IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 198 and 199

FRANK MOORE, ED HICKS, J. E. KNOX, et al., *Appellants*

—VS.—

E. H. DEMPSEY, Keeper of the Arkansas State Penitentiary, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS

ABSTRACT AND BRIEF FOR APPELLEE

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EXPLANATORY STATEMENT

The appellee has not been favored with any abstract or brief on behalf of the appellants, hence the question of just what we should say as to abstract has given us some concern. Being somewhat unfamiliar with the

practice in this court, counsel for appellee is relying upon the spirit of fairness and liberality which has always characterized this Court for indulgence, if, under these circumstances, our brief does not comply strictly with the rules. Assuming that it is proper, in the absence of a statement of the case on the part of appellant, as provided in rule 21, to make an abstract of the record, we proceed to do so before writing the brief.

ABSTRACT

The court will observe that there are two of these cases but as they involve the same questions and the same evidence, stipulation of counsel has been made a part of the record that both causes may be submitted to this court upon the printed record in the case of Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, Appellants, vs. E. H. Dempsey, Keeper of the Arkansas State Penitentiary, Appellee, and that these causes may be consolidated and submitted together upon one printed record (Tr., p. 106).

Appellants filed in the District Court of the United States for the Western Division of the Eastern District

State of Arkansas their petition for writ of habeas corpus against appellee alleging that they are citizens and residents of the State of Arkansas and confined in the Arkansas State Penitentiary, in the jurisdiction of the court; that appellee was Keeper of said penitentiary and as such was unlawfully restraining appellants of their liberty and would, unless prevented, deprive them of their lives in violation of the Constitution and laws of the United States and the State of Arkansas; that they are negroes and were arrested and placed in the jail of Phillips County, Arkansas, and until their trial were kept in confinement upon charge of murder in the first degree for the killing of one Clinton Lee; that said Lee was killed while a member of a posse of white men who were attempting to quell a race riot growing out of the killing of one Adkins at Hoop Spur in said county; that at the time of the killing of Lee, appellants and a large number of other members of their race were assembled in their church house at Hoop Spur with no unlawful purpose; that while they were thus assembled, white persons began firing guns or pistols from the out-

side into said church house, having come there in automobiles for the purpose of breaking up the meeting; that Adkins was killed either by members of his own party or by some other person unknown to appellants but that the posse sent word to Helena, the county seat, that Adkins had been killed by the negroes in cold blood while on a peaceable mission, which report caused great excitement in said county, which excitement spread into other counties and States; that, early the next day, a large number of white men armed themselvs and rushed to the scene of the trouble, same being the vicinity of Elaine, and began the indiscriminate killing of negroes; that highly inflammatory articles were published in the press referring to the incident as "race riot" and "uprising of the negroes" and "a deliberately plan- of Elaine; that the officers of Phillips County called ned insurrection among the negroes against the whites" upon the Governor of the State and the Governor in turn called upon the commanding officer at Camp Pike for soldiers to assist in quelling the disturbance and a company of soldiers was dispatched to the scene of the

trouble who took charge of the situation and finally succeeded in stopping the slaughter.

It was further alleged in the petition that appellants and many others of their race were incarcerated in the jail at Helena on a charge of murder; that a Committee of Seven, composed of leading business men and officials, was selected for the purpose of probing into the situation and picking out those to be condemned to death and those to be sentenced to the penitentiary; that said Committee took charge and proceeded to have brought before them a large number of those incarcerated in jail and examined them regarding their own connection and the connection of others accused; that, if evidence unsatisfactory to said Committee was not given, they would be sent out to an adjoining room in the jail and tortured by beating and whipping and by being placed in an electric chair naked and having a current of electricity turned on to shock and frighten them into giving damaging statements; and that strangling drugs were put up their noses for the same purpose;

and that by these means false evidence was extorted to be used against appellants.

The petition further alleged that on every day from October 1st, 1919, until after their trial on the 3rd of November, 1919, the press carried inflammatory articles giving accounts of the trouble, which aroused bitter feeling aginst appellants and other members of their race, one of which articles was a statement from the above-mentioned Committee of Seven purporting to give the facts concerningg a "deliberately planned insurrection of the negroes against the whites," in which it was stated that the Union, of which appellants were members, was "established for the purpose of banding negroes together for the killing of white people," copy of said article being attached as exhibit "A" to the petition; that, shortly after appellants were placed in jail, a mob of hundreds of men marched to the jail and would have lynched appellants except for the interference of soldiers and the assurance of the officials that appellants would be executed according to law (Tr., pp. 1-3).

Petition further stated that, prior to October 1st, 1919, appellants were share-croppers; that nearly all the land in Phillips County was owned by white men and rented out to share-croppers; that for some years past there had grown up a system among the land owners of furnishing negro tenants supplies with which to make crops and that the system was calculated and did deprive the negro tenants of all their interest in said crops; that, in pursuance of said system, the land-owners refused to give their share-croppers an itemized statement of their indebtedness or to permit them to move or sell any part of their crops (Tr., p. 3) but that the landlords themselves disposed of said crops and gave the tenants no account but paid them only such amount as they wished; that, to protect themselves against this system, the negro farmers organized socities with a view of uniting their financial resources in moral and legal measures to overcome the same and that the land owners were bitterly opposed to such societies and sought to prevent their organization; that, on September 30th,

1919, appellants and other members of the Ratio Lodge near Elaine learned that some negro farmers had employed an attorney of Little Rock, Arkansas, to represent them in effecting a settlement with the land owners and would be at Elaine on the following day to meet all the parties concerned, perfect arrangements and learn of the facts, as far as possible, and they decided to hold a meeting with a view of seeing him while there and engaging his services as attorney to protect their interests and that, accordingly, they met that night at Hoop Spur church house, which resulted, as before set out, in the killing of Adkins and the breaking up of the meeting; that, on October 1st, 1919, the son and agent of the attorney which appellants proposed to employ arrived at Elaine for a consultation but was arrested and barely escaped being mobbed and was taken to the jail at Helena and imprisoned until the thirty-first day of the month when he was indicted on a charge of barratry and on that day was told by officials that he would be released but that he must leave secretely by

closed automobile and go to West Helena, four miles away, and take the train so as to avoid being mobbed, and that his departure was fixed by the judge of the Circuit Court who tried the cases of appellants.

The petition further alleged that the Circuit Court of Philips County convened October 27th, 1919, and that a Grand Jury was organized, composed wholly of white men one of whom was a member of the Committee of Seven and many of whom were in the posses above-mentioned; that, during the session of the Grand Jury appellants and many other prisoners were frequently taken before it in an effort to extract from them false testimony and that they were frequently whipped, beaten and tortured and that by these methods false testimony was secured against appellants; that, on October 29th, 1919, a joint indictment was returned against appellants accusing them wrongfully of the murder of Clinton Lee; that, on November 3rd, 1919, appellants were arraigned and an attorney appointed by the court to defend them and that they were not given an opportunity to employ

an attorney of their own choice and that the attorney appointed or them did not consult with them, did not take any steps to prepare for their defense and did not ask anything about their witnesses; that appellants were immediately placed on trial before a white jury and the trial closed on a hearing of the State's witnesses alone, and that the jury quickly returned a verdict of guilty of murder in the first degree and appellants were sentenced to death by electrocution for December 27th, 1919 (Tr., pp. 3-5).

The petition further alleged that the trial lasted only about an hour and that only two witnesses testified to anything to connect them in any way with the killing of Clinton Lee, said witnesses being Walter Ward and John Jefferson, both under indictment for the same offense, and that said testimony was procured as above described and was wholly false and not given voluntarily and given on promise of immunity and that said witnesses afterwards plead guilty of murder in the second degree and were sentenced to terms of imprisonment and

afterwards made affidavits showing the falsity of their testimony and the means of its acquisition, which affidavits were attached as exhibits "B" and "C", respectively, to said petition (Tr., p. 5).

A certified transcript of the proceedings in the Phillips Circuit Court, which tried the appellants as above described, was attached to said petition as exhibit "D".

Petition further alleged that large crowds of white people bent on the condemnation and death of the appellants thronged the corthouse and grounds all during the trial and that, on account of the publicity given the killing, and on account of the fact that appellants were negroes, and on account of the fact that the Judge, the Sheriff, the Clerk, and the jurors were all white men, and on account of race prejudice it was impossible for appellants to get a fair and impartial trial; that the attorney appointed to defend appellants knew that the prejudice against them was such that they could not get a fair trial yet he filed no petition for change of venue

nor request for them to prepare defense and did nothing to protect appellants' interest; that appellants did not get a fair trial, but that if they had been given an opportunity they would have employed counsel of their own choice and would have made a defense (Tr., pp. 5-6).

The petition further alleged that the feeling against appellants was such that it overawed the Judge, the jury and the attorney appointed to defend for appellants and that all were dominated by the mob spirit and that the court, although a court of original jurisdiction in felony cases, lost its jurisdiction by virtue of such mob domination and that the result was but an empty ceremony carried through in apparent form of law and that the verdict of the jury was a mob verdict and, therefore, the judgment against appellants is nullity (Tr., p. 6); that the entire trial, verdict and judgment against appellants had already really taken place before said Committee of Seven and that when court convened the program laid out by said Committee was carried through and that the verdict was a part of the prearranged

scheme and judgment of said committee (Tr., p. 7). Attached as exhibit "E" to the petition is what purports to be a letter from said Committee of Seven to the Governor of the State (Tr., p. 7).

Petition further alleged that it is the practice in Arkansas to select Jury Commissioners from the white race and that these Jury Commissioners select grand and petit jurors from the white race and that the Judges of the courts appointing said Jury Commissioners are white men and that all of this is discrimination against the negro race; that this has been the practice in Phillips County for more than thirty years although the negro population of said county greatly exceeds the white population, and that a large proportion of the negroes are possessed of the legal, moral and intellectual qualifications required for jurors; that the exclusion of said negroes from juries was intentional; that, under the laws of Arkansas, an objection to an indictment on the ground that it was found by a grand jury composed of white men must be made at the impaneling of the grand

jury and objection to the petit jury must be made before a plea is entered to the indictment; that appellants did not have an opportunity to register their objections in either instance (Tr., p. 7).

Petition further alleged that, after their conviction and sentence to death, the friends of appellants employed other counsel who filed a motion for a new trial, said motion being a part of exhibit "D" to the petition; that said motion was overruled and an appeal taken to the Supreme Court of the State of Arkansas, the highest court in said State, where, on March 29th, 1920, the judgment was affirmed, copy of the opinion being attached as exhibit "F" to the petition and being Hicks vs. State, 143 Ark., 158; that, thereafter, appellants applied to the Supreme Court of the United States for a writ of certiorari to the the Supreme Court of Arkansas, said application being denied October 11, 1920; that, in August, 1921, the Governor fixed September 23rd, 1921, as the date of execution (Tr., p. 8).

Petition further alleged that on October 19th, 1920, the local post of the American Legion at Helena, composed of 300 white ex-service men of Phillips County, passed a resolution calling on the Governor for the execution of appellants and protesting against the commutation of the death sentence, copy of said resolution being attached to the petition as exhibit "H"; that the Rotary Club and the Lions Club, of Helena, both composed of leading business men, adopted similar resolutions, same being attached as exhibits "I" and "J", respectively, to the petition (Tr., p. 8).

The petition further alleged that the trials, convictions and reversals of the cases of others accused of participation in the killings growing out of the Elaine riot showed the existence of mob spirit (Tr., p. 9).

The petition further alleged that, on June 8th, 1921, they filed in the Chancery Court of Pulaski County petition for writ of habeas corpus setting out the matters and things stated in the instant petition and that said writ was granted and hearing set for June 10th, 1921,

but that, on June 9th, 1921, the Attorney General for the State filed petition with the Supreme Court of Arkansas for writ of prohibition against the Chancellor and appellants, which writ was issued on June 20th, 1921, by the Supreme Court, prohibiting the Chancellor from hearing the cause and which writ, also, quashed the writ of habeas corpus theretofore issued by the Chancellor; that on August 4th, 1921, the Hon. Oliver Wendell Holmes, Associate Justice of the United States Supreme Court, denied the application of appellants for writ of error in the matter of said writ of prohibition (Tr., p. 10).

Petition contended that, by reason of these things, appellants were deprived of their rights in violation of Section 1 of the 14th Amendment to the Constitution of the United States and under the laws of the United States enacted in pursuance thereto, in that they were denied the equal protection of the law and were convicted without due process of law; prayer for writ of habeas

corpus for their discharge. The petition was verified (Tr., p. 10).

Exhibit "A" to the petition purports to be a copy of a statement published in a newspaper at Helena October 7th, 1919, by E. M. Allen, giving the names of seven citizens of Helena chosen to direct operations in putting down the insurrection and discovering and punishing the guilty parties and calling on all persons, both white and black, in possession of useful information to come forward and give it and that such action would be for the public safety and the informant's identity would not be revealed. The statement said that the Committee of Seven was composed of leading business men of Helena and that it had been authorized to carry on the investigation both by the municipal and county authorities. After setting out, on its own responsibility the above and the fact that Mr. Allen was President of the Business Men's League and, also, President of the National Association of Insurance Agents, the headquarters of which were in New York City, the newspa-

per then gives Mr. Allen's Statement in full as follows:

"The present trouble with the negroes in Phillips County is not a race riot. It is a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the Progressive Farmers' and Household Union of America, established for the purpose of banding negroes together for the killing of white people. This 'union' was started by Robert L. Hill, a negro 26 years old, of Winchester, Arkansas, who saw in it an opportunity of making easy money. He had been a farmer all his life, but lately had been posing as a 'private detective doing work in this and all foreign countries.'

"He started his first 'union' work in April of this year. He organized the Ratio Lodge in May of this year. He chose Ratio because his mother happened to be living there. He told the darkies that he was an agent of the government and because the senators and representatives at Washington

were white men and in sympathy with white men of the South, it was impossible for the negroes to get in the army, and so the government had called into the rights that had been promised them for service existence this organization which would be supported by the government in defense of the negroes against the white people. He told them it was necessary for all members of the union to arm themselves in preparation for the day when they should be called upon to attack their white oppressors.

"The slogan of the organization is 'We battle for our rights.' The password of all the lodges was 'We have just begun.'

"He told them that those members who were unable to buy munitions would be supplied by the union from the government storehouse at Winchester.

"The purely mercenary side of all develops as follows: Negro men were charged $1.50 entrance fees and Negro women 50 cents. At the second or

third meeting he would bring Dr. V. E. Powell of Winchester with him, who purported to be the examining physician for the government in its work of registering the negroes in defense of their rights. A certificate was filled out and signed by Negro upon payment of fifty cents. This certificate was supposed to be a registration document. Those negroes who were possessed of funds in amounts from $5.00 to $25.00 were enrolled in an advanced section of the union upon payment of whatever sum he (Hill) could procure in excess of $5.00, a certificate was given, entitling the holder to attend the congresses of the 'union' at Winchester and speak on the floor of the meeting regarding any questions brought up, and to assist in keeping the Constitution of the United States from being questioned.

"Another form of extortion was to sell shares of $10.00 each to the negroes in a proposed building to be erected by the 'union' at Winchester. Hill would find out what negroes possessed thrift stamps

and Liberty Bonds and would issue a certificate stating that so many shares had been purchased at $10.00 per share, and all negroes buying shares in the amount of fifty dollars or more were told that their names would be engraved in the building. In other words, he had so planned his campaign that any negro possessing from fifty cents to fifty dollars was given an opportunity to invest in something connected with the 'union'.

"He then advised the members that the general attorney of the 'union' in Little Rock would for an additional consideration represent all the negroes in their settlements with the landlords during the ginning season. He went to several of the meetings with typewritten powers of attorney which he had signed by the negroes, collecting amounts from twenty-five dollars to fifty dollars each with the crop as security. He was very adroit in making use of certain circulars issued by the government and in distorting the purpose of the Arkansas Ware-

house and Ginners' Law to convince the Negroes that the United States government was endeavoring to correct evils which he alleged existed among the farmers.

"He further told the negroes that the plan for Secretary Lane to provide homesteads for the soldiers had been carried out where the white soldiers were concerned, but the negroes had been refused participation in it. We found where negro soldiers at Elaine had sold their discharge papers for sums ranging from fifty to one hundred dollars on the theory that such discharges entitled the holder to forty acres of government land. He produced maps of state lands in Elaine country (1,600) acres which he said could be bought for $200. This amount was raised at one meeting and paid to him in cash. This land was all described and certain negroes had designated which parts of the various farms (all in cultivation), they desired, to take over for themselves after the white people had been driven off.

"He urged all lodges to decide upon a plan of campaign when the day came to strike and designate the part to be played by every man. He told them the government was erecting at Winchester three huge storehouses where arms, ammunition and trained soldiers would be ready for instant use. On Wednesday morning after the first fight at Hoop Spur the negroes crossed the track and lay in the weeds all day waiting for Hill's army to materialize. They were within easy range of automobiles going to and from Hoop Spur all day and could easily have fired into them but they wished to wait for Hill's army in order to clean up in one fell swoop.

"The fight at Hoop Spur was unpremeditated as far as the negroes were concerned as they were organizing their forces Wednesday morning to attack and capture Elaine but when runners informed the leaders that white men were entering the woods at Hoop Spur they decided to go up and wipe

out the little gang that was reported to be there, before entering upon the more serious task of capturing Elaine. They underestimated the size of the force from Helena and the battle resulted.

"Every negro who joined these lodges was given to kill white people. Unquestionably the time for attack had been set but plans had not been entirely perfected and the shooting of the officers brought on the insurrection ahead of schedule.

"Another scheme used by Hill to obtain money was to appoint leading negroes, or several of them, in each lodge as private and foreign detectives—furnishing them large nickle-plated stars and a pair of nickle-plated handcuffs, for which they paid him $50.00 each.

"His meeting at Winchester in August was attended and addressed by white men. He simply played upon the ignorance and superstition of a race of children—most of whom neither read nor write.

"I have cross-examined and talked to at least one hundred prisoners at Elaine. They belong to different lodges in that section. The stories they tell are almost identical as to the promises and representations made by Hill. He even told them that probably some of the negroes would be called upon to die before 'equal rights' would be assured, but they must look upon themselves as crusaders and die if necessary to secure the freedom of the other members of their race.

"A remarkable thing about the developments is that some of the ringleaders were found to be the oldest and most reliable of the negroes whom we have known for the past fifteen years. He had made them believe that he had been intrusted with a sacred mission which had to be carried out regardless of consequences.

"All lodge meetings were required to maintain an armed outer guard of six sentinels. Hill's usual

expression was, 'Get your racks filled for the day to come.'

"As far as oppression is concerned, many of the negroes involved own mules, horses, cattle and automobiles and clear money every year on their crops, after expenses are paid." (Tr., pp. 12-14.)

Exhibit "B" to the petition was an affidavit of Walter Ward made in Lincoln County, Arkansas, on May 8th, 1921, on the State Convict Farm, saying that he was at that time serving a term on a plea for murder in the second degree for killing Clinton Lee and that he was not guilty and that he gave evidence against appellants under extortion about in the manner set out in appellant's petition but that he testified falsely (Tr., pp. 15-16).

Exhibit "B" to the petition also contained an affidavit of George Green who was then serving a term in the penitentiary. He says that he testified against appellants falsely at their trials and that he testified as he did under compulsion, the testimony being secured

in the manner set out in appellants' petition except that he was not whipped but that he saw others whipped. He says that he was, at the time of making the affidavit, serving a six-year sentence in the penitentiary on a plea of guilty to murder in the second degree for killing Clinton Lee (Tr., pp. 16-17).

Exhibit "C" to the petition purports to be an unsigned, unsworn affidavit of John Jefferson, a convict in the State Penitentiary on a sentence to plea of guilty for murder in the second degree for killing Clinton Lee. He says he was not guilty but plead guilty to keep from being sent to the electric chair. He heard others being whipped and saw the results and heard they had an electric chair in jail but didn't see it. He says they threatened to beat him up if he didn't testify against the appellants and that he did testify falsely to prevent this (Tr., pp. 18-19).

Exhibit "D" is a transcript of the record of the cases of appellants in the Phillips Circuit Court, where appellants were tried. It begins on page 23 and ends

on page 64 of the transcript. Page 23 gives the order showing the court to be in session according to law and pages 23 to 25 show the regular and lawful constitution of the grand jury. Pages 25 and 26 show the regular return of an indictment against appellants. Page 27 shows service of copy of indictment on appellants. Beginning on page 27 is bill of exceptions in regular form settting out the testimony.

For the State, R. L. Brooks testified that he saw Clinton Lee killed at the place and time charged in the indictment and that the bullet came from the South (Tr., pp. 28-29)

Dr. O. Parker testified for the State that he was a physician and saw Clinton Lee dying and that he died in a few minutes afterwards, while the physician was engaged with another wounded man and then he turned and saw Mr. Lee after he was dead (Tr., p. 29)

Tom Faulkner testified on behalf of the State that he was present at the killing and saw three negroes three or four hundred yards South of the house and that

he saw one of the negroes fire two shots toward the car in which Lee was sitting (Tr., p. 30). That the killing was done with a rifle, and that he did not know the parties but knew they were negroes (Tr., p. 31).

John Jefferson testified for the State that he knew the defendants and belonged to the Farmers' Household and Progessive Union at Elaine and that appellant Hicks was president of one Lodge and appellant Knox was president of another (Tr., p. 31) and that he was present at the lodge and that the members took guns and that they met Thursday night before the killing and that they had the guns that night (Tr., pp. 31-32) and that he went to Moore's house before daylight on October 1st and heard Frank Moore say that they had been into it at Hoop Spur and they had killed a man (Tr., p. 33). He saw all five of the appellants. He heard Frank Moore saying during the morning on the bridge in the road and he says come on up here, don't you hear that shooting; let's go up there and help them people out and he paired us up, two and two. It was Frank Moore and Hicks

and Knox, these men over here. Moore got in front and says come on, let's go and help them people out at the shooting, and he started on out through the field and through the woods toward Hoop Spur, Moore in front, Hicks in the middle and Knox at the rear end. Knox's business was to shoot down anyone who broke ranks. Paul Hall was in the gang. And so was Sweat Coleman. He had a 45-70 gun. Frank Moore, Ed Hicks and Knox had me in charge, and Coleman and Paul Hall was along, and all had guns. We come out through the field about a quarter of a mile from the house and saw a bunch of white men and Hicks says let's go across this way and cut them off (Tr., pp. 34-35). Ed Hicks and Frank Moore guided us. As we crossed the railroad, Frank Hicks made two shots and Moore was out there in the road near Hicks (Tr., pp. 35-36). Sweat Coleman was in the gang; so was Jo Knox. After Hicks shot the first shot he took his gun down and re-loaded it and somebody in the gang told him don't shoot but he says I am going to shoot and when he made the second shot he said "I

would have got that guy if it hadn't been for the horse." There was a horse between him and this getleman where he shot. After that, the gang split up, some on the West side of the railroad and some on the East (Tr., p. 37).

CROSS-EXAMINATION.

It was nigh a mile or two from where this shooting was done by Hicks up to where the shooting we had heard. After the shooting we went over to Yellow Banks and I was arrested on the Alderman place. I have been indicted for murder inthe first degree. I have never been before the grand jury. I didn't expect to kill any one when I went into the lodge and did not join for that purpose (Tr., p. 38).

Q. Whose gun did Ed Hicks use in shooting at Mr. Lee?

A. I seen him with it when I first seen him; I ain't seen him get it from nobody else.

Q. Did Sweat Coleman have a gun at that time?

A. Yes, sir, he had a 45-72 (Tr., 38).

Q. When did you find out that somebody was to be killed after you joined that lodge?

A. I didn't find out that nobody was to be killed but I heard this Hill mention it in the lodge that it was going to be trouble but just for to say kill somebody, I never heard nothing about that (Tr., p. 39).

Walter Ward, for the State, testified as follows:

I know Paul Hall, Frank Moore, Ed Hicks, Sweat Coleman, J. E. Knox and I belong to the Farmers' Progressive Household Union of America—the same lodge that Hicks and them belong to, I mean these fellows over here. Hill and Hicks had charge of the lodge that I joined but I saw these other fellows in the Union there. They all taken guns. They said they was looking for trouble. That is what the head leaders said. Ed Hicks is one of them and Hill and Frank Moore (Tr., p. 40). About half past four on Wednesday morning Paul Hall woke me at home and told me to go to Ed Hicks' house.

He said Frank Moore sent him after me and for me to go and wake up the President. I didn't know what he wanted me to do until I got over there. I got a gun from Frank Moore, a .32 Smith & Wesson. He didn't tell me what he wanted me to do with the gun until the shooting at Hoop Spur then he hollowed "Come on" and he lines us up two deep and he got in the lead and had Hicks near the middle and Sweat was behind (Tr., p. 42). Knox and Paul Hall were in the line but I couldn't tell you where. I heard Frank Moore telling Ed Hicks that he had been to Hoop Spur and had killed a white man and a colored one and he said let's go and he says if a man breaks rank he was going to turn loose on him and if they find a man picking cotton in the field, that is where they were going to kill him at, right away. I saw Sweat Coleman there at Frank Moore's house that morning and he had a 45-70, but I didn't hear him say what he was going to do with it. From Moore's house we went on up to where that gang of white folks was at the house and we split up there. Frank Moore and

Frank Hicks sat down in the road. Paul Hall was over in the field on the other side of the road. Old man Coleman was on the other side of the road, I don't know which side. Knox was up on the railroad; Frank Hicks made two shots, about ten yards from where I was; Frank Moore was sitting down close to him. He shot right up the road at the McCoy house North (Tr., pp. 42-43).

CROSS-EXAMINATION.

I was told to go to Ed Hicks' house and wake him up and to wake up all on that road and I went. Nobody didn't go with me but some come behind me. All the gang was behind me. I am indicted for killing Clinton Lee, but I didn't shoot at him nor tell anybody else to nor have any agreement with anybody else.

Q. Did any one in this affair have any agreement there with anybody else that anyone would be or should be killed?

A. That was Hill's speech that night (Tr., p. 43).

After the shooting I run—started to run and they said God Damn you stop; where in the Hell you negroes going and we stopped and some of us laid down in the woods and some of us got behind stumps and laid there until Frank Moore said let's go and we went on back down in the corn field and when the train passed up Frank and them went on to Henry Thomas' house. I went across Yellow Banks and stayed there until dark. I went on across Mr. Craig's and Mr. Crow's field and back on the place. Knox was over there (Tr., p. 44). I woke up the President and told him Frank Moore sent for us to meet over at Frank Moore's house and we met over there (Tr., p. 45).

Dave Archer testified for the State as follows:

I know Paul Hall, Frank Moore, Ed Hicks, Sweat Coleman and J. E. Knox (Tr., p. 45). Ed Hicks sent out some men after the follows that didn't belong to the union to capture them and put them—they captured me, I mean these negroes, and carried me over and put me in Ed Hicks' squad at Paul Hall's house and I stayed there

about an hour before I got away. Hicks was pointing the way for us men to go to watch for the white people. He said they was going to kill the white people when they got down there and he told us negroes to do that and I went down in the slough with them and when we got down in the slough I laid my weapon down and says "I will be back directly," I says you watch until I come back and I went on down in the slough and got in the field, the way they carried me; and I went on down to Elaine and before I got to Elaine good the white people was coming up there and so Mr. Stokes—I got away and went to Elaine and got Mr. Stayton to bring me to his house. Frank Moore made a speech and said he was going to do the same thing he was telling his men, he was going to kill all the white people that come down there that evening. Sweat Coleman carried me right through his yard. Paul was at his house. They carried me over to Frank's and then they celebrated me over at Paul's house. Paul Hall hid a Winchester that morning and said he was watching for the white folks (Tr., 47).

CROSS-EXAMINATION.

Just as soon as I got away from them I told Mr. Stokes what was going on over there—that same day. I told him who carried me over there. They made me bet my gun too, a double-barrel shot gun. I had my loads in my pocket. I was badly frightened. Mr. Hicks and Mr. Moore were the boss-men (Tr., p. 48).

J. Graham Burke testified for the State:

I had a conversation with Sweat Coleman, J. E. Knox, and Ed Hicks in the County Judge's office in an investigation that we were making. We sent for them, they were in jail, and brought them out there. Warrants had been issued for them. We just merely asked them questions and they either denied or admitted (Tr., p. 49). No coercion was used in talking to these negroes and no promises of reward. Their statements were voluntarily made. Sweat Coleman said he was a member of the Union (Tr., p. 50). He said he went up to Frank Moore's or Paul Hall's house and they sat around there and different ones of them ranged around there until 11

or 12 o'clock, when the shooting happened at Hoop Spur. The gang organized and went towards Dr. Richardson's place, and that when they got to the railroad track Sweat told about these two shots being fired, and said they split up there and went on each side of the railroad. Knox's statement was practically the same as Sweat's. He admitted that he went up there with the gang. Ed Hicks' statement was about the same, that he was in the gang that went towards Mr. McCoy's house and that after he got up there these shots were fired, that he took a gang of negroes and went on one side of the railroad—seems the crowd split there, part following Frank Moore and some went with him (Tr., pp. 50-51).

The court instructed the jury correctly on the law (Tr., pp. 51-54) as may be seen by reference to the case of Ed Hicks vs. State, 143 Ark., 158. Thereupon, the jury retired and in due time returned a verdict of guilty of murder in the first degree, to which exceptions were properly taken (Tr., p 54). Motion for new trial was presented in due time by counsel for the defendants

(Tr.,p. 55). The motion for new trial was overruled by the trial court and the defendants, appellants here, prayed an appeal from the judgment of the Phillips Circuit Court to the Supreme Court of Arkansas, which appeal was granted and the defendants given sixty days in which to prepare, tender and file their bill of exceptions. The bill of exceptions was prepared, signed and filed within the time prescribed by law (Tr., p. 55). The order showing the court to be open in due form and the order receiving the verdict lawfully are found on page 56 of the transcript. The order of judgment and sentence is found on pages 56 and 57 and is in regular, lawful form. The motion for new trial was in regular form, set up all of the objections which could be made on behalf of the defendants and their interests were properly preserved (Tr., pp. 57-60). The order of the court overruling the motion for new trial and granting an appeal is found on page 63 and is regular. The record sets out the opinion of the Supreme Court of the State of Arkansas (Tr., p. 64) and the judgment of conviction af-

firmed (Tr., p. 67). The decision may be found in 143 Ark., 158, Hicks vs. State, and we assume that the court does not wish to burden the members with a quotation of this case.

Petition for re-hearing of the cause in the Supreme Court of Arkansas was filed April 19th, 1920, in due form and overruled (Tr., pp. 68-70).

Exhibit "E" is a letter written to the Governor of Arkansas by certain citizens of Helena, insisting that the law should take its course (Tr., p. 71).

The opinion in the case of Frank Hicks is found on pages 72 to 75 of the transcript but we do not set it out for the reasons above stated.

Exhibit "G" are proclamations of the Governor fixing dates of execution (Tr., pp. 75-76).

Exhibit "H" to the petition is a copy of a resolution by Richard L. Kitchens Post No. 31 of the American Legion at Helena expressing in it, as the opinion of the Post, that executive clemency would do more harm in the community and would breed lawlessness as well as

disregard for constituted authority, inasmuch as appellants had been convicted of murder in the first degree. The resolution was a protest against the commutation of any of the sentences, and a committee of four was appointed to present the resolution to the Governor (Tr., pp. 76-77).

Exhibit "I" was a similar resolution of the Rotary Club of Helena, adopting a resolution similar to that adopted by the Kitchens Post and ordering that a copy of the resolution officially signed, be sent to the Kitchens Post (Tr., p. 78).

Exhibit "J" was a resolution of the Helena Lions Club adopting the resolution passed by the Legion Post (Tr., pp. 78-79).

Exhibit "K" is the opinion of the Arkansas Supreme Court delivered June 20, 1921, in the case of the State, *ex rel* vs. Martineau, chancellor, in which a writ of prohibition was issued quashing writ of habeas corpus and injunctive order issued by the Chancery Court (Tr., pp. 79-86). This decision may be found in 149 Ark., 237.

For the reasons above stated, we do not set out the opinion in full.

The petition for the writ of habeas corpus in the United States District Court was supported by the affidavits of T. K. Jones and H. F. Smiddy, being found respectively on pages 86 and 91 of the transcript.

T. K. Jones stated in his affidavit that he knew the appellants; that he was a special agent for the Missouri Pacific Railroad; that he was at Helena, Arkansas, on the night of September 30, 1919; that he had a request from Mr. Dick Dazell about seven o'clock P. M. on that day asking if Officers Smiddy and Adkins could go with Charles Pratt to Elaine that night to arrest a man by the name of Clem charged with misdemeanor, and I gave him permission. Mr. Smiddy and Mr. Adkins were working under witness; that Smiddy did not go but Adkins did, leaving about nine o'clock; that about two o'clock in the night Dazell 'phoned witness that this man had gotten into some trouble at Hoops Spur and asked if Mr. Smiddy and I could go with him and others to investigate,

and we went, reaching Hoops Spur Church at three-thirty or four o'clock in the morning. Found the dead body of Adkins near the church; left and returned about sun-up; church house disarranged; shed on the north side of the church had been shot into (Tr., pp. 86-87).

In the afternoon of the first of October, witness heard some white men talking and making threats to kill their negroes if they ever heard of their joining the Union, but does not know who these men were. I stood guard near the Hoops Spur Commissary from eight o'clock in the morning 'till twelve-thirty P. M. with orders to arrest every negro who came by, but I saw none. We heard that the negroes were going to attack the McCoy House and we went down there and remained until three o'clock, and no attack was made. While there Lieutenant Taplin was brought in shot in the left side of the face and neck with a load of buckshot, and he died. While there I saw a bunch of negroes across the railroad going East one-half mile South of the McCoy House, and disappear in a corn field, but did not see any weapons.

None of them stopped and shot. I saw Clinton Lee after he was shot and saw the hole in the rear of the automobile. The Hoops Spur Church was burned down during the day (Tr., p. 88)

From the information I gathered down there, the trouble started because the white folks objected to the negroes having a union (Tr., p. 88). I saw a great many negroes whipped on the third floor of the County Jail to compel them to give evidence. Smiddy conveyed a number of prisoners from the jail to be examined by the Committee of Seven. The negroes were not whipped, but formaldehyde was put in their noses and they were stripped naked and put into an electric chair to further frighten and torture them. I whipped probably two dozen negroes myself. I either whipped or help whip several of these petitioners, including Frank Moore and J. E. Knox. Not all of the prisoners were whipped. The negroes were indicted without taking before the Grand Jury the witnesses. Some person would go before the

Grand Jury and would tell what such and such a person would testify to (Tr., 89-90).

The feeling against the defendants was very bitter and strong. The trial was brief. Shortly after the negroes were placed in jail, a mob was formed, but the presence of soldiers and the advice of level-headed citizens prevented the purpose of the mob (Tr., p. 90).

The affidavit of H. F. Smiddy was to the same effect as that of T. K. Jones (Tr., pp. 91-99).

The cause was heard in the United States District Court on September 26, 1921, upon demurrer filed by the State of Arkansas, stating that the petition for writ of habeas corpus did not allege facts sufficient to entitle the petitioners to the relief asked and prayed that the petition be dismissed, and for all other general and proper relief. The cause was heard before the Honorable John H. Cotteral of Oklahoma acting as United States District Judge by assignment in place of the Honorable Jacob Trieber, Judge of the Court. On September 27 Judge Cotteral rendered his decision sustaining the de-

murrer and motion to dismiss (Tr., pp. 100-101). On the same day prayer for appeal was made and granted (Tr., p. 102), and the formalities necessary to perfecting the appeal were duly complied with (Tr., pp. 103-105).

As stated above, a stipulation of counsel was filed, agreeing that both the above entitled causes might be submitted to the Supreme Court of the United States and briefed together and consolidated and heard on record in No. 595, the stipulation being filed November 14, 1921, No. 595 of the October Term of 1921 being the case of Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, Appellants, vs. E. H. Dempsey, keeper of the Arkansas State Penitentiary, Appellee; and the cause is here on appeal.

BRIEF AND ARGUMENT.

The appellant, Frank Hicks, was indicted by the Grand Jury of Phillips County, Arkansas, for murder in the first degree, alleged to have been committed by shooting one Clinton Lee, and his trial on said indictment in the Phillips County Circuit Court resulted in his conviction of murder in the first degree. Appellants Frank Moore, Ed. Hicks, J. E. Knox, Ed. Coleman and Paul Hall, were jointly indicted by said Grand Jury for the same crime and were tried together, and were all convicted of murder in the first degree in said Court. Subsequent to their trials and conviction, they filed and presented to the trial court their motions for new trials, which motions were overruled by the trial court, to which action appellants duly objected and excepted. Whereupon, they prayed and were granted appeals to the Supreme Court of Arkansas, where the judgments of the trial court were affirmed on the 29 day of March, 1920.

One of appellants' assignment of errors in their motions for new trials was, that their trials occurred under

such circumstances that they were convicted without due process of law. In other words, they contended, on appeal to the Supreme Court of Arkansas, that the trial court was dominated by mob violence and "a committee of seven" to such an extent that they did not get a fair and impartial trial, and were convicted contrary to the provisions of Section 1 of Article 14 of the Federal Constitution. The facts, with reference to said assignment of error in the motions for new trials, and urged in the Supreme Court, were not developed during the course of the trials in the lower court, but were brought into the record by affidavits filed in support of the motions for new trials. Mr. J. Smith of the Supreme Court of Arkansas, in delivering the opinion of that court in said cases, among other things, said;

> "It is now insisted that because of the indictments developed at the trial and those recited in the motion for new trials, and the excitement and feeling growing out of them, no fair trial was had, or

could have been had, and that the trial did not, therefore, constitute due process of law.

It is admitted, however, that eminent counsel was appointed to defend appellants, and no attempt is made to show that a fair and impartial trial was had, except as an inference from the facts stated above, the insistence being that a fair trial was impossible under the circumstances stated.

We are unable, however, to say that this must necessarily have been the case. *The trials were had according to law, the jury was correctly charged as to the law of the case, and the testimony is legally sufficient to support the vedicts returned. We can not, therefore, in the face of this affirmative showing, assume that the trial was an empty ceremony, conducted for the purpose only of appearing to comply with the requirements of the law, when they were not in fact being complied with."*

Hicks vs. State, 143 Ark., 158.

After the Supreme Court of Arkansas had affirmed the judgments of the trial court, appellants filed their motions for rehearing, which motions for rehearing were overruled by the Supreme Court (Tr., p. 70).

On the 9th day of April, 1921, the Governor of Arkansas, under the provisions of Section 3262 of Crawford & Moses' Digest of the Statutes of Arkansas, fixed the date for the execution of appellants to be on the 10th day of June, 1921 (Tr., p. 75).

On the 8th day of June, 1921, appellants filed their petitions for a writ of habeas corpus in the Chancery Court of Pulaski County, Arkansas, seeking therein to restrain and enjoin appellee herein from proceeding under the proclamation of the Governor, as aforesaid, from carrying into effect said proclamation (Tr., p. 79). Said Chancery Court immediately ordered the issuance of said writ returnable before the Court at two o'clock P. M. on June 10, 1921. In the meantime, the Attorney General of Arkansas filed his petition for a writ of prohibition restraining said Chancellor from further pro-

ceeding on appellants' petitions for writs of habeas corpus. The Attorney General's petition for writ of prohibition was granted by the Supreme Court of Arkansas on June 20, 1921. State vs. Martineau, 149 Ark., 237. Thereafter, on the 4th day of August, 1921, appellants made application to the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States for a writ of error, to the Supreme Court of the State of Arkansas, in the matter of said writ of prohibition, but same was denied (Tr., p. 9). The Governor of Arkansas, in pursuance of the authority of Section 3262 of Crawford & Moses' Digest of the Statutes of Arkansas, again set the date of appellants' execution for the 23rd day of September, 1922, but before said date appellants filed their petitions for writs of habeas corpus in the United States District Court for the Western Division of the Eastern District of Arkansas, on the 21st day of September, 1921 (Tr., p. 10).

The motions for new trials filed in the trial court, supported by certain exhibits, the petition for habeas

corpus before the Pulaski Chancery Court and the petitions for habeas corpus filed by appellants in the United States District Court for the Western Division of the Eastern District of Arkansas, are substantially the same. The petitions for writs of habeas corpus now before this court, are merely a repetition of the allegations contained in motions for new trials, filed in the trial court, with reference to the excitement prevailing at and before the trials in the Circuit Court and the alleged domination of mob violence. Said petitions now before this Court are also merely a repetition of the petitions filed in the Pulaski County Chancery Court, and reviewed by the Supreme Court of Arkansas on the State's petition for a writ of prohibition. All of said petitions contained allegations that the appellants, being nergoes, were denied the right and privilege guaranteed by the Constitution of the United States by the exclusion of their race from the Grand Jury and from the trial jury in Phillips County. The motions for new trials and the various petitions filed by appellants recite copies of cer-

tain publications in newspapers and resolutions passed by civil and fraternal organizations prior to the trials and subsequent thereto, alleged to be calculated to arouse the white people of Phillips County to a high pitch of excitement. Said petitions give what purports to be a history of the events leading up to the killing of Clinton Lee, and declare the innocence of appellants of the crime charged in the indictments. Said petitions allege that the witnesses testifying in behalf of the State of Arkansas were tortured into giving false testimony, which said witnesses had retractetd since the trials in the lower court.

Said petitions allege that prior to the indictments there had been an investigation by a committee of white citizens of Phillips County, Arkansas, for the purpose of ascertaining who were the guilty parties in the homicide, which had occurred, and that "the entire trial, verdict and judgment against them was but an empty ceremony; that their real trial and condemnation had already taken place before 'said Committee of Seven'; that said com-

mittee, in advance of the sitting of the court, had set in judgment upon their and all other cases and assumed and exercised the jurisdiction of the court by determining the guilt or innocence of those in jail, had acquired the evidence in the manner herein set out, and decided which of the defendants should be electrocuted and which sent to prison, and the terms to be given them, and which to be discharged; that when court convened, the program laid out by said committee was carried through, and the verdict against petitioners was pronounced not as the independent verdict of an unbiased jury, but as part of the prearranged scheme and judgment of said committee, that in doing this, the court did not exercise the jurisdiction given it by law *and wholly lost its jurisdiction by substituting for its judgment the judgment of condemnation of said committee.*" (Tr., pp. 6-7). See also State vs. Martineau, 149 Ark., 243-244.

It will be observed from the recitals, and prayer for relief, of appellants' petitions for writs of habeas corpus,

that the only issue that is before this court for its consideration is, does the record herein show on its face that the trial court was under the influence of mob domination during the course of the trial of these causes to such an extent that the effect thereof wrought a disillusion of the court, so that the procedings therein were *coram non judice.*

The petitions for writs of error were filed by appellants in the United States District Court for the Western Division of the Eastern District of Arkansas, under the provisions of Section 753, Rev. Stat. Comp. Stat. 1913, Sec. 1281. Under the provisions of said section, before appellants would be entitled to the relief sought, it must appear that they are held by the appellee, E. H. Dempsey, Keeper of the Arkansas State Penitentiary, in violation of the Constitution of the United States. Rogers vs. Peck, 199 U. S., 425, 434.

Inasmuch as appellants are held in custody of appellee by reason of their conviction upon criminal charges, before a court having the power and authority

to hear and determine the same, it results from the very nature of the writs themselves that they cannot have relief on habeas corpus mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, *cannot be reviewed by habeas corpus. A writ of habeas corpus cannot be invoked as a substitute for the writ of error.*

Ex Parte Parks, 93 U. S. 18, 21;

Ex Parte Siebold, 100 U. S. 371, 375;

Ex Parte Royall, 117 U. S. 241;

Re Frederich, 149 U. S. 70, 75;

Baker vs. Grice, 169 U. S. 284, 290;

Tinsley vs. Anderson, 171 U. S. 101, 105;

Markuson vs. Boucher, 175 U. S. 184;

Frank vs. Mangrum, 237 U. S. 309.

It is a well established principle of law that the due process of law that is required by Section 1 of Article 14 of the Constitution of the United States, that a criminal prosecution in the Courts of a State, based upon a law

not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is due process of law in the sense that term is used in our Federal Constitution.

Walker vs. Sanvinet, 92 U. S. 90, 93;

Hurtado vs. California, 110 U. S. 516, 535;

Andrews vs. Swartz, 156 U. S. 272, 276;

Bergemann vs. Backer, 157 U. S. 655, 659;

Rogers vs. Peck, 199 U. S. 425, 434;

U. S. Ex Rel Drury vs. Lewis, 200 U. S. 17;

Felts vs. Murphy, 201 U. S. 123, 129;

Howard vs. Kentucky, 200 U. S. 164;

Frank vs. Mangrum, 237 U. S. 309.

In view of the well established principles of law, as announced by this Court in the foregoing authorities, we shall confine our discussion to the question of

whether or not the law and procedure followed by the prosecution in the cases herein through the various State Courts, were conducted according to the settled course of judicial proceedings as established by the laws of the State of Arkansas.

From an examination of the record herein, it will be observed first, that the Circuit Court of Phillips County, Arkansas, in which the trials were had, originally, was duly opened and constituted, and that the Grand Jury which returned the indictments was duly summoned, sworn, empaneled and charged in keeping with the laws of the State of Arkansas (Tr., p. 23).

Second. The indictments were lawfully returned in keeping with the provisions of the Statute of the State (Tr., p. 26).

Third. The indictments herein were sufficient in every particular, complying with the Statute in such cases made and provided (Tr., p 26).

Fourth. The court, at the time of trial, was duly constituted. Appellants were duly arraigned and the

jurors were duly sworn touching their qualifications to serve as jurors, accepted by appellants and sworn and empaneled to try said cases (Tr., pp. 56, 57).

Fifth. The evidence of both the State and the accused was heard, the jury was instructed according to law, after which it retired to consider its verdict; subsequently thereto returning into court a verdict finding appellants guilty of murder in the first degree (Tr.,p. ——)

Sixth. After their trials and conviction as aforesaid, appellants filed their motions for new trials (Tr., pp. 57-60).

Seventh. The said motions for new trials were duly heard by the trial court and overruled (Tr., p. 63).

Eighth. Within the time allowed by law, and within the time fixed by the trial court, appellants duly filed their bills of exceptions, which were by the court approved and ordered filed as a part of the record (Tr., p. 55).

Ninth. Appeals from the action of the Circuit Court of Phillips County, convicting the accused, were granted January 9, 1920, and the records of said trials duly filed in the Supreme Court of the State of Arkansas, on January 9, 1920.

Tenth. The causes were consolidated and heard by the Supreme Court of the State of Arkansas on said appeals, and the judgment of the trial court affirmed on March 29, 1920. See 143 Ark., 158-164.

Eleventh. Appellants' motion for rehearing was duly filed in the Supreme Court of the State of Arkansas, and subsequent thereto said motion was overruled by said court.

It will be observed from the foregoing recitals of the record herein, which, for the purpose of the demurrer, is conceded to be true, that appellants were charged with violating the law of murder and that such law is not repugnant to the Federal Constitution; that the prosecution of appellants by the State of Arkansas was conducted according to the well established course of judi-

cial proceedings as established by the laws of said State; that appellants were present in person and by counsel at all stages of said proceedings; that the trials were had in accord with competent jurisdiction, according to the well established modes of procedure. Therefore, appellants were not denied the equal protection under the law, nor are they entitled to the relief sought under Section One of Article 14 of the Constitution of the United States.

It is well established by the decisions of this court that the office of a writ of habeas corpus cannot be employed to review irregularities or alleged erroneous rulings made during the trial, however serious; it can only be invoked in cases where the judgments under which the persons are detained show to be absolutely void for want of jurisdiction in the courts that pronounced them, either because such jurisdiction was absent at the beginning, or because it was lost during the course of the proceedings.

The laws of the State of Arkansas provide for an appeal in criminal cases to the Supreme Court of that State upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. Section 2129, Crawford & Moses' Digest of the Statutes of Arkansas. While Section 1 of Article 14 of the Constitution of the United States does not require that a State shall provide for an appellate review in criminal cases, it is clearly obvious that when such an appeal is provided for, and the prisoner has had the benefit of it, as in the cases at bar, the proceedings in the appellate tribunal are to be regarded by this Court as part of the process of law under which said prisoner is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to Section 1 of Article 14 of the Constitution of the United States.

McKane vs. Durston, 153 U. S., 684, 687;

Andrews vs. Swartz, 156 U. S., 272;

Rogers vs. Peck, 199 U. S., 425, 435;

Reetz vs. Michigan, 188 U. S., 505, 508;

Franks vs. Mangrum, 237 U. S., 309.

This Court, in discussing the "due process clause" of the 14th Amendment to the Federal Constitution, said, in the case of Frank vs. Mangrum, *supra*:

> "In fact, such questions as are here presented under the due process clause of the 14th Amendment, though sometimes discussed as if involving merely the jurisdiction of some court or other tribunal, in a larger and more accurate sense involve the power and authority of the state itself. The prohibition is addressed to the state; if it be violated, it makes no difference in a Court of the United States by what agency of the state this is done; so, if a violation be threatened by one agency of the state, but prevented by another agency of higher authority, *there is no violation by the state. It is for the state to determine what courts or other tribunals shall be established for the trial of offenses against its criminal laws, and to define their*

several jurisdictions and authority as between themselves. And the question whether a state is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the Federal Constitution, cannot ordinarily be determined, with fairness to the state, until the conclusion of the course of justice in its courts."

Virginia vs. Rives, 100 U. S., 313, 318;

Civil Rights Cases, 109 U. S., 3, 11.

McKane vs. Durston, 153 U. S., 684, 687;

Dreyer vs. Illinois, 187 U. S., 71, 83, 84;

Reetz vs. Michigan, 188 U. S., 505, 507;

Carfer vs. Caldwell, 200 U. S., 293, 297;

Waters Pierce Oil Co. vs. Texas, 212 U. S., 86, 107;

Re Frederich, 149 U. S., 70, 75;

Whitten vs. Tomlinson, 160 U. S., 231, 242;

Baker vs. Grice, 169 U. S., 284, 291;

Minnesota vs. Brundage, 180 U. S., 499, 503;

Urquhart vs. Brown, 205 U. S., 179, 182.

This court, in numerous decisions, has held, that where it is made to appear to a Federal Court that an applicant for a writ of habeas corpus is in custody of a State officer, in the ordinary course of a criminal prosecution, as appellants are in the case at bar, under a law of the State not in itself repugnant to the Federal Constitution, the writ of habeas corpus, in the absence of very special circumstances, ought to be issued until the State prosecution has reached its conclusion, *and not even then until the Federal questions arising upon the record have been brought before this court upon a writ of error.*

Ex Parte Royall, 117 U. S., 241;

Re Frederich, 149 U. S., 70;

Whitten vs. Tomlinson, 160 U. S., 231, 242;

Baker vs. Grice, 169 U. S., 284, 291;

Tinsley vs. Anderson, 171 U. S., 101, 105;

Markuson vs. Boucher, 175 U. S., 184;

Urquhart vs. Brown, 205 U. S., 179;

The same idential question that is now before this court in this case,—that of whether or not appellants were deprived of their liberty in the trial court, without due process of law, contrary to the provisions of Section 1 of Article 14 of the Federal Constitution, was before the State Supreme Court on two different occasions. The first time, in an assignment of error in the motion for a new trial in the case of Hicks vs. State, 143 Ark., 158; the second time in the case of State vs. Martineau, 149 Ark., 237. In the case of Hicks vs. State, *supra,* the State Supreme Court said:

> "It is now insisted that because of the incidents developed at the trial and those recited in the motion for new trials, and the excitement and feeling growing out of them, no fair trial was had, or could have been had, and that the trial did not, therefore, constitute due process of law.
>
> It is admitted, however, that eminent counsel was appointed to defend appellants, and no attempt

> is made to show that a fair and impartial trial was not had, except as an inference from the facts stated above, the insistence being that a fair trial was impossible under the circumstances stated.
>
> We are unable, however, to say that this must necessarily have been the case. *The trials were had according to law, the jury was correctly charged as to the law of the case, and the testimony is legally sufficient to support the verdicts returned. We cannot, therefore, in the face of this affirmative showing, assume that the trial was an empty ceremony, conducted for the purpose only of appearing to comply with the requirements of the law, when they were not in fact being complied with."*

In the case of State vs. Martineau, *supra,* the second time the question of whether or not appellants were deprived of their property without due process of law, the Supreme Court of Arkansas, speaking through its Chief Justice, said:

"Counsel for the respondents rely on the case of Frank vs. Mangrum, 237 U. S., 309, as sustaining this contention, but an analysis of that decision and a consideration of the language employed by the learned justice who wrote it shows very clearly that such is not the effect of that decision. The court distinctly recognized the well established rule at common law and under the British statutes, that on habeas corpus a court was confined in its inquiry to the face of the process of the judgment under which the prisoner was held in custody. The case of Ex Parte Watkins, 3 Peters 193, was cited where Chief Justice Marshall, in delivering the opinion of the court, followed the common-law rule stated above and decided that a court could not, under habeas corpus, look beyond the face of the judgment of a court of competent jurisdiction to determine whether or not a prisoner was being unlawfully held. This is in accordance with repeated decisions of our own court holding that, if a peti-

tioner for habeas corpus 'is in custody under process regular on its face, nothing will be inquired into save the jurisdiction of the court whence the process came.' State vs. Neel, 48 Ark., 283; Ex Parte Barnett, 51 Ark., 215; Ex Parte Perdue, 58 Ark., 285; Ex Parte Foote, 70 Ark., 12; Ex Parte Byles, 93 Ark., 612; Ex Parte Williams, 99 Ark., 475.

But the Supreme Court of the United States in the Frank case, *supra,* held that Congress had, by the act of February 5, 1867 (Revised Statutes, Par. 753 *et seq.*), conferred upon the Federal courts express authority to inquire beyond the face of the process or judgment under which a prisoner is being and had 'extended the writ of habeas corpus to all cases of persons restrained of their liberty in violation of Constitution or law or treaty of the United States.' Further speaking on this subject, the court said: 'The effect (Acts 1867) is to substitute for the bare legal review that seems to have

been the limit of judicial authority under the common law practice, and under the act of 31 Car. 11, c. 2, a more searching investigation, in which the appellant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

The statute referred to does not apply to any courts except the Supreme Court and circuit and district courts of the United States, and it defines the practice in those courts and the powers of the courts under the remedy afforded by the writ of habeas corpus. The statute does not purport to apply to the courts of the States and Congress had no authority, had it attempted so to do, to prescribe the powers of the State courts and the practice to be followed in matters within their jurisdictions. The court in the Frank case in effect held that the statute had no application to the state courts, for it said this: *'But repeated decisions of this court*

have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with.'"

The Supreme Court of Arkansas further discussing the doctrine as announced by this court in the case of Frank vs. Mangrum, *supra*, said:

"Further discussion would seem to be useless. It was not contended in the argument here that there is any other charge in the motion upon which relief could be granted, *except the one to the effect that the trial court was dominated by a mob, which suspended the functions of the court and prevented a fair trial.* There are no other facts in the petition which would warrant a review of the judgment of the Circuit Court of Phillips County. The allegations with regard to newly discovered evidence and

the retraction by the State's witnesses, which is, in effect an allegation of the discovery of new evidence, affords no ground for a review of the judgments of conviction, for there is no provision in the laws of this State for the granting of a new trial after the lapse of the term on the ground of newly discovered evidence. Howard vs. State, 58 Ark., 229; Thomas vs. State, 136 Ark., 290; Satterwhite vs. State, ante p. 147."

Appellants' petitions herein show, that, after the Supreme Court of Arkansas had, on two different occasions decided, without a dissent, that appellants had received fair and impartial trials in the trial court,—were not deprived of their liberty without due process of law, they attempted to have this court review the judgments of the State Supreme Court by making application to Mr. Justice Holmes of this Court for a writ of error, which application was denied (Tr., p. 9).

Appellants are merely attempting to use a writ of habeas corpus to review alleged errors of law of the

State Courts, when a review thereof can only be had in this Court on a writ of error.

"Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, *cannot be reviewed by habeas corpus. That writ cannot be employed* as a substitute for the writ of error."

Frank vs. Mangrum, 237 U. S. 309, and cases therein cited.

This Court, in the case of Frank vs. Mangrum, *supra,* in discussing the authority of Federal Courts to interfere with the State Courts in administering the laws of the State, where same have been violated, said:

"It follows as a logical consequence that where as here, a criminal prosecution has proceeded through all the courts of the state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the

ground of deprivation of Federal rights sufficient to oust the state of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in Ex Parte Royall, 117 U. S., 241, 252, applying in a habeas corpus case what was said in Covell vs. Heyman, 111 U. S., 176, 182, a case of conflict of jurisdiction: 'The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity which perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is

something more. *It is a* principle of right and of law, and therefore of necessity.' And see Re Tyler, 149 U. S., 164, 186."

The case of Frank vs. Mangrum, *supra,* is almost exactly in point with the case at bar. Frank was indicted by the Grand Jury of Fulton County, Ga., for murder. He was tried on said indictment and found guilty. The trial court rendered judgment, sentencing him to death. On the same day Frank's counsel filed a motion for a new trial, which was subsequently amended so as to include one hundred and three different grounds particularly specified. Among these grounds were several raising the contention that he did not have a fair and impartial trial because of alleged disorder in and about the court room, including manifestations of public sentiment hostile to him and sufficient to influence the jury. In support of one of these, and to show the state of sentiment as manifested, the motion stated "The defendant was not in the court room when the verdict was rendered his presence having been waived by his counsel.

This waiver was accepted and acquiesced in by the court, because of the fear of violence that might be done the defendant were he in court when the verdict was rendered." Numerous affidavits were submitted by Frank in support of his motion, including eighteen that related to the allegations of disorder in and around the court room occurring at the trial. The trial court denied appellant's motion for new trial. The cause was then appealed to the Supreme Court of that State where the allegations in Frank's motion for a new trial, were considered. The Supreme Court affirmed the judgment of the trial court. After the decision of the Supreme Court, affirming the judgment of the trial court, another motion for a new trial was made under Code 1910, Sections 6089, 6092, upon the grounds of newly discovered evidence; and this having been refused, the case was again brought before the Supreme Court, and again the action of the trial court was affirmed. Shortly thereafter Frank unsuccessfully applied to the Supreme Court of Georgia for the allowance of a writ of error to

review its judgment in the Supreme Court of the United States. Thereafter, he applied to several of the Justices of this court, and finally to the Court itself, for the allowance of such a writ. These applications were severally denied. Whereupon, he made application for a writ of error to the Federal District Court for a writ of habeas corpus. The Federal District Court denied his application and he appealed to this court.

The case at bar followed the same course, step by step, through the various State and Federal Courts, that the Frank case followed; First, the trial court, twice before the State Supreme Court, application made and denied by an associate justice of this court, an application in the Federal District Court for a writ of habeas corpus, the writ denied, and an appeal taken to this Court. Inasmuch as the two cases are so near alike, we further quote from the Frank case as follows:

> "And first, the question of the disorder and hostile sentiment that are said to have influenced

the trial court and jury to an extent amounting to mob domination.

The district court having considered the case upon the face of the petition, we must do the same, treating it as if demurred to by the sheriff. *There is no doubt of the jurisdiction to issue the writ of habeas corpus.* The question is as to the propriety of issuing it in the present case. Under Sec. 755, Rev. Stat. Comp. Stat. 1919, 1283, it was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it. And see Ex Parte Watkins, 3 Pet. 193, 201; Ex Parte Milligan, 4 Wall. 2, 110; Ex Parte Terry, 128 U. S., 289, 301.

Now the obligations resting upon us, as upon the district court, to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petitioner attacks. We must regard not any single clause or paragraph, but the

entire petition, and the exhibits that are made a part of it. Thus, the petition contains a narrative of disorder, hostile manifestations, and uproar, which, if it stood alone, and were to be taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict. But to consider this as standing alone is to take a wholly superficial view. *The narrative has no proper place in a petition addressed to a court of the United States except as it may tend to throw light* upon the question whether the State of Georgia, having regard to the entire course of the proceedings, in the appellate as well as in the trial court, is depriving appellant of his liberty and intending to deprive him of his life wthout due process of law. *Dealing with the narrative, then, its essence, and in its relation to the context, it clearly appears to be only a reiteration of allegations that appellant had a right to submit, and did submit, first to the trial court, and afterwards to the Su-*

preme Court of the state, as a ground for avoiding the consequences of the trial; that the allegations were considered by those courts, successively, at times and places and under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination, or the like; and that the facts were examined by those courts not only upon the affidavits and exhibits submitted in behalf of the prisoner which are embodied in his present petition as a part of his sworn account of the causes of his detention, but also upon rebutting affidavits submitted in behalf of the state, and which, for reasons not explained, he has not included in the petition. *As appears from the prefatory statement, the allegations of disorder were found by both of the state courts to be groundless* except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to defendant, and therefore insufficient in law to avoid the verdict. 141 Ga., 243-280. And it

was because the defendant was concluded by that finding that the Supreme Court, upon the subsequent motion to set aside the verdict, declined to again consider those allegations.

Whatever question is raised about the jurisdiction of the trial court, no doubt is suggested but that the Supreme Court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. It is not easy to see why appellant is not, upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. Southern P. R. Co. vs. United States, 168 U. S., 1, 48. The

principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application, in habeas corpus cases, with respect to decisions by such courts of the facts pertaining to the jurisdiction over the prisoner, see Ex Parte Terry, 128 U. S., 289, 305, 310; Ex Parte Columbia George, 144 Fed., 985, 986.

However, it is not necessary, for the purpose of the present case, to invoke the doctrine of *res judicata;* and, in view of the impropriety of limiting in the least degree the authority of the courts of the United States in investigating an alleged violation by a State of the due process of law guaranteed by the 14th Amendment, we put out of view for the present the suggestion that even the questions of fact bearing upon the jurisdiction of the trial court could be conclusively determined against the prisoner by the decision of the state court of last resort.

But this does not mean that that decision may be ignored or disregarded. To do this, as we have already pointed out, would be not merely to disregard comity, but to ignore the essential question before us, which is not the guilt or innocence of the prisoner, or the truth of any particular act asserted by him, but whether the state, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases.

We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated

and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law.

But the state may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trail, followed by an appeal to its supreme court, not confined to the mere record of conviction, but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prison-

er's right to a fair trial. Myers vs. State, 97 Ga., 76 (5) 99, 25 S. E. 252; Collier vs. State, 115 Ga., 803, 42 S. E. 226, 12 Am. Crim. Re. 608.

Such an appeal was accorded to the prisoner in the present case. (Frank vs. State, 141 Ga., 243, 280, 80 S. E. 1016) in a manner and under circumstances already stated, and the supreme court, upon a full review, decided appellant's allegations of fact, so far as matters now material are concerned, to be unfounded. Owing to considerations already adverted to (arising not out of comity merely, but out of the very right of the matter to be decided, in view of the relations existing between the states and the Federal government), we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial through disorder and manifestations of hostile sentiment cannot, in this collateral inquiry, be treated as a nullity, but must be taken as setting forth the truth of the mat-

ter; certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court, upon full investigation, determined them to be, will not be deemed sufficient to raise an issue respecting the correctness of that determination; especially not, where the very evidence upon which the determination was rested is withheld by him who attacks the finding.

It is argued that if in fact there was disorder such as to cause a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of the supreme court. This, we think, embodies more than one error of reasoning It regards a part only of the judicial proceedings, instead of considering the entire process of law. It also begs the question of the existence of such disorder as to cause a loss of jurisdiction in the trial court, which

should not be assumed, in the face of the decision of the reviewing court without showing some adequate ground for disregarding that decision. And these errors grow out of the initial error of treating appellant's narrative of disorder as the whole matter instead of reading it in connection with the context. The rule of law that in ordinary cases requires a prisoner to exhaust his remedies within the state before coming to the courts of the United States for redress would lose the greater part of its salutary force if the prisoner's mere allegations were to stand the same in law after as before the state courts had passed upon them.

We are very far from intimating that manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury, are matters to be lightly treated. The decisions of the Georgia courts in this and other cases show that such disorder is repressed, where practicable, by the direct intervention of the trial court and the officers

under its command; and that other means familiar to the common law practice, such as postponing the trial, changing the venue, and granting a new trial, are liberally resorted to in order to protect persons accused of crime in the right to a fair trial by an impartial jury. The argument for appellant amounts to saying that this is not enough; that by force of the 'due process of law' provision of the 14th Amendment, when the first attempt at a fair trial is rendered abortive through outside interference, the state, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused, and refrain from further inquiry into the question of his guilt.

To establish this doctrine would, in a very practical sense, impair the power of the states to repress and punish crime; for it would render their courts powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle, but it is in conflict with the practice

that prevails in all of the states, so far as we are aware. The cases cited do not sustain the contention that disorder or other lawless conduct calculated to overawe the jury or the trial judge can be treated as a dissolution of the court, or as rendering the proceedings *coram non judice,* in any such sense as to bar further proceedings. In Myers vs. State, 97 Ga., 76, (5) 99, 25 S. E. 252, Collier vs. State, 115 Ga., 803, 42 S. E. 226, 12 Am. Crim. Rep. 608; Sanders vs. State, 85 Ind. 318, 44 Am. Rep. 29; Massey vs. State, 31 Tex. Crim. Rep. 371, 381, 20 S. W. 758; and State vs. Weldon, 91 S. C. 29, 38, 39 L. R. A (N. S.) 667, 669, 74 S. E. 43; Ann. Cas. 1913 E, 801, in all of which it was held that the prisoner's right to a fair trial had been interfered with by disorder or mob violence,—it was not held that jurisdiction over the prisoner had been lost; on the contrary, in each instance a new trial was awarded as the appropriate remedy. So, in the cases where the trial judge abdicated his proper functions or

absented himself during the trial (Hayes vs. State, 58 Ga., 36 (2) 49; Blend vs. People, 41 N. Y., 604; Shaw vs. People, 3 Hun., 272, affirmed in 63 N. Y., 36; Hinman vs. People, 13 Hun., 266; McClure vs. State, 77 Ind., 287; O'Brien vs. People, 17 Colo., 561, 31 Pac. 230; Ellerbe vs. State, 75 Miss., 522, 41 L. R. A. 569, p2 So. 950) the reviewing court of the state in each instance simply set aside the verdict and awarded a new trial.

The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law."

It will be observed that the only evidence substantiating appellants' petitions, is, the affidavit of appellants themselves (Tr., p. 10), the statement of Mr. Allen

in the public press, and the supporting affidavits of Walter Ward (Tr., pp. 15 and 16), George Green (Tr., pp. 16 and 17), and John Jefferson (Tr., pp. 18 and 19). We presume that the statement by Mr Allen, in the public press, was made shortly after the murder was committed, and for which appellants were convicted in the State Courts. The affidavits of Ward, Green and Jefferson, were made in May, 1921, long after the cases had been heard and determined in the State Courts. The trial of appellants occurred in the lower court at the October Term 1919 of the Phillips County Circuit Court; and the cases were affirmed on appeal by the State Supreme Court on the 29th day of March, 1920. See Hicks vs. State, 143 Ark., 158. Such affidavits were made more than a year after the cases had been affirmed by the appellate court. These affidavits were never before the trial court, nor the Supreme Court on appal. To sustain appellants' application for a writ of habeas corpus an said affidavits, would open an avenue for every person charged with a crime, to wait until he had exhausted

his remedies in the State Courts; then open his masked batteries on the State Courts, by going to the Federal Courts by petition for habeas corpus, and support said petitions by affidavits made long after the case had been determined in the State Courts. We can hardly think that this court, or any other court, would give its sanction to such practice. By filing affidavits in support of the petition, as appellants did in the case at bar, the State is deprived of cross examining said affiants to determine whether or not they are making true statements. Under such procedure the State is deprived of searching the conscience of said affiants by way of cross examination.

Again we desire to urge that for this Court to reverse the judgment of the United States District Court for the Western Division of the Eastern District of Arkansas, would open an avenue for every criminal charged with violating our State laws, to open "masked batteries" on our State Courts, indefinitely.

We respectfully submit that the United States District Court for the Western Division of the Eastern District of Arkansas, correctly sustained appellee's demurer and motion to dismiss appellants' petition for a writ of habeas corpus, and that the order and judgment of said court in dismissing said petition be affirmed by this Court.

Respectfully submitted,

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