UNITED STATES OF AMERICA v. CECIL RAY PRICE, ET AL. Filed March 1965

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Nos. —, —

In the Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA, APPELLANT

v.

CECIL RAY PRICE, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

JURISDICTIONAL STATEMENT; MOTION TO CONSOLIDATE APPEALS; MOTION FOR EXPEDITED HEARING

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X

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OPINIONS BELOW

The opinions of the district court (Appendices A and B, *infra,* pp. 11–25) are not yet reported.

JURISDICTION

The judgments of the district court dismissing one indictment in its entirety as to all appellees (Appendix C, *infra,* p. 26) and three counts of a second indictment as to fourteen of the appellees (Appendix D, *infra,* p. 27) were entered on March 2, 1965. Notices of appeal to this Court were filed on the same day. The jurisdiction of this Court to review the decision of the district court on direct appeal is

conferred by 18 U.S.C. 3731. *United States* v. *Braverman,* 373 U.S. 405.

STATUTES INVOLVED

18 U.S.C. 241 provides:

> 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 or 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.

18 U.S.C. 242 provides:

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

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

QUESTIONS PRESENTED

1. Whether the right secured by the Fourteenth Amendment, not to be deprived of life or liberty without due process of law by persons acting under color of State law, is a "right or privilege secured * * * by the Constitution" within the meaning of Section 241 of the Criminal Code.

2. Whether Sections 242 and 2 of the Criminal Code reach conduct by persons not officials of the State who act under color of State law and in association with State officials.

STATEMENT

On January 15, 1965, the United States Grand Jury for the Southern District of Mississippi returned two indictments,[1] each charging the same eighteen persons [2] with offenses against the civil rights of Schwerner, Chaney and Goodman, who were killed during the summer of 1964 in the vicinity of Philadelphia, Mississippi. Three of the defendants (Rainey, Price and

[1] The full text of the indictments is reproduced in Appendices E and F, *infra*, pp. 30–39.

[2] James E. Jordan, one of the defendants charged in the two indictments, was not before the district court and is not involved in the rulings below or the present appeals. His case was transferred to the United States District Court for the Middle District of Georgia under Rule 20, F.R. Cr. P.

Willis) were alleged to be State law enforcement officers then "acting by virtue of [their] official positions and under color of the laws of the State of Mississippi." There is no claim that the remaining defendants held public office.

1. The first indictment (App. E, *infra,* p. 30)—the predicate of Criminal Action Number 5215—contained a single count charging all the defendants with a criminal conspiracy in violation of 18 U.S.C. 241. It alleged that, between stated dates in 1964, the eighteen named persons—

> * * * conspired together, with each other and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi.

The indictment further alleged the means by which the defendants planned to achieve the objects of their conspiracy.

The district court dismissed the indictment in its entirety, as to all defendants, on the ground that it did not state an offense against the United States (App. A, *infra,* p. 11). Invoking an alternative ground of the ruling in *Williams* v. *United States,* 179 F. 2d 644 (C.A. 5), affirmed in part on other grounds, 341 U.S. 70, the court held that Section 241

of the Criminal Code vindicates only "federally created rights", which do not include the Fourteenth Amendment right set forth in the indictment (App. A, *infra,* 12–14).

2. The indictment in Criminal Case Number 5216 is in four counts, each of which names all eighteen defendants (App. F, *infra,* p. 33). Count 1—which was sustained as to all defendants and is not in issue here—charges a violation of 18 U.S.C. 371 by conspiring to commit offenses defined in 18 U.S.C. 242. The allegations are similar to those set forth in the indictment laid under 18 U.S.C. 241. The present appeal is directed to the partial dismissal of Counts 2, 3 and 4, which charge substantive violations of Section 242.

The three substantive counts are identical, except that each involves a different victim. Thus, Count 2 charges that the several defendants—

> * * * while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill Michael Henry Schwerner, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Michael Henry Schwerner summarily and without due process of law and for the purpose and with the intent of punishing Michael Henry Schwerner for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Michael Henry Schwerner of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due

process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense, and if found guilty, to be punished in accordance with the laws of the State of Mississippi.

The district court sustained motions to dismiss Counts 2, 3 and 4 as to all the private defendants (while denying similar motions with respect to the three defendants who are law enforcement officers) (App. B, *infra,* p. 16). The court read Section 242 as reaching only the acts of public officers while acting officially. It deemed insufficient the allegation of the indictment that the defendants who were not State officials were nevertheless "acting under color of the laws of the State of Mississippi" and rejected the suggestion that they were amenable to Section 242 as aiders and abettors of public officials with whom it was alleged they were jointly participating. In the court's view, no offense was stated against the private defendants because it was "not charged as an ultimate fact that [any of them] did anything as an official" or that the "individual defendants were officers in fact, or de facto in anything allegedly done by them 'under color of law'" (App. B, *infra,* p. 18).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The first issue is whether Section 241 of the Criminal Code encompasses Fourteenth Amendment rights. The importance of the question is not de-

batable. It was left unresolved by an evenly divided Court in *Williams* v. *United States,* 341 U.S. 70. Since Section 241 is the only federal statute which carries severe punishment for brutal physical violence in the invasion of civil rights, its scope is a matter of grave concern. Both the Executive Branch and the Congress need a definitive interpretation before determining the need for additional legislation.

In our view, 18 U.S.C. 241 encompasses rights secured by the Reconstruction Amendments. That seems to us the most natural reading of the text. It is, moreover, a fair inference that the provision, originally enacted in 1870 (16 Stat. 140) was intended to implement the new guarantees then recently incorporated into the Constitution. Finally, as the opinion of Mr. Justice Douglas in *Williams* demonstrates (see 341 U.S. at 90–93), that conclusion finds support in the legislative history of the section and early lower court decisions.

2. The other question presented is also important. In effect, the district court ruled that private persons without official status as State officers are never amenable to Section 242 of the Criminal Code—albeit they are intimately involved in the crimes of officials and are alleged themselves to be acting "under color of State law." That holding contradicts the express language of the "aider and abettor" statute (18 U.S.C. 2, *supra,* pp. 2–3)[3] and rejects a substantial body

[3] For the proposition that a person may be convicted of aiding and abetting despite his legal incapacity to commit the substantive offense, see *Wilson* v. *United States,* 230 F. 2d 521,

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of jurisprudence dealing with the precise point. See *United States* v. *Lynch,* 94 F. Supp. 1011 (N.D. Ga.), affirmed, 189 F. 2d 476 (C.A. 5); *Williams* v. *United States,* 179 F. 2d 656 (C.A. 5), affirmed, 341 U.S. 97; *Baldwin* v. *Morgan,* 251 F. 2d 780 (C.A. 5); *Koehler* v. *United States,* 189 F. 2d 711 (C.A. 5), certiorari denied, 342 U.S. 852. The decision is, we submit, plainly erroneous. At all events, the question of the reach of Section 242 when private persons are acting together with public officials (and perhaps shielded from local law by their protective umbrella) is an important one that should be definitely settled by this Court.

THE APPEALS SHOULD BE CONSOLIDATED AND THE CAUSE EXPEDITED

Both appeals involve indictments arising out of the same course of conduct and are taken from judgments contemporaneously entered by the same district court. All of the appellees in the case arising under 18 U.S.C. 242 are also appellees in the case arising under 18 U.S.C. 241. We accordingly move that the two appeals be consolidated.

This case, as the members of the Court and, indeed, the entire country are aware, is one of extraordinary gravity and intrinsic importance. The public interest requires the prompt disposition of all the

526 (C.A. 4) certiorari denied, 351 U.S. 931; *Haggerty* v. *United States*, 5 F. 2d 224 (C.A. 7); *Koehler* v. *United States*, 189 F. 2d 711 (C.A. 5), certiorari denied, 342 U.S. 852, *United States* v. *Melekh,* 193 F. Supp. 586, 592 (N.D. Ill.); *Swanne Soon Young Pang* v. *United States*, 209 F. 2d 245, 246 (C.A. 9); *United States* v. *Snyder*, 14 Fed. 554 (C.C.D. Minn.); see, also, *Coffin* v. *United States*, 162 U.S. 664, and *id.*, 156 U.S. 432.

charges. Their prompt disposition, in accordance with the justice of the cause, depends upon the availability and recollection of key witnesses, either of which might be adversely affected by any substantial delay. The conspiracy count of the indictment involving 18 U.S.C. 242 remains for trial against all the defendants and the substantive counts have been sustained against some of the appellees. Even if no questions of double jeopardy or *res judicata* were precipitated, it would be wasteful to proceed to trial on the merits on those lesser charges while the appeal of the felony indictment was pending here and then, upon reversal, to prosecute the more serious charges in a separate trial.

In the circumstances, we believe that it would be damaging to the administration of justice if the hearing of this cause were postponed to the next term of Court. It also seems apparent that appelles can have no legitimate interest in a delay of this Court's determination of the validity of the indictments. We therefore move that this cause be expedited for hearing at the present Term.

To this end, we also move that appellees be requested to file a response to this paper on or before March 10, 1965. That would permit the Court to determine its probable jurisdiction and act upon the motions set forth above on March 15, 1965. If probable jurisdiction is then noted and the government's motion for expedition granted, we propose, subject to the convenience of the Court, a briefing and argument schedule as follows:

Appellant's brief to be filed on April 5, 1965;[4]
Appellees' brief to be filed on April 25, 1965;
The cause to be set for argument on May 3, 1965 (the first open date following the conclusion of the Court's regularly scheduled hearings).

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted, the appeals herein consolidated and the cause expedited for hearing.

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MARCH 1965.

[4] In view of the somewhat accelerated briefing schedule, we suggest that the parties be granted leave to file their briefs initially in typescript or mimeographed form and to substitute printed copies promptly thereafter.

APPENDIX A

United States District Court
Southern District of Mississippi
Eastern Division

Criminal Number 5215

UNITED STATES OF AMERICA, PLAINTIFF
v.
CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS, DEFENDANTS

The named defendants move to dismiss this indictment for failure to state an offense against the laws of the United States. The indictment is predicated upon 18 U.S.C.A. § 241. The first paargraph of the indictment states that Rainey was sheriff, Price was deputy sheriff and that Willis was a police officer, each acting at all times under "color of laws" of the State of Mississippi. The statute mentions nothing about "color of law" in the description of the crime embraced therein. The indictment charges that from January 1, 1964, to December 4, 1964, the named defendants in the Southern District of Mississippi con-

spired "to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi." The third paragraph of the indictment states that it was the plan and purpose of such conspiracy that said victims would be released by said officials from the county jail and that the individual defendants would intercept said released prisoners "and threaten, assault, shoot and kill them." This entire offense is said to have been committed in Neshoba County, State of Mississippi, in violation of said § 241.

This statute was designed and intended solely for the protection of federally created rights, not for any right merely guaranteed by the laws of the United States. This is not a statute which makes murder a federal crime under the facts and circumstances in this case. The right of every person not to be deprived of his life or liberty without due process of law is a right that existed prior to the Federal Constitution. It is a right which is protected by state laws and is merely guaranteed by the Constitution of the United States.

In *United States* v. *Cruikshank,* 92 U.S. 588, there was an indictment under § 6 of the Enforcement Act of May 31, 1870, appearing as 16 Statute At Large 141, which is similar in many respects to § 241 here. The Court said: "The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, 'of their respective several lives and

liberty of person without due process of law.' This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

"The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

The indictment at bar is clearly void under the holding of *Williams* v. *United States,* (5 CA) 179 F. 2d 644, where the Court reversed a conviction under a very similar indictment in this circuit. That opinion makes abundantly clear the infirmities which are inherent in the indictment here. That decision was rendered on January 10, 1950.

On April 23, 1951, in *United States* v. *Williams,* 341 U.S. 70; 71 S. Ct. 581, the Supreme Court of the

United States affirmed that decision. Among other things, the Supreme Court in that case said: "All the evidence points to the same conclusion: that § 241 applies only to interference with rights which arise from the relation of the victim and the federal government, and not to interference by state officers with rights which the federal government merely guarantees from abridgment by the states. * * * Nor does the defined crime have as an ingredient that the conspiracy be under color of State law. Criminal statutes should be given the meaning their language most obviously invites. Their scope should not be extended to conduct not clearly within their terms. We therefore hold that including an allegation that the defendants acted under color of State law in an indictment under § 241 does not extend the protection of the section to rights which the Federal Constitution merely guarantees against abridgment by the States. Since under this interpretation of the statute the indictment must fall, the judgment of the court below is affirmed."

The Congress has known of that decision now for approximately fifteen years and has acquiesced therein as a proper construction of § 241.

Here we have fourteen private individuals and three officials as defendants. The defendants are not charged with the violation of any right which was conferred upon either of these victims by a federal law. It is of no consequence, therefore, in law that some of the defendants were officials and that some of them were merely private citizens in allegedly committing the offense charged. The motion, like a demurer of old, admits for the purpose of this hearing all matters and things well pled in the indictment, but contends that even so, they are not charged with an offense against the United States. The authorities

cited and found upon independent research support the soundness of this position. The indictment surely states a heinous crime against the State of Mississippi, but not a crime against the United States. This is a court of limited jurisdiction. The United States has no common law. Section 241 must be and is the sole and exclusive exponent of the offense set forth in this indictment. The indictment simply does not charge either of these defendants with any offense against the laws of the United States. The motions to dismiss this indictment against the named defendants will, therefore, be sustained.

There are several other motions presented by these defendants pursuant to a previous order of this Court, but action on such motions is unnecessary by reason of the disposition of the foregoing motions. Such other motions, therefore, may be withdrawn or will be overruled. A judgment accordingly may be presented.

HAROLD COX,
United States District Judge.

FEBRUARY 24, 1965.

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APPENDIX B

United States District Court
Southern District of Mississippi
Eastern Division

Criminal Number 5216

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, ET AL., DEFENDANTS

On January 18, 1965, the defendants were ordered to file all motions to be filed herein on or before January 25, 1965. Those motions have been filed and presented and will be presently decided.

1. The defendants move for sixty days additional time to prepare and file motions and supporting affidavits. That motion is without merit and will be overruled.

2. The defendants move to dismiss the indictment because of widespread adverse publicity and because they were photographed and pictured through the news media of the country as criminals. There was, indeed, a great amount of sensational writing and numerous pictures of these defendants which appeared in many of the newspapers within the state and on television stations within the state and in other states. This unusual circumstance was taken into account by the Court in its supplemental charge to the grand jury who were expressly instructed to com-

pletely disregard all news stories and all clamor from the outside, and to fairly and justly and honestly decide, each for himself, solely from the evidence and testimony presented to them in the grand jury room as to whether or not probable cause existed for indictment. The grand jury was admonished to vote their own honest and sincere and conscientious convictions on that question solely from the evidence and testimony before them under oath in the grand jury room. This was a very intelligent and a very fine grand jury, composed of a good cross section of citizens from the entire Southern Judicial District of Mississippi. It must be and is presumed that they did their duty in accordance with those instructions. That some others throughout the district may have formed an impression of some kind of guilt or innocence of these defendants does not show any prejudice in the mind or on the part of these grand jurors in performing their official duties here. That motion is without merit and will be overruled.

3. The defendants (except Jordan) move to dismiss the indictment for failure to state an offense against, or a violation of any laws of the United States. The indictment is in four counts. The first count is for the conspiracy under 18 U.S.C.A. § 371 to violate 18 U.S.C.A. § 242. Six overt acts in furtherance of such conspiracy are stated. The second, third and fourth counts charge all of the defendants with a violation of 18 U.S.C.A. § 242. Lawrence Andrew Rainey was sheriff, Cecil Ray Price was deputy sheriff and Richard Andrew Willis was a police officer of the municipality at all material times. The other defendants were at all times private individuals and so acting. Surely, Section 242 was a valid law of the United States at such time. The indictment states and the motion for its purpose admits that two or more of

them conspired to violate this law of the United States on this occasion. It is immaterial to the conspiracy that these private individuals were not acting under color of law at such time so as to be vulnerable to § 242. They are not charged with having violated § 242 but are charged with having conspired to violate said act. That is a crime against the United States under § 371. The second, third and fourth counts charge that the official defendants willfully did things that denied and deprived their alleged victims of federally created rights. It is charged that the individual defendants likewise participated in the offenses charged in the second, third and fourth counts of the indictment, but it is not charged as an ultimate fact that they (or either of them) did anything as an official under color of any law, statute, ordinance, regulation, or custom as § 242 provides and as a violation thereof would require. The indictment states that three of the defendants were acting as officers in all that they did, but then does not state or indicate that any of the other individual defendants were officers in fact, or de facto in anything allegedly done by them "under color of law."

It is accordingly the view of this Court that the first count of this indictment is valid against all defendants before the Court; that the second count is valid against Rainey, Price and Willis but not against the other defendants; that the third count is valid against Rainey, Price and Willis but not against the other defendants; and that the fourth count is valid against defendants Rainey, Price and Willis but not the other defendants upon the authorities presently cited.

In *Williams* v *United States,* (5 CA) 179 F. 2d 656, a private detective was indicted and convicted under § 242 for applying third degree methods to a vic-

tim while investigating a theft from a private concern. A city policeman was present at the scene of the offense and lent color of law to the event. The detective held a card from the Director of Public Safety showing his appointment as a special police officer of the municipality. A section of the charter of the city provided that no person should be appointed a special police or detective, except under the direction of the Chief of Police for a specified time. There was substantial evidence that Williams impersonated an officer and acted under color of law. He was found guilty of the charge by a jury and his conviction was affirmed. The case was appealed to the Supreme Court of the United States where it was affirmed. The Supreme Court on appeal in *Williams* v. *United States,* 341 US 97; 71 S. Ct. 576, observed that the indictment charged that petitioner acting under color of law used force to make each victim confess to his guilt and implicate others and that the victims were denied the right to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of that state. The Court quoted from Count 2 of the indictment which charged violation of the Fourteenth Amendment rights as follows: "The right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune while in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said state, and the right and privilege to be tried by due process of law and if

found guilty to be sentenced and punished in accordance with the laws of the State of Florida." The trial judge admonished the jury that the defendants were "not here on trial for a violation of any law of the State of Florida for assault" nor "for assault under any laws of the United States." The Supreme Court thus affirmed said conviction and approved such application and use of § 242 to those facts and circumstances. It is thus made crystal clear that the defendants in this case who were officers and were allegedly acting willfully under color of law as charged in the indictment are vulnerable to the offense charged in § 242. To same effect is *United States* v. *Jones,* (5 CA) 207 F. 2d 785. Likewise in *Koehler* v. *United States,* (5 CA) 189 F. 2d 711, the Court affirmed a conviction of a constable and his co-worker who violated § 242 by the violating of federal rights of a victim under color of law. In that case Ackerman was not a mere private citizen but was a deputy or assistant on duty in all that was done in violation of § 242. The motion to dismiss thus admits all things well pled in the indictment and results in the inescapable conclusion that the county and city officials who are defendants are legally charged with a violation of § 242 in this indictment.

In *Brown* v. *United States,* (6 CA) 204 F. 2d 247, Brown was convicted of violating 18 U.S.C. § 371. The appellant was charged with violation of § 242 but such charges against him were dismissed by the Court because he was a private individual and not an officer acting under color of law as in *Commonwealth of Virginia* v. *Rives,* 100 US 313; *United States* v. *Cruikshanks,* 92 US 542; *Screws* v. *United States,* 325 US 110, 65 S. Ct. 1039. The Court said:

> "The district court dismissed the substantive counts which charged appellant with violating § 242 but submitted the conspiracy count to the jury. This action was clearly correct. * * * The fact that appellant was a private citizen and legally incapable of violating § 242 does not render him immune from a charge of violating 18 U.S.C. § 371 by engaging in an agreement with a law enforcement officer acting under color of state law to violate 18 U.S.C. § 242. *United States* v. *Holte,* 236 US 140; 35 S. Ct. 271, 59 L. Ed. 504. As declared in *Chadwick* v. *United States,* 6 Cir., 141 F. 225, at page 237, opinion by Judge Lurton: 'It is sufficient if any one of the parties to a conspiracy is legally capable of committing the offense, although the other parties may not have been.' As was stated in *United States* v. *Trierweiler,* D.C., 52 F. Supp. 4, at page 7:
>
> " 'It is immaterial that they themselves may not have had the capacity to violate the statute for they became liable criminally if they conspired to violate that statute and if one or more of their fellow conspirators had the capacity to commit the substantive offense.' *Barron* v. *United States,* 1 Cir., 5 F. 2d 799, 801, 802; *Haggerty* v. *United States,* 7 Cir., 5 F. 2d 224, 225; *Kaufman* v. *United States,* 2 Cir., 212 F. 613, 618.
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> "In accord with this conclusion are *Koehler* v. *United States,* 5 Cir., 189 F. 2d 711; *Apodaca* v. *United States,* 10 Cir., 188 F. 2d 932."

As the Court said in *United States* v. *Rabinowich,* 238 U.S. 78; 35 S. Ct. 682: "That a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. *Callan* v. *Wilson,* 127 U.S. 540; 8 S. Ct. 1301." The Court further said: "A person may be guilty of conspiring, although incapable of committing the objective offense."

It is accordingly the view of the Court that the first count of this indictment is valid against all defendants; that as to the remaining counts in the in-

dictment, all of them are valid against the official defendants, but invalid against the private individual defendants therein. The motion to dismiss the indictment will thus be sustained in part and overruled in part as indicated.

4. Burrage moves and Price, Akin, Killen, Posey, Rainey, Roberts, Sharpe, Townsend, Tucker and Willis join him in requesting under Criminal Rule 41(e) that the search under the warrant be adjudged unlawful, and that the property taken be adjudged to have been illegally seized without warrant, or that the warrant be adjudged insufficient on its face, or that the property seized is not described in the warrant, or that there was no probable cause for the issuance of the warrant or that the warrant was illegally executed. Evidence was adduced before the Court on this motion. The contentions and the evidence somewhat overran the bounds of the motion. Some nebulous testimony before the Court was to the effect that government agents with permission had been on open land searching for some clue to the whereabouts of three human bodies. No search was made of any improvements on the "Jolly lands" now belonging to Burrage. No case of an unreasonable search or seizure is shown. Much of the description in the affidavit and warrant is void but the description of the premises known as the "Old Jolly Farm" under control of Olen Burrage in the north half of Neshoba County in the Southern District of Mississippi is sufficient for all purposes. The objects of the search were sufficiently stated. The affidavit of an FBI agent sufficiently set forth grounds for probable cause which were effectually adjudicated to exist by the issuance of the subsequent warrant. *Hester* v. *United States,* 265 U.S. 57; 44 S. Ct. 445. *Monnette* v. *United States,* (5 C.A.) 299 F. 2d 847. The search warrant

described the premises to be searched as the "Old Jolly Farm" under control of Olen Burrage. This place consisted of two hundred fifty acres. It had formerly been owned by Jolly and was the only place of such kind in the county under control of Burrage. The description of the premises to be searched was sufficiently clear to enable an officer with reasonable effort to ascertain and identify the place to be searched. That is the rule and the test. The warrant clearly stated that the search was for the bodies of the three identified victims. This warrant was served at 8:12 A.M., August 4, 1964, according to FBI agents' testimony supported by memoranda made at the same moment as an official record. The Court believes from the evidence that the government agents acted with full authority under this warrant in doing all that was done on said date toward searching for and discovering these bodies. This evidence was not illegally obtained and the process therefor was valid. This motion to suppress is without merit and will be overruled.

5. The defendants move for a production of evidence under Criminal Rule 16. The two motions seek material to which they are not entitled under this rule. The motion does not bring the request within the ambit of the rule. The motions will be overruled.

6. The defendants seek a bill of particulars under Criminal Rule 7(f). An indictment is required by Criminal Rule 7(c) to contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." It is not necessary to allege with technical precision all of the elements essential to the commission of the offense which is the object of the conspiracy. In *Wong Tai* v. *United States,* 47 S. Ct. 300, it is said: "In charging such

a conspiracy certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, it is all that is necessary." There the defendants sought as here to discover the government's evidence to which the Court said that the defendants were not entitled. A defendant in a criminal case may not resort to a motion for a bill of particulars as a discovery device. In *Van Liew* v. *United States,* 321 F. 2d 664, the Court in this circuit said that it is not the office of a bill of particulars to ascertain what offense is charged. In *Johnson* v. *United States,* 207 F. 2d 314, the Court in this circuit said: "The government should not be compelled by a bill of particulars to give a detailed disclosure of its evidence, as would have been required by compliance with the motion." The indictment here contains a sufficiently definite written statement of the offense to enable the defendants to properly and fairly present their defense thereto. It is likewise sufficiently definite and clear to forestall any possibility of double jeopardy. The motion is without merit and will be overruled.

7. Numerous motions are presented by the defendants for a severance under Criminal Rule 14. Criminal Rule 8 authorizes the joinder of offenses and of defendants under stated circumstances. Criminal Rule 14 vests the Court with a sound judicial discretion to grant such relief as may be necessary in any case to assure a fair trial for each defendant. *Opper* v. *United States,* 75 S. Ct. 158. Nothing has been presented to the Court to convince it that a severance of any other defendants, other than Horace Doyle Barnette who has already been severed from this proceeding, is necessary in this case. But under the circumstances it would appear to be fair and just that all of the defendants be first tried under the first count of this indictment in Case No. 5216, and that the trial

of the official defendants under Count 2, Count 3 and Count 4 should be next tried. The motion will thus be sustained in part and overruled in part as indicated.

8. The defendants by separate motions request a trial by jury. Those motions will be sustained.

A judgment disposing of said motions as indicated may be presented for entry.

HAROLD COX,
United States District Judge.

FEBRUARY 25, 1965.

APPENDIX C

In the United States District Court for the
Southern District of Mississippi
Eastern Division

Criminal Number 5215

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS, DEFENDANTS

JUDGMENT

In accordance with the opinion in this cause entered on February 24, 1965, it is Ordered and Adjudged that:

The motions of the defendants to dismiss the indictment in this cause on the grounds that it does not state an offense against the laws of the United States is sustained, and

It is further Ordered that the indictment in this cause be and the same is hereby dismissed.

It is further Ordered that pursuant to the request of the defendants all other motions filed in this cause be and the same are hereby permitted to be withdrawn.

/s/ HAROLD COX,
United States District Judge.

MARCH 2, 1965.

APPENDIX D

In the United States District Court for the
Southern District of Mississippi
Eastern Division

Criminal Number 5216

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS, DEFENDANTS

JUDGMENT

In accordance with the opinion in this cause entered on February 25, 1965, it is ORDERED and ADJUDGED that:

(1) The defendants' motions for sixty days additional time to prepare and file motions and supporting affidavits be and the same are hereby denied.

(2) The defendants' motions to dismiss the indictment on the ground of widespread adverse publicity in the news media picturing them as criminals be and the same are hereby denied.

(3) The motions to dismiss the indictment by the defendants Cecil Ray Price, Lawrence Andrew Rainey and Richard Andrew Willis on the ground

that it fails to state an offense against the laws of the United States be and the same are hereby denied.

(4) The motions of the defendants to dismiss the indictment for failure to state an offense against the laws of the United States be and the same are hereby denied as to the first count of the indictment charging a violation of 18 U.S.C. 371.

(5) The motions of the defendants Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker to dismiss the indictment for failure to state an offense against the laws of the United States be and the same are hereby granted as to the second, third and fourth counts of the indictment charging violations of 18 U.S.C. 242, and count 2, count 3, and count 4 of the indictment be and the same are hereby dismissed as to defendants Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Burnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker.

(6) The motion of defendant Olen Burrage, joined by the other defendants, to suppress evidence obtained from property under his control on the grounds that the warrant was unlawful, that the property was illegally seized without warrant, that the warrant was insufficient on its face and did not describe the property to be searched, and that there was no probable cause for issuance of the warrant, be and the same is hereby denied.

(7) The motions of the defendants for production of evidence under Rule 16, Rules of Criminal Procedure be and the same are hereby denied.

(8) The motions of the defendants for bill of particulars under Rule 7f of the Rules of Criminal Procedure be and the same are hereby denied.

(9) The motions of the defendants for severance under Rule 14, Rules of Criminal Procedure be and the same are hereby denied, except as hereinafter stated.

(10) The motions of the defendants for trial by jury are hereby granted.

It is further Ordered that count 1 of this indictment shall be tried separately from count 2, count 3 and count 4, and that count 1 shall be tried first.

Ordered this March 2, 1965.

/s/ HAROLD COX,
United States District Judge.

APPENDIX E

In the United States District Court for the
Southern District of Mississippi
Eastern Division

Criminal No. 5215

18 U.S.C. 241

UNITED STATES OF AMERICA
v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, JAMES E. JORDAN, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS

THE GRAND JURY CHARGES AND PRESENTS:

1. At all times herein mentioned Lawrence Andrew Rainey was sheriff of Neshoba County, Mississippi; Cecil Ray Price was deputy sheriff of Neshoba County, Mississippi; Richard Andrew Willis was a patrolman of the Police Department of Philadelphia, Mississippi; and each was acting by virtue of his official position and under color of the laws of the State of Mississippi.

2. Commencing on or about January 1, 1964, and continuing to on or about December 4, 1964, Cecil

Ray Price, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Lawrence Andrew Rainey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker, and Richard Andrew Willis, within the Southern District of Mississippi, conspired together, with each other and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi.

3. It was a part of the plan and purpose of the conspiracy that Cecil Ray Price, while having Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in his custody in the Neshoba County Jail located in Philadelphia, Mississippi, would release them from custody at such time that he, Cecil Ray Price, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Alton Wayne Roberts, Jimmy Snowden, James E. Jordan, Billy Wayne Posey, Jerry McGrew Sharpe and Jimmy Lee Townsend could and would intercept Michael Henry Schwerner, James Earl Chaney and Andrew Goodman upon their leaving the area of the Neshoba County Jail, and threaten, assault, shoot and kill them.

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

/s/ ROBERT E. HAUBERG,
United States Attorney,

/s/ ROBERT OWEN,
Special Attorney,
Department of Justice.

A True Bill:

/s/ DALLAS H. COWAN,
Foreman of the Grand Jury.

APPENDIX F

In the United States District Court for the
Southern District of Mississippi
Eastern Division

Criminal No. 5216
18 U.S.C. 242, 371

UNITED STATES OF AMERICA
v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, JAMES E. JORDAN, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JIMMY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS

THE GRAND JURY CHARGES AND PRESENTS:

FIRST COUNT

1. At all times herein mentioned Lawrence Andrew Rainey was sheriff of Neshoba County, Mississippi; Cecil Ray Price was deputy sheriff of Neshoba County, Mississippi; Richard Andrew Willis was a patrolman of the Police Department of Philadelphia, Mississippi; and each was acting by virtue of his official position and under color of the laws of the State of Mississippi.

2. Commencing on or about January 1, 1964, and continuing to on or about December 4, 1964, Cecil Ray Price, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Lawrence Andrew Rainey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker, and Richard Andrew Willis, within the Southern District of Mississippi, conspired together, with each other, and with other persons to the Grand Jury unknown, to commit an offense against the United States in violation of Section 242 of Title 18 of the United States Code, that is to say that they conspired to wilfully subject Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each an inhabitant of the State of Mississippi, to the deprivation of their right, privilege and immunity secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be summarily punished without due process of law by persons acting under color of the laws of the State of Mississippi.

3. It was a part of the plan and purpose of the conspiracy that Cecil Ray Price, while having Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in custody in the Neshoba County Jail located in Philadelphia, Mississippi, would release them from custody at such time that he, Cecil Ray Price, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Alton Wayne Roberts, Jimmy Snowden, James E. Jordan, Billy Wayne Posey, Jerry McGrew Sharpe and Jimmy Lee Townsend could and would intercept Michael Henry Schwerner, James Earl Chaney and Andrew Goodman upon their leaving

the area of the Neshoba County Jail, and threaten, assault, shoot and kill them.

OVERT ACTS

Pursuant to the conspiracy and in furtherance of the objects thereof, the following defendants committed the following overt acts within the Southern District of Mississippi:

1. On June 21, 1964, Cecil Ray Price detained Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in the Neshoba County Jail located in Philadelphia, Mississippi, after sundown on that day until approximately 10:30 p.m.

2. On June 21, 1964, Billy Wayne Posey drove an automobile south on Highway 19 from Philadelphia, Mississippi.

3. On June 21, 1964, Cecil Ray Price drove an automobile south on Highway 19 from Philadelphia, Mississippi.

4. On June 21, 1964, Cecil Ray Price removed Michael Henry Schwerner, James Earl Chaney and Andrew Goodman from an automobile stopped on Highway 492 between Highway 19 and Union, Mississippi, and placed them in an official automobile of the Neshoba County Sheriff's office.

5. On June 21, 1964, Cecil Ray Price transported Michael Henry Schwerner, James Earl Chaney and Andrew Goodman from a place on State Highway 492 between Highway 19 and Union, Mississippi, to a place on an unpaved road intersecting Highway 19 south of Philadelphia, Mississippi.

6. On June 21, 1964, Billy Wayne Posey drove an automobile bearing the bodies of Michael Henry Schwerner, James Earl Chaney and Andrew Goodman from a place on the unpaved road intersecting Highway 19 south of Philadelphia, Mississippi, to

the vicinity of the construction site of an earthen dam, located near Highway 21, approximately 5 miles southwest of Philadelphia, Mississippi.

In violation of Section 371 of Title 18 of the United States Code.

SECOND COUNT

On or about June 21, 1964, in Neshoba County, Mississippi, and within the Southern District of Mississippi, Lawrence Andrew Rainey, sheriff of Neshoba County, Mississippi, Cecil Ray Price, deputy sheriff of Neshoba County, Mississippi, Richard Andrew Willis, a patrolman of the Police Department of Philadelphia, Mississippi, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend and Herman Tucker, while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill Michael Henry Schwerner, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Michael Henry Schwerner summarily and without due process of law and for the purpose and with the intent of punishing Michael Henry Schwerner for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Michael Henry Schwerner of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from

summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

THIRD COUNT

On or about June 21, 1964, in Neshoba County, Mississippi, and within the Southern District of Mississippi, Lawrence Andrew Rainey, sheriff of Neshoba County, Mississippi, Cecil Ray Price, deputy sheriff of Neshoba County, Mississippi, Richard Andrew Willis, a patrolman of the Police Department of Philadelphia, Mississippi, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend and Herman Tucker, while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill James Earl Chaney, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing James Earl Chaney summarily and without due process of law and for the purpose and with the intent of punishing James Earl Chaney for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive James Earl Chaney of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi

and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

FOURTH COUNT

On or about June 21, 1964, in Neshoba County, Mississippi, and within the Southern District of Mississippi, Lawrence Andrew Rainey, sheriff of Neshoba County, Mississippi, Cecil Ray Price, deputy sheriff of Neshoba County, Mississippi, Richard Andrew Willis, a patrolman of the Police Department of Philadelphia, Mississippi, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend and Herman Tucker, while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill Andrew Goodman, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Andrew Goodman summarily and without due process of law and for the purpose and with the intent of punishing Andrew Goodman for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Andrew Goodman of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law,

the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

/s/ ROBERT E. HAUBERG,
United States Attorney,
/s/ ROBERT OWEN,
Special Attorney,
Department of Justice.

A True Bill:
/s/ DALLAS H. COWAN,
Foreman of the Grand Jury.

U.S. GOVERNMENT PRINTING OFFICE: 1965