IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23289

COLLIE LEROY WILKINS, JR., AND
EUGENE THOMAS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR APPELLEE

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STATEMENT

I. Proceedings

An indictment in one count against Eugene Thomas, Collie Leroy Wilkins and William Orville Eaton charging them with a conspiracy in violation of 18 U.S.C. §241 was returned by the Grand Jury for the Middle District

of Alabama on April 6, 1965 (R. 2-4). They were arrested pursuant to arrest warrants on April 7, 1965, and each was released on $50,000 bond (R. 4-7). Arraignment took place on November 5, 1965, at which the defendants were represented by their present counsel, and each pleaded not guilty (R. 7-10). Trial commenced before Judge Johnson of the United States District Court for the Middle District of Alabama in Montgomery, Alabama, on November 29, 1965 (R. 128). Each of the defendants was found guilty by jury verdict returned on December 3, 1965 (R. 51-52) and each was sentenced to ten years imprisonment (R. 56-57). Notices of appeal on behalf of all three defendants were filed on December 3, 1965 (R. 58-60).

II. The Evidence

A. The court order and march

On March 8, 1965, a class action was filed by Negro citizens in the United States District Court for the Middle District of Alabama seeking a temporary restraining order and preliminary injunction against interference with a planned march on United States Highway 80 between Selma and Montgomery, Alabama, for the purpose of peaceably demonstrating in order to

redress grievances concerning the right to register to vote in the State of Alabama. The District Court on March 17, 1965, issued a preliminary injunction enjoining Governor Wallace and other state and county officials from "arresting, harassing, threatening or in any way interfering with the peaceful non-violent efforts of said plaintiffs, members of their class, and others who may join them in the march." (U.S. Ex. 1). As part of its order, the district court approved and authorized the execution of a proposed plan of march. The plan included supportive forces such as transportation "for some persons who will join the group on the last day to complete march by entry into Montgomery . . . and [t]ransportation away from the Capitol grounds . . . to various destinations including transportation terminals" (U.S. Ex. 1). See Williams v. Wallace, 240 F. Supp. 100, 102-109, 110-111, 120-122 (M.D. Ala. 1965). On March 19, 1965, this Court declined to stay enforcement of the District Court injunction (U.S. Ex. 2).

The approved march commenced in Selma on March 21, 1965 and culminated in Montgomery at the State Capitol on March 25, 1965 (R. 214, 218, 414).

B. The death of Mrs. Luizzo

Viola Gregg Luizzo, a resident of Michigan, came to Selma for the march on March 18, 1965 (R. 594, 601). During the next week her car was used for transportation in connection with the march (R. 594-595). On March 24 Leroy Moton, a march worker, picked her up at Brown's Church, march headquarters in Selma, and drove her to the march (R. 595). After the march concluded in Montgomery on March 25, Mrs. Luizzo drove a group of marchers back to Selma and then, with march worker Moton, as a passenger, started on her return to Montgomery on Route 80 (R. 596-597). A car overtook the Luizzo automobile, shots were fired, and Mrs. Luizzo was killed (R. 370, 598).

Special Agents of the Federal Bureau of Investigation arrested Eugene Thomas, Collie Leroy Wilkins, Jr., and William Orville Eaton (all three were members of Chapter 20 of the Knights of the Ku Klux Klan of America, Inc.) on March 26, 1965 (R. 394, 404, 639, 654-655) on warrants charging them with conspiracy in violation of 18 U.S.C. §241.

C. The Klan rally

On Sunday, March 21, 1965, a Knights of the Ku Klux Klan of America, Inc. (hereinafter Klan) rally and parade was held at Crampton Bowl in Montgomery, Alabama (R. 193, 198, 209, 225). The announced purpose of the rally and parade, stated in the request for a permit, was "to protest [an] order issued by [a] Federal Court allowing a five day demonstration march from Selma, Alabama, to Montgomery, Alabama" (R. 209, 198-200; U.S. Ex. 1, 2, 3, 4). Present at the protest were, among other members of the Klan, William Orville Eaton, Collie Leroy Wilkins, Jr., Eugene Thomas and Gary Thomas Rowe, Jr., (R. 396-398, 475, 721, 727; U.S. Ex. 18).[2/] Among the automobiles observed at the rally was Eugene Thomas' 1965 Chevrolet (R. 398-399, 355; U.S. Ex. 13-16).

D. The trip to Montgomery

The following Thursday morning, March 25, 1965, at approximately seven o'clock in the morning, Rowe

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2/ Gary Thomas Rowe had been furnishing information to the FBI on a regular basis since 1960 or 1961 (R. 280, 282, 392, 394, 452). His services had originally been solicited by the FBI (R. 392, 455), and at the request of the FBI he joined the Klan. On March 25, 1965, he was a member of the Eastview 13 Chapter of the Klan located in Birmingham, Alabama (R. 393, 456).

received a telephone call from Eugene Thomas who told him he had to join a group of Klansmen and go to Montgomery that day (R. 401-402). Immediately after Eugene Thomas hung up Robert Thomas, a Klan official, called and told Rowe to go to Montgomery, stating that this instruction came from Robert Shelton's Imperial Office (R. 406). After receiving this telephone call, Rowe contacted Special Agent Shanahan of the FBI and was instructed by Mr. Shanahan to go to Montgomery with Gene Thomas and whoever else would be present (R. 406-408).

Thereafter, Rowe met Eugene Thomas two blocks from the Klan meeting hall in Bessemer, Alabama (R. 408). In the car with Thomas were Wilkins and Eaton (R. 408). Rowe had known Thomas for approximately five years, Wilkins for approximately two years and Eaton "within a year or so" (R. 394). All three were members of Chapter 20 of the Klan (R. 394, 404).[3/] Eugene Thomas and Rowe had participated in many Klan activities together, including an attempt to disrupt

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3/ Rowe testified (R. 442): "The purpose. . . of the Klan organization was to maintain white supremacy, was the number one order. . . . Any means necessary was the phrase that had been used very often, (by the Klan) whether it be, quote, 'Bullets or ballots.'"

a desegregated club in Birmingham, service as security guards for Robert Shelton, and violence at a bus station in Birmingham in 1961 when integrated bus passengers were beaten by members of the Klan (R. 440-441, 541-543). Rowe also had been on Klan assignments with Wilkins and Eaton, including an incident at a night club when the club (which catered to both whites and Negroes) was closed down (R. 441-442, 543-544).

After meeting Thomas on the morning of March 25, Rowe drove back to Thomas' house, parked his automobile and entered Thomas' Chevrolet (R. 408-481, 482). All four then proceeded to Montgomery, arriving around ten o'clock a.m. (R. 409,485). After riding around for a few minutes they parked in a parking lot and walked toward the Capitol (R. 410, 487). Rowe, Eaton and Thomas all were armed, but they left their guns in the car before walking toward the Capitol (R. 410, 485-486). They went to an American Filling Station where they stayed "in

the neighborhood of five hours" (R. 410-411, 487, 489, 842, 846, U.S. Ex. 26).[4/] While at the gas station Rowe and the others "stood around, [we] talked, and [we] harassed the marchers, hollered at them, and booed them, got in an argument with some of the colored spectators. . . ." (R. 412). During the day Thomas and Wilkins went into a telephone booth at the corner of the gas station (R. 413, 488). After they left the telephone line was cut and unusable (R. 413, 488).

E. The trip to Selma

After the speeches by the march leaders at the Capitol had ended, Wilkins, Thomas, Eaton and Rowe left the filling station and returned to the parking lot and their automobile (R. 414). At this time Thomas placed his gun on the compartment between the bucket seats in the front of his Chevrolet (R. 414, 490). All four then proceeded to Jack's Beverages, a restaurant located at one of the gates at Maxwell Air

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4/ Appellants' witness Jesse Hodges testified that Rowe, Thomas, Wilkins and Eaton were at the gas station on this day (R. 842-847). Thomas, in a statement given to the FBI, said that "the man who runs this gas station is very cooperative with the Klan--he's with us, that is where we all gathered, and we watched this thing." (R. 722).

Force Base outside of Montgomery (R. 414). On the way there, according to Rowe, Eugene Thomas said: " '[W]e are going to Selma.' Eaton asked why, and he [Thomas] says, 'Well, you know why, we got things to do, and we are going to get them done. . . ." (R. 415, 416). They ate at Jack's and then proceeded to Selma on highway 80 (R. 416, 492-495).

Shortly after leaving Jack's they spotted a hitchhiker on the road (R. 417). "Eaton said, 'There is a hitchhiker, wonder if it is one of the marchers?' and Wilkins said, 'I don't know, slow down, Brother, and'--referring to Eugene Thomas, he said 'slow down, Brother, and we will see if it is, we will give him a little fun and a surprise,' and Gene slowed the automobile down, and we got up further, close to this man, and Wilkins said, 'No, he is not a marcher,' he said, he is too clean to be a marcher, or words to that effect" (R. 417).

Subsequently, as they proceeded on highway 80 they were flaged down by an Alabama highway patrolman (R. 417-418, 495-498, 384-385, 626-628). The highway

patrol had a radar speed check on highway 80 and although the Chevrolet driven by Thomas was within the speed maximum (R. 419), a warning ticket was issued to Thomas for an improper muffler (R. 419, 498, 723-724, 849; U.S. Ex. 31, 43). Thomas asked the highway patrolman not to write the ticket and he also asked whether " '. . . the niggers have been giving you boys [highway patrol] any trouble?' " (R. 627). Thereafter, the four drove to Selma and went to the Silver Moon Cafe where they stayed for about thirty or forty-five minutes (420). While there Eugene Thomas went over and talked with a man (R. 421). After he returned, he said pointing to the individual to whom he had just spoken, " 'You know that fellow there?' " (R. 421). The other three responded that they did not (R. 422). Thomas said, " 'Gee Whiz, Jesus Christ,. . . 'that is the fellow that is out on the Reeb killing' " (R. 422); he also expressed disappointment that Rowe, Eaton and Wilkins did not recognize him (R. 422-423). Thomas left the booth in which the other three were sitting

and went over to the man in question (R. 423). As the four of them started out the door of the Silver Moon Cafe the man "came up to Gene Thomas and put his arm right--right on his shoulder, and he said, 'God bless you, boys,' . . . 'You go do your job, I have already did mine' " (R. 423).[5/]

They left the Silver Moon Cafe and pursuant to their previous plan (R. 416, 421) drove toward the church where the marchers had gathered (R. 423). Thomas drove with Eaton beside him in the front. Rowe sat behind Thomas on the left and Wilkins behind Eaton on the right (R. 490-491, 722). While driving in the vicinity of the church, where numerous people had gathered, they started down a dirt street and spotted "a couple colored people walking" (R. 424). Eugene Thomas slowed the car down and said: " 'Looka there,' . . . 'We are going to have some fun,' or---- words to that effect" (R. 425). Wilkins told Rowe,

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5/ Ouida Larson, a waitress at the Silver Moon Cafe, testified that Eaton, Wilkins, Thomas and a fourth man were in the Silver Moon on the 25th of March at between 7:00 and 8:30 p.m. (R. 571-574).

'Get ready, Baby Brother, we are going to take them' " (R. 425). When they were within a short distance of the "couple colored people" Rowe saw an Army truck with soldiers sitting within and exclaimed, " 'be careful, there is troops up there, the best thing we can do is get the hell out of here' " (R. 425). At that they passed these people and drove on (R. 425). During the period whey they had spotted these people, and while the car slowed down, Gene Thomas took his gun from between the seats and handed it to Wilkins, but when they noticed the Army truck the gun was replaced between the seats (R. 425).

F. The shooting of Mrs. Luizzo

Immediately thereafter, they drove through Selma toward the Edmund Pettus Bridge (R. 425-426). Approximately two or three blocks before the bridge they stopped for a red light and saw to their left a light colored Oldsmobile with a Michigan license plate (R. 426-427, 310, 556, 762; U.S. Ex. 12, 713). A white woman was driving the Oldsmobile and a Negro was seated in the front seat with her (R. 426). Eugene Thomas said: " 'Wonder--wonder where they are

going? Let's follow them, we are going to see where they are going, I think they are going out to the woods on a dirt road and park somewhere together' " (R. 426). At this point, after leaving the signal light Thomas told the others to get down in the back, below window level, because " 'we are going to follow them and take them' " (R. 426). Thomas then said, " 'I believe we got some of the brass'--'We are going to get them tonight' " (R. 427). After Rowe and Wilkins had been down in the back seat for several minutes and while Thomas was following the Oldsmobile he told them to sit up again (R. 428). They continued to follow the Michigan car and Thomas said again, " 'All right men. . . . 'tonight is the night we are going to take them' " (R. 428). While Thomas was trying to catch the Oldsmobile he said to Rowe, " 'Baby Brother'. . . . get ready, we are going to get them on our side' " (R. 429). As Thomas started to pull alongside the Oldsmobile Rowe saw Craig Air Force Base to the right in front of them (R. 429). He told Thomas to " 'go back' because 'that woman is trying to turn into the Air Force Base' " (R. 429).

Thomas said, " 'Nope' . . . 'we are going to get them tonight' " (R. 429). At this time the Oldsmobile veered to the right as if it were going to turn into the Air Force Base, but it did not, rather it veered out and the woman driver " 'really stepped on the gas and went on down the highway' " (R. 429). Eugene Thomas followed it at speeds of eighty to ninety miles an hour (R. 429, 503) and exclaimed, " 'Well, this is a good place'. . . we will take them now' " (R. 429). Wilkins told Thomas that he better be careful because the highway patrol radar is " 'right up there a little piece' " (R. 429), and Thomas slowed down (R. 403). As they passed the radar unit Rowe observed "a green Volkswagen type station wagon, with several Negroes standing around, and a highway patrolman standing there right at the same place where [Thomas] had received [a] ticket" (R. 430, 628; U.S. Ex. 32).[6/] However, Thomas continued to chase the Oldsmobile and throughout the chase the

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6/ A Volkswagen bus was issued a ticket on this day at about 7:50 p.m. by the highway patrol stationed on highway 80 (R. 628; U.S. Ex. 32).

discussion was that they were " 'going to get them tonight' " (R. 430-431). Thomas asked whether he should bump the automobile in order to stop it (R. 431). Wilkins answered: " 'No brother' . . . 'you can't stop it like that; if you get one speck of paint on this automobile, we will get caught.'. . . 'You just get up beside of it, and we will stop it' " (R. 431).

They started to pull along side the other car again when they passed an old grayish wood building with several cars and several Negroes standing in front of it (R. 431). Rowe sounded a warning and said that car was going to turn in there (R. 431). The Oldsmobile was weaving and at this point its brake light flashed and it suddenly speeded up again (R. 431-432). Thomas exclaimed: " 'we are going all the way tonight'. . . 'we have got to take it this time' " (R. 432).

Just as Thomas' car reached the rear end of the Oldsmobile he said " 'this is it, '. . . 'we are going to take them right here and now' " (R. 432). As the front of Thomas' car drew even with the back

of their car, Wilkins stuck his arm out the window with Thomas' pistol in hand, and at the same time the woman driver in the other car turned her head toward them Wilkins fired two shots into the front window of the automobile (R. 433, 505). Eugene Thomas at this point said, " 'Shoot the hell out of them, everybody shoot the hell out of them' " (R. 433). Eaton started firing his twenty-two pistol, which was loaded with shaved twenty-two caliber rifle bullets (R. 433, 545). Rowe pointed his gun out the window but did not shoot (R. 433, 505). As their car passed the Oldsmobile Wilkins continued firing and Eaton was leaning out of the car trying to fire (R. 433). The Oldsmobile still was going straight down the highway (R. 434). Rowe stated that they had missed (R. 434). Wilkins responded " 'Baby brother, don't worry I don't miss,' . . . 'that bitch and bastard are dead and in hell' " (R. 434). At this moment the Oldsmobile veered off the highway up a side road and Wilkins said " 'those bitches are gone' " (R. 434).

Wilkins threw his casings out the window and reloaded his gun; a few seconds later Eaton also threw his casings out the window onto the right hand side of

the road (R. 434). They then sped off, driving at an extremely high rate of speed until they reached Montgomery (R. 434). Whey they reached the Saint Francis Motel they turned onto the highway to Birmingham (R. 435). They stopped for gas (R. 435) and proceeded to Bessemer (R. 436).

In Bessemer they first went to see the Klansman manager of the V.F.W. Clubin order to get an alibi (R. 437). " 'He will give us a damn good alibi to account for our time in case they find them dead' " (R. 437). However, when they reached the V.F.W. Club they found that the manager--"Bob"--was indisposed; they were told he was drunk (R. 438). Eugene Thomas then suggested they go to Lorene's (R. 438), because the owner was a friend and would give them a " 'damn good alibi' " (R. 438). They went to Lorene's and after Thomas spoke to the owner he returned and said " 'Everything is taken care of'. . . 'if anything comes up'. . . 'she will alibi for us'. . . ." (R. 438-439).

After having a beer they left Lorene's and started back to Eugene Thomas' house (R. 439). On the way there they passed Robert Creel's house and

and Thomas said, " 'Lets go in and tell the Dragon what we did tonight' " (R. 439). Wilkins responded that the lights were out in the house and that he probably was in bed (R. 439). They then passed by Creel's house, went on to Thomas' house and there disbanded (R. 439).

G. Rowe's information to the F.B.I.

Rowe called Special Agent Shanahan as soon as he reached home and briefly related the story of the day's incidents to him (R. 439). Shanahan instructed Rowe to meet him at a parking lot at the West End Baptist Hospital, and they met there (R. 437-440, 285). At this time Rowe related the full story of the day's incidents to him (R. 291-292, 307, 314, 314-321, 345-347).

Early the following morning, on March 26, Rowe with several F.B.I. agents retraced the route of the activities of the previous evening (R. 325, 523, 501). Starting at the Edmund Pettus Bridge at Selma, they first went to the Silver Moon Cafe and then to the area near the Brown Church to view a particular street (R. 328, 531-533, 579). They left Selma and headed east toward Montgomery past the scene of the

shooting (R. 329-330, 524, 533-34, 550). Passing the scene of the shooting, they drove along the highway and Rowe pointed out the approximate place where Wilkins and Eaton threw the empty shell casings out the window (R. 333). Subsequently, they returned to Birmingham (R. 334, 534) and Rowe was incarcerated in the county jail (R. 536).[7]

H. The corroborating evidence

On Monday, March 29, 1965, Special Agents of the F.B.I. were searching highway 80 on the Montgomery side of the place where the woman had been shot (R. 581) when they found five empty thirty-eight caliber shell casings scattered two feet off the highway between the edge of the macadam and the ditch on the right shoulder (R. 582, 589, 731-734; U.S. Ex. 45).[8]

At the scene of the shooting, E. J. Dixon (a state investigator of the Department of Public Safety)

7/ Bond was made for Rowe and he left the jail in the company of Matt Murphy, Gene Reeves and Robert Thomas and returned to Murphy's office where Robert Creel was present (R. 536-537).

8/ These shell casings were found .55 of a mile from the scene of the shooting (R. 591).

found the body of Mrs. Luizzo in the Oldsmobile, about fifty feet off the highway on the south side of the road (R. 364; U.S. Ex. 12, 21-25).

A piece of lead was found on the right rear floor board of the Oldsmobile and subsequently turned over to Dr. Shoffeitt, Assistant Director of the State Department of Toxicology and Criminal Investigation (R. 372, 551). He performed an autopsy of the body of Mrs. Luizzo and determined that the cause of death was "hemorrhage and brain damage as result of a bullet wound which penetrated the left side of the head" (R. 553). He recovered a thirty-eight caliber bullet from the body and delivered it, along with the "piece of lead" he received earlier, to the FBI (R. 554-555).

Eugene Thomas was arrested on March 26, 1965, at Lorene's Cafe (R. 654-655). Special Agent Leahy at this time saw a twenty-two caliber bullet, the nose of lead cut off, lying on the right front window ledge of Thomas' car (R. 657, 714; U.S. Ex. 34). When Special Agent Connaughton pointed the bullet out to Thomas, "he turned ashen or gray" (R. 658-659,

710). Thereafter, several Special Agents, with a search warrant, went to Thomas' house (R. 659, 677-678; U.S. Ex. 35). Mrs. Thomas suggested to Special Agents Leahy and Byron that they would probably want the gun that was in her car (R. 674-675). A written consent to search prepared by the agents was read and then signed by Mrs. Thomas. (R. 679; U.S. Ex. 679.) She gave the keys to her car to her son who, accompanied by Special Agent Leahy, went to the car, retrieved a thirty-eight caliber revolver, brought it back to the house and gave it to Special Agent Byron (R. 674-675, 678; U.S. Ex. 39). The agents also found and seized at Thomas' house; (a) another thirty-eight Smith and Wesson snub-nosed revolver, (b) three boxes of Winchester thirty-eight special ammunition, (c) six rounds of Remington Thirty-eight special ammunition, (d) one box of Remington twelve guage shotgun shells, (e) one Newport model CN double barrel sawed off shotgun (R. 684, U.S. Ex. 36-38, 41, 46).

Further examination of Mrs. Luizzo's Oldsmobile by FBI agent Marion E. Williams (assigned to the FBI's Laboratory in Washington) produced a fragment of a

thirty-eight caliber bullet and another badly mutilated thirty-eight caliber bullet (R. 782-783; U.S. Ex. 50, 51).

The thirty-eight caliber bullet taken from Mrs. Luizzo's body (R. 554-555), the thirty-eight piece of lead found on the floor board of the Oldsmobile (R. 372, 537), and the thirty-eight caliber fragment found in the Oldsmobile all were identified by Williams, a ballistics expert, as having been fired from Thomas' thirty-eight caliber Smith and Wesson (R. 784-785, 795; U.S. Ex. 28, 29, 51, 53-55, 39). All three of these bullets were found to have glass fragments in them (R. 798). [9/]

9/ It was further established that a thirty-eight caliber bullet would penetrate the panels of the Oldsmobile and a twenty-two caliber bullet would only make indentations (R. 768). Examination of the Oldsmobile revealed two indentations, one in the body of the car beneath the window at the read just behind the driver's side door (R. 764; U.S. Ex. 23); two bullet holes in the window in the driver's side (R. 765; U.S. Ex. 22, 23); two bullet holes in the windshield slightly to the driver's side of the center (R. 765; U.S. Ex. 22, 23); and a bullet indentation in the rear view mirror (R. 766; U.S. Ex. 22). All the holes found in the Oldsmobile were due to bullets that had been fired from outside the car (R. 771-772).

ARGUMENT

I. The conspiracy of appellants violently to interfere with the exercise by others of rights under the federal court order authorizing the Selma-to-Montgomery march was in violation of 18 U.S.C. §241.

Appellants urge that the district should have dismissed the indictment in this case for failure to [10/]

10/ The indictment returned by the Grand Jury in its entirety reads as follows (R. 2-4):

> Commencing on or about March 1, 1965 and continuing to on or about March 26, 1965, WILLIAM ORVILLE EATON, COLLIE LEROY WILKINS, JR., and EUGENE THOMAS, within the Middle District of Alabama, conspired together, with each other and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate citizens of the United States in the vicinity of Selma and Montgomery, Alabama in the exercise and enjoyment of certain rights and privileges secured to them by the Constitution and laws of the United States, and because of their having exercised such rights as follows:
>
> (1) The right to publicly protest unlawful deprivation of the right of Negro citizens of Alabama to register to vote and to vote for candidates for federal office.
>
> (2) The right to encourage and assist Negro citizens of Alabama in the exercise of their right to register to vote and to vote for candidates for federal office.

(Continued on following page)

allege a violation of 18 U.S.C. 241, the statute

10/ (Continued from preceding page)

(3) The right to peaceably assemble, publicly protest, and petition the Governor of the State of Alabama for redress of grievances on behalf of Negro citizens of Alabama, free from arbitrary interference by the State of Alabama.

(4) The right to participate in a protest march from Selma to Montgomery, Alabama, to present a petition to the Governor of Alabama in Montgomery, and to participate in the carrying out of a proposed plan for such march pursuant to an order entered on March 17, 1965, by the United States District Court for the Middle District of Alabama, in the case of Williams v. Wallace, Civil Action Number 2181-N.

(5) The right to travel to and from the State of Alabama and to use interstate highways and other instrumentalities of interstate commerce in and through Alabama.

It was a part of the plan and purpose of the conspiracy that the defendants would harass, threaten, pursue and assault citizens of the United States in the area of Selma and Montgomery, Alabama who were participating in or had participated in, or who were lending or had lent their support to a demonstration march from Selma to Montgomery, Alabama, pursuant to the plan, referred to above, that was approved by the order of the United States District Court for the Middle District of Alabama on March 17, 1965.

In violation of Section 241 of Title 18, United States Code.

upon which the indictment is based.[11] Upon motion of the Government, the allegations regarding the specific rights numbered 1, 2, 3 and 5 were deleted from the indictment (R. 82), reducing the scope of the alleged conspiracy to oppressing, threatening and intimidating citizens in connection with the right, set out as number 4 in the indictment, to participate in the Selma-to-Montgomery protest march pursuant to an order entered by the United States District Court for the

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11/ Section 241 provides as follows:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise of enjoyment of any right or privilege so secured --
>
> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Middle District of Alabama in the case of Williams v. Wallace (R. 3). See 240 F. Supp. 100 (M.D. Ala. 1965). The indictment alleged further that it was a part of the plan and purpose of the conspiracy that the defendants would harass and assault citizens "who were participating or had participated in, or who were lending or had lent their support" to the demonstration march authorized by the court's order in Williams v. Wallace.

Appellants argue that rights conferred by a federal court order upon unnamed citizens are not, in the language of §241, "secured . . . by the Constitution or laws of the United States." They further argue that the indictment attempts to enlarge the scope of §241 by reference to the plan and purpose of the defendants to harass and assault not only participants in the march but also those "who were lending or had lent their support" to it.[12/]

12/ The gist of appellants' argument (Brief of Appellants, pp. 43-46) is that the right of unnamed citizens to participate in a protest march authorized by court order is properly vindicated only by contempt proceedings. They further contend that to the extent

(Continued on following page)

At the outset we are free in this case to clear away conceptual difficulties that have attended judicial interpretation of §241, for in this case, unlike United States v. Williams, 341 U.S. 70 (1950), United States v. Guest, 383 U.S. 745 (1966) and United States v. Price, 383 U.S. 787 (1966), we do not deal with questions of rights under the Fourteenth Amendment and the requirement or the immateriality of some degree of State action. The asserted federal right here derives from an explicit federal court order, specific in terms of time, place and purpose. The right of which we speak is no less protected from private interference than it is from official interference.

12/ (Cont. from preceding page.)

that the right involved is one of free speech made applicable to the States through the due process clause, the right consists of immunity from official, not private, interference, and the absence of an allegation regarding state action renders the indictment defective. They cite the recent decisions in United States v. Guest, 383 U.S. 745 (1966) and United States v. Price, 383 U.S. 787 (1966) to support the proposition that State action is an essential element of the §241 violations involved here.

We believe that Federal court orders in general and the order in Williams v. Wallace in particular emanate from the Constitution and laws of the United States. Indeed, they can derive from no other source. It clearly follows that the rights and privileges which federal court orders declare are therefore secured to the persons intended to enjoy their benefits "by the Constitution and laws of the United States" as those terms are used in §241. Even under the most restrictive view of §241 "rights which arise from the relationship of the individual to the Federal Government" are within its purview. United States v. Williams, 341 U.S. 70, 77 (1950), (Frankfurter, J.); Ex parte Yarborough, 110 U.S. 651 (1884). In that category are the rights described in paragraph four of the present indictment.

The legislative history of §241 and the section's coverage of Fourteenth Amendment rights, among others, are treated at length in the recent decisions of the Supreme Court in United States v. Guest, supra,

and United States v. Price, supra.[13] We have no need to develop those matters here. We note, however, two critical aspects of those decisions: they imbue §241 with a scope fully as broad as the language of the section suggests, and they expressly reaffirm the application of the section to the implied rights which by their nature arise out of the fundamental relationship between the citizen and the national government. In Price, Mr. Justice Fortas speaking for a unanimous

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13/ The §241 indictment in Price (the case also involved a separate indictment under 18 U.S.C. §242 arising out of the same facts) alleged a conspiracy among 18 persons, three of whom were police officers, to kill three persons who were to be detained by the police officers in official custody to facilitate the killing. The indictment in Guest charged the defendants, none of whom were public officials, with conspiring to deprive Negroes of certain specified federal rights, including equal enjoyment of restaurants and other places of public accommodation, equal use of publicly owned facilities without racial discrimination, and the right to travel freely on the instrumentalities of interstate commerce in Georgia.

Court quoted and endorsed the following expression of Mr. Justice Holmes in United States v. Mosely, 238 U.S. 383, 378-388 (1915):

> The source of this section in the doings of the Ku Klux Klan and the like is obvious and acts of violence obviously were in the mind of Congress. Naturally Congress put forth all its powers . . . . [T]his Section dealt with Federal rights and with all Federal rights, and protected them in the lump. [See 383 U.S. at 800-801].

The Court in Price went on to declare: "We think that history leaves no doubt that, if we are to give §241 the scope that its origins dictate, we must accord it a sweep as broad as its language." 383 U.S. at 801.

To demonstrate that the right of persons to enjoy the benefits of federal court orders is a right "secured by the Constitution or laws of the United States" and therefore is within the reach of §241, we focus upon the most fundamental ingredients of our governmental structure. Article III of the Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" and further specifies that "the judicial power shall extend to all cases, in Law and Equity, arising under this constitution, the Laws of the United States, and Treaties made, or which shall

be made, under their authority." Congress -- necessarily to belabor the obvious -- has exercised its Article III power and created the federal district and circuit courts, 28 U.S.C. §§ 43, 132, and has invested the district courts with original jurisdiction of all civil actions "to redress the deprivation, under color of any State law, statute, ordinance regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States ...." 28 U.S.C. §1343(3). These are the essential constitutional and statutory provisions from which the right involved in the present case derives.

Several of the earlier and now well-settled constructions of §241 have extended its reach to private interference with aspects of the federal judicial system analogous to the exercise of rights under court orders. In Logan v. United States, 144 U.S. 263 (1892), the conspiracy involved the ambush slaying by private individuals of persons in the custody of a United States Marshal upon the marshal's execution of federal arrest warrants. The Supreme Court, in affirming the application of §241 to the conspiracy, first established that Congress had the authority to enact laws for the arrest and commitment of those accused of federal crimes, and then concluded (144 U.S. at 248):

> The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and laws of the United States.

The Court in Logan reiterated in its summation of the law regarding §241 that the covered rights exist "expressly or by implication." 144 U.S. at 293.[14/]

14/ The right of federal prisoners to be free from private violence while in custody was perceived in Logan as follows (144 U.S. at 294):

> In the case at bar, the right in question does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them.

The opinion in the Logan case followed closely in time and reasoning the decision in In re Nagle, 135 U.S. 1 (1889), in which the Court held that it was the duty of the executive department to protect judicial officers from assault and injury while executing the duties of their offices, and that a marshal assigned to provide such protection who kills a man in the course thereof was immune from state prosecution for murder in connection with the killing. The Court reached its conclusion regarding the duties of the executive in the absence of a statute expressly conferring the duty

The Logan decision was followed in In Re Quarles and Butler, 158 U.S. 532 (1895) where the principle was applied to protect private citizens from violence because of efforts to inform federal officials of violations of federal law. The right of private individuals, said the Court, to inform of federal violations "arises out of the creation and establishment by the Constitution itself of a national government," a right therefore "secured to the citizen by the Constitution." 185 U.S. at 536, 537. The Court observed that "To leave to the several States the prosecution and punishment of conspiracies to oppress citizens of the United States, in performing the duty and exercising the right of assisting to uphold and enforce the laws of the United States, would tend to defeat the independence and the supremacy of the national government." 158 U.S. at 536-537. See also Motes v. United States, 178 U.S. 458 (1900).

Although the precise question of whether the right to obtain and enjoy the benefits of a federal court order comes within the terms of §241 has not been ruled upon by the Supreme Court, a lower court in United States v. Lancaster, 44 F. 885 (W.D. Ga. 1890), reached that conclusion on the authority of Ex parte Yarbrough, supra, and United States v. Waddell, 112 U.S.76 (1884).

The court sustained an indictment under §241 which charged that the defendants conspired against a named victim in his free enjoyment of the right to bring contempt proceedings in federal court against them for violating a decree granting the victim title to certain lands. The court framed the issue in terms of the right to litigate and concluded (44 F. at 892-893):

> It may be taken, I think, as a conclusive proposition, that whenever a party has a right to litigate in the United States courts, he is exercising a right secured to him by the constitution and laws of the United States . . . Wherever, therefore, there exists a right to become a suitor or litigant in the United States courts, it is a right the exercise of which is secured to the party by the constitution or laws of the United States, for, if not secured in this manner, and by these laws, it can have no other security; and it follows, I think, that wherever there is a conspiracy to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of his right or privilege to become a suitor in the courts of the United States, or, having so become, to injure or oppress him to prevent him from litigating his controversy there, the conspiracy is a violation of section 5508 of the Revised Statutes, a matter of which the courts of the United States properly and clearly have jurisdiction to inquire, and, on conviction, to punish the offenders.

The rights treated in the early §241 cases have two critical elements in common: they arise out of the relationship between the private citizen and the national government and they exist in the absolute - that is, all manner of intrusion upon or interference

with their exercise, from whatever source, is barred. Thus the right to vote in federal elections exists not merely free from official deprivation but from violent private incursions upon its exercise, Ex parte Yarborough, supra; the right to settle on homestead lands pursuant to act of Congress exists against all the world and not just against adverse claimants or others with some special relation to the land in question, United States v. Waddell, 112 U.S. 76 (1884); the right to be safe in federal custody exists against all persons who would intrude upon that safety, not just against the government whose duty it is to secure the well-being of its prisoners, Logan v. United States, supra; and the right to use federal courts to assert and enforce legal claims exists as against all who would try to forestall that use, Lancaster v. United States, supra.[15/]

15/ In Lancaster, the conspirators were in fact parties to the original action out of which the attempt to institute contempt proceedings grew. The court's opinion makes it clear that the conspirators' status as original defendants and as proposed subjects of the contempt action which they violently forestalled was not crucial to the §241 charge. Moreover, the application of §241 in Lancaster to parties to an action who violently opposed enforcement proceedings answers appellants' argument here that contempt is the only remedy for interference with rights under court orders.

A right under a specific court decree is in the same category. It is true that the right arises out of a controversy between litigants resolved by the court in favor of one party only as against the other party. But once a court says to litigant A, "Your right as against litigant B entitles you to engage in physical acts X, Y, and Z," the right to do X, Y, and Z, having been conferred by the court in the exercise of judicial functions contemplated by Article III of the Constitution and its implementing federal statutes, exists as between the citizen and the government and therefore exists as against all those who would interfere with it.[16/]

16/ Appellants argue that the right expressed in the present indictment extends beyond §241 in its reference to the plan and purpose of the defendants to harass and assault persons who supported as well as participated in the march. They further suggest that unnamed citizens, as distinguished from litigants, cannot be said to have possessed the right. Reference in the indictment to the plan and purpose to assault supporters of the march in no way broadens the unlawful conspiracy stated in paragraph 4 of the indictment; the reference simply specifies how the defendants intended to accomplish their agreed upon objective. Moreover, the order and approved plan in Williams v. Wallace made repeated references to supporting services for the marchers. 240 F. Supp. at 120. Since the order conferred on unnamed persons who might join with the plaintiffs the right to conduct and participate in the march, a conspiracy directed at all such unnamed persons is within the prohibition of §241. At any rate, the appellants surely did not exclude interference with parties, as distinguished from non-parties, from the objectives of their plan.

It is not essential that a right be explicitly enunciated in some provision of the Constitution or laws of the United States in order to fall within the protection of §241. In United States v. Guest, supra, the Court noted that although there was disagreement over which provision of the Constitution establishes the right to travel freely among the States, the right nonetheless "occupies a position fundamental to the concept of our Federal Union," "has been firmly established and repeatedly recognized," and is therefore covered by §241. 383 U.S. at 757. That the right to enjoy the benefits of court orders is of the same fundamental character is demonstrated by separate actions of the three branches of the national government apart from specific applications of §241.

Congress has long acted upon the premise that private interference with the administration of justice in federal courts, including interference with rights under court orders, is properly prohibited and made criminal by the laws of the United States. 18 USC §§ 1503, 1509.[17/] Presidents, too, have drawn upon their

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17/ The present §1503 was first enacted in 1831, 4 Stat. 488, and has been periodically reenacted and

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constitutional powers to protect persons in the exercise of rights under court decrees when that exercise was threatened by private acts of violence. See 22 F.R. 7628 (1957) (proclamation and executive order of President Eisenhower in connection with the Little Rock situation); 27 F.R. 9681, 9693 (1962) (proclamation and executive order of President Kennedy in connection with the court-ordered desegregation of the University of Mississippi). Lastly, the courts have traditionally exercised their inherent powers of contempt[18/] and injunction[19/] to ensure that

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17/ (Continued from preceding page) expanded. See 35 Stat. 113 (1909); 59 Stat. 234 (1945); 62 Stat. 769 (1948). In Wilder v. United States, 143 F. 433, 440 (C.A. 4, 1906), it was recognized in connection with the predecessor to §1503 that:

> One of the sovereign powers of the United States is to administer justice in its courts between private citizens. Obstructing such administration is an offense against the United States, in that it prevents or tends to prevent the execution of one of the powers of the government.

18/ See, e.g., United States v. Hudson & Goodwin, 7 Cranch 32, 34 (1812); United States v. Barnett, 376 U.S. 681, 696-700 (1964).

19/ Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964); Bush v. Orleans Parish School Board, 187 F. Supp. 42 (E.D. La. 1960), 188 F. Supp. 916 (E. D. La. 1960), affirmed 365 U.S. 569 (1961); 190 F. Supp. 861 (E.D. La. 1961) affirmed 366 U.S. 212 (1961); 191 F. Supp. 871 (E.D. La. 1961), affirmed 367 U.S. 908 (1961); Bullock v. United States, 265 F. 2d 683 (C.A. 6, 1959), cert. denied 360 U.S. 909 (1959); United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330,342 (E.D. La. 1965).

rights declared in judicial decrees are not subverted by either parties or non-parties.

We think it clear, then, that rights under court orders are secured by the Constitution or laws of the United States, and that this proposition has been a fundamental assumption in the functioning of the federal judiciary since its inception. Appellants have pointed to no cases nor have they articulated a legal theory to establish that this particular right is excluded from the full panoply of federal rights reached by §241. If it is excluded, then the right may be denied--to borrow an expression prophetic of this case--". . . by violence and outrage without legal restraint [and] then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force. . . ." Ex. parte Yarbrough, 110 U.S. 651, 667 (1884).

II. Appellants' Motion for a Bill of Particulars was Properly Denied

Appellants urge that the trial court committed reversible error in denying their motion for a bill of particulars (R. 10-14) in which they sought a specification of the overt acts, if any, which they committed in furtherance of the alleged conspiracy and the names of persons conspired against and against whom the overt acts were committed. The Government in response to the motion stated that the conspiracy, as the indictment alleged, was not directed at any particular person or persons but was directed at the entire class of persons who participated in or supported the Selma-to-Montgomery march (R. 37-47). The trial court denied the motion.

The granting of a bill of particulars is within the sound discretion of the trial judge and its denial will be reversed only when there is clear abuse or a showing of surprise. Joseph v. United States, 343 F. 2d 755 (C.A. 5, 1965); Azcona v. United States, 257 F. 2d. 462 (C.A. 5, 1958); Johnson v. United States, 207 F. 2d 314 (C.A. 5, 1953). There was no abuse or surprise in the present case.

A. The Government's representation in response to the demand for particulars regarding the nature of the conspiracy was borne out by the evidence. The defendants conspired not to injure any particular person but to harass and injure the marchers and their supporters generally. Rowe testified that during five hours at a filling station near the Capitol on March 25, 1965, he and the defendants stood around, harassed the marchers, hollered at them, booed them, and got in an argument with some of the spectators (R. 412). He further testified that on the afternoon of March 25, appellant Thomas stated, "We are going to Selma." Eaton asked why and Thomas replied, "Well, you know why. We've got things to do and we are going to get them done." (R. 416). That evening Eaton asked if a hitch hiker on the road to Selma was one of the marchers. Wilkins then said to Thomas, "Slow down, Brother, and we will see if it is, we will give him a little fun and a surprise." When Wilkins said, "No, he is not a marcher," they proceeded on their way. (R. 417). When the appellants were in Selma that evening in the vicinity of a Negro church and saw two Negroes walking, Gene Thomas said, "Look a there. We are going to have some fun." (R. 425).

Wilkins said, "Get ready, Bay Brother, we are going to take them." When they saw some soldiers sitting in an army truck nearby they left that area (R. 425).

A little later the appellants saw a white women and a Negro in an automobile. Wilkins stated, "Look a there." Thomas said, "Wonder where they are going? Let's follow them, we are going to see where they are going." (R. 426). Then Gene Thomas said, "We are going to follow them and take them." (R. 426).

The appellants did not then know the identity of the Negro man and the white women in the automobile. They followed the automobile several miles before any shots were fired. (R. 428-433). Thus the firing of the shots at the unknown white women and Negro man was the violent climax of a plan of harassment and interference directed generally at citizens who were thought by the appellants to have been connected with the march. In retrospect, it was therefore proper to deny their demand for particulars regarding persons against whom the conspiracy was directed.

B. Overt acts in furtherance of a conspiracy under 18 U.S.C. §241 are not elements of the offense;

in this respect §241 differs significantly from 18 U.S.C. §371, the general conspiracy statute. It was therefore proper to deny the motion in its demand for details regarding overt acts.

"The function of a bill of particulars is to provide defendant with details of the alleged offense omitted from the pleading." 8 Moore, Federal Practice 7-28 (1965 ed.); see also United States v. Patterson, 235 F. Supp. 233, 237 (E.D. La. 1964). The indictment itself placed the defendants on notice that any conduct of theirs which reflected a plan or purpose to harass or assault marchers or persons they thought to be marchers could be used as evidence against them. Under the circumstances it is not plausible for appellants to suggest that they could not have known that the Luizzo shooting was to be a major evidentiary element in the Government's case. It is therefore clear that they were subjected to no surprise or prejudice in not being formally apprised by bill of particulars of the precise overt acts, including the shooting of Mrs. Luizzo, which the Government would prove against them. Indeed, even where overt acts must be pleaded, as in a §371 conspiracy case, the trial court may in its discretion deny a motion for particulars specifying dates,

times, places, names and addresses. Luttrell v. United States, 320 F. 2d 462 (C.A. 5, 1962).

III. The Evidence was Sufficient to Support the Verdict

Appellants contend that the trial court erred in denying their motion for a judgment of acquittal made at the close of the Government's case, and that the verdict was contrary to the weight of the evidence and not supported by substantial evidence.[20/]

20/ Appellants also contend in passing at this point in their argument that the trial court erred in not sua sponte specifically instructing the jury on paid informers. (Appellants' Brief, p. 64). There was no objection at the trial to this omission (R. 102-103). This Court has ruled that when a conviction is not solely dependent on the uncorroborated testimony of an informer and the trial court gave correct general instructions to the jury regarding the credibility to be accorded witnesses' testimony, the failure to give a cautionary instruction regarding paid informers is not reversible error. Joseph v. United States, 286 F. 2d 468, 469 (C.A. 5, 1960), cert. denied 372 U.S. 979 (1963); Siglar v. United States, 208 F. 2d 865, 867 (C.A. 5, 1954), cert. denied, 347 U.S. 991 (1954). Here appellants did not object to the absence of a particular instruction regarding paid informers nor was the verdict dependent on uncorroborated testimony of an informer. Moreover, the jury was instructed to consider the relationship of each witness to either the prosecution or the defense. The trial court instructed the jury as follows:

> You jurors in this case should carefully scrutinize the testimony that has been given, the circumstances under which each witness has testified, and every matter in evidence which tends

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It is the settled rule that if a defendant moves for a judgment of acquittal at the close of the Government's case and thereafter introduces evidence in his own behalf but does not renew his motion for acquittal at the close of all the evidence, as required by Rule 29, F. R. Cr. P., his failure to renew his motion operates to waive the benefit of the earlier motion.[21] United States v. Calderon, 348 U.S. 160, 164, fn. 1 (1954); Jasso v. United States, 290 F. 2d 671, 673 (C.A. 5, 1961);

20/ (continued from preceding page)

> to indicate whether a witness is worthy of belief; consider each witness's intelligence and motive and state of mind and demeanor and conduct while on the witness stand; consider, also, any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict that is rendered in the case, and the extent to which, if at all, each witness is either supported or contradicted by other evidence that you accept as being true that has been admitted during the course of the trial for your consideration. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause a witness's testimony to be discredited (R. 79-80) (emphasis added).

21/ Appellants introduced evidence after their motion of acquittal was made (R. 823), and they did not renew the motion at the close of all the evidence.

Harris v. United States, 285 F. 2d 85, 86 (C.A. 5, 1960), cert. denied 368 U.S. 820 (1961); Meeks v. United States, 259 F. 2d 328 (C.A. 5, 1958); Moormaw v. United States, 220 F. 2d 589 (C.A. 5, 1955). Thus, the case is before this Court upon all the evidence, T'Kach v. United States, 242 F. 2d 937, 938 (C.A. 5, 1957), and the verdict will be set aside only to prevent a manifest miscarriage of justice. Meeks v. United States, supra; Beham v. United States, 215 F. 2d 472, 473 (C.A. 5, 1954).

The evidence in this case clearly supports the verdict as to each appellant. The Government's chief witness, Gary Thomas Rowe, observed at close hand every activity of the appellants in the planning and carrying out of the conspiracy, and the details to which he testified at trial were related by him to the FBI within hours after the shooting, prior to the discovery of any corroborating evidence (R. 307-348). Moreover, the corroboration of Rowe's testimony is extensive. For example:

1. Rowe testified that appellants were at an American Filling Station near the Capitol on March 25, 1965 (R. 410-411, 487, 489, 842, 846). Appellants' witness Jesse Hodge testified that they were there on

this day (R. 842-847), and appellant Thomas admitted they were there (R. 722).

2. Rowe said that while they were driving from Montgomery to Selma on highway 80, they were stopped by the highway patrol and that Eugene Thomas received a ticket for an improper muffler (R. 419, 498). Eugene Thomas admitted receiving such a ticket (R. 722-724), and the ticket was introduced in evidence (U. S. Ex. 31, 43).

3. Rowe said the group was at the Silver Moon Cafe in Selma on the evening of March 25, 1965 (R. 420-423). Ouida Larson, a waitress at the Silver Moon Cafe, testified that appellants, Eaton and a fourth man were in the Silver Moon Cafe on the evening of March 25, 1965 (R. 571-574).

4. Rowe had observed the car of the victim was an Oldsmobile with a

Michigan license plate (R. 426-427). The car was an Oldsmobile with a Michigan license plate (R. 556; U.S. Ex. 12, 13).

5. Rowe said that a white woman and a Negro were seated in the front seat of the Oldsmobile (R. 426). Viola Luizzo and Leroy Moton were in the front seat of the car (R. 370, 553, 598, 608).

6. While they chased the Oldsmobile on highway 80 Rowe saw a "Volkswagen type" station wagon with several Negroes and highway patrolmen on the side of the road (R. 430). A Volkswagen bus was issued a ticket by the highway patrol stationed on highway 80 on this day (R. 629; U.S. Ex. 32).

7. Rowe said Wilkins fired a thirty-eight caliber pistol (R. 432-433; U.S. Ex. 39). This gun was found to be the weapon that fired the bullets which were found in the Oldsmobile and removed from the body of Viola Luizzo (R. 784-785, 795; U.S. Ex. 28, 29, 51, 53-55, 39).

8. Rowe said that after shooting

at Viola Luizzo and Leroy Moton, Wilkins threw his empty thirty-eight caliber casings out on to highway 80 (R. 434). These casings were found on Highway 80, 55 miles from the scene of the shooting (R. 582, 589, 591; U.S. Ex. 45).

9. Rowe said that Eaton fired a .22 caliber pistol from the right front window and threw his empty casings out (R. 433-434). The following morning when Thomas was arrested, FBI agents observed a .22 caliber bullet on a ledge outside of the right front window of Thomas' car (R. 657).

The evidence, almost all of it corroborated and without contradiction, shows that appellants were active members of an organization dedicated to preserving segregation and white supremacy by "ballots or bullets"; that appellants had over several years violently disrupted peaceful attempts to desegregate facilities in the Birmingham area; that on March 21, 1965, they participated as Klan members in a protest against the court order of Judge Johnson authorizing the Selma-to-Montgomery march; that they went to the march scene

in Montgomery on March 25 for the purpose of taunting and harassing the marchers; that they went to Selma armed with guns on the night of March 25 in the hope of finding participants in the march whom they could attack; that they toured Selma looking for marchers in an exposed situation; and that they finally found, overtook, and shot at a car which, from the race of its occupants and its out-of-state license plate, they correctly concluded carried persons connected with the march.[22/] The existence of the conspiracy and its culmination in a wilful homicide was proven well beyond any reasonable doubt.

IV. The Trial Court Committed No Error in its Rulings on the Admissibility of the Government's Evidence

Appellants contend that it was reversible error for the trial court to admit over their objection the following testimony and evidence:

22/ Appellant's attack on the sufficiency of the evidence connecting the homicide victim Mrs. Luizzo to the march (Appellants' Brief, p. 64) is beside the point. The evidence was plain that although appellants did not know who she was, they believed she was connected with the march, and thus their attack on her was indeed the climax of the conspiracy. But also, the testimony of her rider, Moton, was clearly sufficient to allow the jury to conclude that Mrs. Luizzo was in fact connected with the march (R. 593-622).

1. U.S. Exhibit 1, the court approved plan of the Selma-to-Montgomery march and the preliminary injunction issued in Williams v. Wallace, and U.S. Exhibit 2, the order of this Court declining to stay enforcement of the injunction.

2. U.S. Exhibits 3 and 4, the Klan parade request and their parade permit.

3. U.S. Exhibits 6 and 13-18, photographs of scenes of the rally at Cramton Bowl on March 21, 1965.

4. U.S. Exhibit 10, three pictures of a car in the Klan motorcade of March 21, 1965.

5. Rowe's testimony as to the organization of the Klan and the meaning of certain Klan expressions (R. 404-406).

6. Rowe's testimony to the effect that after Thomas and Wilkins left a telephone booth on the corner of the American Filling Station in Montgomery, the phone line was cut and unusable (R. 412-413).

7. Rowe's testimony as to his Klan activities with appellants and as to the purpose of the Klan (R. 440-442).

8. U.S. Exhibits 36-38 and 41, packages and loose rounds of.38 caliber ammunition and a sawed-off shotgun.

Each of these items of evidence or testimony was properly admitted. We discuss them below.

A. The court order and plan of march

The indictment alleges that the defendants conspired together to injure, oppress, threaten and intimidate citizens of the United States in their exercise of "the right to participate in a protest march from Selma to Montgomery, Alabama, to present a petition to the Governor of Alabama in Montgomery, and to participate in the carrying out of a proposed plan for such march pursuant to an order entered on March 17, 1965, by the United States District Court for the Middle District of Alabama, in the case of Williams v. Wallace, Civil Action Number 2181-N." (R. 2-3). As we have shown, the court order in Williams is the foundation from which the §241 right in this case derives. Thus, it is clear that U.S. Exhibits 1 and 2 are the fundamental documents which established the relevant right involved, and which provide the details regarding its scope and content.

B. Testimony and evidence regarding the Klan

Proving a conspiracy under sec. 241 necessarily entails proof of the conspirators' intent. To determine the intent with which certain acts were committed, as well as to determine the purpose for which appellants initially joined together, it was proper for the jury to

consider their membership in and the purpose of the Klan, as well as prior Klan activities of the conspirators. U.S. Exhibit 3 is the Klan application for a parade permit for March 21, 1965 which declared its purpose to be "to protest [an] order issued by [a] Federal Court allowing the five day demonstration march from Selma to Montgomery, Alabama" (R. 204, 208-209). U.S. Exhibit 4 was the parade permit. Exhibit 6 consists of three photographs representing a fair and accurate picture of the Klan rally at Cramton Bowl (R. 235, 400). U.S. Exhibits 13, 14, 15, 16 show Eugene Thomas' automobile at the Klan rally (R. 398-399). Appellants and their co-defendant, Eaton, are identified as being present at the rally in U.S. Exhibit 18 (R. 396-397). Further, Rowe's testimony about the Klan in general and his prior activities with Eaton, Wilkins and Thomas all are relevant to thepurpose and character of the conduct engaged in by the appellants on March 25, 1965, conduct which was pursued by the appellants in their roles as Klansmen.

In United States v. Rosenberg, 195 F. 2d 583 (C.A. 2, 1952), cert. denied 344 U.S. 838 (1952), the court held that evidence that defendants were members of the Communist Party and evidence as to

the purpose and character of the Communist Party was correctly admitted by the trial court. See also United States v. Molzahn, 135 F. 2d 92, 97 (C.A. 2, 1943), cert. denied 319 U.S. 774 (1943) (membership in the Bund and affiliation with the Nazi Party); Haupt v. United States, 330 U.S. 631, 642 (1947) (statements by defendant prior to indictment period showing sympathy with Germany and Hitler and hostility to the United States); Scales v. United States, 367 U.S. 203, 255-257 (1960) (Communist Party pamphlet aimed at winning favor with Negro population in South admitted as proof of Party's purpose to undermine government); United States v. Flynn, 216 F. 2d 354 (2d Cir. 1954), cert. denied, 348 U.S. 909 (1955) (experiences of former member of Communist Party admitted to establish Party's objectives and methods which were relevant to a charge that defendants conspired to advocate violent overthrow of the government).[23/]

23/ In United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 334 (E.D. La. 1965), an injunction suit to prohibit Klan-inspired interference with the exercise of federal civil rights in Bogalusa, Louisiana, including rights under a court order, Judge Wisdom, speaking for a three-judge panel, said:

> Seeking refuge in silence and secrecy, the defendants object to

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This Court recently had occasion to discuss the broad latitude which must be allowed to prove intent where it is a bona fide issue. In Roe v. United States, 316 F. 2d 617, 621 (C.A. 5, 1963), the Court said:

> When it comes to the requisite quality of 'wilfulness,' it is apparent that considerable latitude must be accorded in the receipt of evidence under the considerate discretion of the trial Judge. For when intent, as distinguished from knowledge, is being established, it matters not whether the acts are prior or subsequent to the time of the crime charged. 'Intent is a state of mind difficult of precise proof and, therefore, evidence of other and surrounding circumstances may be received for the purpose of proving such intent . . . .'

We submit that the trial court properly admitted the evidence and testimony regarding the Klan.[24/]

24/ (continued from preceding page)

> the admission of any evidence as to klan activities. We hold, however, that what the klan is and what the klan does bear significantly on the material issues and on the appropriate relief.

__/ The appellants themselves introduced the Klan oath in evidence and then elicited considerable testimony concerning Klan tenets, beliefs, and purposes (R. 453-455, 827-829, 891-892; Dfts. Ex. 1).

C. Pictures of car in the Klan motorcade

The appellants claim that U.S. Exhibit 10, three pictures of a car in the Klan motorcade, was never properly identified. Walter Ray Butts, special agent of the FBI, testified that the pictures in this exhibit were close-ups of the side of an automobile in the Klan motorcade on March 21, 1965 showing a sign reading "Yesterday, Today, Forever" and which bore a drawing of a flaming cross (R. 247-249). Although the record does not reflect to whom the car belonged, the connection between the exhibit and the Klan rally was sufficient to allow its introduction in evidence.

D. Rowe's testimony regarding the cut telephone line

Appellants complain that Rowe was allowed to testify that he saw a telephone line cut after Thomas and Eaton left the telephone booth near the filling station in Montgomery on March 25. Evidence showed that the marchers in the parade gathered in the street from the Capitol back to and almost one mile beyond the filling station on Dexter Avenue (R. 412). A telephone booth was at the corner of the filling station. Rowe testified that immediately after Wilkins and Thomas left the booth he noticed that the wire in the booth had been cut (R. 413). This was evidence which plausibly fit the pattern of

general harassment of the marchers in the neighborhood of the filling station and reflected on appellants' purpose in being there. Moreover, it was open to the jury to infer, on the basis of the testimony of appellants' witness Hodges, that the specific purpose in cutting the wire was to blame one of the marchers for it and use the incident to cause a stir (R. 844).

E. The .38 caliber ammunition and the shotgun taken from appellant Thomas' house pursuant to a search warrant

On March 26, 1965, the day following the shooting of Mrs. Luizzo, a search warrant was issued by the United States Commissioner in Birmingham, Alabama, authorizing agents of the Federal Bureau of Investigation to conduct a search of appellant Thomas' home and automobile for "certain property, namely guns, rifles, pistols, ammunition and various and sundry weapons which are believed to have been used in the shooting of Viola Luizzo...." (U.S. Ex. 35). During the afternoon of March 26, 1965 four agents of the FBI conducted a search of Thomas' home pursuant to the warrant (R. 659) and found a .38 revolver, three boxes of Winchester .38 special ammunition, one sawed-off shotgun, and various other boxes of ammunition and loose .38 cartridges (R. 684). Of the objects taken pursuant to the warrant, the loose .38 cartridges, the three boxes of Winchester .38 caliber special ammunition and the shotgun were introduced in evidence at the trial (U.S. Exs. 36-38,

41; R. 707-708, 756).[24] Appellants did not move to suppress this evidence at any time prior to or during the trial. When the three boxes and loose rounds of ammunition were offered in evidence, appellants objected to their admissibility on the ground that the testifying agent had failed properly to identify them (R. 664-666). The objection was at first sustained (R. 666) but subsequently the ammunition was reoffered and admitted over a general objection (R. 756).[25] When the trial judge

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24/ In the course of the search pursuant to the warrant, the agents were informed by Mrs. Thomas, appellant's wife, that she had a weapon in her car which they would want (R. 675). She consented to a search for the weapon and gave the keys to the car to her son who retrieved the weapon from his mother's car and gave it to the agents (R. 675). Mrs. Thomas then executed a written consent for the search of her car (R. 678). The weapon, a .38 revolver, and the written consent were admitted in evidence (U.S. Exs. 39 and 40). FBI weapons specialist Williams testified that the bullet that killed Mrs. Luizzo and two others found in the Luizzo car were fired from the revolver taken from Mrs. Thomas' car (R. 784-785). Appellants raise no issue regarding the admissibility of this weapon.

25/ Following the first objection to Exhibits 36, 37, and 38, a Government witness read the contents of the return of the search warrant into the record, including references to three boxes of Winchester .38 caliber special ammunition and the loose rounds (R. 683-684). Since this precisely described the exhibits, the trial judge subsequently admitted them in evidence when they were reoffered (R. 756). Exhibit 36 consists of six

(Cont. on following page.)

admitted this shotgun in evidence he made the following remarks to the jury (R. 708-709):

> Now, to you jurors; when I admit this testimony -- I mean this Exhibit in evidence for your consideration as part of the evidence in this case, it is not admitted for the purpose of allowing the Government to prove other offenses against either of these defendants, other than what one or more of them are charged with in this case; it's admitted solely for the purpose of whatever light it might shed on the intent of that or those defendants, as they are charged in this indictment, and that is the only basis it can be considered by you as evidence in this case.

Appellants now argue that the search warrant was invalid in its failure to reflect the commission of a federal criminal offense; that the items seized under the warrant were evidence and not, as Rule 41(b)(2) requires, instrumentalities used as the means of

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25/ (Cont. from preceding page)

loose .38 special cartridges; Exhibit 37 is a Remington cleaning bore box containing 6 R-P .38 special cartridges; and Exhibit 38 is three boxes of Winchester .38 special ammunition, one full and two almost full.

committing a criminal offense[26]; and that even if the warrant were valid, the shotgun and ammunition were not relevant to the issues and thus were erroneously admitted in evidence.

1. The contentions regarding the validity of the search warrant cannot be entertained by this Court. Rule 41(e), F.R. Cr. P., makes it explicit that a person aggrieved by an unlawful search on the ground that "the warrant is insufficient on its face" may move to suppress, but that "the motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing" (Emphasis added). Appellants made no motion to suppress before or during the trial and thus at no time suggested to the trial judge that the warrant itself was insufficient. They

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26/ We deem it unnecessary to respond to appellants' argument that firearms cannot be considered the "means" of committing a shooting on the theory that the "means" of a shooting is the person who pulled the trigger. (Appellants' Brief, p. 53). See Gouled v. United States, 255 U.S. 298 (1921).

assert to this Court without discussion or explanation that no motion was made because "opportunity did not exist." (Appellants' Brief, p. 52). We disagree. The warrant was served and appellants were originally arrested on March 26, 1965 (R. 636, 654-659); appellants were indicted on April 6 and re-arrested on April 7 (R. 2-7); and counsel who represented them at trial and who now represents them on this appeal was engaged by appellants on November 4, twenty-five days before the trial began (R. 49). Moreover, the warrant iself was made an exhibit at the trial and counsel for appellants was handed the document for perusal (R. 659-660). Further, the trial judge gave appellant's counsel until the next day to raise questions regarding the search warrant or any other matter testified to by the FBI agent whose testimony laid the foundation for the warrant's admission in evidence (R. 660-661). Thus there was ample opportunity for appellants to challenge the sufficiency of the warrant both before and during the trial, but no such challenge was made.

"In the interest of normal procedural orderliness, a motion to suppress, under Rule 42(e), must be made prior to trial, if the defendant then has knowledge of

the grounds on which to base the motion." Jones v. United States, 362 U.S. 257, 264 (1960). The rule "is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt." Ibid. The rule is intended in part to allow the Government to make a choice before trial whether to attempt to sustain the search under the warrant or proceed without the evidence. Cf. Jones v. United States, 362 U.S. at 26, fn. 1.

This Court has refused to rule on claims of unlawful search under a warrant even when raised at the trial if reasons are not shown why the issue was not raised before trial, as required by Rule 41(e). In Rosen v. United States, 293 F.2d 938 (C.A. 5, 1961), a motion to suppress was made at the close of the Government's case and denied. On appeal this Court said (293 F.2d at 941):

> No motion to suppress was made on behalf of the appellant until after the Government had completed its testimony and rested its case. No effort was made to show that opportunity did not exist for making the motion before trial or that the defendant was unaware of the grounds for the motion. No reasons were given at the trial or on appeal as to why the courts should, by an exercise of

> discretion, permit the motion to suppress to be made after the seized evidence had been admitted without any objection being made on the ground that there had been a wrongful search. No reason appears why the motion to suppress could not have been made before trial. There was no abuse of discretion in refusing to grant the motion at the time it was made.

In Garcia v. United States, 315 F.2d 133 (C.A. 5, 1963), cert. denied, 375 U.S. 855 (1963), a motion to suppress also was ruled untimely and its denial not reviewable when made at the close of the Government's case. In the present case the trial judge never had before him the issues now raised in this Court regarding the validity of the warrant and the Government was at no time put on notice of the claim of invalidity. We think the appellants are far out of time in raising the question at this stage.[27/]

27/ Other circuits routinely refuse to review denials of motions to suppress made for the first time at trial. See U.S. v. Nicholas, 319 F.2d 697, (C.A. 2, 1963), cert. denied 375 U.S. 933 (1963); United States v. Paradise, 334 F.2d 748 (C.A. 3, 1964); United States v. Blythe, 325 F.2d 96 (C.A. 4, 1963); Zachery v. United States, 275 F.2d 793 (C.A. 6, 1960); United States v. Shavin, 320 F.2d 380 (C.A. 7, 1963); Karp v. United

(Cont. on following page.)

The disadvantage to the Government in having to establish the validity of the warrant for the first time in this Court is obvious. The sufficiency of a warrant is in large measure established by reference to the affidavit in support of its issuance or other evidence brought to the attention of the issuing officer. See Aguilar v. Texas, 378 U.S. 108, 109, fn. 1 (1964). The affidavit upon which the warrant here issued is not even a part of the record in this case and, of course, was not brought to the attention of the trial judge. Since the essence of the Fourth Amendment's requirement of probable cause for the issuance of warrants is to require that factual inferences upon which they shall issue "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often

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27/ (Cont. from preceding page.)

States, 277 F.2d 843 (C.A. 8, 1960); Sandez v. United States, 239 F.2d 239 (C.A. 9, 1956); Isaacs v. United 283 F.2d 587 (C.A. 10, 1960). A change of counsel before trial is not of itself grounds for allowing the motion at trial, United States v. Shavin, supra; Young v. Territory of Hawaii, 163 F.2d 490 (C.A. 9, 1947), and unawareness of the grounds for the motion, within the terms of Rule 41(e), does not include counsel's unawareness of the relevant law. Isaacs v. United States, supra.

competitive enterprise of ferreting out crime," Johnson v. United States, 333 U.S. 10, 14 (1948), the substantial question is whether the commissioner who issued the warrant had before her facts upon which she could lawfully conclude that probable cause existed for the issuance of the warrant. What the officers seeking the warrant knew and told her are plainly germane to that inquiry. See Giordenello v. United States, 357 U.S. 480 (1958); Aguilar v. Texas, supra.[28] Thus the failure of

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28/ The Court in United States v. Ventresca, 380 U.S. 102, 108 (1965) said of affidavits for search warrants:

> They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negatave attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

This approach to affidavits for search warrants requires that an inquiry into their sufficiency, and a fortiori into the sufficiency of warrants based upon them, not result in penalties for technical defects regarding the precise statute violated or the government's theory of the federal violation, so long as sufficient facts to support the issuance of the warrant were actually brought to the issuing officer's attention. See United States v. Conti, 361 F.2d 153 (C.A. 2, 1966).

appellants to raise the issue and explore the facts in the trial court should preclude this Court from entering upon an inquiry into the sufficiency of the warrant and the existence of probable cause for its issuance.

Appellants argue that the warrant is defective in its failure to allege the commission of a federal, as opposed to a state, criminal offense. Since the argument concedes that the warrant reflects a state offense, it is clear that Thomas had no Fourth Amendment right to be protected from a search under the warrant. Thus, because the essence of Rule 41, F.R. Cr. P., is to codify the protections of the Fourth Amendment, see Rea v. United States, 350 U.S. 214 (1956); Elkins v. United States, 364 U.S. 206 (1960), the purported defect does not rise to a deprivation of any essential right under the Rule or the Amendment and should not call for suppressing any evidence taken pursuant to the warrant. Moreover, the record shows beyond argument that reliable eye-witness evidence was available to federal agents before the warrant was procured that a federal offense had been committed. Appellants are asking this Court to assume

without knowing that this evidence was not made known to the commissioner who issued the warrant.

2. There was no error in admitting the boxes and loose cartridges of ammunition and the shotgun in evidence apart from the question of the search warrant. The charge in the case was one of conspiracy to commit acts of violence in connection with the Selma-to-Montgomery march. Possession of weapons for the commission of the planned acts of violence contemporaneously with the occurrence of those acts is probative of the existence of the plan and its implementation. Rowe testified that just before the shooting Thomas handed Wilkins a loaded .38 caliber revolver which Rowe believed belonged to Thomas (R. 432-433). Thomas' possession of three boxes and loose cartridges of .38 caliber ammunition in his house just hours after the shooting is thus corrobative of Rowe's testimony. Moreover, the possession of a sawed-off shotgun, a weapon of no conceivable use except in

the course of surreptitious violence, is evidence from which a predetermined intention to commit violence could be inferred.[29/] In any event, these items of evidence did not go to the heart of the Government's case and any possible error regarding their relevance should be viewed as harmless. See Ahlstedt v. United States, 315 F. 2d 62 (C.A. 5, 1963).

29/ Possession of the shotgun by Thomas proved to be another federal criminal violation for which Thomas was convicted. See Thomas v. United States, No. 23700 pending in this Court. Evidence is not inadmissible simply because it shows another violation unrelated to the one for which the defendant is being tried. Cade v. United States, 351 F. 2d 468 (C.A. 5, 1965).

V. The Trial Court Properly Allowed the Government to Close the Arguments to the Jury

Appellants' contention that the trial court committed "plain error", Rule 52(b), F.R. Cr. P., by allowing the United States to close the argument to the jury is without merit.

In Hardie v. United States, 22 F. 2d 803 (C. A. 5, 1927), cert. denied 270 U. S. 636 (1927), this Court declared:

> It is elementary that the order and extent of the argument [to the jury] is entirely within the discretion of the court.

See also Rule 57, F. R. Cr. P. Further, the trial judge's action in setting the time and sequence of opening and closing arguments has been held not to be reviewable on appeal because it does not effect the merits of the case. See United States v. Savannah Shipyards, 139 F. 2d 953, 955-956 (C. A. 5, 1944); Bank of Edenton v. United States, 152 F. 2d 251, 253 (C. A. 4, 1945); Lancaster v. Collins, 115 U. S. 222, 225 (1885).[30/]

30/ The Supreme Court in Hall v. Weare, 92 U. S. 728, 732 (1875), cited in support of this argument by appellants at p. 57, fn. 16, of their brief, stated: (continued on following page)

There is no basis for concluding that the Government has an unfair advantage in being allowed to rebut the closing argument of the defense. The prosecutor must limit himself to a discussion of the evidence, and in this case both sides were firmly cautioned on this point by the trial judge before arguments began (R. 703). It is logical and therefore good procedure to have the party with the burden of proof state its view of the evidence, then allow the defense its opportunity to raise reasonable doubt (which is all it must do in criminal cases) and finally allow the prosecutor to counter the defense's contentions regarding the prosecution's failure to meet its burden.

30/ (continued from preceding page)

> Under the pleadings, the affirmative of the issue framed was upon the plaintiff. He was therefore entitled to the conclusion. But if he was not, the decision of the court awarding it to him is not a subject that will be reviewed here.

VI. The Trial Court Committed No Error In Its Main and Supplemental Charges to the Jury

A. The Trial Court Properly Charged the Jury Regarding the Element of Specific Intent

Appellants contend that the trial judge's charge to the jury failed to state that the jury had to find "a specific intent to deprive a person of a federal right" and on that ground they are entitled to reversal. (Appellants' Brief, p. 58.) We disagree. The charge fully informed the jury that a verdict of guilty had to rest upon their conclusion that the defendants by their conspiracy intended, wilfully and specifically, to interfere with the exercise of rights under the court order in Williams v. Wallace, the federal right involved in the case. Judge Johnson stated:

> [T]he Government in its indictment says the conspiracy was formed to oppress, threaten, and intimidate citizens in the exercise of . . . [the] right. . . to participate in a protest march from Selma to Montgomery, to present a petition to the Governor in Montgomery, and to participate in the carrying out of a proposed plan for such a march pursuant to an order that had been entered on March 17, 1965, by the United States District Court in the Middle District of Alabama (R. 82-83).

* * *

> What the evidence must show in order to establish proof that a conspiracy existed is that the members in some way or manner, or through some contrivance, positively or tacitly come to a mutual understanding to try to accomplish a common and an unlawful plan (R. 88).
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> * * *
>
> And to review and to focus your attention, the indictment generally says that the object or purpose was to injury, oppress, threaten, and intimidate citizens of the United States in the vicinity of Selma and Montgomery in the free exercise and enjoyment of certain rights and privileges secured to them under the Constitution and laws of the United States, this right and privilege specifically referred to and remaining in the indictment being numbered for identification purposes as number four. . . is to participate in this protest march from Selma to Montgomery, Alabama (R. 89).
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> * * *
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> . . . [T]he evidence in the case must show that the conspiracy was formed and that the defendant knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. Now, to participate knowingly and willfully means to participate voluntarily and understandingly and with a specific intent to do what the law forbids; that is to say, to participate with a motive or purpose to disregard the law (R. 90).

Section 241 has long been applied to protect fundamental federal rights, even from private

interference, which have nothing to do with the Fourteenth Amendment and which therefore must be distinguished from the rights often involved in prosecutions under 18 U.S.C. §242.[31] See discussion at pp. ,

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31/ The requirement that there be a specific intent to deny a federal right in connection with §241 derives from the earlier judicial imposition of that requirement in prosecutions under 18 U.S.C. §242. Section 242 proscribes deprivations of federal rights accomplished "under color of any law" so that prosecutions under it frequently arise under the Fourteenth Amendment and thus involve rights encompassed within the imprecise and now broadly read language of the due process, privileges and immunities, and equal protection clauses. Thus, to save the statute from unconstitutionality when applied to punish a deprivation of a Fourteenth Amendment right, the Supreme Court in Screws v. United States, 325 U. S. 91 (1945), ruled that a necessary element of a §242 violation is a specific intent to deny a federal right the existence of which is well established by statute or judicial rule. This does not mean, however, that only those with knowledge of the Constitution or Supreme Court decisions may violate the statute. "The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees." Id. at 106. Moreover, in upholding the application of §242 to rights which the citizen derives directly from the national government, such as the right to vote in federal elections, the Supreme Court did not dwell on any special requirement of specific intent beyond emphasizing that wilfulness is a statutory element of the crime. United States v. Classic, 313 U. S. 299, 325-329 (1941).

supra. These applications of §241 were not conditioned upon the existence of a specific intent different from that which must always be an element in a charge of conspiracy. Thus in United States v. Guest, 383 U. S. 745, 753 (1966) the Court, although it acknowledged a relationship between intent under §241 and intent under 18 U.S.C. §242, said of the §241 requirement:

> Since the gravamen of the offense is conspiracy, the requirement that the offender must act with a specific intent to interfere with the federal right in question is satisfied. Screws v. United States, 325 U. S. 91; United States v. Williams, 341 U. S. 70, 93-95 (dissenting opinion). 32/

32/ Mr. Justice Douglas in his dissenting opinion in United States v. Williams, supra, relied on by the Supreme Court in United States v. Guest, supra, concluded:

> A conspiracy by definition is a criminal agreement for a specific venture. It is a "partnership in crime." United States v. Socony - Vacuum Oil Co., 310 U. S. 150, 253. As stated by Mr. Justice Holmes in Frohwerk v. United States, 249 U. S. 204, 209, an "intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it." 341 U. S. at 94.

The nature of the conspiracy of course must be such as to come within the statute. A conspiracy to commit violence against persons who happen to be exercising federal rights is not by itself covered. In connection with the right of interstate travel at issue in the Guest case, Mr. Justice Stewart explained (383 U. S. at 760):

> Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate §241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought [18 U.S.C. 241].

In the context of the present case, the specific intent of the conspirators necessary for conviction had to relate to the acts of their intended victims in furtherance of rights granted by the court order. If the evidence showed only that appellants conspired to do violence to Negroes, or to white women who drove with Negroes, or to persons with out-of-state

license plates, the Government's case under this indictment would not have been proved. But the charge to the jury here, as the quote at p. supra, indicates, protected against any confusion of that sort. Judge Johnson advised the jury that the unlawful plan alleged by the Government was to interfere with citizens enjoying the right and privilege of participating in the Selma march and that the evidence had to show that "the defendants knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy" and further that "to participate knowingly and willfully means to participate voluntarily and understandingly and with specific intent to do what the law forbids" (R. 89-90). Thus, the charge fully described the element of specific intent relevant to this particular application of §241.[33/]

33/ It is clear that when §241 is applied to punish a conspiracy to interfere with a specific federal right not derived from the general terms of the Fourteenth Amendment the requirement of specific intent does not differ significantly from the intent requirement in other conspiracy cases. This Court has noted that "the charge of conspiracy to violate a criminal law has implicit in it the elements of knowledge and intent." Schnautz v. United States, 263 F. 2d 525 (C. A. 5, 1959), cert. denied 360 U. S. 910 (1959).

Appellants further contend that the trial court compounded its error by not including a reference to specific intent in its supplemental charge [given in response to a request by the jury for a definition of conspiracy (R. 107)].[34/] But by its very nature the supplemental charge satisfied the requirement of specific intent. United States v. Guest, 383 U. S. 745, 753 (1966). Because the

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34/ The trial court stated in its supplemental charge:

> A conspiracy, gentlemen, is a combination of two or more persons by concerted action to accomplish some unlawful purpose. . . . The gist of the offense of conspiracy is a combination or an agreement to violate the law [4. 107].
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> * * *
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> What the evidence must show is--in order to establish proof that a conspiracy existed is that the members in some way or in some manner or through some contrivance. . . came to a mutual understanding to try to accomplish a common and unlawful plan [R. 108].

specific right here in question was forcefully presented to the jury in the original charge, the failure to repeat it in the supplemental charge cannot be said to have left an erroneous impression in the minds of the jury. See Perez v. United States, 297 F. 2d 12 (C. A. 5, 1961). Certainly, such omission does not rise to the level of "plain effor." See Haner v. United States, 315 F. 2d 792 (C. A. 5, 1963); Perez v. United States, 297 F. 2d 12 (C. A. 5, 1961).

B. The Trial Court Properly Acceded to Appellants' Reuqest that the Jury be Charged that Appellants' Failure to Testify Could Not Be Considered In Determining Their Guilt or Innocence

In the course of his charge to the jury Judge Johnson included the following (R. 96-97):

> I have a practice that I have followed through the more than ten years that I have been on the bench of never directly or indirectly commenting upon the failure of a defendant to testify. However, where the defendants' lawyers request it, I do charge you on the law as to the effect of the failure on the part of defendants to testify, and this charge is at the request of the defendants' lawyers; otherwise, I would not have mentioned it or commented upon it. The defendants have not tesified in their own behalf. They don't have to do that. There is no way to--and I am reading it as requested by the defendants' lawyers--there is no way to force them to testifyin their own behalf. The court charges the jury that the fact that the defendants did not testify in this case cannot be considered in determining defendants' guilt or innocence. No inference or conclusion should be drawn by the jury from the fact that the defendants were not sworn and put on the stand as witnesses in their own behalf, nor should this fact have any weight with the jury in reaching a verdict.

Appellants now argue to this Court that the trial court committed reversible error in charging the jury as quoted above, even though they asked for the charge.

It is the well-established duty of a district judge upon request of the accused to charge the jury that no presumption against the accused can arise from his failure to testify. Bruno v. United States, 308 U. S. 287 (1939). The judicial duty arises, the Court in Bruno held, from an act of Congress specifying that the failure of a criminal defendant to testify "shall not create any presumption against him." 8 U.S.C. §3481 [formerly 28 U.S.C. §632 (1940)]. Indeed, this Court very recently held that a trial court of its own violation may caution the jury against drawing a negative inference or conclusion from the failure of the accused to testify, although the Court doubted that it was the better practice to do so. Bellard v. United States, 356 F. 2d 437 (C. A. 5, 1966). See also Davis v. United States, 357 F. 2d 438, 441, fn. 7 (C. A. 5, 1966); Chadwick v. United States, 117 F. 2d 902 (C. A. 5, 1941), cert. denied, 313 U. S. 585 (1941).

Appellants suggest that the doctrine of Griffin v. California, 380 U. S. 609 (1965), should be extended to include forbidding the trial court from commenting, one way or the other, on the accused's failure to testify. The effect, of course, would be the overruling of Bruno, supra, and a declaration that 18 U.S.C. §3481, as interpreted in Bruno, is unconstitutional. The Court in Griffin, however, in declaring unconstitutional any adverse comment on the accused's failure to testify in a state trial, reserved decision not, as appellants suggest, on whether Bruno should be overruled, but on whether state defendants have a constitutional right to obtain the instruction to which federal defendants are entitled by reason of the Bruno holding. 380 U. S. at 615, fn. 6. Thus there can be no question of the continuing validity of Bruno, of the protective right it confers, and the judicial duty it imposes.

C. The trial court committed no error in directing the jurors to continue their deliberations at a time when there was reason to believe they had not exhausted the possibility of reaching a verdict

The trial in this case opened on Monday, November 29, 1965 (R. 128). Impanelling of the jury was completed on that day (R. 153-188). The Government's case, consisting of the testimony of 28 witnesses, one of whom was in rebuttal, began on November 29 and concluded on Wednesday, December 1 (R. 821, 910); the defendants' case, consisting of the testimony of 10 witnesses, concluded on the same day (R. 903). Also, during the trial over 50 exhibits were received. On Thursday morning, December 2, Judge Johnson delivered his initial charge (R. 74-102) and at 10:03 a.m. that day the jury retired to begin its deliberation (R. 103).

Thus the jury in this case had to consider the testimony of 37 witnesses, over 50 exhibits, and the intrinsically difficult concept of criminal conspiracy. In this setting, and after approximately eight hours of deliberation, Judge Johnson advised the jurors to continue their deliberations in an effort to reach a verdict when the foreman suggested to him that the jury was deadlocked. Appellants argue that Judge Johnson's

supplemental charge in this respect exceeded the authority of Allen v. United States, 164 U.S. 492 (1896), and was prejudical to them. The circumstances of this case, however, warranted a direction from the judge to the jury to continue their deliberations; moreover, the precise language used by the Court to insure that the jurors were fulfilling their duty was fully protective of the rights and interests of the defendants.

The jurors, as noted above, began their deliberations at 10:03 a.m. on December 2 (R. 103). At 2:23 p.m., following a lunch break, they asked Judge Johnson to provide them with a dictionary (R. 106). Judge Johnson denied the request, but, upon being informed that the question arose regarding the word "conspiracy", went over that part of his original charge which defined the term (R. 107-108). The jury returned again at 3:41 p.m. the same afternoon and inquired as to the source of some of the exhibits (R. 109). Judge Johnson informed the jury regarding his recollection of the source of the exhibits, and after admonishing the jurors that they were not bound by his recollection, directed them to return to the jury room (R. 110-111). The jurors continued their deliberations for another

hour and forty minutes, when, at 5:30 p.m., Judge Johnson dismissed them for the night (R. 111). They reconvened the next morning at 8:00 a.m.[35] and at 10:09 a.m., they informed Judge Johnson that "we are unable to reach a verdict and seem to be hopelessly deadlocked" (R. 114). At that point Judge Johnson delivered a supplemental charge[36], following which the jurors at 10:15 a.m. resumed deliberation (R. 117) and continued until a luncheon recess at 12:33 p.m. (R. 118). Thereafter, at 2:08 p.m., the jury returned to the courtroom and reported its verdict.[37]

Clear precedent, now recently reaffirmed, justified Judge Johnson's conclusion that he was authorized to give the supplemental charge. See Allen v. United States, 164 U.S. 492 (1896); Lias v. United States,

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35/ The docket entry of the district court clerk, not a part of the printed record, shows that the jury began their deliberations on December 3 at 8:00 a.m.

36/ The trial court's supplemental charge appears at pp. 114-117 of the printed record.

37/ The record does not reflect precisely at what time the jurors resumed their deliberations following the luncheon recess.

284 U.S. 584 (1931); Kawakita v. United States, 343 U.S. 717 (1952), affirming 190 F.2d 506 (C.A. 9, 1951)[38]; Walker v. United States, 342 F.2d 22 (C.A. 5, 1965), cert. denied 382 U.S. 359 (1966); Estes v. United States, 335 F.2d 609 (C.A. 5, 1964), cert. denied 379 U.S. 964 (1965); Andrews v. United States, 309 F.2d 127 (C.A. 5, 1962), cert. denied 372 U.S. 946 (1963); Huffman v. United States, 297 F.2d 754 (C.A. 5, 1962), cert. denied 370 U.S. 955 (1962); Sikes v. United States, 279 F.2d 561 (C.A. 5, 1960). See also Cunningham v. United States, 356 F.2d 454 (C.A. 5, 1966); Thaggard v. United States, 354 F.2d 735 (C.A. 5, 1965), cert. denied 383

38/ In Lias, the court of appeals had upheld a supplemental charge "substantially" similar to the Allen charge (51 F.2d at 218). The Supreme Court, on writ of certiorari "limited to the question raised by the supplemental charge to the jury" (284 U.S. 604), affirmed the lower court's judgment per curiam, simply citing the Allen decision (284 U.S. 584).

In Kawakita, the lower court had similarly upheld a supplemental charge substantially like the Allen instruction (190 F.2d at 521-528). Although the use of the instruction was one of the alleged errors relied on for reversal (Brief for Petitioner, No. 570, Oct. Term, 1951, pp. 160-169), the Supreme Court disposed of the contention by grouping it with others and saying that all were "either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice" (343 U.S. at 744).

U.S. 958 (1966).[39] The charge was the same charge, almost verbatim, which Judge Johnson gave and which this Court approved in Thaggard v. United States, supra. The approval in Thaggard signifies an acknowledgement by this Court that the charge contained none of the coercive elements which caused reversals in Green v. United States,[40] and Powell v. United States, 297 F.2d 318 (C.A. 5, 1961). Specifically, in Green the charge was given before the jury even began its deliberations, and in Powell the district judge commented on possible "stubborness" on the part of individual jurors and

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39/ The Allen charge and variations on it remain in use throughout the Federal judicial system. See Genedella v. United States, 224 F.2d 778 (C.A. 1, 1955); United States v. Kahaner, 317 F.2d 459 (C.A. 2, 1963); Rhodes v. United States, 282 F.2d 59 (C.A. 4, 1960), cert. denied 364 U.S. 912 (1960) [cf. United States v. Smith, 353 F.2d 166 (C.A. 4, 1965)]; United States v. Barnhill, 305 F.2d 164 (C.A. 6, 1962), cert. denied 371 U.S. 865 (1962); United States v. Furlong, 194 F.2d 1 (C.A. 7, 1952), cert. denied, 343 U.S. 950 (1952); Wegman v. United States, 272 F.2d 31 (C.A. 8, 1959); Christy v. United States, 261 F.2d 357 (C.A. 9, 1959), cert. denied (360 U.S. 919 (1960); United States v. Redfield, 295 F.2d 249 (C.A. 9, 1961), affirming 197 F. Supp. 559 (D.C. Nev. 1961); Robinson v. United States, 345 F.2d 1007 (C.A. 10, 1965); DeVault v. United States, 338 F.2d 179 (C.A. 10, 1964); Moore v. United States, 345 F.2d 97 (C.A. D.C. 1965).

40/ 309 F.2d 852 (C.A. 5, 1962).

returned the jury to the jury room at 12:10 a.m. to continue its efforts in spite of the foreman's observation that they had "gotten pretty dull."[41/]

It is important to emphasize that the jury reported its apparent deadlock[42/] without any initiating inquiry by the Judge, and that the Judge returned the jury to its deliberation early in the day, at a time when there remained many hours for a fresh and vigorous exchange of views. The jury accepted the invitation to continue its debate and did so for another three hours. Although a luncheon recess occurred following the supplemental charge, the jurors reach no conclusion in

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41/ The charge here was also free of the features which prompted the dissent in Andrews v. United States, 309 F.2d 127, 129 (C.A. 5, 1952), where the judge delivered the charge after only one hour and five minutes of deliberation; the dissent in Huffman v. United States, 297 F.2d 754, 755 (C.A. 5, 1962) where the judge extemporized at length on the necessity of a verdict and suggested the jurors had a duty to agree; and the reversal in Jenkins v. United States, 380 U.S. 445 (1965), where the trial judge expressly charged the jurors that "You have got to reach a decision in this case."

42/ The foreman's statement was that "we are unable to reach a verdict and seem to be hopelessly deadlocked" (R. 114).

the two hours immediately preceding the luncheon break. In that circumstance it is simply inaccurate to conclude that the jurors were coerced into a verdict by the Judge's remarks.[43/]

The content of the supplemental charge reflects the single purpose of Judge Johnson to insure that the deliberation did not end before the jurors had in fact reached an irreconcilable disagreement on the facts, arrived at only after all the arguments on either side had received a full opportunity for airing. The Judge's remarks fell into two parts -- one emphasized the desirability that this jury reach a verdict, and the other suggested, in typical "Allen" charge language, the techniques of disputation by which all possibilities of agreement might be exhausted. He recalled that the trial involved numerous witnesses and exhibits, and said that "You haven't commenced to deliberate the case long

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43/ The coercive effect in Jenkins v. United States, supra, stemmed from the statement of the judge that the jury had to decide the case. Thus, although the jury deliberated for three or four hours after the supplemental charge, it was reasonable there to assume that the entire deliberation proceeded upon the premise, caused by the charge, that the jury had to reach a verdict.

enough to reach the conclusion that you are hopelessly deadlocked" (R. 115). He added that "Your failure to agree upon a verdict will necessitate another trial equally as expensive; that is, expensive as far as the Government is concerned, [and] it is expensive as far as the defendant is concerned" (Ibid.) (emphasis added)[44/]. He drew the conclusion that "it is very desirable that you jurors should agree upon a verdict in this case" (Ibid.).

Judge Johnson then turned to suggestions, taken from those approved in Allen v. United States, 164 U.S. 492 (1896), as to how the jury should attempt to reach agreement. He emphasized that "this court does not desire that any juror should surrender his conscientious convictions" and that "the verdict to which a

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44/ In Estes v. United States, 335 F.2d 609 (C.A. 5, 1964), this Court specifically authorized reference to expenses in a supplemental charge if the proper protective caveats are also included. The court said (335 F.2d at 619):

> Since the court's remarks were replete with admonitions against either coercion, compromise or surrender of individual convictions the elucidation of the obvious can hardly be deemed coercive.

juror agrees must be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellow jurors" (R. 115-116). With those caveats, the judge told the jurors to consider with deference the opinions of others with a disposition to be convinced, and particularly urged those in a small minority to ask why their views make so little impression upon their equally honest, equally intelligent colleagues (R. 116). He also stated (Ibid):

> You should consider that this case must at some time be decided, that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other.

The tone and substance of the Judge's remarks were uncoercive. It is wise and right for a judge to require further deliberation when the extent of prior deliberation and the nature of the evidence suggest that an irreconcilable deadlock had not been reached. This is particularly true where the case involves not one but three defendants. Moreover, there was nothing in the judge's language which indicated these jurors

must decide the case. He expressed the desirability of this jury deciding one way or the other, and indicated his hope that it would be able to do so, but otherwise reiterated that compromises and the surrendering of conscientious convictions ought not occur. The judge's suggestion that the case "must at some time be decided" did not suggest that this jury had to decide the case. Moreover, it was surely within the province of the judge to conclude from the nature of the evidence that it would in fact be retried in the event of a deadlock. In context, the suggestion was an oblique observation, not directive in character, and was accurate and perhaps obvious in view of the surrounding circumstances.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the verdict and judgment of the district court be affirmed.

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AUGUST 1966.

CERTIFICATE OF SERVICE

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