You will also levy on a sufficiency of the property of said accused party to pay the cost in the event of ..... final conviction. Herein fail not.

This ....., 19.....

T. A. RILEY,
N. P. & Ex-Officio J. P.

Gentlemen of the jury, when our national government was formed and the Constitution of the United States was adopted, that instrument was adopted by consent of the states. The states themselves ceded to the federal government certain powers, reserving all other powers to the states or to the people, but they did cede certain powers to the United States Government. Our state is no exception. Our state is just one state of all the United States, just like the rest of them, and they all together empowered the national government to say that no state should deprive any citizen of the United States of certain rights and privileges.

In pursuance of that authority contained in the United States Constitution by agreement of the states, the Congress passed a statute that reads this way, that "Whoever under color of law, statute, ordinance, regulation or custom wilfully subjects or causes to be subjected any inhabitant of any state, territory or district to the deprivation of any rights, privileges or immunities secured or protected by the Constitution and laws of the United States or to different punishments, pains or penalties, on account of such inhabitant being an alien or by reason of his color or race, than are prescribed for the punishment of citizens, shall be guilty of a crime." That is the statute under which the second count of this indictment is drawn.

The Constitution says that, among those rights which a state through its officers and agents are not permitted to deny people, is the right not to be deprived of life, liberty or property without due process of law. By that agreement and the adoption of the Constitution, no state can deprive a citizen of the right to be free from illegal arrest and assault by the state through its officers; a citizen cannot be deprived of life, liberty or property without due process of law, cannot be denied the right, if he is charged with a crime, of being regularly indicted, tried by a jury, sentenced by a Court; and then, in addition to those, the statute also provides that different punishments or penalties cannot be imposed on one inhabitant that is not common to all citizens, on account of his being an alien, that is not a citizen at all, or on account of his race or color.

Now, in pursuance of that statute the grand-jury has returned this indictment which you will have out with you and it is drawn in three counts, you will observe, numbered Count 1, Count 2 and Count 3. Of course, a count, gentlemen of the jury, in an indictment is just simply the allegation that the defendants committed some certain described crime, each count being separate and distinct from the other counts. In fact, each count might have been drawn in a separate indictment altogether. So, in this indictment there are three counts and the first one has been dismissed and you will not be concerned at all with the first count. You will not find any verdict on it one way or the other. Count 1 you will just ignore because it is not here before you for trial.

Then, Count 2 is drawn under the statute which I have attempted to quote to you in substance and Count 2 charges that the defendant, the sheriff, Sheriff Screws, and the defendant, Frank Jones, acting as officers, deprived Robert Hall of certain rights secured and protected to him and every other citizen of the United States by the Constitution of the United States. It alleges that as such

officers they denied him the right to be secure in his person from illegal assault and battery by officers of the law, and the right not to be deprived of life and liberty without due process of law, that is to say, without indictment by a grand-jury and without trial by a jury and without sentence by the Court in the regular due course of a criminal case under the state law; and that they denied him that right that he had to be tried according to due process of law and that they subjected him to different punishments from other citizens by reason of his race and color.

Now, that last part, gentlemen of the jury, of the statute which deals with different punishments on account of being an alien or non-citizen, or race or color, is a different thing from the first part of the statute which applies to every citizen. Under the Constitution of the United States, those other rights that I mentioned there protected by the Constitution of the United States apply to every citizen of the United States and no state, not only the State of Georgia, but no state in the United States has any right to deprive any citizen of the United States of any of those rights.

It is alleged in that same count that the other defendant, Jim Bob Kelley, aided and abetted these officers in committing the crime alleged and under a statute of the United States, whoever aids or abets another, cooperates with or joins in the commission of a crime, is himself guilty just like the other defendants would be if they committed such a crime.

And it is alleged in that same indictment that these defendants deprived Robert Hall of these rights which I have mentioned by arresting and then striking and beating him and causing his death. That is the second count of the indictment. It is the first count which you will have anything to do with. You will omit count numbered one altogether.

Then, there is another statute known as the conspiracy statute. That statute says that when two or more persons conspire or agree together to commit an offense against the United States and they do some act in pursuance of that agreement, that that itself is a crime.

First, I will say the third count in this indictment charges that these defendants did conspire and agree together to deprive Robert Hall under color of law of these rights which I have mentioned to you, as set out in the second count; and that in pursuance of that understanding or agreement they committed certain acts set out in that third count.

I might illustrate, if I can, the difference between a conspiracy indictment and what is known as a substantive offense. If a statute denounces a certain act as criminal and a man is indicted for doing that prohibited thing, that is known as a substantive offense. If two or more persons agree to violate that statute or commit that crime and they do anything in pursuance of that agreement, then they are guilty of a conspiracy, whether they ever commit the crime or not. That could be illustrated by reference to something which has nothing whatever to do with this case: Suppose, for example, that under a statute which makes criminal the stealing of goods from an interstate shipment, that is to say a shipment of goods that is coming from Florida into Georgia—there is a statute that says it is a crime to steal goods from such an interstate shipment. Well, let's suppose that an interstate shipment was coming into Albany from Jacksonville of goods on a freight train. Then, let's suppose that two men here in Albany hired a truck and went down to the train in the railroad yards and broke the seal on the car and took the goods out, loaded them on a truck and carried them away. Then, they would be guilty of violating that statute and that would be a substantive offense.

Now, let's suppose that when such a shipment comes into Albany on a train that two men agree up town here that they will get a truck and go down and take goods out of that interstate shipment and, in pursuance of that agreement, they go down here on the street and hire a truck but nothing else happens. They do not do anything else. They do not steal any goods; they do not even go down to the train at all. And yet they are guilty of conspiracy because they agreed that they would commit a crime and did an act in pursuance of that agreement, and they would be guilty of conspiracy, even though they did not commit the offense at all, the substantive offense.

Now that third count, the conspiracy count, after alleging that they did agree or have an understanding among themselves that they would commit this offense which is set out in the second count of the indictment, alleges that they committed certain acts which are denominated overt acts. You will find them set out in the indictment, if you read it. There are six of them and one of them is that the defendants, Jones and Kelley, drove to the home of Robert Hall. Now, these overt acts need not necessarily be criminal acts themselves, if they were done in pursuance of an illegal agreement. The second overt act is that Jones and Kelley arrested Robert Hall and handcuffed him. The third act is that Jones and Kelley drove Robert Hall to the Courthouse yard in an automobile. The fourth act is that they beat him in the Court-house yard, and the fifth is that they dragged Robert Hall unconscious from the well through the Courthouse to the jail; and the sixth, that Jones entered the jail and removed the handcuffs from Robert Hall.

Now, on that conspiracy indictment, gentlemen of the jury, you will observe there are two elements necessary to constitute the offense of conspiracy: One is that there must be an agreement or understanding among the defendants that they are going to commit this criminal act.

Now, that does not mean that it is necessary to show that the defendants got together around a table or anywhere else and made a formal agreement, either written or oral, or otherwise. It does mean that they must have a common understanding, that each one understands that they are going out to do a certain act, and that would be sufficient so far as the agreement or conspiracy feature of it is concerned. Of course, on that count if you find there was no such agreement, then you would not pursue that count any further because if there was no understanding of that sort, then there could be no verdict of guilty, because it takes both the understanding, the agreement, and some overt act. On the other hand, if you think that the defendants did have such a common understanding among themselves, then you would take the next step under that count and look to the alleged overt acts in the indictment.

Now, it would not be necessary, if you found that an agreement such as I have described did exist, for you to find from the evidence that all six of these overt acts were committed. It is necessary for the government in that count to show the commission of at least one of those overt acts. It is not necessary to prove, in order to convict, that every defendant participated in the commission of any overt act but it is necessary to show that some one —at least some one, might be more—but at least some one of the defendants committed some one of the overt acts. Well, under that conspiracy count, which is the third count in this indictment, you will look to the evidence and see whether those two things have been proved by the government.

Now, the defendants plead not guilty to both of these counts, count 2 and count 3. Then, at the trial the burden is on the government to produce evidence sufficient to convince the jury beyond a reasonable doubt that the defendants are guilty as charged in the indictment on either one or both of those two counts.

In the beginning of the trial the defendants are presumed to be innocent and that presumption continues until and unless it is overcome by the testimony introduced in the case, that is to say, testimony sufficient to overcome the presumption and to convince the jury beyond a reasonable doubt that the defendants are guilty.

Now, gentlemen of the jury, the case has consumed quite some time and everybody else connected with it has performed his duty and the responsibility of this case now rests with you and me. Our functions are entirely separate and distinct. I am under an oath and so are you to perform those duties which are assigned to us respectively. It is my duty to tell you what principles of law govern this case, what the law is that governs this case, and it is my duty to explain to you, if I can, precisely what questions you are to decide and from what you are to decide them. Your duty under your oath is to take the evidence on the questions which you are to decide and find a verdict which represents your honest opinion of what the evidence shows. Those duties are imposed upon us as a part of a tribunal constituted for the purpose of administering justice. You and I have no discretion. I have no discretion whatever in telling you what the law is in this case. If I believed the law to be one thing and I deliberately and consciously tell you that it is something else, then I would violate my oath. I am not going to do that.

If you make a verdict in this case from any cause, for any reason whatever outside of the evidence itself and what you honestly believe that evidence shows, you likewise would violate your oaths. It has been said that a jury can do whatever it pleases but that depends upon what kind of jury you have. An honest jury cannot be arbitrary. An honest jury can do only one thing; there is no discretion. A jury is not in the box to convict, not in the box to acquit. The jury is in the box to give judg-

ment on what actually the truth about it is and the verdict of either guilty or not guilty results incidentally from that honest judgment.

Now, gentlemen of the jury, in the trial of a long case a great many things almost unavoidably happen that ought not to be considered by a jury. It makes it sometimes right difficult for an honest jury to do its duty, when a great many matters are discussed in argument which in legal contemplation ought not to have any influence whatever with the jury. I say it makes it very difficult for an honest jury to make up an honest judgment on the evidence itself and nothing else. That has happened in this case, just as it does in a great many other cases. I will refer to just a few of them and I might preface that by saying this, that if you honestly believe that the district attorney has failed to prove that these defendants are guilty, but for some reason or other outside of the evidence you should find a verdict nevertheless of guilty, then you would violate your oath, and you would be unworthy to sit on a jury at all, just as I would be if I violated my oath. On the other hand, if you think this evidence, honestly and fairly considered, shows that these defendants are in fact guilty but for any outside reason, any feeling of your own or any other reason outside of your honest opinion of what the evidence shows, you should nevertheless find them not guilty, then you would violate your oath as jurors.

I am saying this, gentlemen of the jury, because I want you, regardless of whether your verdict is guilty or not guilty—I am not even interested in what that will be—I am interested, however, in explaining to you, if I can, the things that you are to decide and the things that you ought to consider in deciding those questions and to prevent you if I can from making a verdict for any other

reason on earth except what you think the evidence itself shows.

One thing referred to by one of counsel, just to illustrate what I am saying, was a question to the jury about how you fellows feel about "son-of-a-bitch". Well, gentlemen of the jury, the way you feel or what you would do about language of that sort is not a question in this case at all and you should not even consider a statement like that in argument in deciding what the truth about this case is.

It was said in argument also that the State of Georgia should try these men and not the National Government. Well, gentlemen of the jury, that is a law question which counsel really have no right to argue to this jury at all. I did not stop him but I want to tell you that the State of Georgia has power, the only power on earth, to try these defendants, if it cared to, for some offenses but not for this one. This Court has no jurisdiction to try a murder case. These defendants here are not being tried for murder, not at all.

Another thing that was said to this jury was that Robert Hall was a bad man and had a pistol and that the sheriff and officers said they were going to break up carrying pistols by the negroes around. Well, the sheriff should break up, not only illegal carrying of pistols, but break up any other violation of state laws but he is charged here with committing an offense against the United States because he did not follow what the State of Georgia provides that he shall do in enforcing the laws. So, whether Robert Hall was a bad man, it is all right for it to be in evidence, it is all right for it to be in evidence that he had a pistol and had a shotgun, all of that is in evidence, but whether he was a bad man or not and whether he actually violated the laws of the State of Georgia or not is not the question in this case at all. If he violated the laws of the State of Georgia in Baker County, it would be the duty of the Sheriff to proceed as the state law provides for the

prosecution of such offenses, but the state law does not provide that he shall proceed contrary to the Constitution of the United States and without due process of law. That is what he is charged with here.

Another thing was said, gentlemen of the jury, that you should back up the officers. Well, that depends on how you construe that question. All good citizens have a duty to back up all law enforcement officers who proceed according to the law and do no violence to the law themselves; but if it should be true that officers of the law themselves commit criminal offenses, then it is not the duty of good citizens and it is not the duty of a jury to back them up, regardless of whether you think they are guilty or not guilty. That is not true.

The Constitution, in providing for the protection of these rights which I have stated, applies equally to the lowliest citizen of the United States as to the highest. It protects equally the rights of every citizen in the United States and it provides that the state through its officers or the illegal acts of its officers cannot impose punishments and penalties without due process of law, or subject an inhabitant of the state to different punishments or penalties on account of his being an alien or by reason of his color or race, than are prescribed for the punishment of citizens.

So, it is not a question, gentlemen of the jury—and I want to make this clear to you—it is not a question of race prejudice. It is not a question of finding a verdict in a Court of law according to your view or my view of any race question. That is not in the case at all. The constitution and the statute provide how to proceed with the enforcement of state laws and the constitution of the United States prohibits the State of Georgia through any illegal acts of its officers from denying any citizen or imposing any punishment, that would not be imposed on any other citizen, on any inhabitant because of his race or color. So, there is no room under the constitution or

under the statute itself for anybody to work into the trial of a criminal case of this sort a question of race prejudice, that is to say, to the extent that the jury should find a verdict different from what the evidence shows on account of these considerations which I have mentioned. That would not be proper.

Counsel said too that three years, the maximum punishment which could be imposed in this case, was not so important but that your verdict would be tremendously important to the whole country, the United States of America, and that your verdict would be sent all over the United States by wire. Well, would the truth about this case be affected one way or the other whether your verdict was sent all over the United States or whether it was concealed right here in this room? The truth about the thing is actually the only thing that you are to find and you are not to be interested or concerned with what effect it might have on other sections of the country.

Something was said in argument too about if you should find these defendants guilty, you might go home and tell your wives and daughters that they do not have any protection any more. Well, I charge you, gentlemen of the jury, that there is all the protection under state laws that the state laws provide and that when officers of the state follow the state law and enforce it to the limit, there is no conflict with this statute under which this indictment is drawn and they have full authority, as full as they ever had, regardless of what your verdict might be in this case, to enforce legally all of the laws of the State of Georgia.

I charge you, gentlemen of the jury, with reference to the warrant and the docket entries, about which you heard a great deal, that so far as the offense itself is concerned, it is not necessary for the government to show that the warrant was a valid warrant. It is not a necessary element of the offense for the government to show that the

sheriff either did or did not write the warrant, or whether the Justice of the Peace signed it or did not. It is not a necessary element of the offense to show that there was a warrant at all. It is not any necessary element of the offense itself to prove that the sheriff made entries in the Justice of Peace's docket. Those matters are in evidence for whatever you think they are worth in determining whether you think these defendants by their conduct alleged in this indictment did deprive Robert Hall of due process of law, whether they did to him things which the Constitution of the United States says they can't do legally, and that would not depend on whether the sheriff made entries in the docket or whether he wrote the warrant or whether there was any warrant. You may consider all of that evidence in determining whether you think the sheriff is guilty or not but, if you think the case is otherwise made out, then you would be authorized to convict the sheriff, even though you might think that he did not write the warrant and that he did not make any entries in the docket at all.

Now, gentlemen of the jury, I charge you that an officer, like the sheriff or any arresting officer, has certain rights and only certain rights in connection with a prisoner in his custody under arrest. I am going to read you two statements from the Supreme Court of this state, the Georgia Supreme Court, about what sheriffs can do legally. In this case it says—and this is the Supreme Court of Georgia—"There was no error in charging that an officer cannot suffer himself to be overcome by any opprobious words or abusive language while he is acting as a minister of the law. He cannot chastise his prisoner for insolence, that is to say, for being uppity. He cannot yield to his passion and take the administration of punishment into his own hands, but can only use such force as is necessary to make the arrest effectual."

In another case, the Court of Appeals this is instead of the Supreme Court, said—this is the Georgia Court of Appeals: "The act of an arresting officer in holding in custody a person whom he has arrested for violation of the law is an act done by virtue of his office. It is the duty of an arresting officer, who has a person under arrest for a violation of law, to refrain from unlawfully assaulting or killing the prisoner."

So, under the holdings of our own appellate Courts, I charge you that legally a sheriff or other officers would have no right to assault and beat or kill a prisoner, no matter what the prisoner said. That is what the Supreme Court of Georgia says, that the sheriff acting as a minister of the law who arrests a man and has him in his custody cannot strike him or beat him or kill him legally, no matter what the prisoner says.

So, if these defendants, without its being necessary to make the arrest effectual or necessary to their own personal protection, beat this man, assaulted him or killed him while he was under arrest, then they would be acting illegally under color of law, as stated by this statute, and would be depriving the prisoner of certain constitutional rights guaranteed to him by the Constitution of the United States and consented to by the State of Georgia.

I charge you, in that connection, that an arresting officer does have the right to use such force as is necessary in order to make the arrest, if he has a legal process under which to make the arrest. A sheriff who has legal process to make an arrest, has a warrant, has a right to make that arrest and he has a right to use such force, but only such force, as is necessary in order to make the arrest and over and above that he has no right to impose any sort of punishment on his prisoner.

I charge you that the sheriff or other officer, if he had a prisoner under legal arrest and it became necessary in order to prevent the prisoner from killing the sheriff or

other officer or doing him serious bodily harm, would have a right to use such force as was necessary to prevent it. That is all the right that arresting officers have in connection with imposing punishment on a prisoner.

Now, gentlemen of the jury, if you think from the evidence here that the government has proved that these defendants are guilty on counts 2 and 3, the form of your verdict would be, "We the jury find the defendants guilty on counts 2 and 3." If you should find them all not guilty on either count, then the form of your verdict would be, "We the jury find the defendants not guilty." That would mean all of them and it would mean not guilty on either offense.

Now, if you should find the defendants guilty on one of these counts and not guilty on the other, then you would say, "We the jury find the defendants guilty on count, either two or three, whichever it might be, and not guilty on the other count." If you should find some of the defendants guilty and some of them not guilty, you would also make that clear in your verdict.

I will see counsel in the office a minute.

(In Court's Chambers.)

Mr. Hager:

Judge, I do not see but one thing that I would suggest in the charge. I do not believe you gave the officers as much protection as you would a private citizen and they are certainly entitled to that anyway. Now, a fellow that has a gun and he puts me in fear of my life or grave bodily injury, I have got a right to kill him.

The Court:

Well, it would only be true if you thought it was necessary to kill him to save your life.

Mr. Hager:

Yes, sir, that is true, but I think that is in this case here. He had wrested, according to the testimony, the gun away from one of the officers and the gun did go off in the struggle, and they had a right to use whatever force was necessary to wrest the gun from him, and if they thought, reasonably thought, that they were in danger of their lives or grave bodily harm, they would have a right to kill him.

The Court:

Yes, they would have a right to use enough force to prevent it.

Mr. Hager:

Yes, sir.

The Court:

I think the only thing I left out of that was to say if the jury under circumstances which they think existed believed or could reasonably come to that conclusion, that it was necessary to do what they did in order to protect themselves—

Mr. Hager:

Yes, sir, I think that would be all right. The only thing, as I see, that you left out of it was I do not believe you gave as much protection to the officers as if they were just acting as individuals and I think what you have in mind would cover it.

Mr. Hager:

Now, Your Honor, there is one other thing I would like for you to charge and that is that the indictment itself is merely a charge and has no evidentiary value.

The Court:
All right.

(Returning to Court-Room.)

Gentlemen of the jury, I state to you now that the charges, the allegations, made in this indictment, which you will have out with you, are not themselves evidence. They simply constitute what the government alleges to be the truth about the matter but they are not evidence of the fact. I charge you also that the plea of not guilty entered on this indictment by the defendants is not evidence. It is the contention of the defendants which in effect says that what the indictment charges is not true. That makes an issue for the jury to try and you are to find out the truth about it from the evidence, oral and documentary evidence, which has been introduced in the trial, but you will not consider the indictment or the plea of not guilty as proving anything at all.

I said to you, gentlemen of the jury, that if an officer has a prisoner under arrest and it becomes necessary, in order to prevent the killing of the officer by the prisoner or the inflicting of serious bodily harm upon him, that the officer would have a right to use such force as would be necessary to prevent the injury or the killing to himself, but only that much force and no more. I charge you in that connection that in this case you will determine from the evidence what the situation was around the well during that occurrence that you have heard about, what things have been proved, in your opinion. Get what the exact situation actually was and if from that situation as you find it to be, you think that the officers could reasonably conclude under those circumstances that it was necessary to do what they did do to prevent injury or death to themselves, then they would have a right to

do it but they would have the right only to do what they thought under the circumstances was absolutely necessary in order to prevent injury or death to themselves.

After argument of counsel for both Government and defendants and after charge of the Court, the jury retired and after deliberating upon the issues, returned a verdict against the defendants on counts II and III of the indictment. Said verdict was returned on the 7th day of October 1943.

Immediately thereafter and on October 7, 1943 (the same day the verdict was returned) the Court imposed sentence upon defendants by sentencing each of them to serve one year on count II of the indictment and to pay a fine of $1000.00 and sentenced each defendant to serve two years on count III of the indictment to run consecutively with the sentence imposed on the second count, making a total term of imprisonment of three years for each defendant and a fine of $1000.00 as to each.

Wherefore, appellants pray that this their bill of exceptions be certified and approved as correct and that the same be transmitted to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, as provided by law.

This the 4th day of November, 1943.

CLINT W. HAGER,
J. F. KEMP,
ROBT. B. SHORT,
Attorneys for Appellants.

To the Honorable T. Hoyt Davis, United States Attorney for the Middle District of Georgia:

You are hereby notified that pursuant to the rules governing appeals in criminal cases in the United States

Courts, that M. Claud Screws, Frank Edward Jones, and Jim Bob Kelley (appellants herein) have this day filed in the office of the Clerk of the District Court of the United States for the Middle District of Georgia, Albany Division, their bill of exceptions and assignments of error therein.

This the 4th day of November, 1943..

CLINT W. HAGER,
J. F. KEMP,
ROBT. B. SHORT,
Attorneys for Appellants.

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226 ACKNOWLEDGMENT OF SERVICE.

Service of the bill of exceptions in the above entitled case is hereby acknowledged. Copy received.

This the 4th day of November, 1943.

T. HOYT DAVIS,
United States Attorney.

ORDER APPROVING BILL OF EXCEPTIONS.

The above and foregoing bill of exceptions is hereby approved and certified as correct.

I do further certify that said bill of exceptions contains all of the evidence material to the issues adduced upon the trial.

This the 4 day of November, 1943.

BASCOM S. DEAVER,
United States Judge.

Agreed to, this the 4th day of November, 1943.

T. HOYT DAVIS,
United States Attorney.

227 ASSIGNMENTS OF ERROR.

(Title Omitted.)

Now come the defendants, M. Claud Screws, Frank Edward Jones and Jim Bob Kelley, hereinafter referred to as appellants and within the time required by law and the rules of this Court governing appeals in criminal cases and simultaneously with the filing of their bill of exceptions hereby respectfully make and file this their assignments of error, and for assignment say:

1.

That the Court erred in overruling the demurrers filed to both counts of the indictment upon all the grounds set forth in said demurrers and for all the reasons assigned therein. (R. .....)

2.

That the Court erred in overruling the motion made by appellants at the conclusion of all the evidence for a directed verdict as to each defendant upon both counts of the indictment, upon each and every ground set forth in said motion and for all the reasons assigned in the various grounds of said motion for directed verdict. (R. .....)

Wherefore, said appellants have appealed to the Circuit Court of Appeals of the United States for the Fifth Judicial Circuit and pray that this their assignments of error be considered and sustained, and that the judgment of conviction be reversed by said Court.

Dated: This the 4th day of November, 1943.

CLINT W. HAGER,
J. F. KEMP,
ROBT. B. SHORT,
Attorneys for Appellants.

Filed: November 4, 1943.

228 DESIGNATION OF RECORD.

(Title Omitted.)

To the Clerk of said Court:

We hereby designate the following papers and documents which we request be duly authenticated and sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit to be considered in the appeal of said defendants, said documents are designated as follows:

1. The indictment.

2. Plea and verdict.

3. Sentence of the Court.

4. Demurrer to the indictment.

5. Order sustaining demurrer to count I and overruling it as to counts II and III.

6. Notice of appeal and grounds thereof.

7. Bill of exceptions together with acknowledgment of service of the same.

8. Order approving bill of exceptions.

9. Cost bonds.

10. Assignments of error.

11. This designation of record.

12. Clerk's certificate.

CLINT W. HAGER,
J. F. KEMP,
ROBT. B. SHORT,
Attorneys for Appellants.

Filed: November 4, 1943.

229

CLERK'S CERTIFICATE.

In the District Court of the United States for the Middle District of Georgia—Albany Division.

M. Claud Screws; Frank Edward Jones; Jim Bob Kelley,
Appellants,
vs. No. 1300, Criminal.
United States of America, Appellee.

United States, of America,
Middle District of Georgia.

I, GEORGE F. WHITE, Clerk of the District Court of the United States in and for the Middle District of Georgia, do hereby certify that the foregoing and attached 229 pages contain a true, full, complete and correct copy of the original record, assignments of error, and all proceedings had in the matter of M. Claud Screws, Frank Edward Jones and Jim Bob Kelley, Appellants, vs. United States of America, Appellee, as specified in the designation of contents of record on appeal of counsel herein and as the same remains of record and on file in the Clerk's Office of the said District Court at Albany, Georgia.

In Witness Whereof, I have hereunto set my hand and the official seal of the said District Court at Macon, Georgia, this 12th day of November, 1943.

GEORGE F. WHITE,
(George F. White)
Clerk, United States District Court, Middle District of Georgia.

(Seal)

[fol. 217] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of December 15, 1943

No. 10834

M. CLAUD SCREWS, FRANK EDWARD JONES and JIM BOB KELLEY

versus

UNITED STATES OF AMERICA

On this day this cause was called, and, after argument by J. F. Kemp, Esq., for appellants, and T. Hoyt Davis, Esq., United States Attorney, for appellee, was submitted to the Court.

[fol. 218] OPINION OF THE COURT AND DISSENTING OPINION OF SIBLEY, CIRCUIT JUDGE—Filed January 14, 1944

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10834

M. CLAUD SCREWS, FRANK EDWARD JONES, and JIM BOB KELLEY, Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Middle District of Georgia

(January 14, 1944)

Before SIBLEY, HOLMES, and WALLER, Circuit Judges

WALLER, Circuit Judge:

Appellants were indicted, tried, and convicted, for an alleged violation of Sec. 20 of the Criminal Code, being

Sec. 52, of Title 18, U. S. C., and for a conspiracy to violate said Sec. 52 of Title 18. It was alleged that the Appellant Screws, while Sheriff of Baker County, Georgia, [fol. 219] and Appellant Jones, while acting as a policeman of the City of Newton, in Baker County, Georgia, both aided and abetted by Appellant Kelley, did under color of the law of Georgia arrest or cause one Robert Hall, a negro citizen of the United States and of the State of Georgia, to be arrested, and brought into the Court House yard of Baker County, where said Robert Hall was beaten over the head with a blackjack by Defendants, from which the death of the said Robert Hall resulted. The substantive offense, alleged in Count 2, was that the Appellants were acting under color of the law of the State of Georgia and deprived the said Robert Hall of rights, privileges, and immunities secured or protected by the Constitution and laws of the United States, among other things the right to be secure in his person and to be immune from illegal assault and battery; the right and privilege not to be deprived of life and liberty without due process of law; the right and privilege not to be deprived of the equal protection of the law; the right to be tried, upon the charge upon which he was arrested, by due process of law; and the right and privilege not to be subjected to different punishments, by reason of his race and color, than are prescribed for the punishment of other citizens.

Appellants challenged by demurrer the jurisdiction of the Court below, asserting that in the killing of Hall and the doing of the other acts charged in the indictment they did not violate Section 52 of Title 18 because the rights, privileges, and immunities enumerated in the indictment are "fundamental or natural rights" which do not have their origin in the Constitution and laws of the United States; that these natural and inalienable rights find their source in the sovereignty of the States, whose duty it is to secure and protect these rights, and that the beating and killing of Hall deprived him of rights afforded by [fol. 220] the State rather than by the Constitution and laws of the United States; secondly, it was asserted that the 14th Amendment to the Constitution was a prohibition against deprivation by the *State* of the life, liberty, or property of any person without due process of law, or against the deprivation by the State of the equal protection

of the law to any person within its jurisdiction, and that the prohibition of the 14th Amendment were not applicable to the individual or personal acts of a citizen; and, thirdly, that Section 52 could not be applied to situations where a sheriff or other State officer was acting contrary to and against the positive prohibition of State law.

The third count in the indictment charged a conspiracy to commit the offense charged in the second count.

Does Sec. 52, Title 18, U. S. C., confer jurisdiction upon the Federal Court to try a Sheriff, a policeman, and another (who aided and abetted the two officers) for unlawfully beating to death one under arrest and in custody of such officers, on the theory that such beating and consequent death was done under color of State law and was a willful deprivation of rights, privileges, and immunities secured or protected to the deceased by the Constitution and laws of the United States?

The pertinent part of the 14th Amendment to the Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the 14th Amendment provides that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article", pursuant to which, and in order to implement [fol. 221] the 14th Amendment, Congress enacted what has now come to be Sec. 52 of Title 18, U. S. C., which is as follows:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

Sec. 88, Title 18, U. S. C., provides in substantial part that if "two or more persons conspire * * * to commit

any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both''.

The lower Court properly overruled the demurrer to the second and third counts of the indictment upon which the Defendants were tried and convicted.

The right to the enjoyment of life and liberty is a fundamental or natural right, and is not derived from nor created by the Federal Constitution.[1] Nevertheless, the 14th Amendment was designed to safeguard and protect the individual against the deprivation without due process of law of those rights by the State rather than to create new rights in the individual. Sec. 52 of Title 18 does not merely undertake [fol. 222] to protect rights which are derived from the Federal Constitution but it undertakes to protect and make secure any rights secured or protected by the Federal Constitution and laws, and to that end makes criminal the wrongful deprivation of any rights that are secured or *protected* by the Constitution or laws of the United States. Clearly the right to be secure in one's person and to be immune from illegal arrest and battery, or the right not to be deprived of life or liberty without due process of law, and the right to enjoy the equal protection of the laws, are rights "secured or protected" by the Constitution of the United States, and this ground of the demurrer was not tenable.

The second ground of the demurrer, to the effect that the 14th Amendment was a prohibition against the deprivation by the State of the constitutional rights covered thereby, and that the prohibitions of the 14th Amendment are not applicable to individual or personal acts of the citizen, has as its base a fundamentally correct concept.[2] However, Sec. 52 of Title 18, and the indictment drawn thereunder, are not intended to cover personal and individual acts of a citizen in wrongfully depriving another citizen of constitutional rights.[3] The section would

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[1] United States vs. Cruickshank, 92 U. S. 553.

[2] United States vs. Classic, 313 U. S. 299; Virginia vs. Rives, 100 U. S. 313; Hodges vs. United States, 203 U. S. 1.

[3] C. B. & Q. R. R. vs. City of Chicago, 166 U. S. 226; Huntington vs. City of New York, 118 Fed. 683.

have no applicability to a citizen who acts without any color of law, statute, ordinance, regulation, or custom of the State, or not in the name or by the authority of the State. The Act can only be applicable to one who acts under guise of authority of the State and thus brings about the illegal deprivation of constitutional rights. The statute was not designed to reach and cannot be stretched to reach the personal, individual act of one citizen toward another when same is not done under color of State law, [fol. 223] even though the depriving actor were the holder of public office.

In the present case the Sheriff contended both before and during the trial that he was acting pursuant to a warrant issued commanding him to arrest and take into custody Robert Hall for the alleged theft of a tire. A warrant can issue and be served only under color, or authority, of law. A void warrant, in the hands of the Sheriff or his deputy, is color of authority, and acts done in the execution of such a warrant are done under color of law. The deprivation of the constitutional rights of one citizen by another is not a violation of Section 52 and becomes a violation only when the depriving citizen is acting under color of law, as distinguished from acting within the law.[4] A sheriff who, acting under a valid warrant in making a necessary and lawful arrest and who in self-defense slays the person he seeks to arrest, has not violated the section, but if a sheriff were acting only under a pretext or color of law and in so doing unlawfully caused the death of another, such sheriff would be amenable to the section in question. The deprivation of liberty or property or life under valid State law constitutes no offense under the Act, but it is a deprivation of a constitutional right under a mere pretense or color of law by one pretending to act under the authority of the State that calls the section into operation. In the instant case there is evidence to the effect that the alleged warrant of arrest was prepared by the Sheriff and was a spurious

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[4] "'Color of law' does not mean actual law. 'Color' as a modifier, in legal parlance, means 'appearance as distinguished from reality'. Color of law means 'mere semblance of legal right'." McCann vs. Des Moines, 174 U. S. 168 (text 175).

afterthought. Be that as it may, he insisted that he was acting under color of authority in making the arrest. Assuming that the Sheriff was possessed of a valid warrant, although there was evidence in the case to the contrary, [fol. 224] the beating of a prisoner to death is not necessarily an incident to the making of a lawful arrest. The wrongful beating of a prisoner by an arresting officer acting under a warrant, whether void or valid, is an unlawful deprivation of a right of a citizen of the United States which the 14th Amendment protects, and which Sec. 52 makes a criminal offense, the constitutionality of which section is not raised.

The jury has found, under the overwhelming weight of the testimony, that the beating of the said Robert Hall to his death by the Defendants was without justification and not in necessary self-defense and not in the exercise of such force as was reasonably necessary to make a lawful arrest or to repel an assault.

The third contention of Appellants is that the section in question does not embrace the personal, unofficial, and individual acts of one who holds an office unless those acts were perpetrated under the guise or authority of State law. It may be conceded that if the Sheriff gets into an altercation in a matter that is strictly personal and which has no connection with his official functions or duties and which arises out of no claim or effort or color of the exercise of lawful authority, the statute would not apply. Certainly the State is not to be held responsible for the unofficial and wholly personal acts of an individual who merely happens to be Sheriff. If John Smith, who happens to be Sheriff, is the owner of a house which he rents to Bill Johnson, and he and Bill Johnson get into a fight over the failure of Johnson to pay rent to Smith, and in the fight Johnson is subjected to the loss of his life, such act would not call the Federal statute into operation. It is essential that the act of deprivation not only be unlawful, but that it be committed under color or pretense of law.

[fol. 225] The 14th Amendment renders State statutes unconstitutional which deny equal protection of the law, due process of the law, etc., but Sec. 52 makes punishable acts done by one under color or pretense of law which result in the deprivation of rights protected by the Federal Constitution.

The motion for directed verdict was based upon substantially the same grounds as were the demurrers, viz, the jurisdiction of the Court. We are of the opinion that the Court below had jurisdiction, that the evidence overwhelmingly supports the verdict of the jury, and that the judgment of the lower Court should be affirmed.

Affirmed.

SIBLEY, Circuit Judge, Dissenting:

Horror at what happened in this case has, I think, interferred with a calm consideration of the law involved. Certainly, if the evidence for the prosecution is credited, the appellants ought to be in the penitentiary. The question is, ought they to be in a penitentiary of the United States?

Death resulted from the beating of a prisoner on the head with a club. The prisoner's loaded shotgun was at hand, and one officer had a pistol. No one attempted to shoot the prisoner. When he appeared to be in a bad condition he was taken at once by the sheriff into another county to a hospital. I do not think it was a wilful murder, but rather that it was involuntary manslaughter in the commission of an unlawful act. The indictment does not charge an intentional killing, and no such issue was submitted to the jury.

[fol. 226] What does the indictment charge? Count 2 is the key count, being merely repeated in Count 3 as a conspiracy. In it there is an elaborate list of rights and immunities alleged to be secured and protected by the Fourteenth Amendment of the Constitution, but these are allegations of law. It is alleged that the defendants acted under color of the law of Georgia and the City of Newton, but no special act of the Legislature or ordinance of the town is mentioned. The fact allegations are these: Screws, being State Sheriff, and Jones, being a city police officer, wilfully deprived Hall of his rights under the Fourteenth Amendment, "that is to say, the defendants arrested and caused to be arrested said Hall * * * and then and there unlawfully and wrongfully did assault, strike and beat said Hall about the head with human fists and a blackjack, causing injuries which were the proximate and immediate cause of his death". The arrest is not alleged to be un-

lawful, but only the beating. Do these facts make a crime against the United States? The affirmative answer is sought in Section 20 of the Criminal Code, the applicable words being: "Whoever under color of any law, statute, ordinance, regulation or custom, wilfully subjects * * * any inhabitant of any State, Territory or District to the deprivation of any rights, privileges and immunities secured or protected by the Constitution and laws of the United States * * * shall be fined * * * or imprisoned * * * or both."

Who is protected? Any inhabitant of any part of the United States territory.

Who is punishable? Whoever acts under color of any law or custom. The statute does not mention State laws, or State customs, or State officers, but applies equally to federal or territorial laws and customs and officers, and indeed to all persons acting by virtue of any supposed [fol. 227] law or custom, whether valid or invalid. The statute does not mention the Fourteenth Amendment and does not profess to be "appropriate legislation" to enforce it. It takes hold of every person in the United States and makes him a potential criminal if he acts under color of any law or custom.

What does it forbid? Wilful deprivation of any right secured or protected by the Constitution and laws of the United States. Wilful, I take it, means intentional, not by accident or misfortune. Does it mean that a particular clause of the Constitution was in mind, with a definite intention to violate it? In this case there is no reason to suppose that Screws and Jones once thought of the Fourteenth Amendment, or that they knew much or anything about it. The jury were not instructed to make any such enquiry. The accused intentionally beat Hall, and the jury were told that was enough, if not justified.

Now it is a common form of legislation to say that a violation of any provision of a particular Act shall be a crime. The citizen has everything before his eyes and can readily know what he may not do. Far more serious would it be to attempt to make criminal "every deprivation of rights secured" even by one elaborate Act, say the Interstate Commerce Act, or the National Labor Relations Act. If this statute had confined itself to punishing State officers for helping a State to deprive any person of life,

liberty or property without due process of law, contrary to the Fourteenth Amendment, which is the function here assigned to it, it seems to me it would have been too vague to make a good criminal statute, for not even the judges on the bench know just what that portion of the Fourteenth Amendment means, and ideas about it have changed very greatly since Section 20 was first enacted. What it does is to gather up every provision of the federal Constitu-
[fol. 228] tion, and every provision of every federal statute which may secure or protect any sort of personal, civil, property or political right, and declare it to be a crime to deprive anyone of his right. Who can enumerate what rights are secured by the Bill of Rights of the Federal Constitution? Or by the prohibitions against State action in the original Constitution, or the Thirteenth, Fourteenth and other Amendments? Or in such laws of the United States as the Interstate Commerce Act, the National Labor Relations Law, the Railway Labor Act, Federal Employers Liability Act, War Risk Insurance Act, Harbor Workers Act, Seamen's Acts, Fair Labor Standards Act, and fifty others? It seems to me that such wholesale criminal legislation is not constitutionally possible, because there is in it no ascertainable standard of guilt, and the right to be precisely informed of the things to be charged as crimes is not practically preserved. *United States vs. L. Cohen Grocery Co.*, 255 U. S. 81.

The statutory words, taken in their full sweep, would involve startling consequences. Judges and prosecuting officers, State and federal, tread on dangerous ground. An intentional refusal to send for witnesses, to furnish counsel, to grant a prompt trial, or a full indictment, may make them criminals. Many Federal Boards have made many "regulations", some of which no doubt are contrary to rights secured by the federal laws. Those who act under color of such regulations are liable to prosecution. Every State Sheriff or United States Marshal who uses force on a prisoner, every prison warden who disciplines, is liable to have to answer a federal indictment, as to whether his act was lawful, or only under color of law. A warden censors a prisoner's mail; does he deny his rights under the postal laws? A law of Georgia permits a landowner to impound trespassing cattle till damages are paid. If under color of this law one impounds cattle

[fol. 229] and then kills and eats them unlawfully, he is of course a criminal under State law, but as he has, under color of a law, taken property without due process of law he also must suffer federal imprisonment. In this very case Jones and Screws had, a few days before, apparently without due process, taken Hall's pistol. They might have been federally indicted for that. When Hall was arrested his shotgun was taken from his home, not in a search of his person, but apparently without lawful warrant. This was federally indictable. Policemen everywhere arrest without warrant unlawfully. They are all guilty of wilfully depriving the prisoner of liberty without due process of law, and indictable under this statute, taken at its face value.

But it is said the present is a clear case of deprivation of rights, and a serious one because life was taken, even if not wilfully taken. Who is to decide whether the right is a clear one, or how serious the deprivation must be? The judge and jury? Thus construed, the statute falls squarely under the decision in the *Cohen Grocery* case, *supra*.

The only reasonable construction of the statute which it seems to me could be upheld is that where one, knowing a law or regulation or custom is contrary to a right secured by the federal Constitution or laws, wilfully undertakes to enforce the law or regulation or custom, he shall be punished. There is here no law or regulation or custom to beat a prisoner, white or black. It is lawful to subdue one, if he resists or attacks the arresting officer. That law is not contrary to any right federally secured. It is also a custom in Georgia to strike one who calls you to your face a "son of a bitch", but as the district judge charged the jury in this case the privilege of resenting such words does not extend to an arresting officer. There [fol. 230] is not shown here by allegation or evidence or judicial notice any law, regulation or custom under color of which Screws and Jones struck Hall unless, as they claimed, to subdue him, which would not have deprived him of any right. If they simply struck him unlawfully, as alleged, they are liable on their official bonds, they are liable in damages for assault and battery, and they are liable to criminal prosecution under Georgia law, and because of

the fatal consequence, the prosecution may be for involuntary manslaughter or perhaps murder. I do not think Section 20, if sustainable at all, can be applied to the case.

[fol. 231] JUDGMENT

Extract from the Minutes of January 14, 1944

No. 10834

M. CLAUD SCREWS, FRANK EDWARD JONES and JIM BOB KELLEY

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Sibley, Circuit Judge, dissents."

[fols. 232-234½] PETITION FOR REHEARING—Filed February 2, 1944

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

M. CLAUD SCREWS,
FRANK EDWARD JONES, and
JIM BOB KELLEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 10834
CRIMINAL CASE

MOTION FOR REHEARING

Now come the appellants named above in the caption, and within the time provided by law, and before the remittitur from this court has been sent down, and move the court for a rehearing upon the following grounds, to wit:

GROUND 1.

Because the court has overlooked or ignored sound and controlling principles of law as announced in the decision of the Supreme Court of the United States in the case of:

Joseph E. Snowden v. Edward J. Hughes, et al

which was decided January 17, 1944, same being No. 57, October Term, 1943, which decision holds that,

> "A construction of the equal protection clause which would find a violation of a federal right in every departure by state officers from state law is not to be favored."

And which further holds that,

> "Mere violation of a state statute does not infringe the federal Constitution."

And wherein (in concurring opinion) Mr. Justice Frankfurter said:

> "It is not to be resolved by abstract considerations such as the fact that every official who purports to wield power conferred by a state is **pro tanto** the state. Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court."

GROUND 2.

Because the court has overlooked or ignored sound principles of law in holding that the act of a state arresting officer, contrary to state law, amounts to state action.

GROUND 3.

Because the court has overlooked or ignored sound principles of law in holding that a District Court of the United States has original jurisdiction to try a state arresting officer who takes the life of his prisoner, in a way and manner which is contrary to state law.

GROUND 4.

Because the court has overlooked or ignored sound principles of law in holding that a state officer acts under "color of law" merely because he is acting by virtue of his office, even though he is not authorized by law to commit said act and even though he acts contrary to law.

GROUND 5.

Because the court has overlooked or ignored sound principles of law in holding that, "The wrongful beating of a prisoner by an arresting officer acting under a warrant, whether void or valid, is an unlawful deprivation of a right of a citizen of the United States which the 14th Amendment protects, and which Sec. 52 makes a criminal offense."

GROUND 6.

Because the court has overlooked or ignored sound principles of law in holding that where a state arresting officer unlawfully strikes his prisoner, that he commits an offense under Sec. 52 of Title 18, U. S. C.

IN CONCLUSION, we respectfully submit that the court erred in its opinion and decision and that a rehearing should be granted.

Respectfully submitted,

CLINT W. HAGER
J. F. KEMP
ROBERT B. SHORT,
Attorneys for Appellants.

GEORGIA, FULTON COUNTY.

We, Clint W. Hager and J. F. Kemp, do certify that we are of counsel for the appellants named in the within and foregoing motion and do hereby certify that we have read the within and foregoing motion for a rehearing and believe that the court has overlooked certain well established principles of law which, if considered, would require a different decision from that rendered by the court and we further certify that this motion is made in good faith and not for the purpose of delay.

This the 31 day of January, 1944.

CLINT W. HAGER

J. F. KEMP

[fol. 235] OPINION ON REHEARING—Filed February 18, 1944

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10834

M. CLAUD SCREWS, FRANK EDWARD JONES and JIM BOB KELLEY, Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Middle District of Georgia

On Petition for Rehearing

(February 18, 1944)

Before Sibley, Holmes, and Waller, Circuit Judges

By the Court: The petition for rehearing in the above styled cause is hereby denied.

Sibley, Circuit Judge, favors a rehearing.

[fol. 236] WALLER, Circuit Judge, specially concurring:

It is my view that Section 52 of Title 18, U. S. C., is an anti-discrimination statute, under which it must be alleged and shown that the deprivation of federal right was on account of the alienage, race or color of the deprivee, but the contrary was held in *United States v. Classic*, 313 U. S. 299, which holding I, unapprovingly, must follow. In the present state of the law, as construed by the Supreme Court, the petition for rehearing is properly denied. The recent decision in *Snowden v. Hughes*, decided Jan. 17, 1944, by that court, is not in conflict with the views expressed by this court in the former opinion in this case.

[fol. 237] ORDER DENYING REHEARING

Extract from the Minutes of February 18, 1944

No. 10834

M. CLAUD SCREWS, FRANK EDWARD JONES and JIM BOB KELLEY

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Sibley, Circuit Judge, favors a rehearing."
"Waller, Circuit Judge, specially concurs."

[fol. 238] MOTION AND ORDER STAYING MANDATE—Filed February 23, 1944

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10834

M. CLAUD SCREWS, FRANK EDWARD JONES, and JIM BOB KELLEY, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee

Now come M. Claud Screws, Frank Edward Jones and Jim Bob Kelley, appellants in the above entitled case and by and through their attorneys at law, Clint W. Hager, J. F. Kemp and Robert B. Short, show to this Honorable Court the following facts:

1

That appellants were indicted by a Grand Jury of the United States, impaneled and sworn in the Middle District of Georgia at the October Term A. D. 1942, of said court.

2

That appellants were put on trial in the Albany Division of the Middle District of Georgia, on the 4th day of October 1943, and on October 7, 1943 the appellants were found guilty by the jury which tried them.

3

That appellants prosecuted their appeal to this Honorable Court and on the 14th day of January 1944, this court affirmed the judgment of the District Court for the Middle District of Georgia.

4

That within the time provided by law appellants filed their motion for a rehearing and on the 18th day of February 1944 this Honorable Court entered an order denying [fol. 239] said petition for a rehearing.

5

Appellants now desire to file a petition to the Supreme Court of the United States for certiorari to review the judgment of this court and of the court below, for the purpose of having the Supreme Court pass upon the questions of law raised by appellants upon the hearing of the court below and in this court.

6

That the mandate of this Honorable Court in the above entitled cause, will be sent down to the District Court of the United States for the Middle District of Georgia on the 28th day of February, 1944, unless the same be stayed by order of this court.

7

That appellants desire that said mandate be stayed for a period of thirty days from the rendition of the order entered by the court denying the petition for a rehearing, to-wit, from February 18, 1944, in order that they may prepare their application for a writ of certiorari to the Supreme Court of the United States, and to have their said application filed and served within the time provided by statute.

Wherefore, appellants pray that this Honorable Court by proper order, stay the mandate in said case for a period of thirty days from February 18, 1944, as provided by law, in order that appellants may prepare, perfect, file and serve their petition for writ of certiorari to the Supreme Court of the United States.

Clint W. Hager, J. F. Kemp, Robt. B. Short, Attorneys for Appellants.

[fol. 240] I hereby certify that I am one of the attorneys of record for movants in the foregoing motion and that it is the intention of appellants to file a petition to the Supreme Court of the United States for a writ of certiorari.

I further certify that in good faith I believe that there are meritorious and substantial questions of law that should be presented in said petition for certiorari and that said petition for certiorari is to be brought in good faith and not for the purpose of delay.

J. F. Kemp, Attorney for Movants.

[fol. 241] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10834

M. CLAUD SCREWS, FRANK EDWARD JONES, and JIM BOB KELLEY, Appellants,

versus

UNITED STATES OF AMERICA, Appellee

On consideration of the application of the Appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellants to apply for and to obtain a writ of *certiorari from* the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a *period of* thirty days, from February 18, 1944; the stay to continue in force until the final disposition of the case by the Supreme Court provided that within thirty days from February 18, 1944 there shall be filed with the clerk of this court the certificate of the

clerk of the Supreme Court that certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from February 18, 1944, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 23rd day of February, 1944.

(Signed) E. R. Holmes, United States Circuit Judge.

[fol. 242] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 243] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 24, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

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