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STATE OF ALABAMA)

VS. :

) NO. _____

HAYWOOD PATTERSON, OZIE POWELL, WILLIE ROBERSON, OLEN MONTGOMERY, CLARENCE NORRIS, CHARLIE WEEMS and ANDY WRIGHT, : IN THE CIRCUIT COURT OF

) JACKSON COUNTY, ALABAMA.

Defendants. :

)

MEMORANDUM IN SUPPORT OF APPLICATION FOR A CHANGE OF VENUE.

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STATEMENT OF FACTS

The facts are fully and particularly set forth in the motion for change of venue, the affidavits and exhibits attached hereto and the references made therein. We will give only the briefest summary of the outstanding facts.

The petitioners and two others, all Negroes, were taken off a train at Paint Rock, Alabama, on March 25, 1931 by a mob of citizens and charged with the crime of rape upon two white girls on that train. All were taken to Scottsboro, the county seat, where the excitement became intense and menacing

crowds gathered. Within three hours, on the call of the sheriff, the Governor sent three companies of the National Guard to guard the petitioners. The local newspapers throughout the northern counties of Alabama published inciting articles.

The defendants were indicted within six days by a special Grand Jury and tried within a week in four separate trials, taking three days in all. They were not properly arraigned until the day of trials. High excitement and large crowds with bands of music surrounded the court house. All were summarily convicted and sentenced to death. The defendants were then transferred to the Birmingham jail for safety where they remained continuously except during the subsequent proceedings in Morgan County. An appeal was taken to the Supreme Court of Alabama and their convictions were affirmed. On a further appeal to the Supreme Court of the United States, their convictions were reversed on the ground that the defendants were not adequately represented by counsel and so denied due process under the federal constitution.

In March, 1933, motion was made before trial Judge Hawkins for a change of venue to Jefferson County which was denied, and the cases transferred instead to Morgan County. An exception was duly taken to said denial. In March, 1933, the defendant, Haywood Patterson was tried separately before Judge Horton in Decatur, Morgan County. On April 9, 1933, Patterson

was convicted and sentenced to die. A motion was made for a new trial and was finally granted on the ground of insufficiency of evidence as a matter of law. Judge Horton then continued the case of Weems, the next defendant to be tried, sine die on the ground that the defendants could not procure fair trial at that time.

The trials and proceedings in Morgan County were conducted in an atmosphere making a fair trial impossible. Hostile and passion-stirring pamphlets and newspapers were widely circulated in Morgan County and the northern counties of Alabama during the proceedings; organized bands from Morgan and the surrounding counties marched upon Decatur and were halted only by the vigilance of the sheriff and the National Guard who were present throughout the proceedings with full armaments of warfare; numerous threats were made on the lives of the attorneys for the defendants; Judge Horton had to halt court several times to warn the public to keep the peace; the conduct of the attorneys for the State, especially in their summations, was calculated to and stirred to fever-pitch the existing high feeling; fiery crosses were burned in Decatur and the surrounding countryside throughout and after the trial.

Since the trial in Morgan County, feeling against the defendants and their attorneys has reached even higher intensity. Results of recent investigations (see affidavits attached to the motion) reveal the prevailing sentiment that

defendants will be found guilty no matter what the evidence and that the "niggers", "their dirty New York Jew lawyers" and defense witnesses were to be lynched or burned.

This highly prejudicial sentiment against the defendants exists throughout the northern counties of Alabama and it is absolutely impossible for the defendants to procure a fair trial, or for them, their attorneys or witnesses to be safe from attack in any of the northern counties. A lynch spirit is being effectively aroused to greet the forthcoming trials of your defendants throughout the northern counties, "the counties of the Tennessee Valley". As recently as November 3, 1933, the "Community Builder", a newspaper published in Madison County and circulating throughout northern Alabama, stated editorially:

> "And in face of the feeling that exists at Decatur, as well as throughout the Tennessee Valley, against any lawyers claiming to represent the International Labor Defense League, we suggest that it will not be well for these lawyers to again show up on any soil at any point within this valley. We do not need that type of cattle down here, and their further appearance is wholly unnecessary."

The jails located in Decatur, Scottsboro and all the other northern counties of Alabama are and are well known to be unsafe for the defendants and their trials there will require the attendance of the National Guard at all times. The county seats of the northern counties are located in rural districts where the feeling against Negroes in general is especially bad. Many of these northern counties are further from Jackson or

Morgan counties than is Jefferson County and can be reached only via Birmingham.

Jefferson County is the nearest county to Morgan and Jackson counties where the defendants may procure a fair trial and their lives and the lives of their attorneys and witnesses may be safe. The county seat of Jackson County is the City of Birmingham, the largest city in the State with a large metropolitan and urban population, where feeling against the defendants and their counsel does not run so high, where adequate protection can be afforded them even without the attendance of the military, and is the nearest county not otherwise objectionable that is most convenient to all the parties concerned.

It is therefore abundantly clear that a fair and impartial trial cannot be had in Jackson County or any of the northern counties of Alabama except Jefferson County and the court should grant change of venue to Jefferson County.

The Constitution of the United States

Article XIV, Section 1, of the Amendments to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Alabama

Article I, Section 6 of the Constitution of this State provides:

> "That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement."

The organic law of the United States and of this state therefore contemplates that a change of venue may be a necessary incident to the fundamental constitutional right of due process and a fair and impartial trial.

The Statute.

The Alabama Code of 1928 provides:

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

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

"Sec. 5581. Removal to nearest county, and but once. -- The trial must be removed to the nearest county free from exception, and can be removed but once.

The statute follows the constitutional authority. Its purpose is obviously to safeguard the right of the defendant in a criminal case to a fair trial.

POINT I.

IN THE PRESENT CASE DEFENDANTS' RIGHT TO A FAIR TRIAL CAN BE ADEQUATELY ASSURED ONLY BY REMOVAL TO JEFFERSON COUNTY.

Where the defendant shows "to the reasonable satisfaction of the court that an impartial trial and an unbiased verdict cannot be reasonably expected" in the county where the crime was committed, the venue must be changed (Seams v. State, 84 Ala. 410, 4 So. 521).

See for example:

Thompson v. State, 117 Ala. 57, 23 So. 676;
Ex parte Chase, 84 Ala. 410;
Hussey v. State, 87 Ala. 121;
Vaughn v. State, 18 Ala. App. 511, 93 So. 25.

In Seams v. State (supra), the appellant, a Negro, was charged with the murder of a popular and respected deputy sheriff. His death was surrounded by circumstances calculated to arouse public indignation and there was great excitement in the community after the murder. Just as in the first and second trials of this case, a military detachment was ordered to the scene by the Governor to protect the prisoner. A motion for a change of venue was made and denied. This Court reversed the conviction on the ground that the motion for a change of venue should have been granted.

The Court said at page 413:

> "And in arriving at a conclusion on this subject the Court is to be governed more by

the facts of the case as proved or admitted and legitimate inferences from them, than by the mere opinions of witnesses which are unsupported by facts." (underscoring ours)

Again, at page 414, the Court said:

"We repeat that the trial must be just as well as the verdict reached through its appliances.

"This cannot be done as long as the minds of the jury are liable to be influenced by a prevailing public prejudice against the prisoner. When excitement runs high, and the public sentiment generally or widely prevails, which would justify or tolerate a dealing with the prisoner by the culpable modes of mob violence, which is the enemy of all law and good government, it is difficult to keep the infection of such prejudice from finding its way into the jury box, however honest in purpose the jury may be, or however enlightened may be the community from which they come. The duress of public opinion is often insidious and potent and the best of men sometimes become its victims without being aware of its influence."

In fact the statute expressly recognizes that the necessity of "a military guard to protect the defendant from mob violence" is in itself a sufficient ground for directing that the venue be changed. (Sec. 5580, supra.) Defendants are entitled to have their trial in a county where a military guard, which itself is an inciting and prejudicial factor, is not necessary. A military guard was needed during the first trial at Scottsboro and the second trial at Decatur, and will be needed again if the coming trial is held in any of the counties of Northern Alabama. It will be impossible for defendants to have a fair trial where only the military can repress mob violence.

A military guard will not be needed in Birmingham where the ordinary agencies of law enforcement, the local police, can effectively check mob violence. Jefferson is therefore the "nearest county free from exception."

In Thompson v. State (supra), the appellant, a Negro, was convicted of the crime of rape. The Supreme Court, reversed the conviction because a change of venue had been denied. The necessity for a military guard was held to be conclusive evidence that a fair trial was unobtainable. The court said by McClelan, J.:

> "The crime charged was of a character to produce the greatest public indignation. The trial was had in a short time after the alleged commission of the offense came to the knowledge of the public -- as soon as a special term of the Court called in obedience to a public demand for speedy punishment, could be convened and held. And the affidavits and other evidence showed that the public was so greatly aroused against the defendant that it required the promptest and most vigorous action of the executive officers of the State from the Governor down and including the military, to protect the defendant from mob violence and summary execution; and further, that this state of feeling continued down to and through the trial, and must have had such effect upon the jury as that their verdict was little else than the registration of the common belief of the people that the defendant was guilty, and a mode of carrying out the public purpose to take his life. The trial was not, and could not, under the circumstances then existing, have been fair and impartial. The Court erred in denying the change of venue moved for by the defendant, and for that error its judgment must be reversed. (117 Ala. at p. 68.) (underlining ours.)

In Vaughn v. State (supra) the appellant was convicted of murder. The feeling in the community was hostile towards him prior to and during the trial. He applied for a change of venue but his motion was denied. Bricken, P.J., in ordering a new

trial, said:

> "A salient right in this connection is afforded by statute, Code 1907 Section 7851, as amended by acts 1909, page 212. This statute provides that any person charged with an indictable offense may have his trial removed to another county, if he cannot have a fair and impartial trial in the county in which the indictment is found; the statute, supra, prescribing the mode of procedure in order for the defendant to avail himself of the right. In the instant case, the defendant sought a change of venue. His application was filed to this end, and as the Court sustained the State's demurrers to the application the sole question presented in this case is the sufficiency of the application as a matter of law."

Change of venue is a matter of right where, as here, the application is made in proper time and supported by sufficient facts.

Seams v. State, supra.
Hussey v. State, supra.

An application to remove a case, not from a single county alone, but from a whole section of the State, should be granted when a fair trial can be had no other way.

In Lee v. State (161 Md. 430, 157 Atl. 723), defendant, a Negro, charged with murder, was granted a change of venue from Worcester to the adjoining county of Corchester. Counsel contended that the feeling aroused "extends throughout all the counties of the Eastern Shore of the State, including Dorchester County to which the case has been removed." Because the appeal from the order of removal was prematurely taken, i.e, before the trial, the Court of Appeals of Maryland was without jurisdiction. The Court nevertheless said:

"In the opinion of this court, the conditions evidenced by the occurrences recited would leave no latitude for discretion, but would demonstrate that the securing of a fair unprejudiced jury from the county selected as the place for the trial of the charges against this man, and any defenses he may make, is unlikely, and that to attain the object of the Constitution and statutes the cause must be removed for trial to some other portion of the state, on the one shore of the bay or the other, where it appears at least much more likely that the local prejudice may be avoided. That there is, in the section of the state so far selected, such prejudice as forbids attempting a trial there, seems to this court to be manifested by.....the conclusion of the local authorities that he must be taken away from both Worcester and Dorchester counties to Baltimore County for safe-keeping while awaiting trial, and that he must be brought to trial with a guard of troops..... the preparations made for military protection of the accused and his counsel." (157 Atl. at 727-8)

After this opinion, and obviously as a result of it, the Lee trial was moved to Baltimore County.

The motion and affidavits show conclusively that all the counties in the northern part of this state are subject to the same objection as Morgan and Jackson Counties: Lauderdale, Limestone, Madison, Colbert, Franklin, Lawrence, Marshall, DeKalb, Marion, Winston, Cullman, Blount, Etowah, Cherokee, Lamar, Fayette, Walker, St. Clair, Calhoun, Cleburne, Pickens, Tuscaloosa, Shelby, Talladega, Clay and Randolph. Prejudice and passion know no county lines. Ease of communication and travel bind the entire section into one unit. Newspapers published in one county circulate through all the adjoining counties. That the entire section, rather than just one or two counties, is infected with this hatred and bias is shown in newspaper

editorials quoted in Paragraph 34 of the motion which refers to "the entire Tennessee Valley," and "the citizens of the Tennessee Valley as a whole", and indicates that it would be well for lawyers for the defendants not "to again show up on any soil at any point within this valley." Jefferson County is a metropolitan center, with its own newspapers, containing an industrial population not so readily influenced by the unfortunate spirit of violence which is so universal in the counties above enumerated, maintains a large metropolitan police force which will make unnecessary the calling out of the militia to attend the trials and the defendants will be safe in the modern Birmingham jail which immediately adjoins the court.

The trials should therefore be removed to Jefferson County, the nearest county free from exception.

POINT II

SECTION 5581 DOES NOT PRECLUDE REMOVAL OF THIS TRIAL TO JEFFERSON COUNTY.

Section 5581 provides:

> "The trial must be removed to the nearest county free from exception, and can be removed but once."

The defendant, Haywood Patterson, has been once tried and convicted in Morgan County and his conviction reversed.

It is obvious that the word "trial", as used in this section, means a particular trial. The purpose of the statute is to have it determined once (subject to review on appeal or mandamus) where the defendant should be tried, so as to avoid frivolous successive applications.

The statute does not mean that on a new trial the venue cannot be set again.

The statute states that "the trial must be removed", not the case, not the cause and not the indictment. Clearly the legislature intended that each trial could be removed, and that an application to remove does not preclude a new application on a new trial. In this respect the Alabama statute differs from that of other states which removes the "indictment", or the "case" Cf. the N. Y. Statute (Code of Criminal Procedure, Sec. 344) which provides that "a criminal action, prosecuted by indictment, may . . . . be removed" etc. (Underscoring ours).

Indeed the Supreme Court of this State has held that a new application for change of venue may be made before a second trial, unaffected by the disposition of a similar application before the first trial.

In Baker v. State 209 Ala. 142, 95 So. 464. The court said:

> "The application for a change of venue may be renewed before another trial, and the evidence thereon may be similar, cumulative, or entirely different; and any discussion by us of this testimony might prejudice the next hearing if the application for change of venue before the next or second trial, the inquiry is limited, like before the first trial, to whether the defendant can have a fair and impartial trial, then - at the second trial - when the new application is made and heard, and not when the former application was made and heard before the former trial. Hawes v. State, 88 Ala. 37, 7 So. 302; Crenshaw v. State, 207 Ala. 438, 93 So. 465." (underscoring ours).

In Looney v. Commonwealth, 115 Va. 921, 78 S.E. 625, on reversing a conviction for murder, the court held that although a change of venue was properly refused at the first trial, nevertheless on the second trial to be held after the reversal, defendant might renew his motion on the basis of facts then existing. The court said:

> "..... nevertheless as both motions depend upon conditions existing at the time of trial, they are, as a matter of course, renewable upon a new trial whenever the exigencies of the situation may call them into requisition". (underscoring ours)

See also Ruffin v. State, 28 Ga. App. 40, 110 S.E. 311.

Section 5581 does not preclude removal of the trial

or trials of the defendants other than Haywood Patterson.

Before final conviction an order on a motion for change of venue is interlocutory in nature and can be modified or reconsidered whenever the facts so require.

Fletcher v. Commonwealth 123 Ky. 571, 96 S.W. 855.

The Kentucky statute relating to change of venue (Sec. 1118 Ky. St. 1903) is less liberal toward the defendant since it provides that "not more than one change of venue or application therefor shall be allowed to any person or the commonwealth in any case." (underscoring ours). The court nevertheless said in the Fletcher case:

> "But the order overruling a motion for a change of venue is only interlocutory, and is subject to the control of the court at a subsequent term. If the events happening since the hearing of the motion in the judgment of the court are sufficient to show that a change of venue should be granted, he may in his discretion set aside the order overruling the motion and sustain the application." (underscoring ours)

The Kentucky court assumed the existence of the power without any statute expressly providing for it. The power to modify its ruling is therefore an inherent power of the court. Under the more liberal statute of this state, this court most certainly has the power to modify its order before the trial or trials and direct that the removal be to Jefferson County and not to Morgan County.

This court therefore has the power and is charged with the duty to order removal to a county genuinely "free from

exception" in the light of conditions and circumstances now existing. Present conditions and present circumstances make a fair trial in Morgan County, or in any county except Jefferson, absolutely <u>impossible</u>. The first duty of this court is to exercise this inherent and statutory power and remove this trial to the only county where defendants can have an impartial trial.

POINT III.

SECTION 5581 OF THE ALABAMA CODE, IF HELD TO PRECLUDE A CHANGE OF VENUE FROM MORGAN COUNTY, WOULD DEPRIVE THE DEFENDANTS OF DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I SECTION 6 OF THE CONSTITUTION OF THE STATE OF ALABAMA.

The events occurring since the change of venue from Jackson County to Morgan County have created a situation where a fair trial in the latter county has become impossible. Although as a matter of general administrative convenience the legislature may provide that there shall be only one change of venue, such a provision could never have been intended to compel a trial in a county where feeling ran so high against the defendants as to render a fair trial impossible.

From the decisions of the Supreme Court of the United States it is clear that regardless of the generally unobjectionable character of a statute, its constitutionality must be judged in the light of its application to and effect upon a particular case. Thus, although the prohibition of a statute may be generally valid, its application to the facts of a particular case may be an unconstitutional deprivation of life, liberty or property. (Fiske v. Kansas, 274 U.S. 380.)

Equally well established is the constitutional principle that a trial dominated by the fear or threat of violence by a

mob does not constitute a fair trial and that such a trial denies the defendant due process of law and the equal protection of the laws under the Fourteenth Amendment of the United States Constitution (Moore v. Dempsey, 261 U.S. 86). The facts as set forth in the motion for a change of venue to Jefferson County and the affidavits in support thereof show that a trial in Morgan County would be "only a form" and would not accord to the defendants due process of law.