SUBJECT INDEX.

PETITION.

BRIEF.

TABLE OF CASES.

TEXTBOOKS.

CONSTITUTIONAL PROVISIONS AND STATUTES.

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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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

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*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

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*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."

*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

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*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).

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*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

*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).

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*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).