Cross-examination.

Examined by Mr. Bailey:

Q. You first came here, of course, under orders from the Governor?

A. Yes, sir.

Q. And you have been here under his orders ever since?

A. That is correct.

Q. You say you made how many trips here from Gadsden?

A. This is the third trip.

Q. In your trips over to Scottsboro, in Jackson County, and your association with the citizens in this county and other counties, I will ask you if you have heard of any threats made against any of these defendants.

A. I have not.

[fol. 87] Q. From your knowledge of the situation, gained from these trips over here, I will ask you if it is your judgment these defendants can obtain here in this county at this time a fair and impartial trial and unbiased verdict?

A. I think so.

Q. Have you seen any demonstration, or attempted demonstration, toward any of these defendants?

A. Absolutely none; a good deal of curiosity but not hostile demonstration.

Q. Your judgment that crowd here was here out of curiosity?

A. That is right.

Q. And not as a hostile demonstration *two*ard these defendants?

A. That is right.

Mr. Bailey: That is all.

The Court: Anything else for the defendants?

Mr. Roddy: That is all, Your Honor.

The Court: Anything further for the State?

Mr. Bailey: No, sir, we don't care to offer anything further. Now, was our objection to the newspaper articles noted.

The Court: Well, the motion is overruled, gentlemen.

Mr. Roddy: We want to except to Your Honor's ruling.

The Court: Yes, I will give you an exception. Let the motion be filed Mr. Clerk—I will give you an exception to it Mr. Roddy.

The Court: Now, is the State ready to go ahead?

Mr. Bailey: Will your Honor have our witnesses called; we have some we are not sure about.

The Court: Call the State witness, Mr. Clerk.

(Witness called by the Clerk for the State.)

.Mr. Roddy: Your Honor please, it is about twelve o'clock and we have a motion in here about the trial of these boys under the age of sixteen years.

The Court: Well, we will see which one we will try first.

Mr. Roddy: We can show their ages*t* to the court.

The Court: We will see about it when we get to it. What says the State?

[fol. 88] Mr. Bailey: The State is ready for trial.

The Court: Which one do you want to try first, Solicitor?

Mr. Bailey: Is there a severance demanded?

Mr. Roddy: No, we don't demand a severance.

The Court: No severance is demanded? Now, do you want to try them all?

Mr. Bailey: The state demands a severance, and we will try under the first joint indictment, Clarence Norris, Charley Weems and Roy Wright first.

Mr. Roddy: If the court please, I would like to inquire about these two boys that are under the age of 16.

The Court: Are they in that group?

Mr. Bailey: Roy Wright is, yes sir.

The Court: Do you want a severance as to this young one who claims he is under age?

Mr. Bailey: That is a matter with the court.

The Court: I understand, but that procedure will delay the procedure in the other cases.

Mr. Bailey: I would like to take up the question of his age first.

The Court: I think, if you can, you ought to proceed with the others.

Mr. Roddy: We are willing to offer proof of the age of these two boys.

The Court: I understand, but I don't want to take that up now. I want to proceed with the others.

Mr. Bailey: Then we will proceed as to the other two.

The Court: What are the names of the other two, Solicitor?

Mr. Bailey: Charley Weems and Clarence Norris, alias Clarence Morris.

Mr. Roddy: All right, call the witnesses.

(Witnesses called by the Clerk for the defendants.)

Mr. Roddy: We want our witnesses, if the court please, or know that we can get them.

The Court: Do you want an attachment for the ones that do not answer?

Mr. Rody: Yes, sir.

The Court: I expect it would not be right to attach Mr. Amos; he is in mighty bad health and I don't expect I ought to give it as to him.

Mr. Roddy: We don't want to impose a hardship on anybody, if the court please, but we want our witnesses here; all we want to know is that the witnesses can be had before we announce ready for trial.

The Court: Have these witnesses been served?

The Clerk: Yes, sir.

[fol. 89] The Court: Who are the other two? I will give you a showing for Mr. Amos, of course. I know his condition. Who else besides Mr. Parrish that did not answer?

Mr. Thompson: Mr. Riddick and Walter Sanders did not answer.

The Court: Have they been served?

Clerk: Yes, sir.

The Court: Do you want an attachment for these witnesses?

Mr. Moody: Yes, sir; we would like to get them here; if we cannot get them here, then we would like to have a showing for them.

The Court: I expect every one of them on a telephone call would come. Sheriff, at the noon hour, you call these witnesses, and I expect they will come right on.

(Court adjourned for noon recess.)

The Court: All right, let's go ahead.

Mr. Roddy: Your Honor, we were talking with the defendants out there and if Your Honor will grant me a few minutes, time, I might simplify these matters. I want to

be of all the help I can with the court and everyone concerned, but there are some very material facts in the case; I have no motive in this world in appearing down here except to get the absolute truth in this matter, and if Your Honor will indulge me a few minutes——

The Court: All right, go ahead as far as you can.

Mr. Roddy: It will take me ten or fifteen minutes.

The Court: What says the defendants now, Mr. Roddy?

Mr. Roddy: We don't know, your Hon*ro* please about our witnesses.

The Court: What about the witnesses, Mr. Sheriff? All right, gentlemen, if we don't get the witnesses here, I will allow you a showing for them. Is that all right?

Mr. Moody: Yes, sir.

Mr. Bailey: Subject, of course, to legal objections.

The Court: All right, Sheriff, now call the jurors.

(Jurors called by the Sheriff and qualified by the court and a list made up containing the names of 72 qualified jurors from which to strike the jury.)

Defendants Charley Weems and Clarence Norris arraigned and plead not guilty. Indictment read to the jury by the Solicitor and the defendants by their counsel plead not guilty thereto.

Witnesses sworn by the Clerk and on motion of the State [fol. 90] are put under the rule, except as to the other defendants not on trial excused from the rule by court.

Filed May 19, 1931.

C. A. Wann, Clerk Circuit Court.

On the 19th day of May, 1931, defendants separately and severally filed in said c-use, in support of their said motion for new trial the separate and several affidavits of Roberta Fearn, Bertha Lowe, Willie Crutcher, Allen Crutcher, the joint affidavit of Henry Cokley, Susie Cokely, and Georgia Haley, and the affidavit of Percy Ricks, which said affidavits are in words and figures as follows, to-wit:

IN CIRCUIT COURT OF JACKSON COUNTY, ALABAMA

No. 2402 and 2404

STATE OF ALABAMA

vs.

HAYWOOD PATTERSON et als.

AFFIDAVIT OF ROBERTA FEARN

The undersigned affiant makes oath in due form of law that she resides in the town of Huntsville, Alabama, and that she is personally acquainted with Victoria Price, alleged victim, in the cases of the State of Alabama vs. Haywood Patterson and eight other boys recently tried in this Honorable Court at Huntsville, Alabama, and that Victoria Price formerly resided in a negro section of Huntsville right near where this affiant lived and that Victoria Price often talked to and with *with* this affiant, and that Victoria Price was a girl of easy virtue, and that she visited and associated with colored people and lived among them. She had the reputation of being a common prostitute, and she told affiant that she was going to make a trip in last year from Huntsville and she may have gone to Chattanooga, as she said last year she was going on a trip and it only takes about three hours for the train to run to Chattanooga from Huntsville, as affiant is advised.

Affiant saw Ruby Bates with Victoria Price on different occasions and Ruby Bates had a reputation of being a prostitute and she lives now in what is called an exclusive negro section in Huntsville, Alabama, and these girls have been in and about these colored neighborhoods from time to time for two or three years, and they are about twenty years old, as she understands. They associate and visit with negroes freely.

(Signed) Roberta Fear*sn.*

Subscribed and sworn to before me May 18, 1931.
(Signed) Lewis C. Colson, Notary Public. Hunts-
[fol. 91] ville, County of Madison, Alabama. My commission expires May 1, 1935. (Seal.)

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

No. 2402

STATE OF ALABAMA

vs.

HAYWOOD PATTERSON et als.

AFFIDAVIT OF BERTHA LOWE

The undersigned affiant makes oath that she lives in the Town of Huntsville, Alabama, and that she has seen Ruby Bates and Victoria Price the alleged prosecuting witnesses against the nine negro boys at Scottsboro, Alabama, and that these two girls live in Huntsville, Alabama, a portion of the time, and that she has seen them in Huntsville on various occasions, in negro section of Huntsville, and that Ruby Bates is staying now in a negro section living in a row of negro houses and associates with negroes almost exclusively in the row where she lives and that she associates with Victoria White who as affiant is told formerly lived in a negro section of Huntsville near where Ruby Bates now lives, and that these two girls appear to be about twenty or twenty-one years old, and they have been in these negro sections perhaps off and on for nearly three years, and at times affiant would see them often and again she would not see them for a month of longer. She heard they visited Chattanooga, but she never knew them in Chattanooga, but she knew them in Huntsville, as that is where she saw them, in negro section of the City of Huntsville, and they were reputed to be prostitutes.

(Signed) Bertha Lowe.

Subscribed and sworn to before me, May 18, 1931. (Signed) Lewis C. Colson, Notary Public, County of ——, State of Alabama. My commission expires on the 1 day of May, 1935. (Seal.)

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

No-. 2402 and 2404

STATE OF ALABAMA

vs.

HAYWOOD PATTERSON et als.

AFFIDAVIT OF WILLIE CRUTCHER

[fol. 92] The undersigned affiant makes oath in due form of law, that she resides in the Town of Huntsville, Alabama, and that she is personally acquainted with Victoria Price, alleged victim, in the case of the State of Alabama v. Haywood Patterson, and eight other boys recently tried in this Honorable Court at Huntsville, Alabama, and that Victoria Price formerly resided in a negro section of Huntsville right near where this affiant lived, and that Victoria Price often talked to and with this affiant, and that Victoria Price was a girl of easy virtue, and that she visited and associated with colored people and lived among them.

She had the reputation of being a common prostitute, and she told affiant that she was going to make a trip in last year from Huntsville and she may have gone to Chattanooga, as she said last year she was going on a trip and it only takes about three hours for the train to run to Chattanooga from Huntsville, as affiant is advised.

Affiant saw Ruby Bates with Victoria Price on different occasions and Ruby Bates had a reputation of being a prostitute and she lives now in what is called an exclusive negro section in Huntsville, Alabama, and these girls have been in and about these colored neighborhoods from time to time for two or three years, and they are about twenty years old, as she understands. They associate and visit with negroes freely.

(Signed) Willie Crutcher.

Subscribed and sworn to before me May 18, 1931. (Signed) Lewis C. Colson, Notary Public, Huntsville, County of Madison, Alabama. My commission expires May 1, 1935. (Seal.)

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

No-. 2402 and 2404

STATE OF ALABAMA

vs.

HAYWOOD PATTERSON et als.

AFFIDAVIT OF ALLEN CRUTCHER

The undersigned affiant makes oath in due from of law, that she resides in the Town of Huntsville, Alabama, and that she is personally acquainted with Victoria Price, alleged victim, in the case of the State of Alabama v. Haywood Patterson, and eight other boys recently tried in this Honorable court at Huntsville, Alabama, and that Victoria Price formerly resided in a negro section of Huntsville right [fol. 93] near where this affiant lived, and that Victoria Price often talked to and with this affiant, and that Victoria Price was a girl of easy virtue, and that she visited and associated with colored people and lived among them.

She had the reputation of being a common prostitute and she told affiant that she was going to make a trip in last year from Huntsville, and she may have gone to Chattanooga, as she said last year she was going on a trip and it only takes about three hours for the train to run to Chattanooga from Huntsville, as affiant is advised.

Affiant saw Ruby Bates and Victoria Price on different occasions and Ruby Bates had a reputation of being a prostitute and she lives now in what is called an exclusive negro section in Huntsville, Alabama, and these girls have been in and about these colored neighborhoods from time to time for two or three years, and they are about twenty years old, as she understands. They associate and visit with negroes freely.

(Signed) Allen Crutcher.

Subscribed and sworn to before me May 18, 1931. (Signed) Lewis C. Colson, Notary Public, Huntsville, County of Madison, Alabama, May 1, 1935. (Seal.)

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

No. —

STATE OF ALABAMA

vs.

HAYWOOD PATTERSON and EUGENE WILLIAMS et al.,
Defendants

AFFIDAVIT OF HENRY COKLE, SUSIE COKLE, AND GEORGIA HALEY

STATE OF GEORGIA,
County of ——:

Georgia Haley, Henry Cokley and Susie Cokley, citizens of Bremen, Georgia, make oath in due form of law, that they are personally acquainted with Eugene Williams and his mother Mamie Williams of Chattanooga, Tennessee, and that Mamie Williams was married at Rossville, Georgia, near Chattanooga, Tennessee, on April 9th, 1916, and that Eugene Williams her son, was born on December 6th, 1917.

These affiants further state that they heard about a boy named Eugene Williams being in trouble in Scottsboro, Alabama, but his age was reported as being 19 years old, and that they did not think it was Eugene Williams of [fol. 94] Chattanooga, Tennessee, son of Mamie Williams, and for that reason they did not send an affidavit about his age earlier than this time, and that this is the first they heard that it was Mamie Williams' son and a grandson of Georgia Haley and a nephew of Henry Cokley and his wife, Susie Cokely.

We were living at Chattanooga, Tennessee just across the State line from Rossville, Georgia, when Mamie Williams was married and were living with her at the time Eugene Williams was born, and we are positive about his age and the date of his birth, as set out in the foregoing affidavit.

(Signed) Henry Cokely. (Signed) Susie Cokely.
(Signed) Georgie (her X mark) Haley.

Subscribed and sworn to before me on this the 4th day of May, 1931, at Bremen, Georgia. (Signed) S. O. Smith, Clerk Superior, Haralson County, Georgia. (Seal.)

[File endorsement omitted.]

Chambers of Judge Superior Courts, Tallapoosa Circuit, J. R. Hutchenson, Judge, Douglasville, Georgia

At Chambers,
Douglasville, Ga., May 6th, 1931.

I do hereby certify that the signature of S. O. Smith, Clerk of the Superior Court of Haralson County, Georgia, is his genuine signature to the attached four pages of typewritten pages.

(Signed) J. R. Hutcheson, Judge S. C., Haralson Co. Ga.

IN CIRCUIT COURT OF JACKSON COUNTY

No-. 2402, 2404, and 2406

THE STATE OF ALABAMA

vs.

HAYWOOD PATTERSON, EUGENE WILLIAMS, OZIE POWELL, Willie Robertson, Andy Wright, Clarence Norris, Charlie Weems, Olen Montgomery

AFFIDAVIT OF PERCY RICKS

Percy Ricks, makes oath that he was on the train that the above defendants were riding from Chattanooga to Paint Rock, Alabama, on the day that defendants were arrested at Paint Rock, Ala.

[fol. 95] That, when the train got to Stevenson, that he saw the two girls, Victoria Price and Ruby Williams get into a freight box car, while this train was standing at Stevenson, and that he saw them when the train approached Stevenson, Ala., going towards Scottsboro, and that when this train reached Stevenson, one of them had on overalls and the other one had on a dress, and that he saw them get

on the train and they went into a freight box car. Later he saw them get out of this box car when the train pulled over on the Southern track at Stevenson he saw them get back into the box car, and they were in it when he last saw them until they got to Paint Rock, and at Paint Rock and they were on the ground running along the train and the second girl was following the first one and looked like they were trying to get away from the train and the officers stopped them.

There was a number of officers there armed and that affiant saw them getting some of the boys out of box cars and some on top of the train, and scattered all along the length of the train.

He saw the car called the gondola in which the girls claimed to be riding and it was nearly full of crushed rock called "Chatt" and load- within about two feet of the top of the car.

He saw one of these girls a week before this trouble and she was hoboing from Stevenson to Huntsville on a freight train.

He further states that the train was running about thirty-five miles an hour, from Stevenson to Paint Rock, and that the time was about one hour. Affiant further states that he is not related to any of the defendants and does not know any of them except that he saw them when they were arrested and that he furnishes this information to counsel for the defendants in order that the truth might be known as far as stated in the foregoing affidavit.

(Signed) Percy Ricks.

Subscribed and sworn to before me on this the 16th day of May, 1931. Geo. W. Chamlee, Notary Public, Hamilton County, Tennessee. (Seal.)

Filed May 19, 1931.

C. A. Wann, Clerk Circuit Court.

On the 5th day of June, 1931, the defendants separately and severally filed in said cause and spread upon the motion docket of said Court a further amendment to said motion for new trial, which said amendment to said motion is in words and figures as follows, to-wit:

[fol. 96] IN CIRCUIT COURT OF JACKSON COUNTY

No. 2402

STATE OF ALABAMA

vs.

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, OLEN MONTGOMERY and EUGENE WILLIAMS, Defendants

SECOND AMENDED MOTION FOR NEW TRIAL

Come the defendants, Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery and Eugene Williams, in the above styled cause of the State of Alabama *vs.* Ozzie Powell, Willie Roberson, Andy Wright, Olen Montgomery and Eugene Williams, and move the court to set aside the verdict and judgment rendered in this case No. 2402 against them on the 8th day of April, 1931, in the Circuit Court of Jackson County, Alabama, and to grant them a new trial and they assign the following reasons and causes separately and severally, to wit:

I

The indictment on which the defendants were tried was void and illegal; (a) In that it was vague, indefinite and uncertain; (b) in that it set forth no facts constituting the crime therein alleged, nor the exact date when and the exact place where the alleged crime was committed by the defendant; (c) in that it failed properly to appraise and inform the defendants of the exact nature, basis and grounds of the charge against them and which they were called upon to meet; (d) in that by reason of the aforesaid vagueness, indefiniteness and uncertainty of said indictment the defendants could not properly and adequately prepare to meet and defend themselves at the trial: (e) in that by reason of the aforesaid vagueness, indefiniteness and uncertainty of the indictment the defendants have become and are subject for the same offense to be twice put in jeopardy of life or limb in violation of said defendants rights under the Constitution of the United States, amendment 5, which provides: — nor shall any person be subject for the same offense to be twice put in jeopardy of life and

limb'' and the rights under the constitution of the State of Alabama, Article 1, Section 6; (f) in that the said indictment by reason of its vagueness indefiniteness and uncertainty was a denial of the defendants' rights under the Constitution of the United States, amendment 14, Section 1 which provides ''—no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'', and under the constitution of the [fol. 97] State of Alabama, Article 1, Section 6 which provides; ''That in all criminal prosecutions, the accused—shall not be deprived of life, liberty, or property, except by due process of law.'' For these reasons the judgment ought to be arrested and a new trial granted.

II

The defendants on trial for their lives were entitled and had a right to be tried by a jury entirely free from bias, prejudice, hostility, vindictiveness or passion, and free from outside or extra-legal influence and communications which might tend to disturb or distract their minds from a free, impartial, unbiased and dispassionate consideration of the merits of the case and of the evidence before them; and where, as in this case, it was evident in advance of the trial that by reason of the hostile sentiment and feeling which dominated the inhabitants of the county from which a jury was to be chosen, the jury's minds would be or become influenced against the defendants by the prevailing sentiment and feeling of hostility in the said county, a change of venue to another and different county should have been granted by the court and the court's refusal to grant a change of venue was a denial to the defendants of their right under the Constitution of the United States, Amendment 14, Section 1, and the constitution of the State of Alabama, Article 1, section 6, and was an abuse of judicial discretion and constituted reversible error. A new trial should therefore be granted.

III

A new trial should be granted in that the rights of the defendants under the Constitution of the United States,

Amendment 14, Section 1, and under the constitution of the State of Alabama, Article 1, Section 6, were violated for the following reasons: (a) Defendants, while under arrest were not afforded nor did they have an opportunity to employ counsel to aid and advise them: (b) they had no opportunity to employ an attorney to represent them: (c) they had no opportunity or sufficient time in the 13 day period between their arrest and trial to prepare properly for the trial on the outcome of which their lives and property depended: (d) they were in prison in a jail situated in a city far away from their homes, where their parents and kinfolks resided and they had no opportunity to communicate with such parents and kinfolks, who, when they finally learned of defendants plight, dared not visit them for fear [fol. 98] of personal violence from a hostile and excited populace; (e) due to race feeling and prejudice which prevailed in the county where the trial was held, they could not have and were denied a fair and impartial trial before an unbiased and unprejudiced jury; (f) immature in years and lacking the advantages of an education, they were too ignorant and did not know how to prepare for trial or how to obtain the attendance of their witnesses in court or how to obtain the services of an attorney and the financial means with which to pay for such services, and they were entirely unacquainted and ignorant of the rules and principles of law; (g) repeatedly threatened, intimidated and put in fear of death, they neither knew how nor could communicate with their parents to employ an attorney in their case and to advise them about their rights until the very day when the case was called for trial: (h) continuously and throughout the trial a crowd of people dominated by prejudice and hostility towards the defendants filled up the Court room and bearing and demeanor influence the jury adversely to the defendants: (i) that while these defendants were on trial a crowd of people to the number of ten thousand gathered from among the inhabitants of the county where the trial was on and adjacent counties, with a band of music playing noisily, surrounded the court house and enacted demonstrations hostile to the defendants, all of which the jury could not but have known: (j) that the defendants were tried in a county where mob hostility towards them raged with such violence that the Sheriff of said

county and the governor of the State of Alabama deemed it necessary to call out a military force to protect these defendants against a threatened lynching by the mob which assembled around the jail where they were held, and to guard them on the way from the jail to the court house and back, and to surround and protect the court house during the entire trial against threatened mob violence to defendants and to guard them after the trial back to jail; all to prevent the threats, repeatedly made, to lynch the defendants, from being carried out; (k) that the trial of the defendants, who, with four other negro boys, were charged with the crime of rape, alleged to have been committed against two white women, was conducted und*re* stress of great excitement, mob hostility, lust and vindictiveness, and at a time when these evil passions and race prejudice completely dominated the minds of the inhabitants of this county and adjacent counties and were further stimulated by the county's and adjacent counties' newspapers, which [fol. 99] published in advance of and during the trial of the defendants, the supposed details of the defenants' crime and their guilt in headlines and language which screamed with a lust born of hate and race prejudice and appealed to vicious and degraded lynch sentiment which they roused in and fed to the people of this county and the adjacent counties, thereby making it impossible for these defendants, as well as for the other defendants, to have the benefits of a fair and impartial trial, and rendering the verdict of the jury and the judgment entered thereon illegal and void; and for these reasons a new trial should be granted.

IV

The court's refusal to grant the defendants a special jury or a special venire of jurors upon the demand therefor by defendants' counsel was a denial to these defendants of their rights under the constitution of the United States, Amendment 14, Section 1, and the Constitution of the State of Alabama, Article 1, Section 6, and was in contravention and violation of the jury law of the State of Alabama as provided by the Statutes of Alabama.

V

The Court erred in not questioning and in failing to qualify the trial jurors as to race prejudice and as to whether

or not they could and would, in view of the fact that the defendants were negroes, and the complainants and prosecuting witnesses a white woman, give the defendants a fair, impartial and unprejudiced trial, and the court further erred in failing to call this fact to the attention of the jurors; and if it had appeared that any juror entertained a prejudice in regard to negroes or that any juror could not or would not, in view of the fact that the defendants were negroes and the complaint and prosecuting witnesses a white woman, give the defendants a fair, impartial and unprejudiced trial, such juror should have been disqualified and discharged from jury duty. The failure of the Court in this respect was a denial of the defendants' rights under the Constitution of the United State-, Amendment 14, Section 1. For this reason a new trial should be granted.

VI

The exclusion of negroes from the list of jurors from which the defendants' jury was drawn was a denial of the defendant's rights under the Constitution of the United States, Amendment 14, Section 1, and a new trial should be granted.

[fol. 100]

VII

The court erred in that it permitted the jurors to remain in the court room during the preliminary argument and discussion of the case between the court and a group of attorneys appointed by the court to represent the defendants. This argument and discussion between the court and counsel was calculated to and did prejudice the minds of the jurors. A new trial should therefore be granted.

VIII

A new trial should be granted in that public sentiment and feeling against the defendants and the crime charged and the language of the newspapers which published the same throughout the northern part of the State of Alabama and in the State of Tennessee and Georgia were of such a character that the defendants could not get a fair, impartial and unbiased jury.

IX

The verdict of the jury and judgment entered thereon are supported by no competent or sufficient legal evidence that they are against the weight of evidence and against the law, and that all the creditable evidence adduced at the trial failed to establish the guilt of these defendants beyond a reasonable doubt; for these reasons a new trial should be granted.

X

A new trial should be granted because of evidence which has been discovered since the trial of the case tending to prove that the defendants are innocent of the charge made against them, and which said evidence the defendants did not and could not know and discover before the trial. Said newly discovered evidence will be properly presented to the court on the day of the argument of this motion for a new trial.

XI

The court erred in refusing to permit the defendants' counsel to interrogate the prosecuting witness, Victoria Price, touching her character and reputation as a common prostitute, and the court's refusal to allow such evidence and the interrogation of the prosecuting witness thereon was reversible error, for which a new trial should be granted.

XII

The court permitted error in refusing to permit defendant's counsel to ask the doctor, who had examined Victoria Price, as to whether or not she suffered from a venereal [fol. 101] disease. A new trial should therefore be granted.

XIII

The court further erred in permitting the prosecuting attorney to put leading questions on direct examination to the State's witnesses and for this reason a new trial should be granted.

XIV

A new trial should be granted in that the court committed error in failing to charge the jury as to consciousness of innocence, evidenced by the fact that the defendants, al-

though they knew of the severity with which the crime of rape is punished and the swiftness with which such punishment is visited in the south, remained on the train and made no effort to flee, a circumstance which, together with their conduct on the day of their arrest, supports the inference of defendant's innocence; the failure of the court to state these facts in his charge and to instruct the jury as to the law thereon was reversible error.

XV

A new trial should be granted in that the State, although it had in its control a number of white boys who were on the train when the alleged crime of rape was committed, among them a boy named Gilley, who, the indictment establishes, testified before the grand jury, failed to produce and call them, and especially Gilley, as witness to support the testimony of the prosecuting witness, Victoria Price, the inference being inescapable that if the testimony of such witness, and especially the said Gilley, would have supported the testimony of the prosecuting witness, Victoria Price, the State most certainly would have produced them in court as witnesses for the prosecution. Nor did the State offer any reason for not producing these witnesses. The State's failure in this respect not only throws grave suspicion upon the testimony of the prosecuting witness, Victoria Price, but completely invalidates and impeaches her testimony. The fact that those boys, and especially Gilley, in the control of the State, were not produced as witnesses in court and were not permitted to testify, supports the inference that their testimony would not have benefited the prosecution but would have benefited the defendants, and moreover, would have exonerated the defendants.

XVI

[fol. 102] A new trial should have been granted in that proof in the record of the trial establishes the following; that the train on which Victoria Price and Ruby Bates claim to have been riding had on it from fifteen to eighteen Negro boys and seven white boys; that between the time of the fight alleged to have been had between the negro and white boys in the neighborhood of Stevenson, Alabama, and the time that this train reached Paint Rock, Ala-

bama, about forty or fifty minutes elapsed; that approximately from three to six of the negro boys had left the train between the time it left Stevenson, Alabama, and the time it reached Paint Rock, Alabama; assuming, therefore, as it is claimed, without, however conceding, that all this trouble occurred while this train was in Jackson County, Alabama, the time was too brief for everything to have happened as contended for and by Victoria Price and Ruby Bates; and that, furthermore, since some of the Negro boys were not arrested, it is impossible for these girls to identify positively all the members of the crowd and to make such identification and proof beyond a reasonable doubt.

XVII

A new trial should be granted to Eugene Williams because the Circuit Court of Jackson County had no jurisdiction to try and pronounce sentence upon him on account of his being under sixteen years of age (Code 1928, Sec. 3528, 22 Ala. App. 135, 113 So. 471).

XVIII

A new trial should be granted to Eugene Williams in this cause because it is shown from affidavits filed that he is under fourteen years of age and conclusively presumed, as a matter of law, incapable of committing crime and therefore is entitled to a new trial.

XIX

A new trial should be granted all the defendants in this case because the Court failed to charge that if it appeared that any of them were under fourteen years of age they were prima facie presumed incapable of committing any crime and that the burden was upon the State to establish by the evidence the contrary to the satisfaction of the jury beyond a reasonable doubt, and the Court was in error in not charging the jury as to all defendants, that if any of them were under the age of sixteen that it was not the intent of the law to incarcerate children in jail, but merely to hold them for safe keeping and dispose of them as provided by the juvenile laws of the State of Alabama, unless the cases had been heard in the juvenile court and trans- [fol. 103] ferred to the Circuit Court in the manner pro-

vided by law. For this error a new trial should be granted. Respectfully submitted.

G. W. Chamlee, Attorney.

[File endorsement omitted.]

Thereupon, on the 13th day of June, 1931, the defendants, separately and severally, filed in said cause, in support of their motion for a new trial, affidavit of Stephens R. Roddy, which said affidavit is in words and figures as follows, to-wit:

AFFIDAVIT OF STEPHEN R. RODDY

STATE OF ALABAMA,
Jackson County:

Personally appeared before me, a Notary Public, in and for the State and County, aforesaid, Stephen R. Roddy, of Chattanooga, Tennessee, who being first duly sworn, deposed as follows:

That he appeared as one of the Attorneys for nine negro boys who were tried and convicted in the Circuit Court, at Scottsboro, Alabama, on or about the sixth day of April last on the charge of rape of two white girls and during the progress of said trials, one of the defendants, Eugene Williams, told affiant he was fifteen years of age and later and before his trial, he voluntarily told affiant in the presence of witnesses, he had misstated his age to officers and affiant and that his actual age was nineteen years instead of fifteen. That he insisted on affiant or his associate Mr. Milo Moody tell the Court he was nineteen instead of fifteen years. That Messrs. Moody and Joe Hunter Attorneys were called and heard the said statement of defendant and all three attorneys closely questioned the defendant because they were apprehensive some sort of pressure had been brought to cause the said negro to change his statement as to his age. That the next day asked affiant if he had told the judge that he was nineteen years of age and upon being told that he had not as yet done so, the defendant insisted upon going before the Judge and so informing him. That he was informed that he would be given the opportunity to inform the Court at the proper time and during the day and while on the witness stand he stated he was nineteen years old.

That a few weeks after being tried and convicted and while lodged in the County Jail at Birmingham, Ala., said Williams told affiant his true age was fifteen years and he had changed his statement to nineteen years as aforesaid, [fol. 104] because he had been threatened, abused and bluffed while in the jail at Scottsboro or Gadsden into saying he was nineteen years of age.

Stephen R. Roddy.

Sworn to and subscribed before me 12th day of June, 1931. C. F. Grigg, Notary Public, ex Off. Justice of the Peace. My commission expires ——— — ———.

[File endorsement omitted.]

The hearing of said motion as amended was continued by the Court from time to time until the 5th day of June, 1931, at which time the following proceedings thereon were had:

T. G. ELKINS, a witness for movants, having been duly sworn, testified as follows:

Direct examination:

My name is T. G. Elkins. I live ten miles north of Scottsboro on Little Mud Creek. I was a member of the jury before when five defendants were tried. I don't remember their names. I was on Jury No. 3. I was not in the court house when the jury reported in the Haywood Patterson case. I was not in the court house when they reported in the Weems and Norris case. I don't know where I was, only I guess I was up at Davis' store. That was the second day of the trial of these negroes when the jury reported. That was when the first case was tried. I heard someone out on the street holler "Whoope," but I didn't pay any attention. When I walked out I asked what the fuss was, and they said the jury had reported. That didn't have any bearing on my decision. I did hear a fuss, but that didn't have any influence on me. I cannot say about a brass band playing on the streets of Scottsboro within a few minutes after the jury reported. If I heard a brass band that afternoon after the jury reported I don't know it. I didn't hear one the next day. I heard a band some time after that. I don't remember what day it was. I couldn't say about that.

I heard a band some time but I don't pay any attention. I was leaving town at the time. I cannot say whether it was the day the jury reported in that case. I gave it no consideration.

I read the Scottsboro papers about the attack on these girls. I believe I read the Chattanooga papers. I think those papers said these men, or some of them had confessed their guilt.

When I was examined as a juror, I was asked questions [fol. 105] as to whether or not I held racial prejudice. I don't remember just what the question was about. I was asked if I held any racial prejudice, and my answer was no. I couldn't say positively who asked that question. There is a hosiery mill band in Scottsboro. I couldn't tell you how many men are members of that band. I have seen them parade a time or two, I couldn't tell you how many members in that band. I have seen them at a show here. I have not seen them recently. I live twelve miles from the court house by road. I had not been to Scottsboro previous to the day I was on the jury; that was the first day I had been here since it came up. That was Monday, I believe. I was not put on the jury the first day I got there. I was put on Jury No. 3. That was the jury that tried the five defendants. I was in Davis store when the jury reported in the Norris and Weems case. I was not in the court house. Davis' store is something like a half block from the court house.

I couldn't say what time of the day the Norris and Weems jury reported.

I didn't pay any attention to the time of the day. It was in the latter part of the afternoon. I didn't pay any attention to the hour.

I have no idea how many people were around the court house at that time; there were several here, a pretty good sized crowd. The military authorities were guarding the court house in Scottsboro at the time I was sitting on the jury. They had machine guns. I suppose the reason for that was to keep down mob violence; that is what I presume it was for. However, I saw no indication of mob violence. There were something over one hundred armed men here in all, including the machine gun crowd. They were guarding the court house yard and keeping the crowd

off the court house grounds. They also had them inside of the court house, upstairs. I don't know whether they searched the people to see if they were armed. They didn't search me. I couldn't say about them searching others. I did not hear either one of the other trials. I was sitting on the jury part of the time when the fourth trial was going on. I was sitting on the jury where they tried the man and the jury disagreed. I did not try that case. I was on number three where they tried five of them together. Jury No. 3 had the other case at that time. I didn't hear the fourth case. They were on this other case.

I saw several heavily armed soldiers in the court house, three or four, I couldn't say how many, as well as out in the street, during the progress of these trials.

[fol. 106] G. W. SARTIN, a witness for movants, having been duly sworn, testified as follows:

Direct examination:

My name is W. G. Sartin. I live out on Sand Mountain. I was one of the jurors that tried five of the negro boys charged with rape. When the jury reported in the Haywood Patterson case, I should judge that I was down at the drug store. I suppose the Weems and Norris, the first case tried, is the one you were speaking of. I do not recall what time the jury reported. I couldn't say about what time it was. It was in the afternoon, I think. I am not sure. I suppose it was after that report was made that I heard some noise. I just heard them hollering. I don't know as I heard any clapping of hands. I heard them hollering. They were hollering around here on the square, seemingly, around the court house. I think the court house is within the square. There were several people around the court house at the time. I wouldn't say there — several thousand people around here. I don't know how many there was. Around the Square is where I heard the hollering. I did not hear a brass band playing within a few minutes after the jury reported. I think it was that evening I heard the brass band playing. I wouldn't say positively. Any way, I heard one playing.

I don't know whether that was the hosiery mill band. I was here in the court house at the time. There were several units of the State Militia around the Court house during the progress of the trial of those negroes. I don't know how many armed soldiers there were here. I think there were eight machine guns around here. There were some boxes of tear bombs sitting around. I suppose there were soldiers in the court house. They were not in the court room when I was in here. After I heard that demonstration I served on the jury in one case where five of the negroes were tried.

Cross-examination:

When I heard this demonstration about which I spoke, I was down about Payne's drug store. I heard some hollering. I heard a band; that is what I thought it was. When the band was playing I taken it to be after court had adjourned and the soldiers were ready to go home; at the time I was in the court room, when it first began. I was not up here immediately after the rendition of the verdict. I am not sure just what time it was when the band was playing here on the square. I know it was after court adjourned. They were playing on the south side of the square. The playing of the band or the hollering did not [fol. 107] in the least influence me in my verdict. I did not know for what purpose, or what cause, or why they were hollering. When it began me and Mr. H. H. Hennegan were standing there talking. I don't know what the hollering was about. When I heard the band playing I didn't know what that was about.

Redirect examination:

Later I heard first one and other state what the hollering was about. They said they began hollering when the verdict was rendered. You can ask the court about what the verdict was. The man I was talking to said his information was that they had returned a verdict. I later found out what the hollering was about. That is what gave rise to it because the verdict was returned. I learned what the verdict was. I found out what they said about it. When I sent on the jury and the five I knew what this demonstration was about in the other case. Somebody had already

told me but I don't know everything people tell me. When I went on the jury that tried the five negroes, case No. 3 I understood what the people had said about it. They said a verdict had been rendered. I was down on the corner at Payne's drug store when I heard that noise. I don't know how far that is from the court house I didn't measure it. It is a short ways down to the corner. I can not tell how far it is. I don't know how many people I heard hollering; there were several. I don't know whether I heard hollering up in the court house. The first time I seen the band on the street was just before sundown. I think it was the same afternoon I heard the hollowing. I do not know what that band was playing.

Recross-examination:

During the time of the trial I did not see a demonstration about a truck with a big wheel and tire. I don't know what that was for. I did not see that truck pulling a big tire around the square.

L. R. JONES, a witness for movant, having been duly sworn, testified as follows:

My name is L. R. Jones. I live about three miles from Bridgeport.

I was on the jury that tried one or more of the nine negroes convicted of rape. I was on the third jury, the one that tried five of the negroes. I was not in the court house when the jury reported its verdict in the first case tried. I was at home, or on my way home. I had left the court room, and left Scottsboro. I didn't hear any demonstration of any sort.

[fol. 108] J. M. BARNES, a witness for movants, having been duly sworn, testified as follows:

Direct examination:

I live at Bridgeport. I was on one of the juries that tried one or more of the nine negroes convicted of rape here some time ago. I was on the third jury. That was

the jury that tried five of them. I don't know where I was when the jury reported in the first case, the Weems and Norris case, but I was somewhere betwe-n Scottsboro and Bridgeport or at Bridgeport. I did not hear any demonstration after the jury reported. I was not in Scottsboro.

WILLIE J. WELLS, a witness for movants, having been duly sworn, testified as follows:

Direct examination:

I live four miles above Paint Rock. I was on the jury that tried five of the Negroes convicted of rape in this court house. I was in Scottsboro when the first jury reported, in the Weems and Norris case. I did not hear any sort of demonstration, any noise, immediately after the jury reported. I never paid any attention to any hollering. I couldn't tell you where I was. I heard a band playing. I couldn't tell you what time it was I heard a band playing. I don't have any time-piece, and don't remember what time it was. I was not at Paint Rock when these men were arrested. I guess I was at home; I don't know. I live four miles, back up the river from Paint Rock. I heard about this trouble. I just talked with people like we always do about such as that. I never heard no big lot of talk. Nobody in my neighborhood came to Scottsboro. I live in a farming section. I have never been on a jury before. I r-member the questions that were asked me beofore they put me on the jury.

Counsel for movants then propounded to the witness the following question:

Q. What did they ask you to qualify to as a juror?

The State objected to the question, the court sustained the objection, and to this ruling of the court movants separately and severally reserved an exception.

Counsel for movants thereupon propounded to the witness the following question:

Q. Were you asked whether or not you held racial prejudice?

[fol. 109] The State objected to the question, the court sustained the objection and to this ruling of the court movants separately and severally reserved an exception.

RICHARD HILL, a witness for movants, having been duly sworn, testified as follows:

Direct examination:

I live in Paint Rock Valley. I was on the jury that tried some negroes convicted here. I was on the one that tried five of them. At the time the jury in the first case reported I was in town somewhere. I was outside of the court house, somewhere on the street. I don't know what time of day that jury reported. It was in the eveni-g sometime. I heard some noise, hollering. I didn't pay any attention to it. I just heard hollering, coming up the street. There were several people around the court house at the time. I don't know whether the National Guard was all round the court house and inside as well; I was not up here. I don't know as I later saw national guardsmen in the court house. I was not back up here that evening. Later when I came in the court room, I saw National Guardsmen in the court room. They had machine guns and other arms around the court house. I don't know for what purpose they had the arms. I did not hear a brass band playing after the jury reported. Nobody told me what that hollering was about. I never did learn what it was about. I have heard them talking since what it was about. I heard that sometime the next week. I do not know what the population of Scottsboro is.

Cross-examination:

I said I never heard a band playing until the next week after the trial.

ROY KILBOURNE, a witness for movants, having been duly sworn, testified as follows:

Direct examination:

I live in Paint Rock Valley, about thirty miles from here. I was on the jury that tried some of these negroes convicted of rape. I was on the one that tried five of them. I

had gone home that evening when the jury reported in this case. I was outside of Scottsboro. I did not hear any demonstration. I had left Scottsboro before the jury reported. I don't know as I heard about the demonstration the next morning. I heard about the verdict. I don't know as anybody told me what happened when the verdict was reported in the court house. I have heard since then [fol. 110] all about it. I don't know whether I heard about the clapping of hands and hollering or not. I went home and was not here. I don't remember whether it was the next day, or the next day, when I was put on the next jury, the case I tried.

Counsel for movants thereupon propounded to the witness the following question:

Q. Do you remember whether or not when you were examined—when you were examined as a juror, did they ask you whether or not you held racial prejudice?

The State objected to the question, the court sustained the objection and to this ruling of the court movants separately and severally reserved an exception.

W. C. Scogin, a witness for movants, having been duly sworn, testified as follows:

Direct examination:

I live on Sand Mountain. I was on the jury that tried some of these nine negroes. I was on the third jury, the one that tried five of them. When the jury reported in the first one of those cases I was across from the sidewalk over there, towards the court house. I asked some man I met over there, and he told me the jury had reported in that case. I heard a lot of noise, hollering and shouts; several hollered. There were several around the court house. I do not mean several thousand but a good many people gathered around the court house. I don't suppose that demonstration, that hollering, lasted a minute. I don't think there was a brass band on the street a few minutes later that day. That afternoon I did not hear a brass band parading around on the streets and playing. I could have

been day before that—I don't remember what day it was—it was about one o'clock this brass band was playing out there, somewhere a little after one o'clock. It was the next day, I think, after the jury reported. I am pretty positive it was the next evening after this first jury reported, because we were summoned to be here at one o'clock, and we were in the court room when this happened. I saw National Guardsmen in the court room and about the court house. When this happened I was on the street between here and the sidewalk over there. I don't know how many men I heard hollering down there. Then I came on to the court house, out in the yard.

I had been in the court house that day. The crowd in [fol. 111] the court house was about the same as the crowd in the court house now, I guess. I have no idea how many men are in the court house now. It looks like there are all that can be seated and a good many standing up. There are several standing around the walls.

Counsel for movants thereupon propounded to the witness the following questions:

Q. How many would you say down this side of the court room are standing up?

The State objected to the question on the ground that it calls for immaterial and irrelevant testimony. The court sustained the objection and to this ruling of the court movants separately and severally reserved an exception.

Counsel for movants then propounded to the witness the following question:

Q. When you were qualified as a joror, where you asked as to whether or not you held racial prejudice?

The State objected to the question, the Court sustained the objection, and to this ruling of the court movants separately and severally reserved an exception.

Cross-examination:

There were not very many people in the court house yard at that time.

There were several gathered around, but not a great crowd. It was late in the evening.

B. M. HOLLOWAY, a witness for movants, having been duly sworn, testified as follows:

Cross-examination:

I live on Sand Mountain. I was on the jury that tried some of those negroes. I was on the one that tried five. I was down town when the jury reported in the first one of those cases. I was pretty close to Payne's drug store. That is right across the street from the court house. I heard hollering after the first jury reported. I did not hear a brass band playing within a few minutes after it reported. I left town in a few minutes after that. When I heard that hollering I heard someone say the jury had reported, and I walked on. I didn't pay any attention to it. They did not tell me about it personally. I just heard people talking. They didn't say that was the reason for this demonstration. I just heard them yelling. It was generally understood by [fol. 112] everbody that was the reason for it. I think it was the next day after that I sat on the jury. I wouldn't say because I am not sure where the soldiers were that were guarding the court house, at the time of this demonstration.

Counsel for movants thereupon propounded to the witness the following question:

Q. When you were put on the jury in the court house the next day to try the five, were you asked the question whether or not you entertained racial prejudice?

The State objected to the question, the Court sustained the objection and to this ruling of the court movants separately and severally reserved an exception.

Cross-examination:

I was on the third jury. I was about town while the other two cases were tried. I was about the court house and heard people talking about the Ford agency putting on a demonstration of cars during the trial and had a talking machine on wheels, on a truck or something like that. I heard the organ. I heard them going around. The Judge called us back at one o'clock. While I was in the trial I heard the organ and learned the fact that it was the Ford

agency playing the organ. I heard they had different kinds of Ford cars going around.

Re-direct examination:

I didn't see that. I was in the court room.

Counsel for movants thereupon propounded to the witness the following question:

Q. Before you went on the jury did anybody tell you what those negroes were going to be tried for?

The State objected to the question, the court sustained the objection, and to this ruling of the Court movants separately and severally reserved an exception.

C. C. ALLEN, a witness for movants, having been duly sworn, testified as follows:

Direct examination:

I live at Olalee. I was on the jury that tried some of these negroes charged with rape. I was on the third jury, the one that tried the five of them. I was not in court here when the jury reported the *the* first case tried. I was outside of the city of Scottsboro. We were excused and I left town. I did not hear any demonstration or noise. Later [fol. 113] on I heard a little something about there having been a demonstration. I heard that when I came to town the next morning. I didn't hear any of it myself. I was out of town. I heard a little about the demonstration, but not much said about it. I did not hear any one of the other trials. When they tried the first case I was up in the country. I left here when they drawed the jury that went on the first case. I left here and went up to my aunt's, seven or eight miles a*s*away. I went home the next night. I was not here when they started the case of Haywood Patterson. We were dismissed and I left town and went home that night.

Counsel for movants thereupon propounded to the witness the following question:

Q. When you were qualified as a juror were you questioned on the subject of whether or not you entertained racial prejudice?

The State objected to the question, the court sustained the objection, and to this ruling of the court movants separately and severally reserved an exception.

Cross-examination:

I am not a minister of the Gospel.

LEE HICKS, a witness for movants, having been duly sworn testified as follows:

Direct examination:

I live at Olalee, Alabama. I was on the jury that tried five of these negroes charged with rape. That was the third jury. I was not in the city of Scottsboro when the jury reported in the first case. I left as soon as they excused us and went out in the country about twelve miles. I came back to Scottsboro the next morning. At that time I did not hear there had been a demonstration by yelling and hollering. I didn't hear anything about that at all, neither did I hear anything about a brass band being on the street a few minutes afterwards. The court house was heavily guarded inside and out by the National Guardsmen during the progress of those trials. Nobody said a word to me about the demonstration. I didn't talk to anybody at all.

Counsel for movants thereupon propounded to the witness the following question:

Q. When they examined you as a juror were you asked the question as to whether or not you entertained racial prejudice?

[fol. 114] The State objected to the question, the Court sustained the objection, and to this ruling of the Court movants separately and severally reserved an exception.

OUTHER BALLARD, a witness for movants, having been duly sworn, testified as follows:

Direct examination:

I live at Stevenson, Alabama. I was on the jury which tried some of the negroes charged with rape. I was on the

third jury, the one that tried five of them, I believe. When the jury in the first one of those reported, I was between here and Stevenson, or at Stevenson.

I was outside of the city of Scottsboro. I did not hear the demonstration immediately following the report of the jury. I came back to Scottsboro the next morning. I did not hear discussion on the street, people talking around about the demonstration that happened the day before. I never heard a word about it. I didn't hear a*by*body mention it at all. I suppose I came right on inside the court house. There was not a big crowd around the court house all during the progress of the trial. The crowd had lessened down. There were some people here. National Guardsmen were armed and stationed inside and outside of the court house. I understood that the National Guard was at the court house to protect the negroes. I don't know what they were to protect them from and who; just said to protect the negroes. I never did hear the word "mob" suggested. They were just here for protection.

JOHN VENSON, a witness for the state, having been duly sworn, testified as follows:

Direct examination:

My name is John Venson. I live in Scottsboro. I am a Ford dealer here. While the trial of these negroes was in progress here the Ford p*d*ople made a demonstration of cars. We had a Ford caravan of commercial trucks displayed, different bodies. I think there were about twenty-eight trucks. They came on Tuesday. They brought some music with them, had a graphophone with an amplifier on it, installed on a car. They had a par-de here in town. I think it was about four o'clock. That amplifier made music so it could be heard for several blocks. That had no connection in the world with this trial. The hosiery mill band came out at si*c* o'clock in the afternoon and played for Guard Mount. The soldiers were putting on Guard Mount. That w*s*s about six o'clock. I don't know anything about the adjournment of court, but it was about six o'clock. [fol. 115] They broke up our demonstration, and I went

over there. I didn't know until Monday that this Ford caravan was coming.

Cross-examination:

I never did know when the jury reported in the first case. I was down here somewhere about the square at that time. I did not hear the yelling and hollering. I remember while we were down there on the corner after we had our parade and was giving a little musical entertainment someone came along and told about the jury reporting. I remember that, but I heard no yelling or anything to indicate that there was anything going on about the court house. There was a crowd, but most of the crowd was down there when we stopped. They were down there to see our demonstration. There was a crowd in town all day. There were more people in Scottsboro the first day than on Tuesday. I don't know how many were here the first day. There was a big crowd. I don't — there were ten thousand. I woul*nd*'t think there were five thousand. I woul*nd*'t gu-ss there was five thousand people at any one time on the street; I don't think so, but I don't know. The court house never was full. There was a crowd around the court house. There were National Guard officers around. I just remember while we were down there *a*that evening—I know it was before the band concert at the Guard Mount—someone came along and told me the jury had reported and told me what the verdict was.

The soldiers putting on Guard Mount and the band playing for them broke up our demonstration. I don't know why the soldiers were putting on Guard Mount. The band played while they were putting on Guard Mount. I don't know what piece they were playing. I had heard them be*o*fore. I had been on Guard Mount before. I don't know any of the pieces. That music lasted thirty minutes or more. I think I stayed out there until I was late for supper.

Redirect examination:

I did not see any mountaineers coming along on mules, carrying long rifles. I didn't see any rifles except what the soldiers had. I did not see any of our citize*sn* from this county coming in and bearing any kind of arms, guns or rifles. I did not see any of them co*n*e in on ox carts.

Recross-examination:

I guess Ford cars have put the ox carts out of business, and freed the mules also.

[fol. 116] Redirect examination:

Guard mount by the militia is somewhat of a novelty to the average citizen. I suppose that was the only one they put on while here. In order to put on Guard Mount it is necessary to have music.

On said date, the 5th day of June, 1931, the State filed in said cause, in rebuttal of the foregoing affidavits, filed by defendants, the joint affidavit of T. B. Reynolds, W. M. Wellman and J. V. Pollards, which said affidavit is in words and figures as follows, to-wit:

IN CIRCUIT COURT OF JACKSON COUNTY

No-. 2042 and 2403

THE STATE OF ALABAMA

VS.

HAYWOOD PATTERSON et als.

AFFIDAVIT OF T. B. REYNOLDS, W. M. WELLMAN, AND J. V. POLLARDE

We, the undersigned, make oath in due form that we reside in the City of Huntsville, Alabama, and are superintendent, Secretary and Treasurer, and paymaster, respectively, and in the order in which our names are signed of The Margaret Mill of Huntsville, Alabama. We further certify that we personally know Victoria Price, a white girl who was in the employ of this Mill during 1929 and 1930. This is the same Victoria Price who alleges that she and Ruby Bates were raped by some negroes on a freight train in Jackson County, Alabama, some time in the early part of this year. We have this day examined the pay roll records in our office and find that Victoria Price was in our constant employ during the months of October, November, December, 1929 and January, February, March and April 1930. The records show that she worked each week during the above months. We further certify that she was — good worker

and her character around and in the Mill was good, except that she possibly had a fight or two. We further certify that from our knowledge of her and opportunity to observe her over a long period of time she was absolutely above having anything wrong to do with negro men.

The other girl, Ruby Bates who is said to have been raped at the same time and along with Victoria Price came to our Mill about six to eight months prior to the time they were said to have been raped, and she was quiet and reserved and bore a splendid character, as far as we know. We never heard one thing against her.

(Signed) T. B. Reynolds, (Signed) W. M. Wellman, (Signed) J. V. Pollards, Affiants.

[fol. 117] STATE OF ALABAMA,
Jackson County:

Sworn and subscribed to before me, this the 3rd day of June, 1931. (Signed) Sallie A. Martin, Notary Public.

[File endorsement omitted.]

On June 6, 1931, the State filed in said cause, a rebuttal of the foregoing affidavits filed by defendant, the affidavit of L. L. Maynor, which said affidavit is in words and figures as follows, to-wit:

AFFIDAVIT OF L. L. MAYNOR

IN CICUIT COURT OF JACKSON COUNTY

STATE OF ALABAMA

VS.

HAYWOOD PATTERSON et als.

Affidavit

THE STATE OF ALABAMA,
Jackson County:

L. L. Maynor makes oath in due form and according to law as follows:

My name is L. L. Maynor. I was born in Hollywood, Jackson County, Alabama, and am 39 years old. For the last 17 years, or thereabouts I have lived in Madison County, Alabama, and for about the last 8 years I have

lived in Huntsville. In August, 1928, I went to the home of Mrs. Emma Bates in Huntsville, Ala., to board and have been boarding in her home since that time. She is the mother of Ruby Bates who together with Victoria Price, whom I also know, was said to have been raped by some negroes in Jackson County some two or three months ago. During all this time that I was at Mr. Bates I was either hauling logs off the mountain or working with the Allied Engineer Company and would return to Mrs. Bates every evening. During this time Ruby Bates stayed at home and kept house for her mother, who was working at the Lincoln Cotton mills in Huntsville. I am absolutely certain that Ruby Bates did not leave home and go to Chattanooga, Tennessee any time during 1929 or 1930. Ruby Bates was a quiet, modest girl and much of the time while I was there she would go to church and Sunday School and I never heard any question of her character up until just a little while before this trouble, and that was after she had begun to associate with Victoria Price. There are dozens if not hundreds of people in Huntsville who know that Ruby Bates did not live in Chattanooga, Tennessee.

(Signed) L. L. Maynor, Affiant.

[fol. 118] Sworn and subxcribed to before me this the 6 day of June, 1931. (Signed) C. A. Wann, Clerk Circuit Court.

[File endorsement omitted.]

On said date, June 13, 1931, the State filed in said cause, in rebuttal of the affidavits filed by defendant, the affidavit of P. W. Campbell, which said affidavit is in words and figures as follows, to-wit:

IN CIRCUIT COURT OF JACKSON COUNTY

STATE OF ALABAMA

VS.

HAYWOOD PATTERSON, et als.

AFFIDAVIT OF P. W. CAMPBELL

P. W. Campbell, being duly sworn, deposes and states as follows:

I am a resident, citizen of Scottsboro, Jackson County, Alabama, and am at this time editor of the Jackson County

Sentinel, a newspaper published at Scottsboro. Some four weeks ago I went to Chattanooga, Tennessee in company with J. K. Thompson, County Solicitor of Jackson County, for the purpose of investigating some affidavits which had been made by some negroes in Chattanooga, concerning the conduct and character of Victoria Price and Ruby Bates, women who were said to have been raped by some negroes in Jackson County.

We went to the office of Chief Detective Hacket and he placed at our disposal two of his men who went with us to the part of Chattanooga where these negroes lived. After considerable effort we located some of them with the following results: We found Asberry Clay and his wife Savannah Clay and Solicitor Thompson read to them the affidavits which they were said to have made. They both said that there was certain statements in the affidavits which they did not make and which they did not know where in there. Especially with reference to these women living with Negro men. They denied that they had ever seen them conducting themselves in such way. They also stated that they told those who procured the affidavits or statements from them that they were not certain as to whether the women they were talking about were the same women as shown them in pictures taken from one of the Chattanooga papers. They further stated that they did not know the women they had in mind as Victoria Price and Ruby Bates. Asberry Clay stated that he received his dinner and seventy-five cents as payment for the affidavit which [fol. 119] he made. We then found Tom Landers whose affidavit we read to him and he stated that at the time these girls were said to have been in Chattanooga, to-wit, the latter part of '29 and the early part of 1930, he was a convict in the State Penitentiary of Tennessee. He also stated that he told Mr. Chamlee, the Attorney responsible for the affidavit, that he could not identify the women shown him in the newspaper clipping. We then went to a white woman by the name of Mrs. Wooten, who lived on the same street where these negroes said these white girls had been and whom they said the girls had lived with and Mrs. Wooten emphatically stated that no such girls had ever lived with her.

We then went to the City Hall to Police Headquarters where we talked with Mrs. Croft, Police Matron, who said

that she had been constantly in the service of the City for the last twenty years or more and was quite certain that no such girls as these two had been up before her charged with any offense and that if they had she would have had some recollection of it. On the other hand the Police Records in Chattanooga do show that two of the Chattanooga negroes, to-wit, Haywood Patterson and Roy and Andy Wright have had police records and the police authorities stated that they were very bad negroes and had given them quite a great deal of trouble. Dated this the 15th day of June, 1931.

(Signed) W. P. Campbell, Affiant.

Sworn and subscribed to before me this 13th day of June, 1931.

(Signed) C. A. Wann, Clerk Circuit Court.

[File endorsement omitted.]

The final hearing and disposition of said motion for new trial, as last amended, was continued by the court until June 22, 1931, at which time defendants separately and severally offered in evidence, in addition to the foregoing oral evidence, in support of their said motion, the following separate and several affidavits:

Joint affidavit of Haywood Patterson, Clarence Norris, Charley Weems, Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery and Eugene Williams; affidavits of Roberta Fern, Bertha Lowe, Willie Crutcher, Allen Crutcher; joint affidavit of Henry Cokley, Susie Cokley and Georgia Haley, affidavit of Percy Ricks, affidavit of Stephen R. Roddy. Said affidavits were admitted in evidence, and are heretofore fully set out in this bill of exceptions.

[fol. 120] The State offered in evidence, in addition to the foregoing oral evidence offered in its behalf, in rebuttal of oral evidence and affidavits offered by defendants, the following separate and several affidavits:

Joint affidavit of T. B. Reynolds, W. M. Wellman, and J. V. Pollarde; affidavit of L. L. Maynor and affidavit of P. W. Campbell. Said affidavits were admitted in evidence, and are heretofore fully set out in this bill of exceptions.

The foregoing is all the evidence offered on the hearing of said motion to set aside the verdict and judgment founded thereon and to grand defendants a new trial.

ORDER OVERRULING MOTION FOR NEW TRIAL

On June 22nd, after hearing and considering said motion, the Court overruled the same and refused to set aside the verdict of the jury and the judgment founded thereon and to grant the defendants a new trial, and to this action of the court defendants then and there separately and severally reserved an exception.

The foregoing was presented to me, the Hon. A. E. Hawkins, Judge of the Ninth Judicial Circuit of Alabama, and Judge presiding upon the trial of said cause, by the defendants in said cause, as a bill of exceptions of the trial and proceedings in said cause, on this the 17th day of September, 1931.

A. E. Hawkins, Judge.

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing having been presented to me by the defendants in said cause, separately and severally, on the 17th day of September, 1931 within the time prescribed by law, as a true and correct bill of exceptions of the trial and proceedings in said cause, the same is accordingly signed and allowed of record as such by me, the Hon. A. E. Hawkins, Judge of the Ninth Judicial Circuit of Alabama, the Judge presiding upon the trial of said cause, on this the 10th day of Nov. 1931.

A. E. Hawkins, Judge.

[File endorsement omitted.]

[fol. 121] IN CIRCUIT COURT OF JACKSON COUNTY

CERTIFICATE OF APPEAL

I, C. A. Wann, Clerk Circuit Court in and for said County and State, hereby certify that the foregoing pages from 1 to 121 inclusive contain a full, true, correct and complete tran-

script of the record and proceedings of the said Circuit Court in a certain cause therein pending wherein the State of Alabama was plaintiff and Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery and Eugene Williams were defendants.

I further certify that the said defendants did obtain an appeal to the Court of Appeals of Alabama, all of which I hereby certify to the said Court of Appeals of Alabama.

Witness my hand and Seal of Office this the 24th day of December, 1931.

(Signed) C. A. Wann, Clerk Circuit Court.

[fol. 122] IN SUPREME COURT OF ALABAMA

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

vs.

STATE OF ALABAMA

ORDER GRANTING WRIT OF CERTIORARI—Jan. 14, 1932

It is ordered that a Writ of Certiorari issue to the Clerk of the Circuit Court of Jackson County, Alabama, commanding him to make and certify to this Court by Thursday of the next call of the 8th Division, January 21st, 1932, a true and correct copy of (1) the arraignment of the defendants (2) the drawing of the venire, both regular and special (3) the order of the Court directing that a copy of the venire and a copy of the indictment be served on the defendants in the case of Eugene Williams, Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery vs. The State of Alabama, pending in said Court.

[fol. 123] IN SUPREME COURT OF ALABAMA

WRIT OF CERTIORARI—Filed Jan. 16, 1932

THE STATE OF ALABAMA,
Judicial Department:

THE SUPREME COURT OF ALABAMA, OCTOBER TERM, 1931-1932

To the Clerk of the Circuit Court of Jackson County, Greeting:

Whereas, In a case now pending in our Supreme Court, by appeal from a judgment of said Circuit Court between

Eugene Williams, Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery, Appellants, and State of Alabama, Appellee, the said appellee has to the Supreme Court suggested, that the transcript of the record of said Circuit Court, filed in same Supreme Court on December 28th, 1931, is incomplete in this: the same fails to set forth a full and complete copy of (1) the arraignment of the defendants (2) the drawing of the venire, both regular and special (3) the order of the Court directing that a copy of the venire and a copy of the indictment be served on the defendants.

We therefore command you to make diligent search of the records and proceedings in your office in the above cause, and certify together with this writ, a full and complete transcript of said above named records and proceedings to our said Supreme Court, by Thursday, January 21, 1932, at Montgomery.

Witness Robert F. Ligon, Clerk of the Supreme Court of Alabama, at the Capitol, this the 14th day of January, 1932.

Robert F. Ligon, Clerk of the Supreme Court of Alabama.

[File endorsement omitted.]

[fol. 124] IN SUPREME COURT OF ALABAMA

RETURN TO WRIT OF CERTIORARI

Order Fixing Date for Special Session Grand Jury, Spring, 1931

STATE OF ALABAMA,
Jackson County:

It appearing to the Court that the Grand Jury organized for this session of the Court was recessed and adjourned on the 13th day of March, 1931, subject to be recalled at any time by the Court; and, it further appears that since the said adjournment of the said Grand Jury a necessity has arisen for the reconvening of said Grand Jury.

It is, therefore, ordered that the said Grand Jury of Jackson County, which is now at recess, and which was organized for this (Spring) session of this Court to be reconvened at the court house in Scottsboro on Monday the 30th day of

March, 1931, to consider such matters as may be submitted to it by the Court, or that deserve their consideration.

The Clerk will issue an order to the Sheriff of this County to notify the members of said Grand Jury of this order and summons them to appear on said 30th day of March, 1931 at 10 o'clock A. M.

This the 26th day of March, 1931.

A. E. Hawkins, Judge 9th Circuit.

Clerk's Order to Sheriff to Summons Grand Jury, at Recess

STATE OF ALABAMA,
Jackson County:

To the Sheriff of Jackson County, Alabama, Greeting:

A- order issued by Hon. A. E. Hawkins, Judge of the Ninth Judicial Circuit of Alabama to the Clerk of the Circuit Court of Jackson County, Alabama, that the Grand Jury of the Spring Term, 1931, that recessed on March 13th, 1931, subject to recall and it appearing to the Court that since adjournment or recess a necessity has arisen for the reconvening of said Grand Jury, and upon said order, you are hereby commanded to notify or summon said Grand Jury to appear at the Court House at Scottsboro, Alabama, on Monday the 30th day of March, 1931 at 10 o'clock A. M., to consider such matters as may be submitted to it by the Court, or anything that deserves their consideration.

The above order being made by Hon. A. E. Hawkins, Judge of the Ninth Judicial Circuit of Alabama, March 26th, 1931.

The following names are the Grand Jury for the Spring Term, 1931, recessed on March 13th, 1931, subject to re-call:

Chas. Morgan, Jas. H. Rogers, J. H. Cox, G. W. Minton, [fol. 125] Geo. B. Phillips, Wm. Rash, J. P. Brown, Arthur Gamble, C. A. Mason, Noah Manning, J. M. Tidwell, A. E. Chambliss, John G. Hicks, Robt. E. Hall, Raymond Hodges, C. D. Paul, J. N. Ragsdale and Walter Berry.

And have you then and there your returns how you have executed this writ.

Witness my hand, this the 26th day of March, 1931.

C. A. Wann, Clerk Circuit Court.

I have executed the within by summoninh all the within named Grand Jurymen this March 30th, 1931.

M. L. Wann, Sheriff.

Order Fixing Date for Special Session of Circuit Court

STATE OF ALABAMA,
Jackson County:

In the opinion of A. E. Hawkins, Judge of the Ninth Judicial Circuit, that it is proper and necessary that a Special Session of the Circuit Court of Jackson County, Alabama, should be held in said County, beginning on Monday, April 6th, 1931, and to continue as long as necessary to dispose of cases set for trial at said Special Session.

It is therefore hereby ordered that a Special Session of the Circuit Court of Jackson County, Alabama, be held at the Courthouse at Scottsboro, beginning on Monday 6th day of April, 1931, and to continue as long as necessary to dispose of the cases that will be set for trial at said Special Session.

It is further ordered that seventy-five regular jurors be this day drawn for said Special Session of said Court and that the Sheriff of Jackson County, is hereby order- to summon all of said seventy-five regular jurors to appear at said Special Session of this Court on Monday the 6th day of April, 1931.

It is further ordered that all judgments by default or judgments in non-jury cases may be entered during said Special Session and that pleas of guilty may be taken in criminal cases and Equity cases may also be submitted for orders and decrees at said Special Session.

This the 26th day of March, 1931.

A. E. Hawkins, Judge 9th Circuit.

[fol. 126] SPRING TERM, SPECIAL SESSION, MARCH 31ST, 1931

No-. 2402 & 2404

THE STATE OF ALABAMA

vs.

HAYWOOD PATTERSON et als.

Arraignment and Order for Trials

The Defendants being in open Court in person and represented by counsel, and being arraigned plead not guilty.

This case is set for trial on Monday April 6th, 1931, being Monday of the first week of said Special Session of the Spring Term, 1931.

It is ordered that the venire from which to select the jury to try this case consists of 100 jurors, and it appearing to the Court that 75 Regular Jurors having been regular-drawn for said Special Session of this Court, it is ordered that 25 Special Jurors be now drawn, and the jury box of Jackson County, being brought into Court and being well shaken, the Court in the presence of the defendants and their counsel, publicly drew therefrom the names of said 25 Special Jurors ordered.

The Clerk will immediately make a list of all jurors, both regular and Special, drawn for the trial of this case and issue an order to the Sheriff of this County to summon all of said jurors, both regular and special, to appear in Court on the day this case is set for trial to serve as jurors.

The Sheriff of this County will forthwith serve on the defendants a copy of the list of said jurors so drawn, both regular and special, the said list showing which are regular and which are special jurors, together with a copy of the indictment against the defendants.

A. E. Hawkins, Judge.

I have executed the within by handing a copy of the original indictment, a copy of the Regular Venire and a copy of the Special Venire to each of the within named defendants, to-wit: Haywood Patterson, Eugene Williams, Charlie Weems, Roy Wright, Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery and Clarence Norris.

This the 4 day of April, 1931.

T. F. Griffin, Sheriff Etowah County.

[fol. 127] Certificate to Certiorari and Appeal of Eugene Williams, Ozie Powell, Willie Roberson, Andy Wright, and Olen Montgomery

THE STATE OF ALABAMA,
Jackson County:

I, C. A. Wann, Clerk Circuit Court in and for said County and State hereby certify that the foregoing pages from 1 to 5 inclusive, contain a full, true and correct record and proceedings in the case of the State vs. Eugene Williams, Ozie

Powell, Willie Roberson, Andy Wright and Olen Montgomery demanded by Certiorari by the Clerk of the Supreme Court on January 14th, 1932, and the same belongs to the transcript in the above cause filed with the Clerk of the Supreme Court on December — 1931; to all of which I hereby certify to the said Court of Appeals as being inadvertently left out of said transcript in the case wherein the State of Alabama was plaintiff and Eugene Williams, Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery were defendants and the same being appealed to the Supreme Court of Alabama.

Witness my hand and seal of office this the 18th day of January, 1932, at the Courthouse in Scottsboro, Alabama.

C. A. Wann, Clerk Circuit Court.

[fol. 128] IN SUPREME COURT OF ALABAMA

The Court met pursuant to adjournment.
Present: All the Justices.

8th Div., 322

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

vs.

STATE OF ALABAMA

Jackson Circuit Court

ARGUMENT AND SUBMISSION—Jan. 21, 1932

Come the parties by attorneys and argue and submit this cause for decision.

[fol. 129] IN SUPREME COURT OF ALABAMA, OCTOBER TERM, 1931-32

8 Div., 322

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

vs.

THE STATE OF ALABAMA

Appeal from Jackson Circuit Court

JUDGMENT

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted, and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court, in so far as Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery are concerned, there is no error. It is therefore considered that the judgment of the Circuit Court as to Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery be in all things affirmed. The time fixed by the judgment and sentence of the Circuit Court for the execution of the prisoners, Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery, having expired pending this appeal, it is ordered that the Sheriff of Jackson County, Alabama, deliver the defendants, Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery, to the Warden of Kilby prison at Montgomery, Alabama, and that said Warden of said Kilby prison at Montgomery, Alabama, execute the judgment and sentence of the law on Friday, the 13th day of May, 1932, before the hour of Sunrise on said day in said prison, by causing a current of electricity of sufficient intensity to cause death, to pass through the bodies of Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery until they are dead, and in so doing he will follow the rules prescribed by the statutes.

It is also considered that the Appellants, Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery, pay [fol. 130] the costs of appeal of this Court and of the Circuit Court.

It is also considered that in the record and proceedings of the Circuit Court as to Eugene Williams, there is manifest error. It is therefore considered that the judgment of the Circuit Court as to Eugene Williams be reversed and annulled, and the cause remanded to said Court for further proceedings therein, with directions to the Circuit Court to ascertain, by proper evidence, the age of the defendant Eugene Williams, before again putting this defendant on trial, and if it be ascertained that he is under sixteen years of age, that he be transferred to the Juvenile Court of Jackson County, to be there dealt with as a Juvenile delinquent, pursuant to the statute in such cases made and provided.

It is further ordered that the prisoner, Eugene Williams, be detained in custody until discharged by due course of law.

[fol. 131] IN SUPREME COURT OF ALABAMA, OCTOBER TERM, 1931-32

8 Div., 322

OZIE POWELL et al.

v.

STATE OF ALABAMA

Appeal from Jackson Circuit Court

OPINION—March 24, 1932

KNIGHT, J.:

Ozie Powell, William Roberson, Andy Wright, Olen Montgomery and Eugene Williams were jointly indicted, along with three others, by a grand jury of Jackson County, charging them, and each of them, with the offense of rape. The victim of their alleged offense was Victoria Price, a young white woman who lived at or near the city of Huntsville, in this State, and who, at the time of the commission of the alleged offense, was riding upon a freight train between Stevenson and Paint Rock, in Jackson County.

[fol. 132] The trial of the appellants was had in the Circuit Court of Jackson County, on April 8, 1931, resulting in the conviction of the defendants of the offense of rape, as

charged in the indictment, and the imposition of the death penalty upon each. And on April 9, 1931, each of the defendants was sentenced to death in accordance with the verdict of the jury. These sentences were, upon motion of the defendants, suspended pending this appeal.

With respect to the appellant Eugene Williams, in addition to the matters presented for review and which are brought forward by each of the defendants, a further question is raised by this appellant growing out of, and based upon, the contention made by him that he was, at the time of his trial, under sixteen years of age, and that the Circuit Court of Jackson County therefore had no jurisdiction over him, or over his case. We will first consider the record with reference to any errors that may there appear, and which affect all the defendants, leaving the question, that is presented upon age of appellant Williams, to be later discussed and considered in this opinion.

The State's theory of the case is, that the woman Victoria Price, and her companion Ruby Bates, had been on a trip to Chattanooga for the purpose of seeking employment; that on March 25, 1931, while these two women were returning to Huntsville, riding in a gondola car, attached to a freight train, and between Stevenson and Paint Rock, the defendants and other associates, all negroes, climbed over and into this gondola car, engaged in a fight with seven white boys, who were riding in this gondola car with the [fol. 133] two white women, and finally, after beating up and overpowering these white boys, either threw them bodily out of the car, or forced them to leave it; that the defendants then proceeded to rape both Victoria Price and Ruby Bates. Some five or six of the negroes, by force and threats had intercourse with the said Victoria Price, while others, at the same time, ravished Ruby Bates. The testimony introduced by the State tended to support, and if believed by the jury, did support the above facts, and the State's testimony further tended to show, and if believed by the jury did show, that after the defendants had gotten into the gondola car, and after they had expelled the white boys therefrom, one of the defendants seized the said Victoria Price, and proceeded to rape her, and while he was doing this, one of the defendants with knife open in hand and drawn, stood over the prostrate form of Victoria Price threatening to kill her if she did not submit to the outrage

then being perpetrated upon her, while some one of them held her by the legs. That six of the assailants on that occasion, by force, had intercourse with Victoria Price, and a number of them with Ruby Bates; and that all of the defendants took part in the raping of the two girls. The testimony for the State further tended to show that while the girls were being ravished, the others of the defendants kept the white boys out of the car, and, to quote the language of Victoria Price, while on the stand, "telling them (the white boys) that they would kill them, that it was their car and we were their women from then on." The evidence for the State tended to show, and if believed by the jury did show, that each of the defendants, either himself ravished the girl Victoria Price, or that each was present aiding and abeting those who did actually, and forcibly, have inter- [fol. 134] course with her. If the two girls, Victoria Price and Ruby Bates, are to be believed, the defendants were guilty of a most foul and revolting crime, the atrocity of which was only equaled by the boldness with which it was perpetrated.

The defendants each denied on the stand that they, in any way molested the girls, each in most positive terms denied that they had ravished her. One or more of them admitted that there was a fight between the white boys and the defendants, and that one of them had a pistol, and at least one of them had a knife.

We have deemed it best not to rehearse the testimony in detail in this case, as in ma-y respects it is too revolting, shocking, to admit of being here repeated.

In this connection, however, we think it proper, now and here, to call attention to the fact that many of the utterances in the printed brief, and oral arguments addressed to this Court of counsel for appellants, are not supported by the record submitted on this appeal in this case.

The indictment in this case is in the following language, omitting the caption:

"The grand jury of said county charge that before the finding of this indictment Haywood Patterson, Eugene Williams, Charlie Weems, Roy Wright, alias Ray Wright, Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery and Clarence Norris, alias Clarence Morris, whose names to the grand jury are otherwise unknown than as stated

forcibly ravished Victoria Price a woman, against the peace and dignity of the state of Alabama."

The sufficiency of this indictment was not tested by demurrer or otherwise, at any time before or during the trial. On motion for new trial, after conviction and sentence, the appellants for the first time question the sufficiency of the indictment. It will be noted that the indictment pursues the form prescribed in the Code, and this Court has uniformly [fol. 135] held that indictments following the Code forms are sufficient. In the case of Jinright v. State, 220 Ala. 268, 125 So. 606, this Court was again called upon to consider, and to pass upon the sufficiency of an indictment prescribed by the Code, and it was there said:

"The power of the legislature to prescribe the form of indictment is part of its general legislative power. Broadly speaking, it is curtailed only by constitutional limitations, such as the right of the accused to be informed of the nature and cause of the accusation, and to have a copy of same.—Bill of Rights, section 6.

"The indictment must reasonably disclose an offense known to the law in force during the period covered thereby, and reasonably inform the accused of the accusation he is called upon to answer. Subject to these qualifications, statutory forms have from our early jurisprudence been held sufficient, although facts essential to a conviction may be omitted.—Noles v. State, 24 Ala. 672, 692; Schwartz v. State, 37 Ala. 460, 466; Doss v. State, 220 Ala. 30, 123 So. 231."

The indictment in the present case is not subject to the criticism that it is vague, indefinite and uncertain. The nature and cause of the accusation are definitely stated, and the name of the woman, the subject of the crime, is set forth in the indictment. The form here used was approved by this Court in the case of Leoni v. State, 44 Ala. 110. This decision was rendered by this Court in 1870, and its correctness has not since been questioned, nor its soundness doubted. There is no merit in this contention of the appellants.—Schwartz v. State, supra; Smith vs. State, 63 Ala. 55; Whitehead v. State, 16 Ala. App. 427, 78 So. 467; Leonard v. State, 96 Ala. 108, 11 So. 307; Walker v. State, 96 Ala. 53, 11 So. 401; Long v. State, 97 Ala. 41, 12 So. 183;

Reeves v. State, 95 Ala. 31, 11 So. 158; Huffman v. State, 89 Ala. 38, 8 So. 28; Bailey v. State, 99 Ala. 145, 13 So. 566; Coleman v. State, 150 Ala. 64, 43 So. 715; Jinright v. State, 220 Ala. 268, 125 So. 606; Doss v. State, supra; Malloy v. State, 209 Ala. 219, 96 So. 57.

[fol. 136] It therefore follows that no rights of the appellants under the State or Federal Constitutions were ignored or invaded by reason of any supposed vagueness, indefiniteness or uncertainty of the indictment. The terms of the indictment fully and sufficiently informed the defendants of the nature and cause of the accusation against them, and, in this regard, it fully complied with all requirements of the Federal and State Constitutions.

The indictment was returned into open court on March 31, 1931, duly authenticated by the signature of the foreman of the grand jury. This return is in all respects regular, and in accordance with law.

On March 31, 1931, after the return and filing of the indictment, the defendants, Haywood Patterson, Eugene Williams, Charlie Weems, Roy Wright, alias Ray Wright, Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery, and Clarence Norris, alias Clarence Morris, whose names are otherwise unknown than stated, attended by their counsel, came personally into open court, and were duly and legally arraigned, and pleaded "not guilty," and which plea was duly entered of record, and thereupon in open court, in the presence of the defendants, and their attorneys, the court set the trial of the cause for Monday, the 6th day of April, 1931, and by due and proper order, ordered and directed that one hundred jurors be allowed as the venire from which to select the jurors for the trial of the cause, the said venire to consist of the seventy-five regular jurors drawn to serve as jurors for the week during which the cause was set for trial, and twenty-five jurors to be drawn from the jury box of Jackson County, and thereupon the said jury box was brought into court, and after being well shaken, the court in the presence of the defendants and their counsel, and according to law publicly drew therefrom the names of twenty-five special jurors, in compliance with the [fol. 137] order of said court to complete the venire for the trial of said cause. It also appears that the Court, by proper order, directed that the sheriff summons all of said jurors, regular and special, to appear in court on the day

the case was set for trial, and also to serve forthwith on defendants a list of all jurors so drawn, regular and special, together with a copy of the indictment in the case.

Thereafter, on April 4, 1931, the sheriff of Jackson County made his return to the court showing that he had fully and completely complied with said above order of the court. It thus appears that every step in the proceedings in said cause was regular, and according to law, as respects the indictment, the return thereof into court, the arraignment of the defendants thereon, the setting of a day by the court for the trial of the cause, the order for a special venire, the drawing of the same, and the service of a list of the jurors upon the defendants, together with a copy of the indictment.

Section 5570 of the Code provides "When two or more defendants are jointly indicted, they may be tried, either jointly or separately, as either may elect."

At common law, it was within the sound discretion of the court, whether the trial would be joint or several. Section 5570 of the Code confers on the defendants the unqualified right to elect and demand separate trials. In the case of Whitehead v. State, 206 Ala. 288, 90 So. 351, it is held that where two or more defendants are jointly indicted, and they do not demand a separate trial, then whether the trial shall be separate or joint rests in the sound discretion of the court. This has been the uniform holding of this Court through the years, and in ordering a severance in the case, the court but exercised a discretion confided to it by the common law, and not abrogated by statute.

[fol. 138] The complaint of appellants at this action of the court can avail them nothing. And besides, no objection was made thereto and no exception was reserved. Jackson v. State, 104 Ala. 1; Wright v. State, 108 Ala. 60; Wilkins v. State, 112 Ala. 55, 21 So. 56; Charley v. State, 204 Ala. 687, 87 So. 177.

This brings us down to a consideration of appellants' motion for a change of venue in the cause, which was made by the appellants, and overruled by the court upon consideration of the motion, and the evidence offered in support thereof, and counter proof offered by the State.

In their petition or motion, the appellants represented to the Court "that they nor either of them can have a fair and impartial trial in this county; that the newspapers published in this county have so persistently tried the cause

asserting the guilt of defendants in such terms, as to influence the public mind to the extent that the sheriff of said county had the Governor of this State to call out the National Guards to protect the lives of your petitioners. That after the arrival of said troops, hundreds of people gathered about the jail, where they were confined, apparently in threatening manner. That from the inflammatory statements contained in said newspapers, which are circulated all over this county, the mind of the public is such that your petitioners could not have a fair and impartial trial. A copy of which publications are hereto attached marked Exhibit 'A' and 'B' and made a part of this petition. Wherefore, petitioners pray your honor to make an order removing this trial to some other county and defendants make oath that all the foregoing statements are true." This motion is sworn to by each of the nine defendants.

[fol. 139] It will readily appear from the motion or petition that the main or chief ground of apprehension that defendants could not secure a fair and impartial trial was due to newspaper accounts of the affair, published in the Jackson County Sentinel, a newspaper published at Scottsboro, the county site of Jackson County. That the publications of the accounts of the affair inflamed the public mind to the extent that the sheriff had the Governor of Alabama to call out the National Guard to protect the defendants, and that upon the arrival of the troops "hundreds of people gathered about the jail, where they were confined, apparently in a threatening manner." It will be observed, however, that the petition does not charge that any actual violence, or threatened violence was offered the prisoners, or any one of them. Nor does it any where appear that the "hundreds of people who gathered about the jail" were armed, or disorderly in any wise, or to any extent. That the crime of which the defendants were charged was, one calculated to arouse the people of any community, county, or state, cannot be denied; that it was news that newspapers, the world over, would print and convey to their readers must also be borne in mind. Newspapers, observing due proprieties, have the right to keep the public informed of the happenings throughout the country. Such is the sphere and scope of their enterprise. They exist for the purpose, and sole purpose of conveying to the public the happenings of the day, whether it be of crime com-

mitted, or of events in the social world, or of matters of commerce or business. So long as they exist, we may expect them to carry accounts of crime committed, not only within the radius of their circulation, but elsewhere. Accounts of crime committed on the other side of the Atlantic often appear in the press on this side within a few hours after it has happened,—the extent of the accounts varying with the atrocity of the crime.

[fol. 140] In the case of Godau v. State, 179 Ala. 27, 60 So. 908, this Court had occasion, on consideration of the application made by the defendant in the lower court for change of venue, based in part on newspaper publications, to give expression to some principles of law here applicable, and it was there said: "So long as we have newspapers we may expect to have through them the report of crimes, and it is not to be unexpected that, when a homicide is committed and discovered under circumstances like the present—even if the defendant's account of the entire matter is the truth—newspapers of the community, answering the public interest, will furnish the defendant some material upon which to base an application similar to the one under discussion." But newspaper accounts, of themselves, cannot be made the sole basis for a change of venue. It must be made to reasonably appear to the judicial mind that these accounts have, by their circulation, so moulded and fixed the public opinion as to make it appear that the cause should be removed to some other locality not so affected for trial.

In the case of McClain v. State, 182 Ala. 67, 62 So. 241, it appears from the original record that Jacob Lutes and his wife, Marcella, were murdered in their home on the 6th or 7th of November, 1911. The murder was committed with a hatchet, and was most brutal and bloody in the manner and circumstances of its execution, and was followed by robbery of the murdered couple of a considerable sum of money. This murder was followed by great public excitement and indignation, and extraordinary activity by officers and citizens looking to the prompt discovery and punishment of the perpetrators of the crime. Hundreds of people from St. Clair and Etowah counties hurried to the scene. [fol. 141] The discussion of the crime was constant and general throughout both counties both among the people and in the newspapers. About two thousand people were in Ashville during the preliminary trial, and heard or were

informed of the testimony, and of the alleged confession of one of the defendants; and a full report of the evidence, on the preliminary trial, was published in the local and in the Gadsden daily papers, with sensational headlines and comments, and with repeated statements that defendants were undoubtedly guilty, with one statement that the defendant was regarded as the ringleader. Numerous exhibits of the newspaper reports were attached to, and made a part of, the motion for a change of venue from St. Clair county, the county in which the crime was committed. These newspaper reports were equally as sensational and damaging as are the reports attached to the petition in the instant case, but like the present case they disclosed no actual violence offered defendants, and no disposition was exhibited to take the law into their own hands by the citizens. Commenting upon these newspaper reports, Mr. Justice Somerville remarks:

"It may be fairly asserted that these conditions accompany or follow the commission of all very brutal crimes, also, that newspaper reports of such crimes, accompanied by sensational comments and denunciations of the accused, are likely to inflame the sentiments of certain classes of the people and to engender in their minds a passive conviction, more or less permanent, of the guilt of the accused.

"We are not prepared to concede, however, that the sensational language of a newspaper reporter or special correspondent used in 'writing up' such cases as this may be safely taken as a reflection of general public sentiment; nor that it may be lightly assumed that such statements as those here shown are capable of permanently molding and fixing the opinions of the more intelligent classes of the people to the extinction of their sense of fair play, and the suppression of their sober second thought."

[fol. 142] Most people, of fair judgment, are honest in their convictions, and do not arrive at convictions, where life and death are at stake, until after due consideration of the facts of the case. And we may also add, that under the laws of Alabama, only such classes are permitted in the jury boxes of the State.

In the McClain case, supra, the court following the directions of the Act of August 26, 1909, now section 5579, Code, after full consideration of the petition for change of

venue, and the proof submitted in support of it, upheld the ruling of the Circuit Court of St. Clair County, overruling the petition and denying to the defendant a change of venue. In that case, this Court, in affirming the case, used this presently pertinent language:

"Upon the principles and reasoning stated in the recent case of Godau v. State, 179 Ala. 27, 60 So. 908, not unlike this in its material aspects, we are constrained to hold that the trial court did not err in overruling the application. We have considered its merits de novo, as required by the amendatory Act of August 26, 1909 (Acts, Sp. Sess. 909, p. 212), and we are not reasonably satisfied that it should have been granted."

It is insisted that the publications made exhibits to the application inflamed the public mind to the extent that the sheriff of said county had the Governor to call out the National Guard to protect the lives of the petitioners. The testimony offered upon the hearing of the petition does not support the statement as to the inflamed condition of the public mind, or that it was necessary to assemble the National Guard to protect the prisoners from threatened violence. In this connection, 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 sheriff re- [fol. 143] quested the presence of the guard, on his own initiative, out of abundance of precaution, and we may assume, realizing the gravity of the charges against the prisoners. Up to the time the call was made, no violence had been offered any of the prisoners, and, so far as the testimony discloses, no violence was threatened them. There was, as the testimony shows, quite a large crowd in Scottsboro during the trial, made up not wholly of Jackson County citizens, but of citizens of other counties. We can well understand that such a happening, 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. But that does not mean that the gathering was for the purpose of reaking summary vengeance upon the defendants. It will be noted that in the application for change of venue, it is stated

"that after the arrival of said troops, hundreds of people gathered about the jail, where they (defendants) were confined, apparently in a threatening manner." There is absent from this record a single statement of fact, which tends to show in the remotest degree any offer of violence to the defendants, and, as for that, any threatened violence.

In support of the application for change of venue, the defendants called as witnesses and examined, ore tenus, the sheriff and Major Starnes, the commanding officer of the unit of National Guard ordered to Scottsboro by the Governor. The sheriff's testimony throws much light upon the situation prevailing at Scottsboro during the period of this trial, and the cause or causes leading up to, and culminating in his calling upon the Governor for the dispatch of a unit of the National Guard to that place.

[fol. 144] The sheriff, while testifying that he had asked for the National Guard to protect the defendants, also testified, "It was more on the grounds of the charge that I acted in having the guards called than it was on any sentiment I heard on the outside. I have not heard anything as intimated from the newspapers in question that has aroused any feeling of any kind among a posse. It is my idea, as sheriff of this county, that the sentiment is not any higher here than in any adjoining counties. I do not find any more sentiment in this county than naturally arises on the charge. I think the defendants could have as fair trial here as they could in any other county adjoining. From association among the population of this county, I think the defendants could have a fair and impartial trial in this case in Jackson County. That is my judgment. I have heard no threats whatever in the way of the population taking charge of the trial. It is the sentiment of the county among the citizens that we have a fair and impartial trial."

The defendants in support of their application for change of venue also called, had sworn, and examined Major Starnes, who was in charge of the units of the National Guard on duty at Scottsboro during, and before, the trial of the defendants. Major Starnes testified that he was the commanding officer of the National Guard at Scottsboro, and that he had made three trips to that place. With reference to the feeling prevailing at Scottsboro at the time these defendants were brought up for trial, we quote, in

part, the testimony given by Major Starnes to the court, on the hearing of the defendants' application for a change of venue:

[fol. 145] "I first came here, of course, under orders from the Governor, and I have been here under his orders ever since. This is the third trip I have made here from Gadsden. In my trips over to Scottsboro in Jackson County and my association with the citizens in this county and other counties, *I have not heard any threats made against any of these defendants.* From my knowledge of the situation gained from these trips over here, I think these defendants *can obtain here in this county at this time a fair and impartial trial and unbiased verdict. I have seen absolutely no demonstration or attempted demonstration toward any of these defendants.* I have seen a good deal of curiosity but *no hostile demonstration.* In my judgment the crowd here was here out of curiosity, and not as a hostile demonstration toward these defendants. (Italics supplied.)

The accounts published in newspapers, and which were introduced in evidence, while condemning in strong terms the crime, alleged to have been committed against two defenseless white girls, did not advocate violence against the defendants, but rather appealed to the citizenship of Jackson County for a fair trial for the defendants, and for an opportunity for the facts of the case to be tried by a jury. The character of the crime was such as to arouse the indignation of the people, not only in Jackson and the adjoining counties, but every where, where womanhood is revered, and the sanctity of their persons is respected. That many should have been attracted to Scottsboro during the days covered by the trial, and the preliminaries incident thereto is no small wonder, considering the character of the crime charged against the defendants. The alleged victims were not citizens of Jackson County, and it is more than possible that they were not known to a citizen of that county, but they were, if the testimony is to be believed, two young white women, unknown, and entirely defenseless. No matter whether their sins were as scarlet, it neither gave justification nor excuse to any man to lay a violent hand upon [fol. 146] them, or to force them to submit, against their will, to the violation of their persons. The record of facts

in this case, notwithstanding the atrocity of the crime charged, does not disclose a single act done by the populace to show a disposition to take the law into its own hands. If the record truly gives the facts in the case, and we have no right to doubt it—the defendants at no time were in danger of mob violence, and it wholly fails to show that the court, jurors or officers were inflamed against the defendants. To the contrary, considering the nature of the crime and its revolting features, the people seem to have conducted themselves with a commendable spirit and a desire to let the law take its due course.

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. In the case of Malloy v. State, 209 Ala. 219, 96 So. 57, this Court, in an opinion written by Justice Miller, said:

"When the defendant makes application for a change of venue, the burden rests upon him to show 'to the reasonable satisfaction of the court that an impartial trial and an unbiased verdict cannot be reasonably expected' in the county where the defendant was found.—Seams v. State, 84 Ala. 410, 4 So. 521."

The defendants have vigorously pressed upon our attention the case of Thompson v. State, 117 Ala. 67, as an authority not only justifying, but requiring, that this Court should reverse the lower court in refusing the defendants' application for a new trial. A careful reading of the facts in the Thompson case, supra, will disclose that this insistence is not well taken.

[fol. 147] In the Thompson case, supra—which was a case in which the offense charged was rape—it was made to appear to the court by "affidavits and other evidence" that the public were so greatly aroused against the defendant that "it required the promptest and most vigorous action of the executive officers of the State, from the governor down, and including the military, to protect the defendant from mob violence and summary execution," and that the feeling continued down to and through the trial. No such state of facts are shown in this case, and no such disposition on the part of the public was exhibited against these defendants at Scottsboro.

Much has been said in brief and oral argument by counsel for appellants about the case of Moore, et al. vs. Dempsey, Keeper of the Ark. State Penitentiary, 261 U. S. 86, in which the opinion was written by Justice Holmes, and in which Justices McReynolds and Sutherland dissented.

It requires no close scrutiny to see, and no argument to demonstrate, and there is no parallel between the facts of that case and the case now under consideration. By no stretch of the imagination can it be said that the case under consideration resembles, in the remotest degree, in any of its salient facts, the facts made the basis for habeas corpus, in the Moore case, supra.

The case of Downer v. Dunaway, (No. 6286) 53 Fed. Rep. (2d) p. 586, is cited in support of appellants' contention that they should have been granted a change of venue. We have carefully read the report of this case. The facts superinducing the majority opinion written by Judge Bryan in that case are so unlike the facts in the instant case, and the circumstances attending that trial so differ- [fol. 148] ent in all essential features, that it is not an authority in point. Anyone reading the facts in the two cases would see, and comprehend, that the cases are wholly dissimilar, and in no true sense can the decision in the Downer case, supra, be said to support the contention of appellants in this case.

Observing the plain mandate of section 5571 of the Code, but without conceding that the legislature had the right to so legislate, we have carefully considered the application, and the evidence submitted in support thereof, of appellants from a change of venue, without indulging any presumption in favor of the judgment and ruling of the lower court on said application. The burden of proof was on the defendants to show the reasonable satisfaction of the court that a fair and impartial trial could not be had in Jackson County. This burden of proof appellants did not, in our opinion, meet and discharge. The evidence fails to show that their trial was dominated by a mob or mob spirit, or that there was at any time any mob present at, or during, the trial, or that the jury was inflamed against the defendants to the point where they could not, or did not, give the defendants a fair and impartial trial; nor does the evidence show there was any violence, actual or threat-

ened against the defendants, from the time of their arrest to the conclusion of their trial.

We are at the conclusion that the lower court committed no error in overruling appellants' motion for a change of venue. Baker v. State, 209 Ala. 142, 95 So. 467; Malloy v. State, 209 Ala. 219, 96 So. 57; Godau v. State, 179 Ala. 27, 60 So. 908; Adams v. State, 181 Ala. 58, 61 So. 352; McClain v. State, 182 Ala. 67, 62 So. 241; Hawes v. State, 88 Ala. 37, 7 So. 302; Byers v. State, 105 Ala. 31; Gilmore v. State, 126 Ala. 20; Riley v. State, 209 Ala. 505, 96 So. 599; Hendry v. State, 215 Ala. 635, 112 So. 212.

[fol. 149] There is no merit in the exception reserved by the defendants to the action of the court with reference to a special venire for the trial of the defendant. The record proper shows, as heretofore pointed out, that these defendants, along with their co-defendants, and before any severance was granted, appeared in open court, attended by counsel, and were each, along with their co-defendants—nine in number—in open court duly and legally arraigned upon the indictment, pleaded not guilty; and the court, then and there pursuant to the statute, set a day for the trial, and ordered that the venire for their trial should consist of one hundred jurors, to be composed of the seventy-five regular jurors drawn for the week of the trial, and twenty-five special jurors to be drawn, as the law directs, in open court, by the presiding judge from the jury box of Jackson County. This was done in all respects according to the statute, in such cases made and provided, and a list of these one hundred jurors, by order of the court, together with a copy of the indictment was served upon each of the defendants. This was a strict compliance with the law of the case.—Code, § 8644. And, besides, section 8649 provides:

"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." (Italics supplied.)

This section, as was the manifest purpose of the legislature, removed the necessity of drawing a special venire for

each capital case set for trial on the same day. But, be [fol. 150] this as it may, when the court ordered and allowed, a special venire of one hundred jurors to try this case, it stood upon the docket as one case, and against these defendants, as well as against their co-defendants. It results that appellants can take nothing by this exception, as the record affirmatively shows that the court had given them a special venire consisting of one hundred jurors, the maximum allowed by law.—Code, section 8644.

During the progress of the trial only two exceptions were reserved by the defendants to the ruling of the court on admission of evidence. While Sim Gilley was on the stand, testifying on behalf of the State, and after he had testified that he was "one of the boys on the train that day"—referring to the day on which the alleged rape occurred—and that he saw all the negroes in that gondola, he was asked by counsel for the State, "How many in that row there, look at that row of five sitting on the front—get up and walk over there if you cannot see them?" The defendants separately objected to the question, upon the grounds "it was immaterial, irrelevant, illegal and incompetent, and because it was reopening of the case." The court overruled this objection and defendants duly excepted. The evidence was clearly admissible. Whether it was in rebuttal, strictly speaking, we cannot affirm, but if not, the propriety of admitting it was addressed to the sound discretion of the court. There was no error in this ruling of the court.

After the witness had testified that he saw "every one of those five in the gondola," counsel for the State thereupon propounded this question to the witness Gilley: "Were the girls in there?" The defendants separately objected to that question, the court overruled it, and defendants duly [fol. 151] excepted. The objection was without merit. The question called for relevant, material and competent testimony.

It was clearly within the discretion of the court to allow counsel for the State to have a second argument, although defendants' attorneys had declined to make argument. Southern Bell Tel. & Tel. Co. v. Miller, 192 Ala. 346, 68 So. 184; Mobile & M. Rwy. Co. v. Yeates, 67 Ala. 164; Hall v. State, 216 Ala. 336, 339, 113 So. 64; Sheppard v. State, 172 Ala. 363, 55 So. 514.

After the verdict was rendered against the defendants they filed motion for new trial on the 9th day of April, 1931, and thereafter amendments to the motion were made, and filed in the cause.

It is not necessary to a proper understanding that the motion be set out at length. The principal argument in support of the motion relates to motion for a change of venue which in the main has been heretofore treated in this opinion.

It is insisted, among other things, that the demonstration made when the other verdict or verdicts were brought in greatly prejudiced their case. There was considerable testimony offered on this phase of the case, and it does not support appellants' contention. A number of the jurors testified on the hearing of the motion, and it does not appear that the appellants' cause was prejudiced by any alleged demonstrations. Certain it is also that defendants never, at any time, made any objection or reserved any exceptions to anything that occurred with reference to demonstrations or applause. Nor does it appear that the court failed promptly to suppress any misconduct that came to its notice. We hold that no error is made to appear from the ruling of the court on defendants' motion for a new trial based on the above ground—Hendry v. State, 215 [fol. 152] Ala. 635, 112 So. 212.

It is also insisted by defendants that a new trial should have been granted them, because, inter alia, they were not given time to prepare their cases for trial. No motion for a continuance appears in the record. Therefore, this contention cannot avail defendants, made for the first time after verdict. Application, based upon proper grounds, should have been made to the court before the trial was entered upon.

It is also urged that the defendants are entitled to a new trial because the court erred in not interrogating, and in failing to qualify, the trial jurors as to race prejudice, and as to whether or not they could and would, in view of the fact that the defendants were negroes, and the complainant and prosecuting witness a white woman, give the defendants a fair, impartial and unprejudiced trial, etc. It should suffice to say that the court will not be put in error for not assuming that there exists here in Alabama, and

particularly in Jackson County, racial prejudices. No doubt had counsel for the defendants assumed such to exist, and had, acting upon such assumption, requested the court to interrogate the jurors on that subject, the court would have complied with their request.

It is also insisted, however for the first time on motion for new trial, that "exclusion of negroes from the list of jurors," from which defendants' jury was drawn, was a denial of the defendants' rights under the Constitution of the United States, Amendment 14, section 1. It should suffice to say that the defendants made no objection whatever to the venire upon any such ground, nor does the record, in point of fact, sustain any such contention. Having made no objection to the personnel of the jury on account of race or color, the defendants are in no position to put the court in error, in the contention made for the first time on motion for new trial. By failing to object [fol. 153] to the personnel of the jury, the defendant must be held to have waived all objections thereto.—Batson v. State, 216 Ala. 275, 113 So. 300; Herndon v. State, 2 Ala. App. 118, 56 So. 85; Carson v. Pointer, 11 Ala. App. 462, 66 So. 910; 20 R. C. L. 241; 18 L. R. A. 475; 68 L. R. A. 885; 16 Corpus Juris 1158; Eastman v. Wright, 4 Ohio St. 156; State v. Jones, 89 S. C. 41, 71 S. E. 291; Ryan v. Riverside, 15 R. I. 436; 8 Atl. 246; Stewart v. Eubanks, 3 Iowa 191; State v. Whiteside, 49 La. Ann. 352, 21 So. 540; Ferrell v. State, 45 Fla. 26, 34 So. 220; Whitehead, 206 Ala. 288, 90 So. 351.

Without regard, however, to the foregoing, there is no merit in the appellants' above stated contention. The State of Alabama has the right, within constitutional limitations, to fix qualification for jurors.—Thomas v. Texas, 212 U. S. 278. The jury laws of Alabama do not exclude any man from jury service by reason of race or color. The qualifications of jurors are fixed and defined by section 14, Acts of Legislature of Alabama 1931, pages 55 et seq., and by this Act the jury board is required to place on the jury roll and in the jury box the names of "all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment." The jury boards of the State are required to observe these positive requirements of the statute, and

there is nothing in the record to show that the jury board of Jackson County failed of their duty in any respect with reference to the jury roll or jury box in that county. The contention of the appellants in the respect here pointed out is without merit.—Ragland v. State, 197 Ala. 5, 65 So. 776.

[fol. 154] It is also urged upon our attention that the trial court committed reversible error in not granting defendants a new trial because of newly discovered evidence. It is insisted earnestly that they should have had an opportunity to prove that the said Victoria Price had the reputation of being a common prostitute. There was no evidence offered to show that she had ever had intercourse with negroes. This evidence could only be admissible as tending to show consent. The entire theory of defendants' case was that they had not touched the woman, and had no intercourse with her. The question of consent, vel non, was not therefore an issue in the case. The evidence was wholly irrelevant to any issue in the case as presented and tried.—Rice v. State, 35 Fla. 236, 17 So. 286.

It is insisted that the defendants were put to trial so soon after the alleged commission of the offense that they were unable to prepare their defense, and at a time when the public mind was so inflamed that they could not secure a fair and impartial trial.

Article VI, Constitution of the United States, provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense."

And Section 6 of the Constitution of Alabama secures to all persons, within her territorial limits the same fundamental and constitutional rights.

[fol. 155] The record before us fails to show that any right guaranteed to the defendants under the Constitution of the United States or of the State of Alabama was denied to the defendants in this case: on the contrary, the record

shows that every such right of the defendants was duly observed, and accorded them.

The appellants complain of the speed of the trial. There is no merit in the complaint. If there was more speed, and less of delay in the administration of the criminal laws of the land, life and property would be infinitely safer, and greater respect would the criminally inclined have for the law.

On the 6th day of September, 1901, at 4:07 P. M. in the city of Buffalo, in the State of New York Czolgosz, an assassin fired two bullets into the body of the then most illustrious and beloved man in the United States—President William McKinley. This foul crime was committed in the presence of thousands of the citizens of Buffalo. The crime shocked, and aroused the indignation of people everywhere. Within less than ten days after the burial of Mr. McKinley, the murderer was placed on trial for his life, in the city of Buffalo, where the crime was committed. It is recorded that the trial was presided over by Judge Truman C. White, "one of the oldest and most experienced of the Supreme Court justices." It required "exactly eight hours and twenty-six minutes" to conclude the trial, and it is further recorded that "in less than one hour after Justice White began his charge to the jury, the verdict of 'guilty' was brought into court." On October 29, 1901, less than two months after the crime was committed Czolgosz, the murderer, was executed for his crime. This verdict, sentence and execution were approved by good citizens, North, South, East and West, in fact on both sides of the Atlantic.

[fol. 156] True this Czolgosz verdict was rendered in a case where a human life had been taken in a most dastardly manner. But we are of the opinion that some things may happen to one worse than death, at the hands of an assassin, and, if the evidence is to be believed, one of those things happened to this defenseless woman, Victoria Price, on that ill-fated journey from Stevenson to Paint Rock, on March 25, 1931.

As to the defendants Ozie Powell, William Roberson, Andy Wright and Olen Montgomery, we find no error in the record, and none as to defendant Eugene Williams, unless it be on account of the asserted fact that he was, at the time of his trial, under sixteen years of age. This we will now proceed to consider. The question presented is not

without its difficulties, due to the fact that our statutes on the subject of juvenile delinquents do not furnish rules of procedure by which such delinquents, when indicted for crime, and brought before a court of competent jurisdiction for trial, on such indictments, shall present to the court the fact that they are under the age of sixteen years, and, therefore, not subject to trial upon such indictment. Courts must follow the plain, positive and unambiguous provisions of the statutes, whether rules for their guidance in such cases are given along with such statutes or not, and they may prescribe, for their procedure such reasonable rules and regulations not inconsistent with the statute, as may be deemed reasonable and proper.

The presently pertinent sections of the Code dealing with juvenile delinquents, and the disposition of cases in which such delinquents are brought before the courts are found in sections 3528, 3529 and 3539. Section 3528 defines juvenile delinquents. Section 3529 confides to the courts of [fol. 157] probate, except in the several counties of the State in which special courts have been given exclusive jurisdiction over children under sixteen years of age, original and exclusive jurisdiction of all proceedings coming within the provisions and terms of Chapter 100, dealing with juvenile delinquents; and it confers upon such probate courts original and exclusive jurisdiction to hear, determine and adjudicate all questions and cases falling or coming within the provisions of said statutes. To this extent jurisdiction in the circuit court is denied, or excluded. Section 3539 provides:

"Nothing in this chapter shall be construed as forbidding the arrest, with or without warrant, of any child as is now or may hereafter be provided by law, or as forbidding the issuance of warrants by magistrates as provided by law. Whenever a child under sixteen years of age is brought before a magistrate of any court in the county other than the juvenile court, charged with any offense, such magistrate or court shall forthwith, by proper order, transfer the case to the juvenile court of the county. Any criminal court or any court exercising criminal jurisdiction in any county coming under the provisions of this chapter before which any child between the ages of sixteen and eighteen years is brought, charged with the commission of a crime,

shall have authority, if such court shall deem it to be in the interest of justice and of the public welfare, to in like manner transfer such child by proper order to the jurisdiction of the juvenile court of said county to be dealt with as a delinquent child under the terms of this chapter and when so transferred such child shall come under all terms and conditions of this chapter and be so dealt with as other children are dealt with under this chapter. All information, depositions, warrants, and other processes in the hands of such magistrate or court shall be by him or by the judge of said court forthwith transmitted to the juvenile court and shall become a part of the records of the juvenile court. The juvenile court shall thereupon have jurisdiction of the cause and shall proceed to hear and determine the case so transferred to it, in the same manner as if the proceedings had been instituted in the juvenile court by petition as hereinbefore provided."

[fol. 158] Our statute upon the subject of juvenile delinquents are not unlike the laws on the same subject in a number of other states. The general provisions of our statutes are very similar to the statutes, on the same subject, in Kentucky and Tennessee.

In the case of Sams v. State, 180 S. W. 173, 133 Tenn. 188, 193, the question now before this Court received the attention of the Supreme Court of Tennessee. In that case (Sams) the plaintiff in error, was indicted for a criminal offense. To the indictment he filed a plea raising the question that the circuit court was without jurisdiction to try him upon the charge, in as much as he was under sixteen years of age. This plea on motion of the state was stricken. There was a jury and verdict of guilty, and sentence of the court thereon. It then appears in the minute entry that defendant filed motion in arrest of judgment. This motion was overruled by the court, defendant excepting. On appeal to the Supreme Court, the court observed:

"But the most difficult question in the present case is how plaintiff in error shall be dealt with in the circuit court upon remandment of the cause; in other words, what is the jurisdiction of that court in respect of the charge in the indictment set out against this particular plaintiff in error under the facts of this case and our existing statutes."

Continuing, this court further observed:

"The question of the jurisdiction of the circuit court is directly presented in the cause, when we come to consider the assignment of error based on the action of the court in overruling the motion in arrest of judgment. That motion was based on the lack of jurisdiction in the circuit court. The court could then see from the proof in the cause that the plaintiff in error was under the age of sixteen years at the time of his arrest, and indeed under such age at the time of the court's action on the motion in arrest of judgment, and of course under such age at the time the indictment charged the offense to have been committed. These facts clearly appeared without dispute in the evidence which had been introduced before the jury."

[fol. 159] Continuing, the court said:

"When these facts appeared to the trial court, it should have sustained the motion in arrest of judgment, for the reason that, under chapter 58, Acts 1911, plaintiff in error was a 'delinquent' child within the meaning of section 1 of that act. That section defines a delinquent child under the age of sixteen years who violates any law of the state."

The court in the Sams case, supra, held that the motion in arrest of judgment should have been sustained, and the trial court should have transferred the case to the juvenile court.

In the case of Talbott v. Commonwealth, 166 Ky. 659, 179 S. W. 621, under statutes almost identical with our own, the Supreme Court of Kentucky held:

"That, as the circuit court was without jurisdiction of the person of the defendant (he being under sixteen years of age) the question could be made at any time, and was available for reversal, even though the question was raised for the first time in this court on appeal. It therefore results that this defendant did not lose the right to raise the question because of his failure to do so during the progress of the trial."

This question again came before the Supreme Court of Kentucky, in the case of Mattingly v. Commonwealth, 188 S. W. 370, 171 Ky. 222, and the court again re-affirmed the conclusion and holding in the Talbott case, supra.

The Court of Appeals of Alabama, in the case of Hart v. State, 22 Ala. App. 135, 113 So. 471, held, that where the defendant was under sixteen years of age, the trial court, under existing statutes, was without authority to pronounce judgment of conviction against him, being without jurisdiction of the person of the defendant, other than to forthwith, by due and proper order to transfer the case to the juvenile court of the county.

[fol. 160] In support of the motion of appellant, Eugene Williams, for a new trial, based on the ground that he was under sixteen years old, when brought before the court for trial, are the affidavits of three persons who claimed to have known him from his birth. They swear that he was born on December 6, 1916, and that affiants were living with this defendant's mother when he was born. In opposition to this evidence, no proof was offered by the State, so far as the record shows. While these affidavits may be false, yet there is nothing in this case to show their falsity. It also appears that the age of this defendant was brought to the attention of the court before the trial was entered upon.

Since the statute declares a juvenile delinquent the ward of the State, it became the duty of the trial court upon suggestion that the defendant, Eugene Williams was under sixteen years of age, or if his personal appearance suggested a doubt as to his age, to ascertain his age, and if found to be under sixteen years of age, to transfer the cause as to said defendant, Eugene Williams, to the Probate Court, as the Juvenile Court of Jackson County.—Code, Sections 3529, 3539.

If the Probate Court, as the Juvenile Court of Jackson County, upon due investigation or trial of disciplinary measures in the institution provided for the purpose, becomes convinced such delinquent cannot be made to lead a correct life and cannot be properly disciplined, he has authority to retransfer the cause to the circuit court to be tried as other cases.—Code, section 3540; Berry v. State, 209 Ala. 120, 95 So. 453.

[fol. 161] Under the plain mandatory terms of the statute, the State offering no testimony to show that the defendant was sixteen years of age, or over, it became and was the duty of the court to grant this defendant a new trial on this ground of his motion, and none other. In fail-

ing to do so, the court committed error, as to the appellant Eugene Williams, necessitating a reversal of this cause as to said appellant Eugene Williams.

There are no errors in the record as to the other appellants, viz., Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery, and the cause as to them will be here affirmed.—Agee, et al. v. State, 190 Ala. 19, 67 So. 411. As to the appellant Eugene Williams the cause is reversed, with directions to the court below to ascertain, by proper evidence the age of defendant Eugene Williams before again putting this defendant on trial, and, if it be ascertained that he is under sixteen years of age, that he be transferred to the juvenile court of Jackson County, to be there dealt with as a juvenile delinquent, pursuant to the statute, in such cases made and provided.

The several matters which impel Chief Justice Anderson to dissent as shown by his dissenting opinion have received the careful consideration of the court in conference.

The speedy trial and presence of the military seems to be regarded as enough to have a coercive influence on the jury. We cannot approve the idea that speedy trials should not be had because the gravity of the charge is such as to arouse public interest and indignation. The presence of the militia, instead of having a coercive influence on the jury, was notice to everybody that the strong arm of the State was there to assure the accused a lawful trial. Any [fol. 162] good citizen would interpret this to mean a fair trial in which the guilt or innocence of defendants should be determined on the evidence and punishment meted out accordingly.

We would consider it a dangerous precedent to declare that, because, out of abundance of caution in cases of this character, it was deemed best to have militia present, safeguarding the prisoners, this should furnish a ground for setting aside the verdicts of juries and granting a new trial. As stated in the opinion, not only is there a lack of evidence that the citizenship of Jackson County intended other than a legal and fair trial of these cases, but direct evidence that such was the general expression.

Touching alleged applause upon a return of the verdict in one of the cases, we have noted evidence negativing any prejudicial effect; but would not make it plain that affidavits prepared and submitted on this line on the motion for a

new trial, related to matters occurring on the main trial and in the presence of the court hearing the motion. The bill of exceptions, prepared by experienced counsel now appearing, is entirely silent as to what did occur. The bill of exceptions made up under the safeguards of law is the method of presenting such matters.

The trial judge was under the duty to consider affidavits, if at all, in the light of his own knowledge of such incidents. If these affidavits did not accord with his own knowledge, it was his duty to disregard them.

Under all the rules sustaining the trial Judge unless error affirmatively appear, his ruling on this question is not presented for review.

[fol. 163] We think it a bit inaccurate to say Mr. Roddy appeared only as amicus curiae. He expressly announced he was there from the beginning at the instance of friends of the accused; but not being paid counsel asked to appear not as employed counsel, but to aid local counsel appointed by the court, and was permitted so to appear. The defendants were represented as shown by the record and pursuant to appointment of the court by Hon. Milo Moody, an able member of the local bar of long and successful experience in the trial of criminal as well as civil cases.

We do not regard the representation of the accused by counsel as pro forma.

A very vigorous and rigid cross-examination was made of the State's witnesses, the alleged victims of rape, especially in the cases first tried. A reading of the records discloses why experienced counsel would not travel over all the same ground in each case.

Whether benefit or hurt would have attended an effort to present an argument for the accused is purely conjectural.

It is a recognized rule that if manifest error appear an appellate court is not primarily concerned with the guilt of the accused, but merely the question of a fair trial under the rules of law. But when we come to consider the granting of a new trial on account of atmosphere as affecting the verdict, we think the manifest and obvious guilt of [fol. 164] the accused is to be regarded.

We think in such case the finding of the jury and the action of the trial court should be credited to a conviction of duty under the evidence; while in a very doubtful case

the question of coercive influence should be carefully scrutinized.

We cannot, therefore, agree with the Chief Justice that these cases should be reversed on the grounds set out in his opinion.

And it appearing to the Court that the day fixed by the Circuit Court of Jackson county for execution of the death sentence imposed by that court upon the said defendants, Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery, has passed, it is ordered by this Court the 13th day of May, 1932, be and the same is hereby set and fixed for the execution of the sentence of death heretofore passed upon them by the Circuit Court of Jackson County, Alabama.

Affirmed as to appellants Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery, and reversed and remanded as to the appellant Eugene Williams.

Gardner, Thomas, Bouldin, Brown and Foster, JJ., concur.

Anderson, C. J., dissenting as indicated, holding that a new trial should have been granted.

[fol. 165] DISSENTING OPINION

ANDERSON, C. J. (dissenting):

While the Constitution guarantees to the accused a speedy trial, it is of greater importance that it should be by a fair and impartial jury, ex vi termini, a jury free from bias or prejudice, and, above all, from coercion and intimidation.

Whether or not these defendants should have been granted a change of venue may be questionable for, as was stated by the sheriff, when a witness, they could probably get as fair a trial in Jackson as any nearby county and there is no reason why this was not true. None of the defendants or the injured girls resided in Jackson County and the prejudice aroused, if any existed, was due largely to the nature of the crime and which was of such a revolting character as to arouse any Caucasian county or community, but the indictment was found and the trial had within a few days after the alleged commission of the

offense and when the entire atmosphere was at fever heat.

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

[fol. 166] Under the statute, the defendants being unable to employ counsel, it was the duty of the trial judge to appoint counsel, not exceeding two—Section 5667 of the Code of 1923. 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. Not only this, and notwithstanding the appointment of the entire bar, we find one of the leading, if not the leading, firm subsequently appearing throughout for the State and actively participating in the trial of the cases. This is not intended as a criticism of said firm as the senior member stated to the trial court that when the Chattanooga lawyer, Roddy, appeared upon the scene in behalf of the defendants, he then accepted employment to prosecute and the trial court accepted the explanation. This Chattanooga lawyer, however, declined to appear as employed counsel and only did so as an amicus curiæ. Again, these defendants were confined in jail in another county during most of the time from the arrest to the trial and local counsel had little opportunity to confer with them and prepare their defense. They were non residents and had little time or opportunity to get in touch with their families and friends who were scattered throughout two other states, and time had demonstrated that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases judging from the number and activity

of counsel that appeared immediately or shortly after their conviction.

Another pertinent suggestion, and which is not intended as a harsh criticism of the local counsel that did attempt to represent the defendants throughout the trial, as we can appreciate the position of a lawyer appointed to defend an indigent defendant whom he may feel is guilty and as against whom public sentiment is at fever heat, the record indicates that the appearance was rather pro forma than [fol. 167] zealous and active and which is indicated by a declination on the part of counsel to argue the case notwithstanding the solicitor insisted upon the right to open and close and the State did, in fact, have the benefit of two arguments and the defendants none. We, of course, realize that a defendant can sometimes gain an advantage by agreeing to submit a case without argument as the State has the opening and closing, but where there is no agreement and the solicitor or prosecutor makes two arguments and the counsel for the defendant makes none, it is bound to make an unfavorable impression on the jury.

It also appears that when the jury returned the verdict in the first case tried the court house was not only crowded but there was great applause and demonstration of approval and this was bound to have some influence over those to try the succeeding cases.

There is still another point that would indicate that the juries that tried these cases were coerced by public feeling or sentiment actuated through passion or prejudice. The punishment for the offense for which these defendants were tried, and which is to be fixed by the jury, runs from ten years in the penitentiary to death, and the jury, as to each of the eight defendants, went the extreme notwithstanding there may have been some facts, such as difference in age, leadership, etc., that would render the conduct of some less culpable than others, yet we find no discrimination whatsoever in the fixation of the punishment.

As to whether or not these defendants are guilty is not a question of first importance, the real one being did they get a fair and impartial trial as contemplated by the bill of rights? The accused being entitled to a trial by an impartial jury is deprived of this right when the jury is overawed or coerced by outside influence, pressure or conduct. According to the State's theory, the crime was brutal and

harrowing and calculated to arouse the indignation of everyone and even stir the blood of the cooler and law [fol. 168] abiding citizen.

" 'But the law should prevail, without any reference to the magnitude or brutality of the offense charged. No matter how revolting the accusation, how clear the proof, or how degraded, or even brutal, the offender, the Constitution, the law, the very genius of Anglo-American liberty, demand a fair and impartial trial. If guilty, let him suffer such penalty as an impartial jury, unawed by outside pressure, may under the law inflict upon him. He is a human being and is entitled to this. Let not an outraged public, or one which deems itself outraged, stain its own hands—stamp on its soul the sin of a great crime—on the false plea that it is but the avenger of the innocent.' "—Seay v. State, 207 Ala. 453.

It may be that neither of the foregoing reasons, if standing alone, should reverse these cases, but when considered in connection with each other they must collectively impress the judicial mind with the conclusion that these defendants did not get that fair and impartial trial that is required and contemplated by our Constitution. Therefore, in justice to the defendants and to the fair name of the State of Alabama, as well as the County of Jackson, these cases should be retried after some months of cooling time have elapsed and by their vigilant employed counsel.

I think that the trial court erred in refusing to grant a new trial in each of these cases and therefore feel constrained to dissent from the affirmance of same.

[fol. 169] Clerk's certificate to foregoing paper omitted in printing.

[fol. 170] IN SUPREME COURT OF ALABAMA

No. 322

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

vs.

STATE OF ALABAMA, Appellee

On Appeal from the Circuit Court of Jackson County, Alabama

APPLICATION FOR REHEARING

[fol. 171] [Title omitted]

Comes the appellants, Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery, and hereby make application for a rehearing of said cause and moves the Court to set aside the judgment of conditional affirmance rendered in said cause and to grant them a new trial, and that said cause be reversed and remanded to the Circuit Court of Jackson County, Alabama, for the causes and reasons assigned hereinafter in this application.

Geo. W. Chamlee, George W. Chamlee, Jr., Joseph R. Brodsky, Irving Schwab, Allen Taub, Elias M. Schwarzbart, Joseph Tauber, Sydney Schrieber, Attorneys for Appellants.

[fol. 172] [Title omitted]

Now comes the appellants, Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery, in the above cause and presents this their application for a rehearing therein, and prays the Court to set aside and vacate the judgment and opinion of conditional affirmance rendered in said cause and to enter a judgment in favor of appellants or reversing and remanding said cause, and in support of their application for a rehearing presents the following assignments of error with brief and argument in support thereof.

I.

The Court erred and misconstrued appellants' assignment of errors, as set out in their brief and in this cause, and that their motion and petition for a change of venue with the exhibits thereto and evidence in support thereof legally entitled them to a change of venue, and the action of the Circuit Court of Jackson County was reversible error and violative of their legal rights as provided by Article 6, of the Constitution of the United States, which provides that, "in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

[fol. 173] II

The Court erred and its conditional judgment of affirmance is violative of that portion of the Constitution of the United States in Article 14, Section 1, which provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

III

The Court erred in not granting a new trial and reversing the judgment of the Circuit Court of Jackson County, because the appellants were denied a speedy and public trial by an impartial jury of the State and District wherein the alleged crime was alleged to have been committed, but was tried under the influence of a mob and a biased jury.

IV

The Court erred and a new trial should be granted because the indictment against the appellants merely charges that the appellants "Before the finding of the indictment

forcibly ravished Victoria Price, a woman, against the peace and dignity of the State of Alabama", and said indictment was illegal and void, and the Act of the Legislature of the State of Alabama, upon which said indictment was founded, was unconstitutional and void and in conflict with the Constitution of the United States, which provides, that the appellants shall "be informed of the nature and cause of the accusation" against them at the time of the trial, and their rights were denied and abridged by the judgment of the Circuit Court of Jackson County, Alabama.

V

The Court erred and its conditional judgment of affirmance should be reversed and rescinded and the judgment of the Circuit Court of Jackson County reversed, because the jury was not interrogated as to whether or not they bore any race prejudice against the appellants, and because of the presence of a mob at and about the Court house while the jury trying these appellants was hearing the testimony and considering their case, a mob was demonstrating in the [fol. 174] Court house and about the streets in Scottsboro within the sight and hearing and in the presence of the jury trying these appellants, which deprived them of a trial by an impartial jury of the State and District wherein the crime was alleged to have been committed.

VI

The Court erred in not granting a new trial because the appellants were not represented by counsel and had no opportunity to prepare their case for trial and on account of the mob spirit and hysteria dominating the trial, terrorized the Judge, jury and counsel and denied to the appellants due process of law.

VII

The Court erred in not granting a new trial because the jury commission and the officers executing the jury law of Jackson County purposely excluded all negroes from the special grand jury which brought in the indictment against the appellants, and also excluded all negroes from the

special panel or venire of jurors from which the jury was selected to try appellants, and such exclusion of negroes was based upon race discrimination and race prejudice because the appellants were negroes and the prosecuting witness a white woman and this constituted a denial of that provision of the United States Constitution, Article 14, Section 1, which provides, "equal protection of the law to all persons."

VIII

The Court erred and the judgment of the Circuit Court of Jackson County should be reversed, because there was present at the Court a mob threatening and menacing the appellants, embarrassed and coerced the members of the trial jury, intimidated and prejudiced the minds of said jury by a demonstration before the trial began, and a demonstration after the trial began and during the time that Court was in session, and because of the presence of the mob spirit and hysteria dominating the trial, terrorized the Judge, jury and counsel, the appellants were denied due *rp*ocess of law, and the judgment against them was void.

[fol. 175]

IX

A new trial should be granted and the judgment of the Court below reversed, because the indictment was void and because Section — of the Code of Alabama, 1907, and Form 84 of Code Section 5407 is unconstitutional because in conflict with and repugnant to the Constitution of the United States, Article 14, Section 1.

X

The Court erred and a new trial should be granted because the Supreme Court of the State of Alabama follows in this cause a ruling laid down in said Court in the case of Malloy v. State, 209 Ala. 219, which said ruling is repugnant to and in contr*o*vention of the Constitution of the United States, as above cited, which provides that "No persons shall be put to answer any criminal charge except by indictment, etc. and that the indictment should inform him of the charge against him, and the ruling of the Supreme Court of Alabama in Malloy v. State, 209 Ala. 219, should

be overruled because repugnant to the Constitution of the United States, and because it deprives these appellants of their legal and constitutional rights to be informed legally of the charge against them.

Geo. W. Chamlee, (Signed) J. R. Brodsky, (Signed) Irving Schwab, (Signed) G. W. Chamlee, Jr., Attorneys for Appellants.

I hereby certify that I served a copy of this petition to rehear with the brief attached hereunto upon the Honorable Thomas E. Knight, Jr., Attorney-General for the State of Alabama, on this the 25 day of March, 1932.

G. W. Chamlee, Attorney for Appellants.

[fol. 176] IN SUPREME COURT OF ALABAMA, OCTOBER TERM, 1931-32

8 Div., 322

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, OLEN MONTGOMERY, AND EUGENE WILLIAMS

vs.

THE STATE OF ALABAMA

Appeal from Jackson Circuit Court

ORDER OVERRULING APPLICATION FOR REHEARING

Application for rehearing having been filed by Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery, in this case, on March 25th, 1932, and each and all grounds of the petition being duly examined and understood by the Court, it is considered and ordered that each and all grounds of the petition be and the same are hereby overruled, and said application for rehearing be and the same is hereby overruled.

[fol. 176½] IN SUPREME COURT OF ALABAMA

No. 322

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

vs.

STATE OF ALABAMA, Appellee

PETITION FOR STAY OF EXECUTION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Alabama:

The Petitioners, Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery, Appellants, in the above styled cause most respectfully represent that on the 24th day of March, 1932, this Honorable Court announced its affirmance of the judgment of the Circuit Court of Jackson County, Alabama, imposing the death penalty upon these petitioners and fixing May 13, 1932, as the date of their execution, and that they filed their petition for a rehearing in this Honorable Court, which was overruled and disallowed on April 9, 1932, and they desire to obtain a stay of proceedings or a recalling of the order imposing the death sentence upon them to give them and their counsel time to comply with the legal requirements in the preparation and filing of their petition for certiorari in the Supreme Court of the United States at Washington, D. C. for the purpose of having their case reviewed by the Supreme Court of the United States under the rules and pleadings prescribed for trials in that tribunal.

Your petitioners make this application under the provisions of Section 9(d) of the Act of Congress of February 13, 1925, (U. S. Code title 28, section 350), and in support thereof present the following:

Your petitioners feeling themselves aggrieved by the judgment of this Court and as they are advised by their attorney a petition for a writ of certiorari to the Supreme Court of the United States is to be filed, the grounds being in brief as follows:

[fol. 177] That the judgment of this Court in affirming the judgment of the Circuit Court of Jackson County has de-

prived, or is about to deprive, your petitioners of their lives and liberty without due process of law and has denied to your petitioner the equal protection of the laws as provided by the 14th Amendment to the Constitution of the United States in that:

(a) A change of venue was denied to your petitioner although duly applied for compelling your petitioner to face trial in the presence of a hostile and threatening mob.

(b) The indictment did not apprise the petitioners of the charge against them with the certainty required.

(c) Your petitioners were denied an opportunity to employ counsel or to be properly represented by counsel and to prepare their case for trial.

(d) Mob spirit and hysteria dominated the trial, terrorized jury and counsel, interfering with the course of justice and denying to your petitioners their right to a fair and impartial trial under the law of the land.

(e) Negroes were improperly excluded from the grand and petit jury panels, and for any other reasons appearing in the transcript of this cause.

Your petitioners are advised by counsel that under the Federal Statutes and rules of the Supreme Court of the United States the following steps must be taken before the petition for the writ of certiorari is deemed "docketed," and submitted to the Supreme Court:

I

The transcript of the proceedings before this Court must be certified by the Clerk thereof (Rules of the Supreme Court of the United States 38 subd. 1). Your petitioners are advised by their counsel that a præcipe for the preparation and certification of this transcript is being filed with the Clerk on the day of the presentation of this petition together with copies of the record on appeal, certified [fol. 178] copies of the opinion and all other records required by the rules of the Supreme Court which the attorneys for your petitioners may have in their possession.

II

The transcript must be forwarded to the Government Printing Office for printing. Rule 38, subd. 7, requires that the record of the Court below must be printed and filed prior to the submission of the petition for the writ of certiorari.

III

The printing of these records must be completed before the petition for a writ of certiorari and the brief in support thereof can be placed in final form. This is necessary in order that the proper references to the transcript may be made in the petition and brief.

IV

The rules of the Supreme Court also require that the petition for the writ of certiorari and the brief in support thereof be likewise printed before the application is deemed docketed.

V

All of the aforementioned procedural requirements must be completed before the Supreme Court will entertain the petition for writ of certiorari. By the rules of the Supreme Court of the United States, the Acts of Congress, these procedural steps must be complied with within ninety days from the date of the entry of the final decree or the judgment of this Court.

Your petitioners are advised by their attorneys that they will proceed with the docketing of the petition for the writ of certiorari with dispatch and will complete same without any undue delay.

Your petitioners respectfully ask this Court to take into consideration, not only the aforementioned technical delays but the additional factor—the distances between the seat [fol. 179] of this Court, the seat of the Supreme Court of the United States and the offices of the attorneys for the petitioners, and your petitioners have been advised that it will take your petitioners and their counsel almost all, if not the entire ninety days allowed by Federal statute for the preparation and verification, certification and printing of the transcript, petition for the writ of certiorari and brief in support thereof.

Your petitioners respectfully ask this Court to also take into consideration the additional time required by the Supreme Court for the consideration and decision upon the petition for the writ of certiorari.

The record in the instant case is voluminous and your petitioners respectfully submit that the Supreme Court of the United States will need time to study the records in this case as well as in the two other related cases of Charlie Weems et al. vs. State of Alabama, and Haywood Patterson vs. State of Alabama.

Even if it were practicable or possible to complete the docketing for the wirt of certiorari before May 13, 1932, the decision of the Supreme Court of the United States will have to be made upon the petition before the writ of certiorari will issue.

Your petitioners respectfully submit to this Honorable Court that a stay of execution is necessary in order to give your petitioners an adequate opportunity to make application for review by certiorari by the Supreme Court of the United States. They respectfully pray that an order be made by this Honorable Court providing for a reasonable stay of execution pending the preparation and docketing of a petition for a writ of certiorari and pending the consideration and decision of the Supreme Court of the United States thereon.

Respectfully submitted.

(Signed) Andy Wright, (Signed) Olen Montgomery, (Signed) Ozie Powell, (Signed) Willie Roberson, by (Signed) G. W. Chamlee, Atty.

[fol. 180] *Duly sworn to by George W. Chamlee. Jurat omitted in printing.*

A copy of the foregoing petition was served on Honorable Thomas E. Knight, Jr., Attorney General for the State of Alabama, on this the 18 day of April, 1932.

(Signed) G. W. Chamlee, Atty. (Signed) Irving Schwob, Atty.

[fol. 181] IN SUPREME COURT OF ALABAMA

Present: All the Justices.

8 Div., 322

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

vs.

STATE OF ALABAMA

Appeal from Jackson Circuit Court

ORDER STAYING EXECUTION—April 19, 1932

In this cause is to made to appear to the Court by petition that defendants (appellants) desire to seek a review of the judgment of this Court by the Supreme Court of the United States through writ of certiorari, and that the preparation and presentation of a proper petition for certiorari under the rules of practice of the Supreme Court of the United States cannot reasonably be accomplished before May 13th, 1932, the date heretofore set for the execution of the death sentence upon defendants, it is ordered by the Court that the execution of such sentence be and is stayed until Friday June 24th, 1932, which date is now set for the execution of such death sentence in all respects as required by law.

The time fixed by the judgment and sentence of the Supreme Court for the execution of the prisoners Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery having expired pending this appeal, and the date of execution of the sentence having been reset by the Supreme Court of Alabama from May 13th, 1932, to June 24th, 1932, it is therefore ordered that the Sheriff of Jackson County, Alabama, deliver the defendants Ozie Powell, Willie Roberson, Andy Wright and Olen Montgomery to the Warden of Kilby prison, at Montgomery, Alabama, and that the said Warden of said Kilby prison at Montgomery, Alabama, execute the judgment and sentence of the law on Friday the 24th day of June, 1932, before the hour of Sunrise on said day in said prison, by causing a current of electricity

of sufficient intensity to cause death to pass through the bodies of said Ozie Powell, Willie Roberson, Andy Wright [fol. 182] and Olen Montgomery until they are dead, and in so doing he will follow the rules prescribed by the statutes.

It is also considered that the appellants pay the costs of appeal of this Court and of the Circuit Court.

[fol. 183] IN SUPREME COURT OF ALABAMA

No. 322

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

vs.

STATE OF ALABAMA, Appellee

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed April 18, 1932

To Robert F. Ligon, Esq., Clerk of the above-entitled court.

You are hereby requested to make a transcript of the record of this cause to be used on an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of

1. The record on appeal in said cause, a copy of which we submit herewith,
2. The opinions of the Supreme Court of the State of Alabama, certified copies of which we submit herewith,
3. The stenographic minutes of the testimony taken at the trial, a certified copy of which we submit herewith.
4. All journal entries contained in the record of the proceedings of the Supreme Court of the State of Alabama relating to said cause.
5. The petition for a rehearing, a copy of which we submit herewith.
6. The final judgment and decision of the Supreme Court of the State of Alabama.
7. The copy of this præcipe.

8. Your certificate to the record that it is a complete record in said cause.

Dated this 18 day of April, 1932.

Yours, etc., (Signed) G. W. Chamlee, Attorney for Appellants.

[File endorsement omitted.]

[fol. 184] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 31, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted, and the case is advanced and assigned for argument on Monday, October 10th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.