No. 08-987

IN THE

Supreme Court of the United States

RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO, GERARDO HERNANDEZ, AND LUIS MEDINA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CIVIL RIGHTS CLINIC AT HOWARD UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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STATEMENT OF INTEREST

Amici curiae are the Dean and the Civil Rights Clinic of Howard University School of Law. We submit this brief in support of the petitioners' request for a writ of certiorari in order to respectfully urge this Honorable Court to reverse the decision of the Eleventh Circuit that the petitioners did not establish a right to a change of venue.

For one hundred and forty years Howard University School of Law has trained lawyers to be public

servants and social engineers. In pursuit of that mission the school places the defense of human rights at the heart of its educational practice. When more than seventy years ago Charles Hamilton Houston, a former Howard Law Professor and Dean, and the late Justice Thurgood Marshall, a former Howard student, developed the winning legal strategy challenging the pernicious separate but equal racial segregation doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), their fight was not only against racial subordination, but also against all forms of injustice that would deny human beings the full due process and equal protection promise of the United States Constitution.

By refusing petitioners' request for a change of venue a mere thirty miles away from Miami, Florida, the Eleventh Circuit ordered five agents of the government of Fidel Castro to stand trial at the epicenter of the anti-Castro movement in the United States. In so doing, the court guaranteed that jurors would be drawn from a cross section of a community inflamed by passion, warped by prejudice, awed by violence, and menaced by the virulence of public opinion. In that poisoned atmosphere, petitioners had no more of a fair chance of impartial justice than black defendants before all-white juries during the Jim Crow era.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Under the Sixth Amendment to the Constitution, criminal defendants have the right to be tried by an impartial jury selected from a fair cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). At the heart of the fair cross section doctrine is the principle that a defendant's fellow citizens will

judge a case fairly and neutrally when they represent the entire community and not simply one segment of it. *Taylor*, at 530. But a jury made up of a cross section of the community can never be fair when that community is so inflamed by passion and so warped by prejudice that the jury becomes the very thing for which it was intended as a corrective: the arbitrary application of government power, the expression of irrational bias, and a threat to individual liberty. *See Groppi v. Wisconsin*, 400 U.S. 505, 511 (1971).

The 2001 trial of the petitioners in Miami, Florida took place in a historical, social and political milieu in which the community perceived petitioners as the embodiment of an evil regime. In Miami Florida, circa 2001, being an agent of the Castro government in effect meant being a member of a minority group, despised by broad cross sections of the population, subjected to violence by radical fringe groups, and removed from the consideration of mainstream society and the protection of law enforcement. In other words, agents of the Castro government standing trial in Miami, Florida in 2001 had no more of a chance of impartial justice than black defendants before all white juries during the Jim Crow era.

In arguing that petitioners were no more likely to obtain a fair trial in Miami Florida than black defendants in the Jim Crow South, *amici* do not claim that present day Miami, Florida society is the contemporary reiteration or moral equivalent of Jim Crow society. We merely aim to show that the same conditions that made it impossible for Jim Crow jurors to see beyond the race of defendants also made it impossible for Miami jurors to see beyond petitioners' Castro connection.

REASONS FOR GRANTING THE WRIT

As far back as the 1940's, this Court identified the fair cross section doctrine as calling for a jury "truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940); *see also Glasser v. United States*, 315 U.S. 60, 86 (1942). Thirty years later, the Court elevated that doctrine to a constitutional requirement when it held, in *Taylor v. Louisiana*, that a jury is more likely to be impartial if it is composed of representatives of all segments and groups of the community, who together create a body capable of exercising "the commonsense judgment of the community." 419 U.S. 522, 530 (1975). The *Taylor* Court explained that in the context of a federal criminal case and the Sixth Amendment's jury trial requirement, "our 'notions of what a proper jury is have developed in harmony with our basic concepts of a democratic system and representative government." *Id.* (quoting *Glasser v. United States*, 315 U.S. 360 (1942)). As part of the democratic system and as an expression of representative government, "the purpose of a jury is to guard against the exercise of arbitrary power-to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor*, 419 U.S. at 530, (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)).

However, the fair cross section doctrine is a means, not an end. In the words of the Court, "[t]he Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)." *Holland v. Illinois*,

493 U.S. 474, 480 (1980). Thus, the fact that a jury is drawn from a cross section of the community does not necessarily guarantee a fair trial when the community itself is so fundamentally hostile to the defendants that the very environing atmosphere of the trial becomes irredeemably poisoned:

> There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action.

Groppi v. Wisconsin, 400 U.S. 505, 511 (1971).

We do not lack for examples from our recent past of criminal trials by jurors too inflamed by passion, too warped by prejudice, too awed by violence, and too menaced by the virulence of public opinion to render a fair verdict. *See Moore v. Dempsey*, 261 U.S. 86 (1923); *Powell v. Alabama*, 287 U.S. 45 (1936); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Shepard v. Florida*, 341 U.S. 50 (1951); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Downer v. Dunaway*, 1 F. Supp. 1001 (D. Ga. 1932); *State v. Wilson*, 158 So. 621 (La. 1935); *Browder v. Commonwealth*, 123 S.W. 328 (Ky. Ct. App. 1909); *Ex Parte Hollins*, 14 P.2d 243 (Okla. Crim. App. 1932). The common denominator in virtually all of these cases is a set of historical, social and political conditions that make it virtually impossible for the jury to serve its proper functions of safeguarding liberty, protecting citizens from arbitrary government power, and determining guilt or innocence. These conditions, which used to be present in the Jim Crow era and are sadly prevalent in present-day Miami, Florida are: 1) the presence of

a universally despised minority group; 2) the use of violence by radical fringe groups; 3) the toleration of that violence by mainstream society; and 4) the suppression of any dissenting voices.

I. THE PASSIONS OF THE ANTI-CASTRO MOVEMENT POISONED THE ENVIRONING ATMOSPHERE OF PETITIONERS' TRIAL AND SERVED AS AN INSURMOUNTABLE IMPEDIMENT TO DUE PROCESS

To be exiled from one's homeland, Dante wrote in the Divine Comedy, is to "leave everything you love most."[1] For nearly half a century, Cuban life in the United States has often sounded like an echo of the poet Ovid's lament upon his expulsion from Rome: "exile is death."[2] For many Cuban-Americans, living at the epicenter of the Anti-Castro movement in Miami, Florida, the passage of time seems to have done little to dampen their passionate hatred of a regime they believe banished them into exile. *Amici* respectfully submit that it is neither a sign of indifference toward the sincerity of that sentiment, nor even a point of disagreement with the politics of their cause to conclude, as the Eleventh Circuit should have done, that jurors drawn from a cross section of that community can never render a fair and impartial judgment on the criminal guilt or innocence of the very people they believe are keeping them from returning home.

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[1] Dante Alighieri, *The Divine Comedy of Dante Alighieri: Paradiso*, 148 (trans. Allen Mandelbaum University of California Press 1982).

[2] *See* Joe Marie Claasen, *Displaced Persons: The Literature of Exile from Cicero to Boethius* 160 (1999).

Shortly after the triumph of the Cuban Revolution, relations between Cuba and the United States began to sour. *See* Hernando Calvo & Katlijn Declercq, *The Cuban Exile Movement: Dissidents or Mercenaries* 1 (2000). Many Cubans who supported the Revolution felt betrayed when Castro's nationalist campaign turned into a Communist regime. Richard R. Fagen, et. al. *Cubans in Exile* 34 (1968). Once in power, Castro seized and nationalized private industries, imposed limits on the size and quantity of land holdings, and set up a revolutionary tribunal which sentenced thousands of Cubans to either prison or death by fire squad. Robert M. Levine, *Secret Missions to Cuba* 29, 31-33 (2001).

Soon thereafter, the island experienced a mass exodus of Cubans to the United States. Levine, *supra* at 33. These exiles, mainly consisting of upper and middle class educated and affluent whites opposed to Castro's revolution, had been rendered virtually destitute with the communist takeover. *Id.* at 42-3. Miami became the central hub for an exile community, whose members shared an abiding desire to overthrow the Castro government and regain the life they had lost when Cuba became a communist country. *See generally Miami Now* 83 (Guillermo J. Grenier & Alex Stepick III eds. 1992).

One of the first such anti-Castro movements in Miami was the Pedro (Peter) Pan airlift of Cuban children to Miami. Levine, *supra*, at 43-44. With funding from the CIA and other government agencies, children from Cuba were airlifted to the United States and separated from their parents based on rumors that the Castro regime planned to ship them to Soviet education camps for indoctrination. *Id.* Some of the Pedro Pan youths later became

prominent businessmen and politicians in Miami. *Id.* One such individual, Joe Carrollo, became mayor of Miami. *Id.* at 45.

The years immediately following the revolution witnessed several events that would further polarize Cuban and American communities on the mainland from those on the island: the Bay of Pigs, the Cuban Missile Crisis, Operation Mongoose, etc. *See generally* Hernando Calvo & Katlijn Declercq, *The Cuban Exile Movement* (2000).

The Bay of Pigs was a failed attempt by exiles at invading Cuba. Levine, *supra*, at 52-53. The failed invasion resulted in the deaths of over one hundred Cuban exiles and the capture of 1,189 exiles. *Id.* Some of the captured exiles were released for a ransom of $53 million, paid by the United States government as a result of pressures placed on Washington by Miami's exile community. Levine, *supra*, at 54.

Shortly after the Bay of Pigs, President Kennedy approved Operation Mongoose, which aimed at overthrowing Cuba's government. *See* Calvo & Declercq, *supra*, at 7-8. Castro turned to Soviet support, which led to the construction 388 surface- to-air missiles in Cuba and created a real threat of nuclear strikes against the United States. *Id.* While the missile crisis was eventually diffused in 1962, anti-Castro sentiment in the United States continued unabated. Jane Franklin, *Cuba and the United States: A Chronological History,* 66 (1997). In July 1963, the Organization of American States voted 14 to 1 to for a hemispheric ban on travel to Cuba, and the Kennedy administration tightened the embargo that it had placed on the country over a year prior. *Id.*

Elements of the Cuban exile community, including such prominent figures as Jorge Mas Canosa and Luis Posada Carriles, launched their own private crusade to violently oust Castro. *See* Ann Louise Bardach, *Cuba Confidential: Love and Vengeance in Miami and Havana*, 171 (2002). While Canosa provided the public face with successful businesses and lobbying organizations, Posada Carriles manned the violent and radical wing of the operation where he "remained in the shadows, consorting with intelligence operatives, anti-Castro militants, mercenary assassins and, according to declassified documents, reputed mobsters." *Id.* at 175.

During the mid 1960s, Carriles participated in a host of terrorist activities based out of Miami supported and funded by the CIA. Bardach, *Cuba Confidential, supra* at 183. Before falling out of grace with the CIA and moving to Venezuela, Carriles aligned himself with Orlando Bosch, who spent four years in federal prison for firing a 57-milimeter cannon into a Polish ship docked in the Port of Miami. *Id.* at 183-84. The efforts of Carriles and Bosch culminated in the bombing of a Cuban commercial airliner carrying Cuba's national fencing team. *Id.* at 189-90.

Upon returning to the United States after a questionable acquittal in a Venezuelan court in 1986, Bosch was arrested, quickly becoming the "cause célèbre among the exile leadership." *Id.* at 201. Many prominent members of the exile community stepped forward to defend him. Representative Ileana Ros-Lehtinen, whose campaign was managed by former Governor Jeb Bush, ran on the issue of Bosch's release. *Id.* at 201-02. Others went as far as to call in bomb threats to the Immigration and

Naturalization Services facility in which Bosch was being held. *Id.* at 202. Despite the recommendation of his own Justice Department, which found that Bosch "has been resolute and unwavering in his advocacy of terrorist violence [for thirty years]," President George Bush expedited Bosch's release, later granting him United States residency. *Id.*

Other examples of the extremist anti-Castro sentiment present in Miami include the creation and continual operation of anti-Castro paramilitary groups among the exile community. *See* Calvo & Declercq, *supra,* at 19. One such group is the Alpha 66, which operates a military training camp forty-five minutes outside Miami's city limits. *Id.* at 25-26. A United States Senate special committee investigation revealed the "Alpha 66 along with the CIA participated in at least two assassination attempts against Fidel Castro." *Id.* at 25. Although the investigation also revealed that Alpha 66 had the "motives, capacity, and resources to assassinate President Kennedy," the Miami Commission helped finance the group by giving it $100,000 in 1982. *Id.*

The silencing of all speech conciliatory towards Cuba has manifested in every aspect of Miami life and is actively supported by the Miami municipal authorities. In early 2006, the anti-Castro community lobbied the Miami school board to ban a children's book, which appeared to portray Cuba in a positive light. *Am. Civil Liberties Union v. Miami-Dade*, 439 F.Supp.2d 1242, 1247 (S.D. Fla. 2006). The community compared the book to devil worship and deemed it propaganda for the Castro regime. Rob Jordan, *Commie Book Ban; Vamos a Cuba has Become an Unlikely Lightening Rod,* Miami New Times, Aug. 10, 2006, at 1. The School District banned the book,

overruling a previous decision made by the board, which normally decided such matters. *Am. Civil Liberties Union,* 439 F.Supp.2d at 1157. In July of 2006, the United States District Court for the Southern District of Florida ruled that the School District's banning of the book violated the constitutional protections of free speech. *Id.* at 1272.

In 1988, the Cuban Museum of Arts and Culture became a site of controversy. *City Museum of Art's and Culture, Inc., v. Miami*, 766 F.Supp. 1121, 1122 (S.D. Fla. 1991). At the time, the museum was auctioning off works by Cuban artists who lived in Cuba or had not openly renounced the Castro government. *Id.* The night of the auction, a work by a Cuban artist was auctioned off and then set on fire near prominent Ronald Reagan Ave. Lissette Corsa, *Art to Burn*, Miami New Times, April 8, 1998, at 1. After the incident, the museum faced a barrage of threats from anti-Castro exiles. *City Museum of Arts and Culture, Inc.*, 766 F.Supp.1121, 1122. One member of the board was injured by a car bomb, while each board member was pressured to resign. *Id.* at 1123. The Miami City Commission attempted to shut down the Museum by, among other things, revoking its non-profit status. *Id.* When the Museum's lease ended in 1991, the City Commission refused to renew it. *Id.* at 1124. In time, the United States District Court for the Southern District of Florida would find that the City's actions had violated the First Amendment. *Id.* at 1131.

In the early 1990's, anti-Castro exiles often staged marches of protest near the radio station which aired Fransisco Aruca, an advocate for open trade with Cuba and radio talk show host. Clara Germans, *Cool Cuban Heats Miami Tempers*, The Christian Science

Monitor, April 7, 1992. These protesters smashed in the station's windows and threatened the commercial sponsors of Aruca's radio show. *Id.*

II. THE POLITICAL AND SOCIAL DYNAMICS OF THE JIM CROW ERA POISONED THE ENVIRONING ATMOSPHERE OF RACE-DOMINATED CRIMINAL TRIALS AND SERVED AS AN INSURMOUNTABLE IMPEDIMENT TO DUE PROCESS

The intransigence and violence of the anti-Castro movement poisoned the atmosphere of petitioners' trial in the same fashion as the intransigence and violence of Jim Crow society poisoned criminal trials where race was at issue. This is not to say that Miami, Florida is the contemporary reiteration or moral equivalent of Jim Crow society. To make such a claim would be both insupportable and an undeserved affront to the majority of the Cuban-American community. Rather, the point is that agents of the Castro government summoned in the minds of Miami jurors the same emblem of fear and loathing that black defendants conjured in the imagination of white Jim Crow jurors. A brief history of Jim Crow society and the race-dominated criminal trials it engendered may help make the point clear.[3]

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[3] The history of Jim Crow society has been amply documented by social scientists, legal cholars and this very Court. *See* Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 Duke L.J. 624 (1985); James W. Fox, *Imitations of Citizenship: Repressions and Expression of Equal Citizenship in the Era of Jim Crow*, 50 How.L.J. 113 (2006); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

A. Jim Crow society was marked by an Atmosphere of profound racial hostility, violence against blacks by radical groups, the toleration of that violence by mainstream society, and the silencing of dissenting voices.

At the conclusion of the Civil War, newly freed slaves represented a universally despised minority. *See* David M. Chalmers, *Hooded Americansim: The History of the Klu Klux Klan 3rd Ed.* 11-14 (1987). In the South, formerly dominant whites "lived with fears that their land might well become" subject to "black insurrection." *Id.* Racial tension mounted, which led to race riots, and ended with Blacks running away to hide in wooded areas. *Id.* at 14. In the north, the growing migration of blacks to urban cities engendered discrimination in public accommodations and deteriorating racial attitudes. *See* Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 12 (2004).

Out of this cauldron of racial hostility emerged the Jim Crow era of state-sanctioned racial apartheid, during which the South explicitly adopted, and the North tacitly tolerated, a racial caste system designed to maintain white supremacy and black inferiority. Pursuant to that system, the races were formally segregated in virtually all areas of social and public life, including in schools, transportation and accommodations, work, church and marriage. *See* Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 Duke L.J. 624 (1985).[4] A

[4] This Court, in *Plessy v. Ferguson*, initially upheld the racial caste system and it would take not only *Brown v. Board of Education*, 347 U.S. 483 (1954) but a host of other decisions to

majority of Southern states adopted poll taxes and literacy tests to suppress the black vote, racial disparity in educational spending became enormous, and legislatures adopted new measures for coercing black agricultural labor. *See* Klarman, *supra*, at 10-11.

Social segregation was enforced by physical violence. *See* David Chalmers, *Backfire, How the Ku Klux Klan Helped the Civil Rights Movement* 15-17 (2003). The number of blacks lynched each year rose dramatically. *Id.* The Ku Klux Klan and other violent groups arose, with the purpose of destroying Black "political effectiveness" by terrorizing blacks and northern Republicans in order to maintain white supremacy. *See* Chalmers, *Hooded Americansim, supra,* at 14-18. Klan members printed threats in local papers, posted warning on trees, and ordered masked gunmen to ride around town near Republican meetings and the homes of whites and blacks who supported reconstruction. William L. Katz, *The Invisible Empire: The Klu Klux Klan Impact on History,* 31 (1986). If warnings proved ineffective, Klan members "set fires to barns, homes, and meeting halls." *Id.* Teachers were whipped, branded, murdered, and driven out of state for instructing black children. *Id.* at 42; *see also* Chalmers, *Hooded Americansim supra*, at 15.

While the Klan and other violent groups could not count the majority of the population as official

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finally root out segregation out of American life. *See, e.g., Turner v. City of Memphis*, 369 U.S. 350 (1962) (municipal airport restaurant); *New Orleans City Park Improvement Assn. v. Detiege*, 358 U.S. 54 (1958) (parks); *Gayle v. Browner*, 352 U.S. 903 (1956 (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (golf courses) (1955); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (beaches) (1955).

members, it and other groups thrived because they enjoyed the tacit support of the community as a whole and of members of the political, business, and law enforcement establishment. *See* Glenn Feldman, *Politics, Society and the Klan in Alabama 1915-1949* 77-91 (1999). The Klan "successfully turned to more violence . . . where lawmen did not interfere and often joined and where judges and juries did not indict [or] convict." *See* Chalmers, *Backfire supra* at 40. Sheriffs within various Klan organized states did not arrest Klan members for crimes against Blacks, who in turn simply stopped reporting crimes. *Id.* at 44. Some of the poor Whites who joined the Klan stated that they only joined the organization "to avoid becoming its victim." Chalmers, *Hooded Americanism*, *supra* at 18.

Finally, the system of racial apartheid was maintained, not just by the violent suppression of blacks, and not just by the tacit accent of mainstream white society, but also by the suppression of any dissenting voices. In Alabama, after Klan candidates won the 1926 state government elections, Klan members used violence to silence whites who opposed the Klan agenda. Feldman, *supra,* at 84-92. When Clarence Darrow gave a speech in Mobile, Alabama, denouncing white supremacy and encouraging Blacks to resist racial suppression, the Klan circulated handbills depicting Darrow as an agitator and planned to tar and feather him. *Id.* at 96. When rumors of the Klan's plans to lynch Darrow circulated, detectives safely got Darrow onto a train out of town. *Id.* at 96-97.

In 1961, when freedom riders from the Congress of Racial Equality sought to desegregate public facilities by organizing bus rides throughout the south, they

were met with immediate violence. Chalmers, *Backfire, supra*, at 27-30. For example, when freedom riders arrived in Anniston, Alabama, a mob including members of the Ku Klux Klan, "pounded on the bus with clubs and pipes, smashed windows, [and] slashed tires." *Id.* at 30. They forced the passengers from the bus with a bomb and then brutally beat them. *Id.* A second group of freedom riders experienced the same brutal attacks in Birmingham Alabama. *Id.* at 30-31. A third group of freedom riders, including newsmen and President Kennedy's special representative, were beaten by angry mobs. *Id.* at 32. In 1964, the Klan, in Mississippi, beat, shot at, and jailed civil rights workers. *Id.* at 52. During that summer, Klan members were responsible for "eighty beatings, and the burning or bombing of at least sixty-five homes, churches, and other buildings," including the murder of at least eight people. *Id.*

B. The social and political violence of Jim Crow society produced community mob-influenced trials in which race was an insurmountable impediment to due process

The record of race-tainted trials that came out of Jim Crow society is much too long to be usefully catalogued here but the few examples we offer below are indeed emblematic of the phenomenon of jurors reflecting community prejudice rather than fairness.

Browder v. Commonwealth, 123 S.W. 328 (Ky. Ct. App. 1909), involved the trial and conviction of a black man accused of shooting and killing his white boss. The defendant, Browder, claimed self-defense, showing that he shot his boss only after his boss shot at him leaving a bullet lodged in Browder's back.

After Browder's arrest, two mobs stormed the jail; when they could not locate him they lynched four innocent black men. *Id.* at 330. The lynching resulted in a "midnight alarm" where the whites in the community, fearing backlash from the blacks, took up arms. *Id.* "Up to the trial the condition of public sentiment in the county was such that it was impossible to induce a member of the local bar to take part in the defense," yet the trial court denied Browder's motion for a change of venue. *Id.* at 331. The appellate court overruled the trial court's venue decision and stated, "race feeling was so excited that the defendant, who was the immediate occasion of the excitement, could not have a fair trial" in Russelville. *Id.* The court determined that "[w]hen the public mind is excited by race hostility the feeling may smolder, but, though not apparent on the surface, it does not soon die out, on the contrary often the sentiment spreads and strengthens." *Id.*

In *Moore v. Dempsey*, 261 U.S. 86 (1923), six black defendants appealed death sentences imposed for a murder allegedly committed in connection with the infamous race riot in Phillips County, Arkansas, in the fall of 1919. *Dempsey*, 261 at 87. An initial altercation in which whites shot into a black union meeting at a church and blacks returned the gunfire, killing a white man, quickly escalated into mayhem. *Id.* Marauding whites, some of whom flocked to Phillips County from adjoining states and enjoyed the assistance of federal troops ostensibly employed to quell the disturbance, went on a rampage against blacks, tracking them down through the rural county, and killing (on one estimate) as many as 250 of them.

Id.[5] Seventy-nine blacks (and no whites) were prosecuted as a result of the riot; twelve received the death penalty for murder; and six were involved in the appeal to the United States Supreme Court in *Moore v. Dempsey*. *Id.* at 101 n.2. The Court reversed their convictions on the ground that mob-dominated trial proceedings violated the Due Process Clause. *Id.* at 87.

In *Downer v. Dunaway*, 1 F. Supp. 1001 (D. Ga. 1932), the Georgia federal district court overturned the conviction and death sentence of a black man, John Downer, for rape of a white woman. Before Downer's arrest, the police arrested four other black men for the crime and a massive and hostile mob of 1,500 individuals surrounded the jail were the four suspects were incarcerated. *Id.* To prevent mob lynching, police officers rushed them away to a different county. *Id.* A day later, officers arrested the defendant and another suspect, and the mob once again mobilized and stood outside the jail. *Id.* at 1002. The governor called in National Guard troops and officers disguised the defendant in a national guard's uniform in order to transport him to a different county jail. *Id.* The defendant went on trial on the same day a grand jury indicted him. During the trial, the National Guard had to surround the courthouse to prevent the gathered mob from lynching the defendant. *Id.* The trial began at ten o'clock in the morning and the jury rendered its verdict and sentenced the defendant to death by ten o'clock that evening, after only five minutes of deliberation. *Id.*

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[5] *See also* Richard C. Cortner, *A Mob Intent on Death: The NAACP and the Arkansas Riot Cases* (1988).

In *Ex Parte Hollins*, 14 P.2d 243 (Okla. Crim. App. 1932), the appellate court reversed a conviction and death sentence of a black man convicted of rape. One day after the alleged rape, two mobs formed and attempted to lynch the defendant before trial. *Id.* at 245. On the same day that the defendant waived his right to a preliminary hearing, he appeared in district court and entered a guilty plea, and the judge sentenced him to death by electrocution, all without the presence of a defense attorney. *Id.* The trial judge "was afraid if the arraignment and sentence was delayed there might be a serious outbreak in Creek [C]ounty." *Id.* at 246. In finding that the defendant was not afforded due process of law, the appellate court reasoned that, while a defendant may voluntarily waive his right to a change of venue, the "defenseless Negro, with the terror of the mob in his mind, did not and could not voluntarily do anything, and therefore did not waive any of his constitutional rights." *Id.*

In *State v. Wilson*, 158 So. 621 (La. 1935), Wilson, a black man, appealed his murder conviction and death sentence by hanging for killing a white deputy sheriff. The deputy sheriff had attempted to arrest Wilson without a warrant. *Id.* at 622. A scuffle ensured, during which members of Wilson's family were shot, including Wilson himself, who sustained a gunshot wound to the thigh. *Id.* Officers arrested the entire Wilson family including, the children living in the Wilson home. *Id.* They charged one of Wilson's brothers and mother with principal charges and held the rest of the family as material witnesses. The night of Wilson's arrest, one of his brothers died in jail from a gunshot to the stomach, while the community attempted to lynch the rest of the family. *Id.* The trial judge scheduled the case for trial only

six days after the arraignment and denied a request for continuance from Wilson's attorneys, even though they had only four days, including the weekend, to prepare for trial; even though the extreme pain from Wilson's gun shot wound rendered him unable to assists his attorney's in preparing his defense; even though the jail physician found that Wilson could not walk or stand and would have to be carried into the courthouse; and even though on the day of the trial both Wilson and material witnesses remained in jail to escape a hostile mob of demonstrators. *Id.* The day after the case was submitted, the jury ruled Wilson guilty. *Id.*

Powell v. Alabama, 287 U.S. 45 (1936), was one of numerous state and federal decisions surrounding the infamous Scottsboro Boys incident. There, a group of young black men was accused, tried, and convicted in Alabama of raping two white women. The subsequent appeals raised a host of constitutional defects in the initials, including, among others, the fact that confessions had been coerced from some of the defendants and virtually all of them had been denied adequate counsel. But more relevant to the matter now before the Court is the description of the community sentiment at the time of the arrest and trial of the defendants. As this Court described the surrounding environment, a "sheriff's posse seized the defendants." *Powell*, 287 U.S. at 51. "Word of their coming and of their alleged assault had preceded them, and they were met at Scottsboro by a large crowd." *Id.* The "attitude of the community was one of great hostility," and "every step taken from the arrest and arraignment to the sentence was accompanied by the military." *Id.* In short, this Court reversed, noting that it was "perfectly apparent that the proceedings, from beginning to end, took

place in an atmosphere of tense, hostile, and excited public sentiment." *Id.* at 51.

In *Brown v. Mississippi*, 297 U.S. 278 (1936), three black men were tried and convicted of the murder of a White man. The main evidence at trial was the confessions of the defendants. But, as this Court recounted, the first defendant confessed after a deputy sheriff, accompanied by a community mob, hung him by a tree twice and subsequently whipped him until he confessed. *Id.* at 281. The remaining defendants confessed after they were stripped naked, laid over chairs and whipped with a leather strap with buckles on it until "their backs were cut to pieces." *Id.* at 282. The subsequent one-day trial of the Black defendants resulted in murder convictions, even though, "[t]he record of the testimony shows that the signs of the rope on [the] neck [of one of the defendants] were plainly visible..." *Id.* at 281

In *Shepard v. Florida*, 341 U.S. 50 (1951), two black men were accused of raping a white woman. The circuit court found the men guilty of the crime. *Id.* at 50. This Court reversed, holding that the trial court erred in denying the defendants' motion for a change of venue. Among other facts, the Court found: newspapers in the community falsely reported that defendants had confessed to the crime; a mob gathered and demanded the officers to turnover the defendants to them; defendants had to be removed to state prison to prevent the mob from lynching them; the enraged mob burned down the home of one of the defendants' parents and homes of other black people in the community; blacks had to abandon their homes and flee from the community in order to prevent the mob from lynching them; and the National Guard had to be called in an attempt to restore peace.

Shepard, 341 U.S. *at* 51-53 (Jackson, J., concurring). Defendant's motion for a continuance, until the passion of the community had subsided, and a change of venue were denied. *Id.* at 53. In his concurring opinion, Justice Jackson wrote:

> [T]his trial took place under conditions and was accompanied by events, which would deny defendants a fair trial before any kind of jury. I do not see, as a practical matter, how any Negro on the jury would have dared to cause a disagreement or acquittal. The only chance these Negroes had of acquittal would have been in the courage and decency of some sturdy and forthright white person of sufficient standing to face and live down the odium among his white neighbors that such a vote, if required, would have brought.

Id. at 55.

In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the defendant, a black man, was convicted of murdering a white woman. The trial took place in Calcasieu Parish, Louisiana after law enforcement officials permitted a local television station to secretly film an interview with the defendant, in which he made incriminating statements after a night of interrogation. The interview was then repeatedly broadcast in the parish and surrounding communities and inflamed community sentiments to such an extent that this Court, in reserving Mr. Rideau's conviction, described the trial proceedings as a "kangaroo court." *Rideau*, 373 U.S. at 726.

While not every one of these cases was necessarily concerned with the constitutional standard for a change of venue in a criminal trial, together they, and others too numerous to discuss here, serve as a

historical proof of how, as in the case of petitioners' trial in Miami, Florida, the prejudices of the community and the passions of the moment can turn trials and juries into a threat to individual liberty.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, we pray the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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