Government see that the States be not restricted in their method of administering justice insofar as they do not act arbitrarily and discriminatingly.

The operation and effect of this clause of the 14th Amendment and various statutes can best be stated by referring to those leading cases of this Court dealing with questions analagous to the one at hand.

We quote from the case of Frank vs. Mangum, 237 U. S. 309:

> "The due process of law clause of the Fourteenth Amendment does not preclude a State from adopting and enforcing a rule of procedure that an objection to absence of the prisoner from the courtroom on rendition of verdict by the jury cannot be taken on motion to set aside the verdict as a nullity after a motion for new trial had been made on other grounds, not including this one, and denied. Such a regulation of practice is not unreasonable.
>
> "The due process of law clause of the Fourteenth Amendment does not impose upon the State any particular form or mode of procedure so long as essential rights of notice and hearing or opportunity to be heard before a competent tribunal are not interfered with; and it is within the power of the State to establish a rule of practice that a defendant may waive his right to be present on rendition of verdict."

The words "due process of law" have never been definitely defined as said by Mr. Justice Brown in Holden vs. Hardy,169 U. S. 366, 389:

> "This court has never attempted to define with precision the words 'due process of law' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

It is important to appreciate that "due process of law" is process according to the system of law obtaining in each State, and not according to any general law of the United States.

Missouri vs. Lewis, 101 U. S. 22, 31;
Hurtado vs. California, 110 U. S. 516, 535.

We gather from the cases above cited that a defendant in a criminal case has been accorded due process of law when there is a law creating or defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to answer the charge, trial according to the established course of judicial proceedings, and a right to be discharged unless found guilty; however, no particular form of procedure is required where the conditions just enumerated are fulfilled and there is no violation of the guaranty of due process of law regardless of whether the appellate court may approve of the verdict of the jury and the judgment based thereon. In other words, the question of due process is determined by the law of the jurisdiction where the offense was committed and the trial was had.

Missouri vs. Lewis, 101 U. S. 22, 31;
Hutardo vs. California, 110 U. S. 516,535;
Brown vs. New Jersey, 175 U. S. 172;
Jordan vs. Massachusetts, 225 U. S. 167;
Rogers vs. Peck, 199 U. S. 425;
Garland vs. Washington, 232 U. S. 642;
Missouri ex rel Hurwitz vs. North, 271 U. S. 40;
Miller vs. Texas, 153 U. S. 535;
Ong Chang Wing vs. United States, 218 U. S. 272;
Hodgson vs. Vermont, 168 U. S. 262.

In view of the rule set out in the case above cited the records in these cases disclose the fact that these defendants were not denied due process of law in that their trials were in all ways in accordance with the constitution and statutes of the State of Alabama which provisions are in no way attacked as being unconstitutional. Their trial was con-

ducted in compliance with the rules, practice, and procedure long prevailing in the State of Alabama. The court of last resort decided their cases in compliance with those rules of appeal and error which they apply in all cases.

The following procedure was followed in compliance with the requirements of the statutes of Alabama.

(a) An indictment was returned by a Grand Jury—Sections 4524, 4526, 4529, 4556 (88), 5202, 8616, 8617, 8630, 8632 and 8665 of the Code of Alabama, 1923.

(b) Petitioners were notified of the offense with which they were charged.—Sections 5568 and 8644, Code of Alabama, 1923.

(c) The date of trial was set by the trial judge.—Sections 5565, 8649 and 8650, Code of Alabama, 1923.

(d) Counsel were appointed to represent the petitioners. —Section 5567, Code of Alabama, 1923.

(e) Qualifications of jurors.—Section 14 of an Act approved February 20, 1931 (General Acts, 1931, page 56) same as Section 8603, Code of Alabama, 1923.

1

Counsel

Counsel for petitioners contend that they were denied due process of law in that they were not properly represented by counsel nor were counsel appointed for them as required by law. We agree with counsel for petitioners that under the laws of the State of Alabama the petitioners were entitled to counsel and that if they had been denied counsel they would have been deprived of their rights as guaranteed by Section 6 of Article 1 of the 1901 Constitution of Alabama.

The State of Alabama has done more than guarantee to the defendant the right to counsel but has by statute pro-

vided that when it appears to the Court that a defendant charged with a capital offense has not employed counsel that the Court shall appoint attorneys for his defense.

Section 5567, Code of Alabama, 1923, is as follows:

> 5567. When counsel appointed for defendant in capital case.—If the defendant is indicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours.

A compliance with this section is shown on pages 87-101 of the Powell record, pages 118-133 of the Patterson record, and pages 85-99 of the Weems record. The petitioners were arraigned on March 31, 1931 at which time a Mr. Stephen R. Roddy, an attorney from Chattanooga, Tennessee, appeared and stated to the Court that he was there at the instance of friends of the then defendants but had not as yet received definite employment in the case. In view of this fact the Court desiring to give to the defendants all the protection which the Court could possible give them, appointed members of the Scottsboro bar. It must be borne in mind that at the time of the arraignment there were nine defendants and while the record does not disclose the number of attorneys practising at the Scottsboro bar, we venture to say that there were not as many as eighteen attorneys at that bar, the number which the Court could have appointed under the statute.

If there had been only one defendant, it does not seem plausible to us that he could correctly contend that he had been denied due process of law because the Court appointed more than two lawyers to represent him. This was at most, a mere irregularity which would not invalidate a conviction.

It appears to us from the colloquy between the Court, Mr. Roddy and Mr. Moody (pages 87-101, Powell record; pages 118-133, Patterson record; pages 85-99, Weems rec-

ord) that Mr. Roddy was in fact retained by friends of the then defendants and that those members of the Scottsboro bar who had investigated and prepared the case assisted Mr. Roddy when under the law they could not have been compelled to do so.

The following is a part of the colloquy which took place between the Court, Mr. Roddy and Mr. Moody of the Scottsboro bar:

> Mr. Roddy: If the court please, I am here but not as employed counsel by these defendants, but people who are interested in them have spoken to me about it as your Honor knows. I was here several days ago and appear again this morning but not in the capacity of paid counsel.
>
> * * * * * *
>
> Mr. Roddy: I would like to appear along with counsel that your Honor has indicated you would appoint.
> The Court: You can appear if you want to with the counsel I appoint but I would not appoint counsel if you are appearing for them; that is the only thing I am interested in. I would—to know if you appear for them.
>
> Mr. Roddy: I would like to appear voluntarily with local counsel of the bar. Your Honor appoints; on account of friends that are interested in this case I would like to appear along with counsel your Honor appoints.
>
> The Court: You don't appear if I appoint counsel?
> The Court: If you appear for these defendants, then I will not appoint counsel; if local counsel are willing to appear and assist you under the circumstances all right, but I will not appoint them.
>
> Mr. Roddy: Your Honor has appointed counsel, is that correct?

The Court: I appointed all the members of the bar for the purpose of arraigning the defendants and then of course I anticipated them to continue to help them if no counsel appears.

Mr. Roddy: Then I do not appear then as counsel but I do want to stay in and not be ruled out in this case. The Court: Of course, I would not do that. . . . . .

Mr. Moody: *Your Honor appointed us all and we have been proceeding along every line we know about it under Your Honor's appointment.*

Mr. Moody: I see his situation of course and I have not run out of anything yet. Of course, if your Honor purposes to appoint us, Mr. Parks, I am willing to go on with it. *Most of the bar have been down and conferred with these defendants in this case; they did not know what else to do.*

Mr. Procter: Now, your Honor, I think it is in order for me to have a word to say. When this case was up for arraignment, I met Mr. Roddy and had a talk with him, and I gathered from Mr. Roddy that he would be employed in the case, and he explained the situation to me that he was going back to see the parties interested and he thought probably there would be employed counsel in the case and I recognize the principle involved, and the fact that I took it for granted that Mr. Roddy would be here as employed counsel, and I was approached then to know if I was in a position to accept employment on the other side in the prosecution, and I thought under the circumstances I was. I am not trying to shirk duty, and I know my duty is whatever the Court says about these matters, but I did accept employment on the side of the State and I have conferred with the Solicitor with reference to matters pertaining to the trial of the case, and I think it is due the Court, I was not trying to shirk any duty whatever, and I want the Court to un-

derstand my attitude in the matter; I am ready to obey any order of the Court."

We wish to call to the attention of the Court the fact that Mr. Roddy, in an affidavit which appears on page 117 of the Powell record, avers that he represented the defendants throughout the trial. That part of the affidavit which is pertinent is hereafter set out.

> "Personally appeared before me, a Notary Public in and for the State and County, aforesaid, Stephen R. Roddy, of Chattanooga, Tennessee, who being first duly sworn, deposed as follows: That he appeared as one of the attorneys for nine negro boys who were tried and convicted in the Circuit Court at Scottsboro, Alabama. . . ."

Petitioners, as authority for their contention that they were deprived of counsel in contravention of the 14th Amendment, cite the cases of:

> Cook vs. United States, 267 U. S. 517, 537;
> Shepherd vs. State, 165 Ga. 460;
> Jackson vs. Commonwealth, 215 Ky. 800.

These cases are not in any way authority for their contention, although they do state correct principles of law: (1) That a prisoner should not be denied the right of counsel, (2) Nor should counsel appointed to represent a defendant be denied a reasonable time to prepare his case.

Headnote 4 of the Cook case, supra, is as follows:

> "Where the alleged contumacy was committed by sending a letter to the judge in chambers, and eleven days thereafter an order reciting the facts and adjudging contempt was entered and an attachment thereupon issued under which the accused was arrested forthwith and brought before the court, and, upon admitting authorship of the letter, was pronounced guilty because of it and of extraneous facts referred to by the judge as in aggravation, *and was forthwith punished,*

without being allowed to secure and consult counsel, prepare his defense and call witnesses, or to make a full personal explanation—Held that the procedure was unfair and oppressive and not due process of law."

The Shepherd case, supra, Headnote 1 lays down the principle that:

"Except under extraordinary circumstances in which counsel appointed to defend one on trial for his life are already thoroughly familiar with the facts and circumstances of the case, it may be stated as a general rule, essential to the preservation of the constitutional guaranty of benefit of counsel, that counsel appointed to defend one accused of a capital offense upon their request for a postponement in order to prepare a defense, are entitled to at *least as much as one entire day* for the preparation of the defense of the accused, even though the request for postponement be not based upon the absence of witnesses, and even though there be in fact no witness absent."

The petitioners in this case were not denied the right of counsel as was the fact in the Cook case, supra, nor were they put to trial on the same day on which counsel were appointed to defend them as was the fact in the Shepherd case, supra. On the other hand, the petitioners were represented by counsel from Chattanooga and by two members of the bar of Scottsboro. They were not put to trial until one week after counsel were appointed. The record affirmatively shows that counsel had conferred with them and had done everything that they knew how to do. (Statement by Mr. Moody hereinbefore set out)

This Court in the case of Henry Ching vs. United States, 254 U. S. 630 refused to review the Circuit Court of Appeals of the Ninth Circuit which Court rendered an opinion which we respectfully insist is in support of our contention that the petitioners were not deprived of their right to counsel. The opinion of the said Circuit Court of Appeals

is reported in 264 Fed. 639, a part of which is set out below:

> "It is contended that the court erred by compelling defendant over his objection to proceed to trial and in appointing an attorney to defend them. It appears that Ching, through Warren Williams, his counsel, had pleaded guilty, but at a later date the court declined to accept the plea of guilty which had theretofore been interposed, and ordered that a plea of not guilty as to both counts be interposed in behalf of defendant. On October 2, 1919, the case was called for trial; defendant and his counsel, W. J. Little, being present in open Court, Mr. Little asked permission to withdraw from the case. The court denied the request, and thereupon appointed Mr. Little to act as attorney for the defendant, and thereupon, both parties having announced themselves as ready, the trial was proceeded with.
>
> "When the case was called, counsel for the government stated that he did not see the defendant in court whereupon Mr. Williams, who had formerly appeared for the defendant, stated to the court that he had notified the defendant, who had notified him that Mr. Little had been employed by him to defend. Thereupon Mr. Little stated to the court that defendant had told him that he did not wish him to try the case. Mr. Williams then said that he had called the attention of the defendant to the matter and that defendant had assured him he would be ready with counsel to proceed with the trial. At this point the defendant appeared in person and was ordered into the custody of the marshall. Thereupon the case was called, whereupon Mr. Little expressed his wish to withdraw, stating that he did not represent the defendant, and that defendant said he did not wish him to represent him. Thereupon the court asked defendant what he would like to do with the case. Defendant replied that he would like to have it postponed for ten days. The court declined

to continue the case and appointed Mr. Little to defend Ching. No objection was made and the trial proceeded.

"We do not see that the action of the court was prejudical to the rights of the defendant. He was notified that his case had been set for trial; he had ample time to employ such counsel as he wished, and when Mr. Little was appointed to defend him no objection was made."

There was no demand or motion made for a continuance. However, such a motion would have been addressed to the discretion of the Court and under the facts of this case a denial thereof would not have been an abuse of the discretion vested in the Circuit Court.

Jones vs. Commonwealth, 38 S. W. (2) 251;
Commonwealth vs. Flood, 153 Atl. 152;
United States vs. Rosenstein et al, 34 Fed (2) 630;
Williams vs. Commonwealth, 19 S. W. (2) 964.

It thus appears that the trial court complied with every provision of law and extended every effort to afford to these petitioners the rights to which every citizen of the State is entitled and which the courts of this state have so zealously guarded regardless of color or creed. The defendants were represented by capable counsel, one of whom has enjoyed a long and successful practise before the courts of Jackson County.

Counsel, by their own statements, show that they not only had time for preparation of their case but that they knew and proceeded along proper lines for a week prior to the trial.

2

Change of Venue

Petitioners further contend that the refusal of the trial court to grant their petition or motion for a change of venue was a denial of "due process of law."

The right to a change of venue is statutory and is provided for in certain instances by Section 5579, 5580 and 5581.

The petition for change of venue is set out on pages 4 and 5 of all the records. The petition alleged that they could not have a fair and impartial trial in Jackson County because: (a) That newspaper articles had inflamed the minds of the public, (b) that a large crowd was present at the time the case was set for trial.

(a)

Newspaper Articles

The newspaper clippings which the petitioners alleged inflamed the public against them are set out on pages 5, 10, 14, 16 and 17 of all the records.

These articles relate the story of the alleged crime as the newspapers understood it and they also lament the fact that such an atrocious crime should have been perpetrated, but not once in any of them is there a single attempt to incite the people of Jackson County to mob violence nor do they contain anything which might be construed as attempting to prejudice the mind of any man who might be called to serve as juror on those cases. One of the articles expressly shows that the paper published in Scottsboro did not wish to prejudice anyone against the petitioners. In fact, it shows that the paper had tempered down the story.

There was not one scintilla of evidence introduced on the part of the petitioners to show that the newspaper articles clippings or editorials had so prejudiced the minds of the people of Jackson County that the appellants could not get a fair trial by an impartial jury of that county. It was not even shown that the Chattanooga News or Montgomery Advertiser had any circulation in Jackson County. The mere fact that certain newspaper stories were published about this matter does not, of itself, entitle a defendant to

a change of venue. It must be shown that the people of that county have been prejudiced thereby.

In the case of Malloy vs. State, 96 So. 57, the Supreme Court of Alabama held: "On change of venue motion, where there was no evidence indicating that a newspaper article would or did have any influence on public opinion in the county of trial, there was no error in refusing a copy of the paper in evidence."

The weight given newspaper articles as grounds for change of venue in the State of Alabama can best be shown by setting out a part of the opinion of the Supreme Court of Alabama in the case of Godau vs. State, 179 Ala. 27, 60 So. 908, 910:

> "The newspapers of Mobile,—and they were widely read and circulated there—teemed with sensational accounts of the murder, and in all these accounts the guilt of the defendant was assumed as a fact. Pictures of the defendant and of her daughter and of the dead policeman, as well as of the sheriff and probably of some of his assistants, also appeared in the Mobile papers, and, to be short, the newspapers of Mobile did all that newspapers can do to create the impression that the defendant was certainly guilty of the murder. In addition to this, they undertook to go into the past of the defendant. She appears to have been three times married, and it was broadly hinted in the papers that the defendant had murdered two, and probably all three of her husbands, and we presume they were read by everybody as one of the worst criminals. Whether the defendant deserved all that was said of her by the papers we do not know; but, as we read the articles as they appear in this record, the facts are as we state them.
>
> "So long as we have newspapers we may expect to have through them the report of crimes, and it is not to be unexpected that, when a homicide is committed

> and discovered under circumstances like the present, even if the defendant's account of the entire matter is the truth, the newspapers of the community, answering the public interest, will furnish the defendant with at least some material upon which to base an application similar to the one under discussion. In the instant case the newspapers laid bare the real character of the deceased, and, if animosity was aroused against the defendant it was due to no appeal which was made to popular passion on account of the character of the man who was killed, but because of the character of the crime, the uncanny disposition of the body of the deceased, and the frightful hints as to the defendant's history."

In addition to the newspaper clippings the defendant, Godau, offered affidavits of 57 citizens of Mobile to the effect that the newspaper articles had so influenced the people of Mobile County against the defendant that she could not get an impartial trial therein.

The above case was cited by us to show that the Supreme Court of Alabama was merely following a long line of cases in holding that the petitioners did not make out a case entitling them to a change of venue because of certain newspaper articles. The defendant Godau was a white woman, and the newspaper articles connected with her case were much more vicious and more damaging than those of the present case and there was testimony to the effect that certain persons had been influenced thereby. So how can the petitioners be heard to say that the courts did not accord them the same process of law that had theretofore been afforded other persons charged with crime in this State, because they are of the colored race.

McClain vs. State, 62 So. 242;
Hawes vs. State, 7 So. 302;
Riley vs. State, 96 So. 599.

(b)

Crowd

It cannot be asserted as a correct principle of law that when a large crowd gathers at a court of justice that that fact alone entitles a defendant to a change of venue. There must be some hostility shown towards the defendant rather than the curiosity of a number of country men.

In the instant case there is not one particle of evidence to the effect that these petitioners were ever in danger of violence at the hands of any of the people of Jackson County, Alabama. If the citizens of that county had been as blood-thirsty, as lawless, as completely barren of all sense of right and justice as the petitioners in their brief would have this court believe, they would have mobbed the petitioners while they were still in Paint Rock, before they were brought to the county jail in Scottsboro. Where is there any evidence of threats against these petitioners. It may be true that a number of people assembled around the county jail when the petitioners were first incarcerated but this is easily understood when one realizes the circumstances of the people of that small town in the hills of north Alabama, and the manner in which they live. Scottsboro is typical of many of the small towns of the South. Very few, if any, industries are located there and the people earn their livelihood chiefly by agricultural pursuits. Each day is like the one that preceded it and the one that is to follow will be likewise. There is very little to keep many of them occupied. Very seldom anything occurs to change "the even tenor of their way," or as some might express it, "to break the monotony of an uneventful life." Anything out of the ordinary that tends to create excitement is grasped and "great crowds gather" to discuss the events or to see the persons or things which have been the means of creating or arousing interest. In a town of the size of Scottsboro the words "a great crowd" can not be taken in their ordinary sense, as a handful of people main-

ly the loafers of the town, constitute "a great crowd" in the eyes of the people of the villege.

In the absence of some overt act or acts, some manifestation of violence, some evidence of threats on the part of the "crowd" it cannot be correctly asserted that the presence of "the crowd" entitled the petitioners to a change of venue.

The petitioners, in support of their petition, called the Sheriff of Jackson County, Mr. Wann, and Major Starnes, the commanding officer of the National Guard Units sent to Scottsboro. If there were any two men connected with these cases who had an opportunity to know the feeling of the people of the county, they were those two men.

On direct examination Sheriff Wann testified:

> "I did not see any guns or anything like that and I did not hear any threats. I had this National Guard unit to accompany the prisoners to court when they were brought here several days ago. As Sheriff of this county I deemed it necessary for protection of the defendants for the National Guard unit to bring them to court. That was not only on account of the feeling that existed here against these defendants, but by people all over the county. I deemed it necessary not only to have the protection of the Sheriff's force but the National Guards."

On cross examination he said:

> *"It was more on the grounds of the charge that I acted in having the guards called than it was on any sentiment I heard on the outside. I have not heard anything as intimated from the newspapers in question that has aroused any feeling of any kind among a posse. It is my idea, as Sheriff of the county, that the sentiment is not any higher here than in any adjoining counties. I do not find any more sentiment in this county than naturally arises on the charge. I*

think the defendants could have as fair trial here as they could in any other county adjoining. From association among the population of this county, I think the defendants would have a fair and impartial trial in this case in Jackson County. That is my judgment. *I have heard no threats whatever in the way of the population taking charge of the trial. It is the sentiment of the county among the citizens that we have a fair and impartial trial."*—Page 18 of each of the records.

Major Starnes on cross-examination testified:

"I first came here, of course, under orders from the Governor and I have been here under his orders ever since. This is the third trip I have made here from Gadsden. In my trips over to Scottsboro in Jackson County and my association with the citizens in this county and other counties, I have not heard of any threats made against any of these defendants. From my knowledge of the situation gained from these trips over here, I think these defendants can obtain here in this county at this time a fair and impartial trial and unbiased verdict. I have seen absolutely no demonstration or attempted demonstration toward any of these defendants. I have seen a good deal of curiosity but no hostile demonstration. In my judgment, the crowd here was here out of curiosity and not as a hostile demonstration toward these defendants."

Thus it appears from the petitioners own witnesses that the "crowds" had gathered because of curiosity and not animosity.

(c)

Militia

The reason for the presence of the military forces is plainly set out in the testimony of Sheriff Wann, when called as a witness on the motion for a change of venue. (Records, pages 18 and 19) They were called out merely as a precaution and not to dispel any organized mob or be-

cause of the fact that threats and demonstrations had been made against these petitioners. The crime with which they were charged was a serious one, and the manner in which it was alleged to have taken place was unusual and the sheriff in calling out the militia was as anxious for his own protection as for the protection of the petitioners. He is charged with the duty of protecting all of those placed under his charge. He was conscious of the fact that he was also responsible for the protection of the good name of the State of Alabama, and that such crimes as the one with which these petitioners were charged naturally tended to raise the indignation of the public, no matter to what race the perpetrators might belong.

It does not seem reasonable that it could be held that because a sheriff of a county took precautionary measures for the protection of himself and of those charged with crime that that fact alone would deny due process of law to those charged with the commission of the crime. Nothing had been done by the people of Jackson County whereby the sheriff was compelled to call out or ask for assistance. And the guards were not necessary to disperse "crowd."

The Circuit Court of Appeals, Sixth Circuit, in the case of Bard & Fleming vs. Chilton, Warden et al, 20 Fed (2) 906, a case very similar to the instant case, held:

> "The petitioners were indicted in the Circuit Court of Hopkins County, Ky. for rape, convicted and sentenced to death. Their convictions were affirmed by the Court of Appeals of Kentucky. They applied to the United States District Court for release by habeas corpus, upon the claim that the state court trial had been in violation of their constitutional right to due process of law. Some of the questions now raised pertain to the preservation and exercise and right to a change of venue, for which the Kentucky Code *conditionally* provides. These questions were decided by the court of last resort in the state and they are not open now. They involve no constitutional question, ex-

cept as they touch the claim chiefly relied on, which is that the court and jury did not and could not give a free and impartial trial but acted under the coercion of the mob and the mob spirit in the community. The District Judge gave a patient hearing and listened to many witnesses. There was some testimony tending to show that the local situation and public excitement were such as to embarass or even prevent the giving of the constitutional fair trial; but the preponderance of evidence is to the contrary. The District Judge accepted such contrary view; and not only would we give respect to his determination, but we are compelled to reach the same conclusion.

"We are satisfied that there is no sufficient basis for sustaining petitioners' contention, *unless we must say as a matter of law that, where there is such public excitement that the state authorities think it prudent to call out the military force of the state to protect a respondent against unlawful violence and where the trial is held under the immediate protection of this military authority, and where some incipient disorder is by that force sternly suppressed, the trial, for that reason alone, is not due process of law. This we cannot say.*"

Headnote 3 of the case just above quoted is as follows:

"Trial under protection of state military force is not, as matter of law, prejudicial to defendants as to constitute denial of due process."

"Public excitement, such that state authorities think it prudent to call out the military force of the state to protect defendants against unlawful violence and the holding of trial under the immediate protection of military authority, are not as a matter of law, so prejudicial as to amount to a denial of due process, in violation of the Fourteenth Amendment of the Federal Constitution."

This Court denied petition for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, 48 Sup. Ct. 122, 275 U. S. 565.

Therefore, in the absence of a showing that the militia was actually needed to dispel mob violence, their presence in Scottsboro cannot be taken even as evidence of the fact that the trial was not fair and impartial.

3

Conduct of Trial

a

Demonstrations

There was no ruling of the court invoked as to the conduct of the trials other than on the motion for a new trial. Section 9518, Code of Alabama, 1928 (Michie) states the grounds for new trial.

Weems and Norris were tried first, then Patterson, then Powell, Roberson, Wright and Montgomery.

The motion for a new trial in the Weems and Norris case contains these allegations.—(Record, pages 65, 66)

> A new trial should be granted because of the state of excitement in Scottsboro, and when the jury reported in the case of these defendants, there was a public demonstration by the clapping of hands and hollowing in the court room in the courthouse when these defendants were tried as a result of the verdict of the jury in passing the death sentence. Because there was a demonstration in the court room and out on the streets outside of the court room when the jury reported its verdict against these defendants.

The motion for a new trial in the case of Powell et al contains the following averments: (Record, page 54)

> Because the defendants allege that before this trial came (the jury) before whom they were tried were around and about the court yards at the time the jury reported the death sentences in the case of Clarence Norris and Charlie Weems, that at the same time of said report of said jury there occurred a tremendous demonstration in the Courtroom loud enough to be heard a block away; that immediately the same demonstration by clapping of the hands and yells occurred on the outside of the court room and in the courthouse yard where jurors who tried the defendants could hear and did hear it. That such conduct was liable to have influenced the jury in this case.

The motion in the Patterson case contained these averments:

> While the trial was on, the jury in his case was asked by the court to withdraw to an adjoining room, and the jury in another case, to-wit: State of Alabama, vs. Weems and Norris, entered the court room and announced they found the said defendants, Weems and Norris, guilty and recommended the penalty of death to the sound of great applause, stamping of feet and jubilant shouting from the spectators which crowded the court room and from those who filled the environs of the courthouse, all of which the jury hearing the evidence in the trial of this defendant could not but have heard, to the irreparable hurt of this defendant, then on trial for his life.

In support of these allegations the petitioners in addition to their own affidavits called a number of the jurors several of whom testified that they heard a slight commotion but that it did not influence their verdict in any way and none of the jurors heard any commotion while they were serving as jurors. It does not appear that the defendants at any time made any objection or reserved any exception or asked for a continuance or mistrial nor does

it appear that the court failed promptly to suppress any misconduct that came to its notice.

The Supreme Court of Alabama has held that matters of this kind must be brought to the attention of the court during the trial in order that the court might prevent any further disturbance and also that he might interrogate the jury as to any effect the commotion might have had on them and to charge them they pay no attention to it. The highest court of the State of Alabama has held that a matter of this kind comes too late on a motion for a new trial.

> When it did not appear that any action of the trial court was invoked because of the applause of spectators before entering upon the trial, and where defendant did not move for a continuance on that ground, or ask any other ruling presenting anything more than the matter of the court's discretion, the denial of his motion for a new trial was not an abuse of discretion.
>
> Dempsey vs. State, 72 So. 773;
> Hendry vs. State, 112 So. 212.

In the Hendry case, supra, the Supreme Court of Alabama said:

> Misconduct of bystanders, an audience attending the trial, by way of applause while the trial is in progress, is highly reprehensible and should be promptly and vigorously suppressed in such manner that the jury is made to see the ugliness and injustice of such demonstration. When thus promptly and effectively handled by the court in best position to see and determine the proper measures to be taken, the verdict of the jury will not usually be disturbed because of such misconduct. Like other issues on appeal in this state, it must be made to appear that some action or nonaction of the court in the premises probably injuriously affected substantial rights of the defendant. The

record recites in general terms that the applause was promptly suppressed. It does not appear that vigorous counsel for defendant asked further action of the court. It will be presumed the court dealt with the matter effectively and properly. We find no error in refusing a new trial because of this occurrence.

State vs. Shellmon, 192 S. W. 435;
Bowers vs. United States, 244 Fed. 641;
Waters vs. State, 123 S. E. 806, 158 Ga. 510;
People vs. Ruef, 114 Pac. 54, 14 Cal. App. 576;
Horn vs. State, 73 Pac. 705, 12 Wyo. 80;
Stevens vs. State, 93 Ga. 307, 20 S. E. 331.

The only evidence submitted on the hearing for the motion for a new trial that the demonstration was of long duration and exceedingly loud was the affidavits of the petitioners. If these are sufficient to set aside a verdict of guilt it will be exceedingly difficult to ever get a verdict to stand. The court was cognizant of the facts surrounding the trial. He is presumed to do his duty. The petitioners state that there was a large crowd present, surely if the facts were as the petitioners represent them to be that there were some good and honest people who would have so testified.

-b-

Strategy of Counsel

Petitioners aver that the failure of the counsel representing them to argue the cases to the jury was caused by the fear of the crowd. This is nothing more than a conclusion of counsel. Counsel in the trial court were not afraid to reserve exceptions and to interpose motions. The strategy of counsel cannot be reviewed by the appellate courts. We do not know why counsel preferred not to argue the cases to the jury but that was a question entirely left to their judgment.

The courts of the State of Alabama have held that after the State had made its opening argument and counsel for the defense prefer not to argue that the trial court is correct in permitting the State to make a closing argument.

> "It was within the discretion of the trial court to permit an attorney, assisting the solicitor, in a prosecution for homicide, to close the argument, notwithstanding defendant's attorney had declined to make an argument."
>
> Sheppard vs. State, 55 So. 514, 172 Ala. 363.

Objections to qualifications of jurors subject to challenge for cause, not raised in the trial court will not be considered on appeal.

> Batson vs. State, 113 So. 300;
> United States vs. Gale, 109 U. S. 65;
> Tarrance vs. Fla., 188 U. S. 519.

4

Moore vs. Dempsey

The case of Moore vs. Dempsey, 261 U. S. 89, strenuously relied upon by petitioners is not here applicable.

Petitioners (Brief, pages 36-47) point out what they claim to be the similarities of the two cases, but in so treating the instant case they resort to conclusions of counsel in many instances.

Before going into the facts surrounding the trial of the Moore case, supra, it should be here noted that the case came to this court on an appeal from an order of the district court dismissing a petition for habeas corpus upon demurrer, the demurrers admitting the allegations of the petition. The Court said: "We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the

trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the district judge should find whether the facts alleged are true, and whether they can be explained so far as to leave the state proceedings undisturbed."

In the instant case the allegations are in no way admitted but the records of the proceedings affirmatively show that the statements made by petitioners are mere conclusions and cannot be supported by the facts in the cases.

In the Moore case, supra, *it was admitted*:

(a) That the white people of the county had practically been at war with the petitioners. That a white man of that county had been killed. That the colored people of the county were in open rebellion against the whites.

(b) That the entire trouble was a conflict between the two races.

(c) That counsel for the colored people was nearly mobbed and compelled to leave the county.

(d) That the action of the colored people was termed an "insurrection" and a "Committee of Seven" appointed by the Governor to investigate.

(e) That shortly after the arrest of the therein petitioners a mob marched to the jail for the purpose of lynching them, but were prevented by United States troops and that a promise on the part of the "Committee of Seven" was the only thing that prevented their being mobbed."

(f) That the "Committee of Seven" caused certain colored witnesses to be whipped in order to make them testify against the petitioners.

(g) That on the grand jury which returned the indictment was a member of this "Committee of Seven"

and also several members of a posse organized to fight the blacks.

(h) That petitioners were put to trial on the same day counsel was appointed to defend them. That counsel had not conferred with petitioners.

(i) That blacks were systematically excluded from the jury.

(j) That the adverse crowd threatened anyone interfering with the desired result and that counsel did not venture to demand delay or ask for a change of venue.

(k) No witnesses were called for the defense nor were the defendants put upon the stand.

(l) Trial lasted only forty-five minutes.

(m) That there never was a chance for petitioners to be acquitted.

(n) That no juryman could have voted for an acquittal and continued to live in Phillips County.

(o) That if any prisoner had been acquitted he could not have escaped the mob.

In the case now before this Court none of the conclusions of the petitioners are admitted. The facts, as disclosed by the record, are:

(a) That the petitioners were not residents of Jackson County and that the people of that County had no personal animosity towards them.

(b) That the victims of the rape were not residents of Jackson County.

(c) That counsel representing petitioners were in no way interfered with in the performance of their duties.

(d) That no mob was ever organized to lynch the petitioners and that no threats of violence were made against them.

(e) That witnesses were not intimidated.

(f) That petitioners had benefit of counsel at least one week before trial.

(g) That the people of Jackson County did not try to intimidate the jurors.

(h) That witnesses were called for the defense and petitioners testified in their own behalf.

(i) That the record does not disclose any subsequent hostility toward the jurors who sat on the case in which a mistrial was had.

It is readily ascertained after a careful comparison of the facts of this case with the admitted facts of the Moore case, supra, that they are not in accord. The Moore case does not change the rule of law laid down in the case of Frank vs. Mangum, 237 U. S. 309, but this Court merely held that the facts admitted by the demurrer came within the principle of law set out in the Frank case.

> Where a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the court of justice, there is, in that court, a departure from due process of law in the proper sense of that term.

We respectfully insist that in this case the averments of the petitioners are mere conclusions and are not in any manner supported by the evidence. It seems apparent to us that counsel which were retained by "friends" of the petitioners after the actual trial of this case, and who were not present at the trial and therefore had no personal knowledge of the conduct of the trial framed their motions for new trials in every way possible to come within the case of Moore vs. Dempsey, supra. The averments are very similar but it was impossible for them to so change the facts. Those attorneys who represented the petitioners during the trial and who were familiar with the entire proceedings did not so frame their motion for a new trial. It

will be noted that where the facts alleged in the Moore case were not admitted, Frank Moore vs. Ark., 254 U. S. 630, this Court refused to reverse the judgment of the state court.

B

Equal Protection of the Laws

The Petitioners were not denied equal protection of the laws because of the fact that there were no members of their own race on the jury which convicted them.

The means of preparation of jury rolls, of appointing the members of the jury and the qualifications of jurors are fixed by an act of the Legislature of Alabama, 1931, approved February 20th, 1931 (General Acts, 1931, p. 56).

Section 14 of the above cited act is identical with Section 8603, Code of Alabama, 1923, and is as follows:

> "The Jury Board shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or over sixty-five years of age or who is an habitual drunkard, or who being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a free holder or householder his name may be placed on the jury roll and in the jury box."

Under the rulings of this Court in numerous cases the constitutionality of the section above quoted cannot be doubted. This Court has repeatedly held that a state statute not discriminating against a certain race or class

because of their race, color or previous condition of servitude or other arbitrary disqualification but merely fixing the qualifications of jurors is not unconstitutional.

In the case of Franklin vs. South Carolina, 218 U. S. 161, 54 Lawyers' Edition 980, this Court held that a state law fixing the qualifications of jurors, which qualifications were practically the same as the Alabama statute now under consideration, was not unconstitutional.

> "We do not think there is anything in this provision of the statute having the effect to deny rights secured by the Federal Constitution. It gives to the jury commissioners the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions. There is nothing in this statute which discriminates against individuals on account of race or color or previous condition, or which subjects such persons to any other or different treatment than other electors who may be qualified to serve as jurors. The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications."

Murray vs. Louisiana, 163 U. S. 101, 108;
Gibson vs. Mississippi, 162 U. S. 565;
Tarrance vs. State, 188 U. S. 519;
Williams vs. State of Mississippi, 170 U. S. 213;
Rives vs. Virginia, 100 U. S. 313.

This Court has held that when negroes are excluded solely because of their race or color, a negro defendant is denied equal protection of the laws in violation of Constitution U. S. Amendment 14, whether such exclusion is done through the action of the legislature, through the courts, or through the executive or administrative officers of the state.

Carter vs. Texas, 177 U. S. 442, 44 Lawyers' Edition 839;
Strander vs. West Virginia, 100 U. S. 303.

However, the mere fact that negroes are not on a jury does not entitle the defendant to have the venire quashed or a motion for a new trial granted. There must be proof in support of timely and proper motions or pleas that the jury commissioners purposely omitted the negroes from the venire solely because of their race or color and not because of their lack of the statutory qualifications.

In the case of Martin vs. Texas, 200 U. S. 316, it was held:

> "While an accused person of African descent on trial in a State court is entitled under the constitution of the United States to demand that in organizing the grand jury, and empanelling the petit jury, there shall be no exclusion of his race on account of race and color, such discrimination cannot be established by merely proving that no one of his race was on either of the juries;and motions to quash, based on alleged discriminations of that nature, must be supported by evidence introduced or by an actual offer of proof in regard thereto."

In the case of Ragland vs. State, 65 So. 776 it was held:

> "The defendant moved to quash the venire, on the ground that the defendant was a negro and the jurors were all white persons, and hence that there was an unlawful and unconstitutional discrimination against him on account of his race or color. No evidence or showing was offered in support of the motion, and neither the trial court nor this court will presume that the officers of the law violated either the state or the federal Constitution or statutes in the selecting or drawing of persons, as jurors, to constitute the venire in this case. There was no error in overruling the motions to quash the grand and petit juries."

It has also been held that even when there is a motion to quash filed there must be evidence of the fact that the administrative officers charged with the duty of selecting the venire excluded negroes therefrom on account of their race or color and that the affidavits of those under indictment to that effect are not alone sufficient.

> "An actual discrimination by the officers charged with the administration of statutes unobjectionable in themselves against the race of a negro on trial for a crime by purposely excluding negroes from the grand and petit juries of the county, will not be presumed but must be proved. An affidavit of the persons under indictment, annexed to a motion to quash the indictment on the ground of such discrimination, stating that the facts set up in the motion are true 'to their best knowledge, information and belief', is not evidence of the facts stated."
>
> Tarrance vs. Florida, 188 U. S. 519.

The petitioners did not file a motion to quash and the only thing that could be in any way taken as attacking the jury was the averment of the petitioners in support of their motion for a new trial that "negroes possessing necessary qualifications were systematically excluded from the jury."

In the case of United States vs. Gale, 109 U. S. 65, in dealing with a matter of this kind in the Federal Courts it was held: "An objection to the qualification of grand jurors, or to the mode of summoning or empanelling them, must be made by a motion to quash, or by a plea in abatement, before pleading in bar."

We quote from the case of Watts vs. State, 171 S. W. 202, 204.

> "It is further contended the motion in arrest of judgment should have been sustained because the defendant is a negro, and the jury commission who drew the grand jury that indicted appellant, and the jury that

tried him discriminated against him in this: The said jury commission did not draw a negro on the petit jury, and therefore, he was discriminated against, in violation to the fourteenth and fifteenth amendments to the Federal Constitution of the United States of America. And further, that defendant was in jail when the indictment was returned, and not given a chance to object to the grand jury that found the indictment. These matters come too late after the conviction. If appellant had desired to take advantage of discrimination against him because he was a negro, it should have been taken in advance of the conviction."

CONCLUSION

The laws of the State of Alabama afforded to these petitioners due process of law. The rules of procedure and practice applied to their cases are the same as are applied to all persons charged with crimes of the same nature in the State of Alabama and same are not unreasonable. The petitioners were not denied equal protection of the laws.

The judgments of the Alabama Supreme Court should be affirmed.

Dated September 24, 1932.

Respectfully submitted,

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