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LYNCHING AND THE LAW IN GEORGIA CIRCA 1931: A CHAPTER IN THE LEGAL CAREER OF JUDGE ELBERT TUTTLE

Anne S. Emanuel*

Elbert Parr Tuttle joined the federal bench in 1954, shortly after the Supreme Court decided Brown v. Board of Education. In 1960, he became the Chief Judge of the United States Court of Appeals for the Fifth Circuit, the court with jurisdiction over most of the deep south. As Chief Judge, he forged a jurisprudence that proved effective in overcoming the intransigence and outright rebellion of those who had long denied fundamental constitutional rights to African Americans.

This Essay traces an episode that occurred in 1931, when Tuttle spearheaded an effort to obtain a fair trial for John Downer, a black man accused by a white woman of rape. As a National Guard officer, Tuttle joined in an effort that saved Downer from lynching by a mob. He then took up Downer's cause in the courts. Even with the help of a number of highly regarded attorneys, he was unable to save Downer from death in Georgia's electric chair.

Tuttle's commitment to obtaining justice for one man, John Downer, would be echoed in a long and distinguished career. Elbert Tuttle died at the age of ninety-eight on June 23, 1996. An editorial in The New York Times commemorating his life and work closed with a fitting epitaph: "He brought honor to his calling and justice to millions of Americans."

* * *

"The past is never dead. It's not even past."—William Faulkner¹

"I always worked around white people; I had all the respect for them I could."—John Downer²

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¹ WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1950).

² Brief of Evidence at 58, State v. Downer (Oglethorpe, Ga. Super. Ct. 1933) (testi-

INTRODUCTION

Even casual observers of American history know that in May 1954 the Supreme Court issued its landmark opinion in *Brown v. Board of Education*.³ Few realize, however, that another event critical to the civil rights revolution occurred that same month when President Eisenhower appointed Elbert P. Tuttle to a new seat on the United States Court of Appeals for the Fifth Circuit.

Although the Fifth Circuit included most of the deep south—Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas—in 1954,⁴ few foresaw the depth or duration of the turmoil that would attend *Brown*'s implementation in the Fifth Circuit. Judge Tuttle himself did not. When a friend, upon hearing that Tuttle had accepted the appointment, asked if he had heard about *Brown*, Tuttle responded, "Oh yes, but they'll fall in line."⁵ He could not have been more wrong. But if Tuttle himself could not predict the extent and intensity of the South's resistance to the mandate of *Brown*, others could not foresee the intelligence, integrity, and fortitude with which Tuttle would meet and overcome that resistance.

At an extraordinary time in our nation's history, a concomitantly extraordinary group of men sat on the federal benches of the Fifth Circuit. Among them were Frank Johnson, Skelley Wright, Richard Rives, John Minor Wisdom, and John Brown—men whose names now reverberate in our legal history.⁶ Chief Judge Elbert Tuttle set the tone in the critical early years, from 1960 to 1967. Three decades earlier, a little known but highly provocative episode involving a near lynching and subsequent execution helped to shape his attitudes toward race, justice, and due process. This Essay examines that episode and its influence on Judge Tuttle.

mony of John Downer).

³ 347 U.S. 483 (1954).

⁴ In 1981, the old Fifth Circuit came to an end, and the new Fifth Circuit, with jurisdiction over Louisiana, Texas and Mississippi, was created. The new Eleventh Circuit assumed jurisdiction in Alabama, Florida, and Georgia. DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED* 244 (1988).

⁵ JACK BASS, *UNLIKELY HEROES* 15 (1981).

⁶ Johnson and Wright sat on district courts at the time; Rives, Wisdom, and Brown sat on the Fifth Circuit Court of Appeals. They, along with others among their colleagues, have been memorialized in numerous books and countless articles. See, e.g., BASS, *supra* note 5; FRANK T. READ & LUCY MCGOUGH, *LET THEM BE JUDGED* (1978); JOHN J. SPIVACK, *RACE, CIVIL RIGHTS AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT* (1990). Frank Johnson alone is the subject of at least three biographies. See JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* (1993); ROBERT F. KENNEDY, JR., *JUDGE FRANK M. JOHNSON, JR.* (1978); FRANK SIKORA, *THE JUDGE: THE LIFE AND OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR.* (1992).

I. A BRIEF HISTORY OF LYNCHING

Times were hard in Georgia in 1931. A period of relative peace and prosperity that began around 1924 abruptly halted in 1929 as the Great Depression swept away not only economic gains but also the modicum of relaxation in the oppression of blacks that had been realized. Early in 1930, Methodist minister Will Alexander,⁷ the executive director of the Commission on Interracial Cooperation (CIC), opined, "Lynching is almost galloping to extinction. Ten years from now we will be wondering how it really happened."⁸ Although the rate of lynching had slowed, by year's end, five black men were lynched in Georgia.⁹

For many, the term "lynching" gives rise to an image of a black man, accused of raping a white woman, being hanged by a mob of white men. Horrible as it is, that image does not begin to encompass the reality of lynchings. In its landmark 1919 study, the National Association for the Advancement of Colored People (NAACP) found that rape was not even alleged in seventy-one percent of the 3224 recorded lynchings that occurred during the previous thirty years.¹⁰ Reasons for lynchings included insulting whites or disputing their word, living with a white woman, being lazy, using inflammatory language, and throwing stones.¹¹ White newspapers sometimes reported racial prejudice and unpopularity as the underlying reason for a lynching.¹² A 1942 study found that of 3811 blacks lynched between 1889 and 1941, less than seventeen percent were accused of rape.¹³ The

⁷ For a biography of Alexander, see WILMA DYKEMAN & JAMES STOKELY, *SEEDS OF SOUTHERN CHANGE: THE LIFE OF WILL ALEXANDER* (1962). See also MORTON SOSNA, *IN SEARCH OF THE SILENT SOUTH: SOUTHERN LIBERALS AND THE RACE ISSUE* 20-41 (1977) (discussing Alexander's roles in founding the Commission on Interracial Cooperation and in improving race relations).

⁸ DONALD L. GRANT, *THE WAY IT WAS IN THE SOUTH: THE BLACK EXPERIENCE IN GEORGIA* 327 (1993). Though overly optimistic, Alexander was also prescient; the most recent study of lynching concluded that "1930 marked the end of widespread lynching in the South." STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930*, at 261 (1995). From the 1890s to the 1920s, lynchings declined significantly. In the 1890s, 799 blacks were lynched, while in the 1920s and 1930s the numbers were 206 and 88, respectively. *Id.* at 202.

⁹ GRANT, *supra* note 8, at 327. Five would prove to be the highest number recorded by any state in 1930. With no lynchings recorded, 1931 was a better year for Georgia. This was not for lack of trying, however; at least four times, mobs were "frustrated." *Georgia Women Laud 1931 Lynching Record*, ELBERTON STAR, Jan. 19, 1932, at 2.

¹⁰ NAACP, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES: 1889-1918*, at 10 (1919).

¹¹ GRANT, *supra* note 8, at 160.

¹² *Id.*

¹³ JOHN TURNER ET AL., *THE KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE* 27 (1982).

alleged "crimes" included threatening to sue a white man, trying to register to vote, becoming involved in union activities, showing disrespect for a white man, and speaking to or looking at a white woman.¹⁴

The actual hanging, moreover, was rarely the worst of a victim's ordeal. Victims were typically tortured. In one 1899 case, the sheriff in Newnan, a town about thirty-five miles from Atlanta, gave the jail keys to a mob so that it could lynch Sam Holt, a black man arrested for murder and rape.¹⁵ The lynching was hardly spontaneous. Atlanta newspapers anticipated it,¹⁶ and a special train carried some two thousand sightseers to the event.¹⁷ Before Holt was coated in oil and burned alive, parts of his body were cut away.¹⁸ Afterward, pieces of his flesh and bones were sold as souvenirs.¹⁹

Although an enraged mob seeking vengeance is a hallmark of lynchings, lynchings were not simply the spontaneous venting of a thirst for retribution. Instead, lynchings were a brutal method of social control that was sanctioned by much of society. After the Holt lynching, an *Atlanta Constitution* editorial urged those taken aback by the "terrible expiation" inflicted on Holt to "[k]eep the facts in mind! When the picture is painted of the ravisher in flames, go back and view that darker picture of Mrs. Cranford outraged in the blood of her murdered husband."²⁰ The newspaper had offered a five hundred dollar reward for Holt's capture, and after the much publicized lynching, the editors wrote, "The *Constitution* never issued a check

¹⁴ *Id.*

¹⁵ A subsequent investigation indicated that the rape never occurred and the killing may well have been in self-defense.

Reverdy C. Ransom, a militant black activist, financed an investigation of the Hose lynching from his base as an A.M.E. minister in Chicago. He hired a white detective who went to Georgia and obtained a statement from Mrs. Cranford. She said Hose had come to the Cranford house for pay due him and had quarreled with her husband, who ran into the house to get his revolver. Just as Cranford was about to shoot him, Hose picked up an ax and threw it at Cranford, killing him instantly. Hose then fled. Mrs. Cranford attested that Hose had not entered the house or assaulted her. Ida B. Wells, then the leader of the antilynching movement, also investigated the incident and confirmed Ransom's version. The results of these investigations did not appear in the white press. If they had, they probably would have caused the lynchings of suspected black informants.

GRANT, *supra* note 8, at 163-64 (Grant mistakenly referred to Holt as "Hose").

¹⁶ See, e.g., *Determined Mob After Hose; He Will Be Lynched if Caught*, ATLANTA CONST., Apr. 14, 1899, at 1 (in early articles, the *Atlanta Constitution* mistakenly referred to Holt as "Hose").

¹⁷ *Story of the Capture of Sam Holt by the Jones Brothers*, ATLANTA CONST., Apr. 24, 1899, at 1.

¹⁸ *Id.*; see GRANT, *supra* note 8, at 162.

¹⁹ GRANT, *supra* note 8, at 162-63.

²⁰ Editorial, *Keep the Facts in View*, ATLANTA CONST., Apr. 24, 1899, at 4.

with greater pleasure.”²¹

From 1882 to 1927, 510 blacks were lynched in Georgia, second only to Mississippi's 517.²² Events in Georgia in 1915 contributed to a national resurgence of lynching. On August 16, 1915, a mob lynched Leo Frank, the Jewish manager of an Atlanta pencil factory convicted of murdering thirteen-year-old worker Mary Phagan.²³ Tom Watson, a frustrated populist turned racist demagogue, used his popular newspaper, *Tom Watson's Magazine*, to fan the flames of anti-Semitism that led to the Frank lynching.²⁴ Watson also used the paper to incite racist and anti-Catholic sentiment.²⁵ A few months after the Frank lynching, on Thanksgiving 1915, the Knights of Mary Phagan reconvened at Stone Mountain, near Atlanta. They called themselves the Ku Klux Klan.²⁶ Within weeks, the Klan received a boost from an unlikely source—a movie.²⁷

An earlier manifestation of the Klan flourished after the Civil War but faded away after federal legislation, enacted in 1871, authorized the President to use federal troops against the group.²⁸ Thomas Dixon glorified the early Klan and vilified blacks in his novel, and subsequent play, *The Clansman*.²⁹ D.W. Griffith later turned *The Clansman* into *The Birth of a Nation*, a cinematic classic which opened in Atlanta on December 6, 1915.³⁰ Based on a book in which “[b]lacks were depicted as ignorant bar-

²¹ *Id.*

²² Texas followed with 370. WALTER WHITE, ROPE AND FAGGOT 234 (1929).

²³ In *Frank v. Mangum*, 237 U.S. 309 (1915), the Supreme Court recognized that the domination of a trial by a mob could frustrate a defendant's right to due process, but the Court declined to find a constitutional violation. *Id.* at 335-38. Subsequently, Governor John Slaton commuted Frank's sentence to life imprisonment, an act that triggered a mob attack on the governor's home. William F. Holmes, 1890-1940: *Civil Rights*, in A HISTORY OF GEORGIA 292 (Kenneth Coleman ed., 2d ed. 1991).

²⁴ Holmes, *supra* note 23, at 292.

²⁵ *Id.*

²⁶ *Id.* at 292-93. Even before the formal reorganization of the Klan, black Georgians had begun to flee the state to escape the terrors of nightriders. Some date the beginning of the Great Migration in Georgia to 1914, when five trains packed with black laborers left Savannah heading north. Over the next five years, thousands of blacks left Georgia, creating a labor shortage that the Commissioner of Commerce and Labor called “acute.” GRANT, *supra* note 8, at 290. Not everyone was dismayed, however. In 1919, for example, W.E.B. Dubois exulted in reporting that women from some of Georgia's “first families” had to help with field work. *Id.* at 293.

²⁷ NANCY MACLEAN, BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN 12-13 (1994); GEORGE TINDALL, THE EMERGENCE OF THE NEW SOUTH 1913-1945, at 187 (1967).

²⁸ TURNER, *supra* note 13, at 14.

²⁹ THOMAS DIXON, JR., THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN (1905).

³⁰ GRANT, *supra* note 8, at 315. The movie was shown in Elberton the Thursday before the incident chronicled in this Essay occurred. A four inch banner headline ad-

barians, lusting after fair young white maidens, corrupting the political process, and swaggering domineeringly over the good white citizens who were trying to rescue the vestiges of their superior civilization,"³¹ the movie broke local attendance records.³² Lynchings of blacks increased from a national total of sixty-nine in 1914 to ninety-nine in 1915.³³ Legitimized and glorified by the movie, the Klan posted a national membership of perhaps two million by 1924; by 1923, some fifteen thousand Atlantans had joined klaverns.³⁴

II. ELBERT P. TUTTLE: THE YOUNG ATTORNEY

Nineteen twenty-three was also the year Elbert Tuttle arrived in Atlanta. He moved there at the behest of his brother-in-law, Bill Sutherland, a native Georgian. Tuttle and Sutherland first met in the summer of 1917. Tuttle, then a Cornell undergraduate, could not afford to return home to distant Hawaii, so he accepted an invitation from friend and classmate Strawn Perry to spend the summer with Perry's family in Jacksonville. The two young men arrived one June morning around ten o'clock. Indefatigable, Perry had arranged a swimming party for noon. Among the guests was his neighbor, eighteen-year-old Sara Sutherland. Elbert Tuttle fell in love at first sight.³⁵

Later that summer, Sara's brother Bill came home for a brief visit, bringing his law school roommate, Mac Asbill. Tuttle met the two, but not much of a bond was formed. Bill and Mac were Harvard Law School men, while Elbert Tuttle was still an undergraduate. The gap seemed considerable. It narrowed with the passing of time, however, and in 1923, Bill and Mac, who were practicing law in Atlanta, happily welcomed their brother-in-law to town.³⁶

vertisement announced the screening of this astonishingly popular movie. Advertisement, *Strand One Day Thursday: The Birth of a Nation with Sound*, ELBERTON STAR, May 12, 1931. In 1972, the movie was arguably still the most profitable film ever made. LAWRENCE KARDISH, REEL PLASTIC MAGIC 70 (1972).

³¹ GRANT, *supra* note 8, at 190. Southern historian George Tindall described the film as "a gross distortion of history" that "brilliantly evoked the Southern mythology of Reconstruction." TINDALL, *supra* note 27, at 186.

³² GRANT, *supra* note 8, at 315.

³³ WHITE, *supra* note 22, at 231.

³⁴ GRANT, *supra* note 8, at 319.

³⁵ Interview with Judge Elbert Tuttle, in Atlanta, Ga. (Mar. 19, 1993). He never fell out of love, and Sara and Elbert Tuttle's devotion to each other was legendary. On October 22, 1994, they celebrated their 75th wedding anniversary. On November 26, 1994, Sara Tuttle died in her sleep at home, with her husband at her side.

³⁶ Mac Asbill married the third and youngest of the Sutherland siblings, Jennie, in 1921. *Id.* By 1923, Asbill had become a partner in Watkins, Russell & Asbill. He would not join his brothers-in-law in practice until after World War II. *See infra* note 42.

Bill Sutherland had graduated with honors from Harvard Law School in 1917. His career began auspiciously, with a two year stint as "legal secretary" to Louis Brandeis, who was a newly appointed Justice of the United States Supreme Court.³⁷ Recognizing the importance of the development of federal agencies, Brandeis suggested that his young clerk next work at the Federal Trade Commission (FTC). After some fifteen months as an attorney and examiner at the FTC, Sutherland moved to Atlanta in January 1921. He formed a "loose association" with Jones, Evins & Moore.³⁸ At that time, partnerships rarely offered salaried positions to associates, and Jones, Evins & Moore was no exception. The firm gave Sutherland office space and referred work to him, and in return, he shared with the partners any fees he earned.

Before arriving in Atlanta in 1923, Tuttle graduated from Cornell Law School, where he was editor-in-chief of the law review. His wife, Sara, who was born in College Park, just outside of Atlanta, wanted to return home. He would have preferred to have returned to Hawaii, but when he proposed the idea, Sara responded, "Oh no, it's too far away." "Too far from where?" he asked, tweaking her. "From here," she responded firmly. He did not persist. They moved to Atlanta, where Tuttle joined an established and respected firm, Anderson, Rountree & Crenshaw.³⁹

In early 1924, Sutherland won a case⁴⁰ in the Georgia Supreme Court for which he earned a fee of twenty-five hundred dollars. Sutherland and Tuttle wanted to form a partnership and calculated that this nest egg would cover expenses for a year. Tuttle left his job and moved into an office next to Sutherland's, and the two attorneys established the firm of Sutherland & Tuttle.⁴¹ In 1928, Sutherland and Tuttle hired their first associate, Joseph

³⁷ Joseph Brennan, Sutherland, Asbill & Brennan Firm History (Feb. 1979) (unpublished manuscript, on file with author).

³⁸ MARTINDALE'S AMERICAN LAW DIRECTORY 108 (1923). "Jones" was Robert P. Jones, the father of golf champion Robert Tyre (Bobby) Jones.

³⁹ Sullivan & Cromwell in New York had offered Tuttle a position at \$150 per month, the going rate for associates in the best New York firms. At Anderson, Rountree & Crenshaw, Tuttle received \$175 per month. Tuttle was married and the father of a son when he interviewed with Dan Rountree. Tuttle calculated the salary he would need to support his young family, asked for it, and Rountree agreed. Rountree, who had acquired Coca-Cola stock soon after it went public, was a wealthy bachelor nearing retirement. He agreed to Tuttle's request, Tuttle modestly surmised, because "the dollars and cents just didn't mean that much to him." Interview with Judge Tuttle, *supra* note 35.

⁴⁰ *Hartley v. Nash*, 121 S.E. 295 (Ga. 1924). In an opinion by Chief Justice Russell, the father of Senator Richard Russell and Judge Robert Russell of the United States Court of Appeals for the Fifth Circuit, the court reversed itself and upheld the right to interest on past-due county warrants. Sutherland owed his involvement in this litigation to his father-in-law, former Georgia Attorney General Hewlett Hall. Interview with Judge Tuttle, *supra* note 35.

⁴¹ Sutherland & Tuttle is now Sutherland, Asbill & Brennan. See *infra* note 42 (de-

B. Brennan, a native of Savannah, Georgia and a recent Harvard Law School graduate.⁴²

From its inception, Sutherland & Tuttle was a "silk stocking law firm." The two founding partners were both educated at Ivy League schools; both were from families of substance, if not wealth, and of social standing;⁴³ both married into similar families;⁴⁴ and both were themselves part of Atlanta's professional and social elite.⁴⁵ Nonetheless, neither hesitated to align himself with what he determined to be the right side of a cause, no matter how unpopular that position proved to be.⁴⁶

tailoring the name change). Although Sutherland and Tuttle traced their start to 1924, they continued a "loose association" with Jones, Evins & Moore. Sutherland is also listed in *Martindale's Directory* for 1925 and 1926 as the resident partner of Miller & Chevalier, one of the leading federal tax firms in the country. MARTINDALE'S AMERICAN LAW DIRECTORY 117 (1925); MARTINDALE'S AMERICAN LAW DIRECTORY 127 (1926). *Martindale's* does not list the firm Sutherland & Tuttle until 1927. MARTINDALE'S AMERICAN LAW DIRECTORY 140 (1927). By 1930, Sutherland & Tuttle had received an "a v" rating, and the notation "no collections under \$500" was included in the firm's description. MARTINDALE'S AMERICAN LAW DIRECTORY 167 (1930). Oddly, even though Sutherland & Tuttle is listed in the 1927 and 1928 directories, the listing for Jones, Evins, Moore & Powers continued to include Bill Sutherland as an associate. MARTINDALE'S AMERICAN LAW DIRECTORY 137 (1927); MARTINDALE'S AMERICAN LAW DIRECTORY 147 (1928).

⁴² Brennan became a partner in the firm in 1933, whereupon the name was changed to Sutherland, Tuttle & Brennan. In 1952, Tuttle left to become General Counsel to the U.S. Treasury. By then, their brother-in-law, Mac Asbill, had joined the firm, and it had been renamed Sutherland, Asbill & Brennan, which is the firm's current name. Brennan, *supra* note 37.

⁴³ Tuttle met the Sutherlands through his friend and classmate Strawn Perry, whose father was the president of the Florida National Bank and whose family members were friends and neighbors of the Sutherlands in Jacksonville. Interview with Sara Tuttle, wife of Judge Elbert Tuttle, in Atlanta, Ga. (June 1, 1993). Tuttle's father was the acting president of the Outrigger Club in Honolulu from 1909 to 1910, sandwiched between the founder, A.H. Ford, and the second president, Sanford Dole. HAROLD YOST, *THE OUTRIGGER* 39 (1971).

⁴⁴ Tuttle married into the Sutherland family. Sutherland married the former Sarah Hall of Newnan, Georgia, whose father, Hewlett Hall, was a prominent attorney who served as Attorney General of Georgia from July 14, 1910 until June 30, 1911. GEORGIA OFFICIAL AND STATISTICAL REGISTER 1171 (1975-76).

⁴⁵ Both Bill Sutherland and Elbert Tuttle were early members of the Piedmont Driving Club. Organized in 1887 and chartered in 1895, the Piedmont is Atlanta's most exclusive private club. MELISSA FAY GREENE, *THE TEMPLE BOMBING* 30 (1996). Sutherland was elected to membership in 1922, and Tuttle, in 1925. *PIEDMONT DRIVING CLUB, MEMBERS' HANDBOOK* 1984-1985, at 51 (1984).

⁴⁶ This Essay addresses the *Downer* case. Perhaps even more remarkable was the firm's willingness to take up the *Herndon* case. Downer was a black man accused of rape, a charge many recognized as often spurious. Herndon, on the other hand, was a young black man charged with insurrection due to his American Communist Party re-

III. THE LEGAL LYNCHING OF JOHN DOWNER

A. *The Arrest: Fighting Off the Mob*

On May 19, 1931, Elbert Tuttle received a telephone call from Homer C. Parker, the Adjutant General of the Georgia National Guard. Parker wanted Tuttle, a captain in the Guard,⁴⁷ to go to Elberton, a town approximately one hundred miles from Atlanta. A young white woman had accused a black man of rape.⁴⁸ She identified John Downer, and Downer implicated Isaac McCauley. Both men were taken to the county jail, which was located on the second floor of the sheriff's home.⁴⁹

cruitment activities. See CHARLES H. MARTIN, *THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE* (1976).

⁴⁷ Never having lived in Georgia prior to moving there in 1923, Tuttle worried about how to identify himself with his new home state. When he mentioned to Bill Sutherland that he had a second lieutenant's commission in the U.S. Army and thought he might join the National Guard, Sutherland put him in touch with Charlie Cox, a major in command of a National Guard infantry battalion in the 122nd Infantry Regiment. Cox assured Tuttle that if he enlisted, he would be commissioned quickly. Tuttle did receive a commission, as a second lieutenant in the Howitzer Company of the 122nd Infantry Regiment. Clifford M. Kuhn, *Creating "A Peaceful Revolution in Race Relations": An Oral History Interview with Judge Elbert Parr Tuttle*, 2 GA. J.S. LEGAL HIST. 149, 152 (1993).

⁴⁸ This accusation was perhaps the most inflammatory one that could be made. In a December 20, 1921 missive to the United States Congress opposing the Dyer anti-lynching bill, former Georgia Governor Joseph M. Brown wrote:

First, let me call your attention to the fact that the victims of the mobs for whose deaths the States are condemned in almost all cases were charged with being guilty and quite likely generally were guilty of crimes so heinous and so revolting as to have set on fire the brains of the ordinarily law-abiding manhood of the communities wherein these crimes had been done. And this flaming wrath, particularly against negroes who had assaulted white women has culminated in the hanging or burning at the stake of the despicable felons not only in the South but also in such States as Pennsylvania, Colorado and even Illinois, the State of Abraham Lincoln.

Joseph M. Brown, Missive to the Senators and Representatives of the U.S. Congress of the United States (Dec. 20, 1921) (on file with author). Among the worst of the resulting evils, Brown wrote, was that the mob usurped the legitimate authority of the state. *Id.* He contended that a federal anti-lynching bill represented a great evil as well because it too would usurp the legitimate authority of the states. *Id.* Such claims of states' rights have a long, dishonorable history of use in the support of segregation.

Representative L.C. Dyer, a Republican from Missouri, first introduced his anti-lynching bill in 1911, and he continued to introduce it in almost every session of Congress until his defeat in 1934. Strongly supported by the NAACP, the bill passed the House of Representatives in 1922 but was defeated by a filibuster in the Senate. DONALD L. GRANT, *THE ANTI-LYNCHING MOVEMENT: 1883-1932* (1975).

⁴⁹ Habeas Hearing Transcript at 92, *Downer v. Dunaway*, 1 F. Supp. 1001 (M.D.

A total of six black men were quickly arrested in connection with the alleged assault. Earlier in the day, four of the men were transported to the jail in nearby Athens, Georgia. En route, the car carrying them was fired on and nearly overtaken.⁵⁰ Rumors that the Athens jail would be attacked at seven o'clock that night led to a decision to move the four to Atlanta. The second move required a caravan of four cars, two carrying the prisoners and two others, one ahead and one behind, carrying "[o]fficers armed with riot guns, rifles, pistols and shotguns."⁵¹

Meanwhile, a mob several hundred strong was gathering in Elberton. The judge, sheriff, mayor, and police chief called the governor and described the situation as serious. Shortly after three o'clock that afternoon, Governor Hardman issued a proclamation putting the city under martial law. General Parker ordered two Elberton units—a local machine gun company and a headquarters company—to duty. By the time they reached the jail, members of the mob were at the cell and were hammering away at the lock. The local Guard units managed to clear the jail, but they were not able to secure the sheriff's home downstairs, much less the surrounding grounds. General Parker dispatched Tuttle to bring tear gas grenades to the beleaguered troops.⁵²

Tuttle called Leckie Mattox, a captain in the National Guard, and asked Mattox to join him.⁵³ Mattox was Tuttle's closest friend and a cousin of Sara Tuttle. Thinking that it might be useful to be able to blend into the mob, the two men decided that Mattox would wear civilian clothes. Tuttle changed into his uniform, picked up Mattox and the tear gas, and raced toward Elberton. They arrived shortly after sundown, and just in time to hear a burst of machine gun fire from the jail.⁵⁴

Tuttle and Mattox arrived at a pivotal moment. Increasingly confident that the local Guard members would not fire their machine guns at them, the mob ignored the machine gun positions set up to secure the jail and crowded into the yard and even into the sheriff's home below the jail. Members of the mob were yelling, "[T]hey haven't got any ammunition. They have just got blanks."⁵⁵ The last line of defense was a machine gun at the top of the stairs manned by Captain Marion Williamson and the regimental command-

Ga. 1932) [hereinafter *Downer Habeas Transcript*] (testimony of Elbert Tuttle). Unless otherwise noted, the description of the scene at the jail is derived from the testimony of witnesses as recorded in this transcript.

⁵⁰ *Calm Follows Furious 48-Hour Storm in Elberton*, ELBERTON STAR, May 19, 1931, at 1.

⁵¹ *Tear Gas Bombs, Rifle Fire Used to Save Negroes*, ATLANTA CONST., May 19, 1931, at 1.

⁵² *Downer Habeas Transcript*, *supra* note 49, at 92-93.

⁵³ *Id.*

⁵⁴ *Id.* at 92-93, 175-76.

⁵⁵ *Id.* at 13 (testimony of Colonel Gerald P. O'Keefe).

er, Colonel Gerald P. O'Keefe, both Guard officers from Atlanta. Just as Tuttle and Mattox arrived, the mob began sallies up the stairs. Colonel O'Keefe fired several rounds with his pistol, calling out that he was not firing blanks. When his warning was ignored, he ordered machine gun fire. At least one man was struck in the leg.⁵⁶ Almost simultaneously, Tuttle and Mattox lobbed several canisters of tear gas.

Attacked from two sides, the crowd was shaken. Tuttle made his way inside, where he and Major Drake, the local commander, managed to move the mob out of the sheriff's house. Over the next hour, the crowd continued to swell. Tuttle found the fire chief and had him attempt to disperse the crowd with a hose. The mob quickly gained control of the hose, however, and directed it at the jail, breaking the windows and drenching the prisoners and their guards.⁵⁷ Fortuitously, the water also quenched the tear gas that had drifted upstairs.

Elberton boasts a wealth of granite and marble. Then, as now, quarries abounded, and dynamite used in quarrying was readily accessible. The mob threatened to blow up the jail if the two black men were not turned over to them. Emissaries from the crowd came to warn Colonel O'Keefe of the plan, saying the only thing that was preventing its implementation was the concern for Elberton soldiers inside the jail. O'Keefe took care to keep them there. Circulating in the crowd outside, Mattox attempted to circumvent the plan by "talking to groups of men . . . as if I were one of the Elbert County people; and the gist of my remarks was that we did not want to blow up a bunch of our Elbert County boys in there just to get a couple of negroes."⁵⁸

The threats continued. Finally an emissary, whom O'Keefe believed to be a superintendent of a quarry, warned the colonel that the crowd had dynamite and that they would detonate a warning blast and then give the soldiers five minutes to clear the jail. About this time, two companies from Monroe, Georgia arrived. O'Keefe had them unload in the square, assemble in formation, and march to the jail. The show of force had little effect. Shortly thereafter, a small explosion, which O'Keefe believed to be the warning blast, shook the jail.⁵⁹

Inside, the officers devised a plan. Two guardsmen gave their uniforms

⁵⁶ Although Colonel O'Keefe and Captain Williamson testified to firing down the stairs, not out the windows, one newspaper reported that the two returned the fire coming from the courthouse grounds and thereby wounded two men, one so critically that his leg would likely be amputated. *Id.* at 13, 47; *Tear Gas Bombs, Rifle Fire Used to Save Negroes*, *supra* note 51, at 1.

⁵⁷ *Negro Suspects are Brought to Atlanta for Safekeeping After Rifle Fire, Tear Gas Bombs Suppress Elberton Mob*, ATLANTA CONST., May 20, 1931, at 1.

⁵⁸ *Downer Habeas Transcript*, *supra* note 49, at 177-78 (testimony of W.L. Mattox).

⁵⁹ *Id.* at 18-19 (testimony of Colonel O'Keefe); see *Negro Suspects are Brought to Atlanta for Safekeeping After Rifle Fire, Tear Gas Bombs Suppress Elberton Mob*, *supra* note 57, at 1.

to the prisoners, who were then placed in the middle of the units. Most of the lights in the jail had been broken, and the remaining ones were extinguished. Under cover of darkness, the prisoners were ferreted out of the jail among clusters of soldiers. They were put on the floors of cars parked outside, surrounded by groups of soldiers trying to look as if they were simply lounging. Near midnight, troops from Atlanta arrived, and the prisoners were moved to troop buses. Their ruse undetected, the National Guard units drove off, leaving behind a mob that, at its peak, numbered two thousand people.⁶⁰ What would have been the first two lynchings in Georgia in 1931 had been averted. Tuttle's involvement, however, was just beginning.

B. *Speedy Indictment, Instant Trial*

During the melee, the mob was promised a speedy trial in Elberton.⁶¹ A local Baptist minister, Reverend Henry Brookshire, tried to dissuade the mob from violence. Arguing with the leaders, he committed himself to insuring a speedy trial, saying he would call the judge and ask him to set a special term of court. As he spoke, someone else made the call and reported back that the judge had agreed.⁶² By forestalling the mob until reinforcements arrived, Brookshire helped save both prisoners from a terrible death. Implicit in his plea to let the law take care of the matter, however, was a promise that the law would take care of the matter in a manner satisfactory to the mob by promptly ordering the execution of the accused.⁶³ The next morning, the local superior court judge convened a special term of court and empaneled a grand jury. The grand jury returned an indictment against Downer, and the trial was scheduled to begin the following day.

At nine o'clock in the morning on Monday, May 26, just more than a week after the alleged crime was committed, Judge Moseley convened court and appointed three attorneys to represent Downer.⁶⁴ Southern attorneys typically resisted representing black defendants in cases involving the rape of a white woman.⁶⁵ Appointing more than one attorney, however, served

⁶⁰ See *Downer v. Dunaway*, 1 F. Supp. 1001, 1002 (M.D. Ga. 1932). At the time, Elberton had a total population of approximately 4650 people. Respondent's Brief at 7, *Downer v. Dunaway*, 53 F.2d 586 (5th Cir. 1931) (No. 6286).

⁶¹ *Downer Habeas Transcript*, *supra* note 49, at 64 (testimony of Captain Marion Williamson).

⁶² *Id.* at 162-63 (testimony of Reverend Henry Brookshire).

⁶³ See DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 115 (1979).

⁶⁴ *Downer Habeas Transcript*, *supra* note 49, at 138 (testimony of Charles Smith).

⁶⁵ At the habeas hearing, one of the appointed attorneys, Charles Smith, explained that the judge had called him the day before, after the grand jury returned the indictment. Smith had moved back to Elberton only recently. He tried to avoid appointment by pointing out that his practice would never prosper in Elberton if he started with this

to diffuse both the stigma and the responsibility associated with such representation.⁶⁶

Because of the hysteria surrounding Downer's arrest, his case cried out for a motion for change of venue. Even the Governor had expressed concern.⁶⁷ Captain Williamson later recalled a conversation between Governor Hardman and Judge Moseley: "[T]he Judge said nothing would satisfy the people of Elbert County other than a speedy trial. The Governor told [the judge] he was not going to send that negro back up there to be lynched like that one was lynched at Cartersville."⁶⁸

On Thursday of the week between the near-lynching and the trial, Captain Saunders of the Elberton Machine Gun Unit of the National Guard had called Captain Williamson at General Parker's office. He reported that dynamite was found around the jail and that "things were in pretty bad shape, . . . [and] the people of the county were mighty sore."⁶⁹ The next day three Elberton officers came to Atlanta and, along with Captain Williamson, General Parker, and General Napier, met with the Governor and the Attorney General. At the Governor's office, the spokesperson for the Elberton delegation told the Governor

that Major Drake asked them to come and tell the Adjutant General [Parker] that if they were going to try the negro up there and send troops to Elberton, to be sure to send enough of them; to send at least eight hundred. . . . [The spokesperson explained] that they were organizing in Elbert County and surrounding counties, and that they were going to have

case. The judge merely explained that many attorneys were disqualified because they sometimes represented the state or had other valid excuses, and he needed to appoint Smith. Smith testified that he was uncertain whether he would actually be appointed until court convened the next morning and Judge Moseley announced his name. *Id.* at 133-35.

⁶⁶ In addition, Smith agreed to serve only if he was joined by at least two other local counsel. *Id.* at 135.

In the infamous Scottsboro case, which grew out of an incident that occurred in March 1931, the trial judge appointed the entire local bar to represent the defendants at the arraignment until or unless other counsel appeared. *CARTER*, *supra* note 63, at 17. On appeal, the U.S. Supreme Court recognized that appointment as a sham. *Powell v. Alabama*, 287 U.S. 45, 55-58 (1932).

⁶⁷ Captain Marion Williamson testified that General Parker told him that "the Governor was very much alarmed over the situation." *Downer Habeas Transcript*, *supra* note 49, at 55.

⁶⁸ *Id.* John Will Clark was lynched at Cartersville, the last of five black men lynched in Georgia in 1930. "A picture of the mob, with its smiling members arranged around the body, was printed in the black press." *GRANT*, *supra* note 8, at 327.

⁶⁹ *Downer Habeas Transcript*, *supra* note 49, at 56 (testimony of Captain Williamson).

leaders . . . and that they were determined to get the negro, and Colonel O'K[e]ffe because they felt that Colonel O'K[e]ffe, was the man that shot the local boy. . . . Then the Governor called on each one present to tell him what he thought the situation was in Elbert County. Each one said that there was a lot of spirit up there, and said that some of the officials up there were very wrought up on account of the troops having been called out; said that the local guard was being called the negro guards, that is, the National Guard, and nigger loving sons of bitches, and things like that.⁷⁰

At the later habeas hearing, Captain Williamson was asked if anything else was said about a change of venue. He responded, "Yes, sir, General Parker said that he had talked to Justice Russell and Justice Hines [of the Georgia Supreme Court], and they said it would be very, very bad to try the negro up there."⁷¹ Captain Williamson also testified that "the Attorney General told the Governor, that if troops were going to be present, the law made it mandatory on the Judge to change the venue."⁷²

The Governor asked the National Guard officers what they thought he should do, and General Parker responded that "it ought to be suggested to the Judge that the venue be changed."⁷³ The Governor arranged for another conference the next day. Everyone returned (except one of the Guard officers from Elberton), and they were joined by the sheriff, the chief of police, the mayor, a county commissioner, and Judge Moseley. Although everyone agreed that troops would be necessary if the trial was conducted in Elberton, most of the Elberton officials did not want a change of venue.

Some of the officers, and Chief Irwin was one, wanted to proceed with the trial there, because of the promise made the mob, and because he thought it would be a lesson to other negroes in the county. . . . [H]e felt like it ought to be tried there, and some of the others did too. That was the consensus of opinion. The Mayor finally said that he did not think it ought to be tried there, and that he did not want to try it there. He said that, my dear wife has got more sense than I have, and when she kissed me good bye this morning, she

⁷⁰ *Id.* at 57-59.

⁷¹ *Id.* at 59. The court sustained an objection to the justices' opinions as being irrelevant. *Id.* at 60-61.

⁷² *Id.* at 61. The state objected to this opinion, but no ruling on the objection appears in the transcript. *See id.*

⁷³ *Id.* at 62.

said that negro ought not to be tried here.⁷⁴

Finally, the Governor turned to Judge Moseley, and

asked him what he thought ought to be done, . . . and he said to the Governor that it would be hard to suggest anything. Then the Governor asked him what he thought about a motion to change the venue. Judge Moseley said, Governor, I will take that matter up at the proper time.⁷⁵

The judge never ruled on the matter because Downer's attorneys did not make a motion for change of venue.⁷⁶

Downer's attorneys also failed to move for a continuance. The recent rioting, combined with the "high feelings" so evident in Elberton and controlled only by a show of superior military force, demanded a continuance until tempers cooled. In addition, Downer's attorneys were entitled to time to investigate the incident and prepare for trial. Nonetheless, they only asked for time to speak with Downer and to subpoena the witnesses who could verify that Downer was home in bed all evening. Between ten-thirty and eleven o'clock in the morning, the attorneys announced they were ready to proceed.⁷⁷ Downer's attorneys had prepared for his capital murder trial in less than two hours, without ever leaving the courthouse.

John Downer now stood on trial for his life in the Elbert County Courthouse. One week earlier, he had stood in the adjacent jail in jeopardy of losing his life to a lynch mob. That mob was pacified partly by the promise of a swift trial in Elberton, and that promise was not broken.

The trial commenced as five hundred spectators, joined by the two to three hundred National Guardsmen (including Tuttle) who were on duty to prevent further violence, crowded the courtroom and courthouse.⁷⁸ The proceedings began with the testimony of the alleged victim and her companion on the evening of the incident, whom she had married during the interven-

⁷⁴ *Id.* at 64.

⁷⁵ *Id.* at 65.

⁷⁶ At the hearing on the habeas petition, one of Downer's attorneys conceded the obvious—that violence would have erupted again had the trial court granted a change of venue. *Id.* at 149 (testimony of Charles Smith).

⁷⁷ *Id.* at 139.

⁷⁸ The description of the trial is from the transcript of the habeas proceeding, the transcript of the second trial, and newspaper accounts. No transcript of the first trial exists, although the transcript of the hearing on the habeas petition indicates that the proceedings were transcribed.

At the time, transcripts of proceedings in Georgia's state courts were not verbatim. The questions were not recorded, and each witness's testimony was set forth in narrative style.

ing week.⁷⁹ She again identified Downer.⁸⁰ Next, the sheriffs of Elbert, Lincoln, and Wilkes counties testified that they followed footprints from the alleged crime scene to Downer's nearby home and that Downer told them that the shoes that made the prints were lent to Isaac McCauley, a man with whom he often exchanged clothing. McCauley took the stand and denied borrowing the shoes. Finally, Dr. D.N. Thompson testified that, based on his examination of the victim shortly after the event, he believed that her hymen had recently ruptured, causing bleeding. He also stated that he observed bruises around her thighs and on the side of her head.⁸¹

According to the alleged victim and her husband, they were riding in his car and stopped for him to have a cigarette when they were accosted by a black man waving a pistol.⁸² The attacker forced the young woman out of the car and raped her. Downer lived near the site of the alleged assault. The next day, officers, claiming they followed footprints from the scene of the crime to Downer's house, found Downer at home and arrested him.

The alleged victim lived in a boarding house with her sister. Instead of taking her home, her companion took her to his brother's house. Dr. Thompson, a local physician, examined her that evening and gave her a sedative the next morning. Around three o'clock that afternoon, she awoke to find two sheriffs and John Downer outside her bedroom window. She identified Downer as her assailant: "After having seen him I could identify him as being the person who made the assault on me."⁸³ "She described her attacker by size, color, and thick lips."⁸⁴

Tuttle was not convinced that the rape even occurred. Several young guardsmen who bantered with the alleged victim as she waited to testify told him bluntly that they did not believe she was raped.⁸⁵ The alleged victim was wearing her sister's dress, and the bleeding from her ruptured hymen apparently soiled it. In 1931, premarital sexual activity carried an enormous stigma. If her bleeding and disarray were caused by a tryst with her ardent suitor, she might resort to explaining it with a cry of rape. At the habeas

⁷⁹ See *infra* notes 82, 86.

⁸⁰ The victim was not cross-examined. *Downer Habeas Transcript*, *supra* note 49, at 141 (testimony of Charles Smith). Smith testified that he thought the defense cross-examined her, but conceded that the record did not reflect that they had. *Id.*

⁸¹ L.A. Farrell, *Girl's Attacker Is Found Guilty at Elberton, Ga.*, ATLANTA CONST., May 27, 1931, at 1.

⁸² At the time of the alleged rape, the couple had not yet married. See *Downer Habeas Transcript*, *supra* note 49, at 128 (testimony of W.T. Hunnicutt) (indicating that they were merely dating at the time of the incident); see also *infra* note 86 (discussing the timing of the marriage).

⁸³ Brief of Evidence at 10, *State v. Downer* (Oglethorpe, Ga. Super. Ct. 1933).

⁸⁴ Appellee's Brief at 3, *Downer v. Dunaway*, 53 F.2d 586 (5th Cir. 1931) (No. 6286).

⁸⁵ See BASS, *supra* note 5, at 36-37.

hearing, Captain Williamson testified that he thought her injuries were inflicted by her companion, who was by then her husband.⁸⁶ Several critical witnesses, including the alleged victim, her sister, and the doctor, were not cross-examined.⁸⁷ The defendant's attorneys did cross-examine the companion, but only in a cursory manner, without challenging his account of how he and the young woman were overpowered and without exploring the possibility that he had ruptured her hymen during intercourse.⁸⁸

At the time of the Downer trial, under Georgia law, a criminal defendant was not competent to testify under oath. The defendant could, however, make an unsworn statement in his or her defense. Neither the defense counsel nor the prosecution had the right to examine the defendant.⁸⁹ Downer made an unsworn statement in which he explained the footprints by saying that he lent his shoes to Isaac McCauley that Sunday evening, knowing McCauley might rob people parked where the alleged crime occurred. Downer testified that when McCauley brought the shoes back he told Downer, "I raped a white girl," and Downer replied, "Why did you want to do that? You have got me into trouble and yourself too."⁹⁰

Downer's statement was not credible. The lack of credibility, however, does not necessarily indicate guilt. Downer's wife and grandmother, respectively, described him to his lawyer as not being "bright in his mind" and not always having "a good mind."⁹¹ When seized by the sheriffs and confronted with the tracks, Downer surely believed that proof that he had made the tracks would be viewed as proof that he had committed the crime, so he desperately tried to dissociate himself from the tracks. His lawyers did not

⁸⁶ See *Downer Habeas Transcript*, *supra* note 49, at 85 (testimony of Captain Williamson); see also *Statewide Interest in John Downer Hearing*, *ELBERTON STAR*, July 8, 1932, at 1 (reporting Captain Williamson's testimony). The couple married in the week between the incident and the trial. Under Georgia common law, a wife is not competent to testify against her husband for a criminal offense against her person. See, e.g., *Peters v. State*, 444 S.E.2d 609, 611-12 (Ga. Ct. App. 1994). Neither the possibility that the young suitor forced himself on his companion or that the couple engaged in consensual sex was raised at the trial.

⁸⁷ *Downer Habeas Transcript*, *supra* note 49, at 141-42 (testimony of Charles Smith).

⁸⁸ *Id.* at 85 (testimony of Captain Williamson).

⁸⁹ Georgia was the last jurisdiction in the United States to follow this hoary common law rule. Ed Alex Davis, Comment, *To Question or Not to Question—That is the Question!!!*, 14 *MERCER L. REV.* 412, 412 (1963).

⁹⁰ Brief of Evidence at 61, *State v. Downer* (Oglethorpe, Ga. Super. Ct. 1933) (defendant's statement made during the first trial and read into the record of the second trial).

⁹¹ *Downer Habeas Transcript*, *supra* note 49, at 148 (testimony of Charles Smith). Smith testified that he did not think Downer received a fair trial and that after the trial he briefly continued to investigate the matter. In the course of that investigation, he spoke with Downer's wife and grandmother. *Id.*

bring out the obvious: Downer lived near the scene, and he often walked by it when traveling from his work to his home.

In the late afternoon, the attorneys began their closing arguments. Following the arguments, the judge charged the jury, instructing that they could return one of three verdicts: guilty of rape, guilty of rape with a recommendation of mercy, or not guilty.⁹² Under Georgia law in 1931, a verdict of guilty of rape carried only two possible sentences: the death penalty or a prison term of one to twenty years.⁹³ Notably, the conventional choice of life imprisonment was omitted.

Before the Civil War there were two separate statutes, making the legislative intent crystal clear: one statute provided that the punishment for rape of a white female by a black male was death; the other provided that the rape of a white female by anyone else was punishable by a prison term of two to twenty years.⁹⁴ In carrying this scheme forward in a single statute, the legislature apparently was confident that no jury would ever recommend mercy for a black man accused of raping a white woman, especially if the only alternative was a prison term less than a sentence of life. On the other hand, white men could expect to receive a recommendation of mercy for the crime of sexual assault, and they would be sentenced not to life in prison but to a term of one to twenty years. Rarely (one hopes) have the twin evils of racism and sexism so brutally converged in a single statute.

Trial had commenced at nine o'clock in the morning. A little more than twelve hours later, the judge gave the case to the jury for deliberation and verdict. In less than a day, John Downer was tried for a capital crime, and in a scant six minutes, the twelve white men from Elbert County rendered their verdict: guilty of rape, with no recommendation of mercy.⁹⁵

After receiving the verdict from the jury, the judge asked Downer if he had anything to say. According to the *Atlanta Constitution*, "The negro raised his right hand and said: 'Judge, before God, I didn't do it.'"⁹⁶ God, however, was neither judge nor jury that day in Elberton. The judge sentenced Downer to death. Satisfied, the crowd dispersed quietly.

At noon the next day, the judge adjourned the special term. Upon adjournment, the defendant's right to move for a new trial expired. A motion for a new trial, which gives the trial judge the opportunity to correct error

⁹² Charge of Court at 73, *State v. Downer* (Oglethorpe, Ga. Super. Ct. 1933). This is a reference to the charge at Downer's second trial. The transcript of the first trial is not extant. See *supra* note 78. The two charges should have been identical on this point.

⁹³ Between 1930 and 1964, Georgia executed 61 defendants for rape; 58 of the defendants were black. Marvin Wolfgang & Marc Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658, 663 (1975).

⁹⁴ See *McCleskey v. Kemp*, 481 U.S. 279, 329-30 (1987) (Brennan, J., dissenting).

⁹⁵ Farrell, *supra* note 81, at 1. The *Atlanta Constitution* carried a banner headline that day: "Negro Is Sentenced to Die." *Id.*

⁹⁶ *Id.*

by setting aside the verdict, was a prerequisite to a notice of appeal. By not moving immediately for a new trial, John Downer's attorneys waived his right to appeal.⁹⁷ The execution was scheduled to take place on Monday, June 15, less than a month after the day of the alleged crime.⁹⁸

Decades later, Tuttle described his emotions after the trial:

By the next morning my mind was in a turmoil about these proceedings. The forms of justice had been followed. Downer had been indicted by a grand jury; he had been given counsel to represent him; he had faced his accuser in open court; his fate had been submitted to a jury of twelve; and he had been given a sentence within the provisions of the Georgia statute. . . . Nevertheless, no lawyer of today would say that he had had a trial. Therefore, no lawyer would say that his execution would be after "due process."⁹⁹

C. Downer's Federal Habeas Corpus Motion

John Downer's near lynching and subsequent sentence to death attracted a good deal of attention. One interested observer was A.T. Walden. Walden, born in 1885, was the son of slaves from Fort Valley, Georgia. A remarkable man, he earned his law degree at the University of Michigan in 1911 and earned a commission as a captain in the U.S. Army before returning to Georgia to practice law.¹⁰⁰ In 1931, he was one of a handful of black lawyers in Atlanta, and he served as the president of the local branch of the NAACP.¹⁰¹ Walden read the front page stories recounting Downer's arrest and near lynching, his quick trial, and his sentence to death. Encountering Tuttle one day in the halls of the Fulton County Courthouse, Walden asked

⁹⁷ See *infra* note 111. They did so deliberately, having decided there were no grounds for appeal. *Downer Habeas Transcript*, *supra* note 49, at 144-45 (testimony of Charles Smith). The obvious ground for an appeal—that Downer was denied a fair trial by being tried in an atmosphere of such immense hostility that 200 soldiers were required to keep order—was arguably waived by his attorneys when they decided not to move for a continuance or for a change of venue.

⁹⁸ Order of the Court at 129, *State v. Downer* (Elbert County, Ga. Super. Ct. May 26, 1931).

⁹⁹ Elbert P. Tuttle, *Reflections on the Law of Habeas Corpus*, 22 J. PUB. L. 325, 327 (1973). It is informative that Tuttle did not question whether Downer received a fair trial but instead maintained that the proceedings were so flawed that it was as if there had been no trial at all.

¹⁰⁰ GERALDINE R. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* 119-20 (1983).

¹⁰¹ CHARLES H. MARTIN, *THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE* 30 (1976).

Tuttle to help him obtain a fair trial for Downer by seeking a writ of habeas corpus in federal court.¹⁰² Tuttle agreed.¹⁰³

Because he was present, Tuttle was in a particularly good position to record the facts of the riot at the jail and the conduct of the trial. Because he was a participant, however, Tuttle felt constrained from participating in the motion as an attorney. He realized that if a hearing was held on the habeas petition, in all likelihood he would be a principal witness. So Tuttle wrote the brief and asked his brother-in-law and partner, Bill Sutherland, to sign it. Sutherland agreed readily and was joined by three other prominent white attorneys and A.T. Walden.¹⁰⁴

Downer's execution was scheduled to occur after midnight on Sunday, June 14. That Saturday, Tuttle, Walden, and Harry Strozier, a Macon attorney who joined on the brief, presented the petition for writ of habeas corpus in Macon federal district court before Judge Bascom Deaver. Then, as now, a federal court would not entertain a petition for writ of habeas corpus filed by a state prisoner until all state remedies had been exhausted.¹⁰⁵ Tuttle was satisfied that the state remedies had been exhausted in the Downer matter because Downer could not appeal to the Georgia Supreme Court—or at least no appeal would lie until after the scheduled execution.¹⁰⁶ Judge

¹⁰² Walden may have realized that Tuttle was involved in the National Guard operation because at least one of the newspaper articles mentioned Tuttle as one of the officers in charge. *Tear Gas Bombs, Rifle Fire Used to Save Negroes*, *supra* note 51, at 1.

¹⁰³ More than 50 years later, Donald Hollowell, a respected black attorney who moved to Atlanta in the 1950s and who represented Martin Luther King, Jr., was asked if he knew what led Walden to seek Tuttle's help. Hollowell replied that he and Walden never discussed it, but, he added,

[t]here have always been what black people might call the good white folks—who know wrong when they see it and who are willing to help you any way they can if it does not create any embarrassment to them. And then there was always the group who would go that far and who would take the next step—who would stand because it was right, because it was right.

Interview with Donald Hollowell, Partner of Arrington & Hollowell, in Atlanta, Ga. (June 21, 1993). Hollowell surmised that Walden recognized that quality in Tuttle. *See id.*

¹⁰⁴ The others were Granger Hansell and Jerome Jones of Atlanta and Harry Strozier of Macon. *Asks Only Justice for Downer, Says Sutherland, Outlining Case*, ATLANTA CONST., June 16, 1931, at 1. Tuttle approached each of them, and each immediately agreed. Interview with Judge Tuttle, in Atlanta, Ga. (July 8, 1993).

¹⁰⁵ *See, e.g., Downer v. Dunaway*, 53 F.2d 586, 589 (5th Cir. 1931).

¹⁰⁶ The Georgia Penal Code required a motion for new trial to be made before the adjournment of the term at which the verdict was rendered. GA. CODE ANN., PENAL CODE § 1090 (1926). A defendant could not appeal a verdict. Rather, an appeal would only lie from an order denying a motion for new trial. *See Holsey v. Porter*, 31 S.E. 784 (Ga. 1898); *Holland v. State*, 88 S.E. 908 (Ga. Ct. App. 1916). The Georgia Penal Code allowed for an out-of-term extraordinary motion for new trial, GA. CODE ANN., PENAL CODE § 1091 (1926), but the Georgia Supreme Court had held that even an ex-

Deaver, however, was not convinced. Concerned about exhaustion, he denied the petition but granted a certificate of probable cause. The execution was stayed pending an appeal to the United States Court of Appeals for the Fifth Circuit.

The proceedings in Macon lasted late into the evening. Returning to Atlanta, Tuttle and Walden reached East Point, a city just south of Atlanta, after midnight. A policeman pulled their car over and, alluding to a curfew on black people, brusquely asked Tuttle, "What is this colored boy doing out after midnight?" Tuttle, restraining his outrage, answered deferentially. Citing the exception to the curfew for official court business, he informed the policeman that he and Walden were returning from a hearing in Macon. "Well get him home as soon as you can," the officer responded. Tuttle and Walden drove away. It was a minor episode, but one that Tuttle would never forget.¹⁰⁷ Black men like John Downer—farmers and laborers—were subject to the whim of the mob, the wrath of the nightrider; black professionals like Walden were subject to constant indignities and inequalities imposed by custom and by law. For the time being, Tuttle could do very little about either.

Months later, Downer's attorneys presented his appeal of the denial of his habeas corpus petition before the United States Court of Appeals for the Fifth Circuit, the court Tuttle would later lead. Relying strongly and pointedly on Leo Frank's futile appeal in *Frank v. Mangum*¹⁰⁸ and on *Moore v. Dempsey*,¹⁰⁹ Downer's attorneys pressed home their essential point: the presence of formal elements of due process (an indictment, a trial, and an appeal) did not constitute due process if each was a sham with a predetermined result:

traordinary motion must be made within a term. *Perkins v. State*, 55 S.E. 101 (Ga. 1906). By September, when the next term was to commence, Downer would be executed.

Downer could have petitioned the trial court to convene a special term to hear his extraordinary motion for a new trial, but the statute placed that decision in the trial court's discretion. GA. CODE ANN., PENAL CODE § 796 (1926). Determining that a denial of an out-of-term extraordinary motion for new trial would be a non-appealable order, the Fifth Circuit Court of Appeals concluded that Downer's state remedies were exhausted. *Downer*, 53 F.2d at 590.

¹⁰⁷ Interview with Judge Tuttle, in Atlanta, Ga. (Mar. 26, 1993).

¹⁰⁸ 237 U.S. 309 (1915). In *Frank*, the Supreme Court held that mob domination could reduce a trial to a charade, nullifying a guilty verdict. Nevertheless, the Court held that Frank failed to establish that his trial had indeed sunk to that level. *Id.* History suggests otherwise. "One juror stated that he wasn't sure of anything except that unless they convicted Frank, they would never get home alive." GRANT, *supra* note 8, at 315.

¹⁰⁹ 261 U.S. 86 (1923). *Moore* was the first case in which the United States Supreme Court held that allegations of mob dominance of a trial authorized a federal district court to proceed with a hearing on a habeas corpus petition.

We maintain that when an execution is the result of mob passion and violence or the threat thereof, little is gained by the fact that this passion and violence is permitted to operate through the machinery of the law. It may well be that the new evil is the worse of the two. It is certainly more insidious: being cloaked in the forms of justice.¹¹⁰

In a two-to-one decision, the court of appeals ordered the district court to hold a hearing on the merits.¹¹¹

At the federal district court hearing in Macon in July 1932, an impressive array of legal talent represented Downer. Bill Sutherland, Granger Hansell, and A.T. Walden remained part of the team. Macon attorney Harry Strozier was joined by his partner, Orville Park, a former president of the State Bar of Georgia who handled much of the hearing.¹¹²

The hearing had several dramatic moments. During Park's examination of one of the grand jurors, Elberton businessman Z.T. Copeland, Park asked if Copeland blamed him for trouble in Elbert County since the trial. Copeland said he did. G.T. Christian, the editor of the *Elberton Star*, also blamed Park for local unrest because in an address to the Macon Kiwanis Club on May 26, 1931, Park had described the Downer trial as a "judicial lynching."¹¹³ Park stood by his description of the trial.¹¹⁴

Christian also testified that he believed the trial would have been orderly

¹¹⁰ *Asks Only Justice for Downer, Says Sutherland, Outlining Case*, *supra* note 104, at 1. Sutherland's statement to the press appears prepared. Asked if he had drafted it, Tuttle responded, "I'm sure I did. I actually handled the whole matter." Interview with Judge Tuttle, *supra* note 107.

¹¹¹ *Downer v. Dunaway*, 53 F.2d 586 (5th Cir. 1931). In his dissent, Judge Richard W. Walker opined that Downer was not denied due process by the state but inexcusably failed to seek it. Judge Walker noted that Downer's original attorneys could have moved for a new trial in the 14 or 15 hours between the conclusion of the trial and the adjournment of the special term of court. Judge Walker opined that Downer's new attorneys could have made an extraordinary motion for a new trial, and the trial judge could have called another special term in order to address it promptly. If such a motion was denied, an appeal to the Georgia Supreme Court would have been in order. *Id.* at 593 (Walker, J., dissenting). Judge Walker concluded by commenting that a defendant should not appeal to a federal court "when adequate protection of his right to have the benefit of due process of law may be obtained by resort to courts of the state." *Id.* The majority, on the other hand, may have taken judicial notice, *sub silentio*, that although Georgia courts would move with alacrity to try, convict, and sentence Downer to death, they were extremely unlikely to move in this fashion at his behest.

¹¹² Park was president of the State Bar of Georgia in 1918. STATE BAR OF GEORGIA, STATE BAR OF GEORGIA 1996-97 DIRECTORY AND HANDBOOK 16 (1996).

¹¹³ *Statewide Interest in John Downer Hearing*, ELBERTON STAR, July 8, 1932, at 1.

¹¹⁴ *Downer Habeas Transcript*, *supra* note 49, at 221.

even without the presence of the National Guardsmen. A handful of witnesses agreed. This testimony strained credulity: only a week before, a mob of two thousand people (in a town of less than five thousand) stormed the jail seeking to lynch the defendant, and the trial was in fact accomplished only by stationing hundreds of troops in and around the courtroom and by filtering all who entered through a series of three machine gun stations. The district court did not find the testimony believable and held that the allegations of the petition were substantially supported.

Reverend W.T. Hunnicutt, pastor of Elberton's Methodist church, faulted the defense for its limited cross-examination and for not producing the clothing worn by the victim on the day at issue.¹¹⁵ He also thought it curious that although she testified that the darkness prevented her from seeing whether they were parked near trees, she nevertheless claimed to have seen Downer clearly. Captain Marion Williamson responded bluntly when asked about his belief that the cross-examination of her companion should have gone further: "Well, personally and frankly I think the boy with her screwed her."¹¹⁶

The district court granted the petition.¹¹⁷ Downer's attorneys won a significant legal victory, but for Downer it represented more form than substance. The state elected to retry him.

D. *Retrial and Conviction*

By the time the federal habeas proceedings were concluded, feelings ran high in Elberton against the attorneys who represented Downer. It was

¹¹⁵ Prior to this incident, Hunnicutt had some involvement with the Commission on Interracial Cooperation. He testified that he was not a member but had attended CIC meetings. *Downer Habeas Transcript*, *supra* note 49, at 125. Immediately after the riot, Hunnicutt corresponded with R.B. Eleazer about seeking a change of venue:

I consulted with a number of the men . . . and they all thought it best to have the trial here, so I did not communicate with Governor Hardman. It seemed to be the consensus of opinion that if they did not have the trial here it would make it more difficult to manage the mob, should there be another case of like character. I . . . will do all I can to see that the negro gets an impartial trial, though I feel that is almost an impossibility. . . . When I hear [a lawyer] say that he had rather go to jail or pay a fine than to be appointed to represent this negro, I feel that that lawyer would make a very poor defense, should the Court appoint him. I still hear some doubt expressed as to the guilt of the negro, but professional men and business men are afraid to talk.

Letter from Reverend W.T. Hunnicutt to R.B. Eleazer (May 23, 1931) (Commission on Interracial Cooperation Papers, on file with the Atlanta University Center Woodruff Library).

¹¹⁶ *Downer Habeas Transcript*, *supra* note 49, at 85 (testimony of Captain Williamson).

¹¹⁷ *Downer v. Dunaway*, 1 F. Supp. 1001, 1001 (M.D. Ga. 1932).

agreed that Downer would have a better chance on retrial if he were represented by an attorney who was not previously connected with his cause. Bill Sutherland discussed this with Will Alexander, and the Commission on Interracial Cooperation agreed to retain Henry C. Hammond, a former superior court judge.¹¹⁸ Hammond was the first of Downer's attorneys to receive payment for his legal services.¹¹⁹

Trial was set for early April 1933 in Oglethorpe County. The relocation of the trial to an adjacent county disappointed Downer's attorneys. After the Fifth Circuit remanded the case to the district court for a hearing on the merits, Will Alexander wrote to Roger Baldwin, Director of the ACLU, seeking his help on a point of law:

The attorneys for Downer want if possible to have the order of the Federal Judge include some direction as to where Downer is to be tried. . . . None of the attorneys have any doubt whatever that a fair trial cannot possibly be obtained in Elberton. . . .

All of the attorneys are very anxious therefore to have the order of the Federal Judge contain a provision to the effect that Downer shall be retried at a distance of more than 100 miles from Elberton or some such provision as that.¹²⁰

¹¹⁸ Hammond served as a superior court judge in the Augusta Judicial Circuit from 1904 until his resignation in 1923. GEORGIA DEPT. OF ARCHIVES & HIST., GEORGIA OFFICIAL & STATISTICAL REGISTER 840 (1969-70). Hammond took the case for a \$1000 fee. Letter from Henry Hammond to Bill Sutherland (Mar. 9, 1933) (Commission on Interracial Cooperation Papers, on file with the Atlanta University Center Woodruff Library).

¹¹⁹ The CIC, however, did reimburse Parks & Strozier for its expenses. Letter from Henry Hammond to Bill Sutherland, *supra* note 118; Letter from Harry Strozier to Will Alexander (Mar. 22, 1934) (Commission on Interracial Cooperation Papers, on file with the Atlanta University Center Woodruff Library). The CIC or the NAACP may have compensated A.T. Walden. See Letter from R.B. Eleazer to A.T. Walden (May 29, 1931) (Commission on Interracial Cooperation Papers, on file with the Atlanta University Center Woodruff Library) (writing to Walden, "You are hereby retained [by the CIC]"); Letter from R.B. Eleazer to Reverend Paul E. Baker (Dec. 7, 1932) (Commission on Interracial Cooperation Papers, on file with the Atlanta University Center Woodruff Library) (stating that Eleazer had "employed a competent Negro lawyer"). *But see* Letter from Will Alexander to C. Vann Woodward (Oct. 17, 1931) (Commission on Interracial Cooperation Papers, on file with the Atlanta University Center Woodruff Library) (noting that Walden "probably will receive nothing for his services").

¹²⁰ Letter from Will Alexander to Roger Baldwin (June 16, 1932) (Commission on Interracial Cooperation Papers, on file with the Atlanta University Center Woodruff Library). Tuttle probably drafted the letter. See *supra* note 110.

Baldwin referred the question to the ACLU's General Counsel, Arthur Garfield Hays. Hays did not believe the federal court had the power to order that the trial be held in a different county. Such an order, he thought, would usurp the power of the state courts. Hays also noted that there was no precedent for such an order: "If there had been [precedent] I believe these lawyers would undoubtedly have found it. They have done a very unusual job in getting the federal court interested."¹²¹

The attorneys' concern about trying the case near Elberton proved well-founded. Members of the mob followed Downer to Lexington, the county seat of Oglethorpe County, and demanded the keys to the jail. The situation was serious enough that county police officers moved Downer to Athens, Georgia overnight and brought him back for trial the next day.¹²² There was some improvement, Hammond wrote Tuttle, in trying the case in Oglethorpe County instead of Elbert County, but precious little. "If we could have secured a change to some urban County in a remote part of the State, it would have been better, but such a change was not in our control or within the range of reasonable hope."¹²³

Downer's attorneys could have made one other motion on Downer's behalf that would have struck at the heart of segregation. During the legal proceedings involving Downer, no challenge was made to the composition of the grand jury or the panels from which the trial juries were drawn. In the wake of the Civil War and the enactment of the Civil War Amendments to the Constitution,¹²⁴ the United States Supreme Court recognized that the systematic exclusion of members of a defendant's race from grand and petit juries violated the Equal Protection Clause of the Fourteenth Amendment.¹²⁵ The Court held, however, that state action was presumed to be constitutional and that the defendant bore the burden of proving intentional or deliberate discrimination. For more than half a century, until the Court's

¹²¹ Letter from Arthur Garfield Hays to Roger Baldwin (June 27, 1932) (Commission on Interracial Cooperation Papers, on file with the Atlanta University Center Woodruff Library).

¹²² *Quiet Reigns at the Downer Trial*, ELBERTON STAR, Apr. 4, 1933, at 1.

¹²³ Letter from Henry Hammond to Elbert Tuttle (Mar. 20, 1934) (Commission on Interracial Cooperation Papers, on file with the Atlanta University Center Woodruff Library).

¹²⁴ The Civil War Amendments are the Thirteenth Amendment (prohibiting involuntary servitude except as punishment for crimes), the Fourteenth Amendment (declaring all persons born or naturalized in the United States to be Citizens and subject to the privileges of citizenship, due process, and equal protection), and the Fifteenth Amendment (designed to prevent the abridgement of voting rights based on race). U.S. CONST. amend. XIII-XV.

¹²⁵ *Neal v. Delaware*, 103 U.S. 370 (1881) (finding that exclusion by discriminatory administration of neutral statute violates the Equal Protection Clause); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding that exclusion by statute violates the Equal Protection Clause).

1935 ruling in *Norris v. Alabama*¹²⁶ allowed defendants to use statistical evidence to make a prima facie case of discrimination and shift the burden of proof to the state, proving intentional or deliberate discrimination was an insurmountable barrier.¹²⁷

A *Norris* challenge was possible in Downer's case, but Hammond's decision not to make such a motion is understandable. No challenge was more difficult to sustain. It required putting qualified blacks on the stand to establish their existence and exclusion, thereby placing them at considerable risk. In addition, such a challenge was likely to prejudice the jurors against the defendant. Both a CIC observer and a *New York Times* reporter at the *Norris* trial commented that this motion greatly disturbed jurors.¹²⁸ Nor was any motion more inflammatory. For example, bringing this motion at Norris's trial provoked open threats on Norris's lead attorney's life, leading the judge to address the threats in court.¹²⁹ Furthermore, the motion almost certainly would be futile. On retrial, Norris himself was sentenced to death again.¹³⁰

Downer's retrial commenced and progressed quickly. The alleged victim and her companion repeated their earlier testimony, and both were cross-examined. The cross-examination highlighted the fact that the young couple went to an isolated area for privacy, and it challenged their account of being overpowered by a single assailant as well as their identification of Downer. They maintained their story.¹³¹ On cross-examination of the doctor, the defense questioned whether a rape truly occurred. The doctor conceded that essentially what he observed were the effects of intercourse, but he insisted

¹²⁶ 294 U.S. 587 (1935). Norris was one of the celebrated Scottsboro defendants. The Scottsboro incident occurred in March 1931, two months before the Downer incident. In *Norris*, the jury challenge was raised by Samuel Leibowitz, a New York attorney brought in for the retrial of the defendants by the International Labor Defense (ILD). It is noteworthy that a New York attorney, rather than a Southern attorney, raised the issue. For a discussion of the Scottsboro incident, see CARTER, *supra* note 63.

¹²⁷ See generally Bernard S. Jefferson, *Race Discrimination in Jury Service*, 19 B.U. L. REV. 413 (1939) (analyzing the exclusion of African-Americans from juries).

¹²⁸ CARTER, *supra* note 63, at 202.

¹²⁹ *Id.* at 202-03.

¹³⁰ After the Supreme Court decision in *Norris*, the state placed black men in the pool of 100 veniremen, but none were seated on the jury. See *id.* at 340-41, 369. Norris was paroled in 1943 but was required to remain in Montgomery, Alabama even though Roy Wilkins of the NAACP had arranged for a job for him in Cleveland, Ohio. Norris left the state, was imprisoned for the parole violation, and was paroled again in 1946. Again he violated parole, but this time, to avoid detection, he severed all ties with his family. In 1976, after NBC broadcast a two-hour docudrama on the Scottsboro incident, Norris contacted the Alabama Board of Pardons and Paroles. Later that year, Governor George C. Wallace granted Norris a full pardon. *Id.* at 425-27.

¹³¹ Brief of Evidence at 1-16, 25-33, *State v. Downer* (Oglethorpe, Ga. Super. Ct. 1933).

that it appeared to him that the intercourse was unusually forceful.¹³²

In his unsworn statement at the first trial, Downer had reiterated the story that he told the sheriffs at the time of his arrest. He also described the circumstances under which allegedly loaned to another man the shoes which made the incriminating footprints:

But to tell you about this track business, I loaned this boy my shoes. That is how come the sheriff to ask me, Ain't that your tracks? . . . One of the fellows in the crowd . . . said, You god damn son of a bitch, I will cut your eyeballs out. I didn't know what to do. . . . They carried me down there on the branch to make me tell something else. And Mr. Hammond [the sheriff of Lincoln County] and another sheriff and two more fellows who had on a white shirt, had a knife in his hand, and he said, Take him down the branch and make him tell something else—cut his damn balls out. That scared me to death. I knowed they would cut my balls out or punch my eyes out. That frightened me to death.¹³³

At the second trial, he recanted the story about lending his shoes, and explained,

I didn't loan Isaac McCauley my shoes. I had them shoes on myself. And the reason I told the officers that, they was working on me so, and the crowd was around me, and I didn't have a chance to get to where none of my white people was [I]f I had known them I would have said I made them tracks there myself. . . . I had never seen Isaac McCauley that night at all. I had never seen him but I told the officers that so the crowd wouldn't kill me. . . . So far as this crime, I don't know anything about it gentlemen, that is the truth. I always worked around whi[t]e people; I had all the respect for them I could. I never had the first thing against me that I know of; I have never been arrested in my life, and I behaved all my life and have never been arrested there and have never been in fight in my life. That is all I know about it, gentlemen. I am innocent of that crime.¹³⁴

¹³² *Id.* at 18-19 (testimony of Dr. D.N. Thompson).

¹³³ *Id.* at 59-60 (John Downer's statement in the previous trial introduced by counsel for the state).

¹³⁴ *Id.* at 57-58 (statement of John Downer).

Downer's two sisters-in-law, his step-daughter, and a man who was courting one of the sisters-in-law all testified that Downer was home the evening of the incident. Two of the family members corroborated his statement that he was sick that day. All three women slept in the same room with Downer and his wife, and they corroborated his statement that he did not leave the house.¹³⁵

In trying the case, Hammond faced two extremely difficult problems. One was the identification of Downer by the victim. Hammond brought to light the fact that she was sleeping under the influence of morphine when a crowd of white men brought a single negro to her window. As she explained on the stand, she nodded, and they took him away.¹³⁶ However absurd this was as a truth seeking process, it was apparently compelling to a Southern jury.

Hammond described the other problem in a letter to Tuttle:

The great danger in this case lies, as we all realize, in the confession or quasi confession of the defendant. . . . He is confronted with the tracks and with his shoes that he is obliged to admit made those tracks. Then he attempts an elaborate circumstantial explanation. . . . You see where this leaves the defendant. Upon a statement of the main points in the State's case the average mind is prone to reject it as preposterous. . . . [I]f he had raised a blank wall of denial of any knowledge whatever of the occurrence he would have been in a much stronger position. . . . It is such an incriminatory statement that I feel I would like to have him repudiate it on the ground of fear and intimidation, but he seems utterly disinclined to do this.¹³⁷

Hammond did his best to undermine the reliability of the identification, and he persuaded Downer to recant his original statement. That, however, left Downer in the position of having made inconsistent statements. Given the temper of the times and the local notoriety of this particular case, it is doubtful that there was ever any possibility of an acquittal or even a recommendation of mercy. In the Scottsboro case, for example, after hearing one of the two alleged victims recant her prior testimony and testify that no rapes occurred, the jury still returned a verdict of guilty, with a punishment

¹³⁵ *Id.* at 52-56 (testimony of Fannie May Martin, Annie May Martin, and Melva Martin, and Otis Hudson). On cross-examination, the gentleman caller said Downer left the porch at dark, but he did not know where he went. All of the women testified that he went to bed. *Id.* at 53-56.

¹³⁶ *Id.* at 14.

¹³⁷ Letter from Henry Hammond to Elbert Tuttle, *supra* note 123.

of death.¹³⁸

After closing arguments and the charge by the court, the jury deliberated for less than an hour. The verdict and the sentence were the same.¹³⁹ On April 6, 1933, John Downer once again was convicted and sentenced to death.

E. *Form Over Substance, or "Magic Words"*

Again, the trial court scheduled a prompt execution, this time setting it for April 28, 1933.¹⁴⁰ Downer's attorneys immediately filed a motion for a new trial, which the trial court denied. On May 24, 1933, they filed a bill of exceptions in the Georgia Supreme Court.

In an amendment to the motion for a new trial, Downer's attorneys attacked the court's charge to the jury. Three times, the amendment pointed out, the court told the jurors that if they recommended mercy, Downer would serve one to twenty years. Each time, the court emphasized that such a recommendation differed from a recommendation of mercy following a conviction for murder, in which case the defendant would be sentenced to life in prison. Each time, the court pointed out that one to twenty years was not life imprisonment, but was the same penalty imposed for a conviction of assault with intent to rape. Downer's attorneys argued that the language of the charge, combined with the effect of repeating it, "conveyed to the jury an intimation and expression of opinion on the part of the court that a recommendation to mercy would result in a punishment too mild for the crime committed."¹⁴¹

The court also instructed the jury extensively on the principle that if an alleged victim consents, there is no rape. Downer's attorney objected. He did not raise consent as a defense. For a black man to contend that a white woman consented to sexual relations with him could only inflame a jury. The instruction, Downer's attorneys argued, was prejudicial.¹⁴²

These issues formed the basis of an appeal to the Georgia Supreme Court, but they never were heard by the court. Downer's writ of error set forth the procedural history of the case and concluded, "After argument the Court did on the 20th day of May 1933 overrule the defendant's original and amended motion for new trial on each and every ground thereof and

¹³⁸ See CARTER, *supra* note 63, at 232-40.

¹³⁹ See *Downer v. State*, 172 S.E. 463, 463 (Ga. 1934) (noting that the jury found Downer guilty).

¹⁴⁰ See *End Seems Near, Noted Criminal Case of Elbert: John Downer Is Again Headed Towards Chair*, ELBERTON STAR, Dec. 11, 1933, at 1.

¹⁴¹ Amendment to the Original Motion for New Trial at 78, *State v. Downer* (Oglethorpe, Ga. Super. Ct. 1933).

¹⁴² *Id.* at 80.

denied and refused the defendant a new trial.”¹⁴³ It continued, “And now within the time allowed by law, John Downer presents this his bill of exceptions.”¹⁴⁴

Although Downer’s attorneys obviously were appealing the order denying a new trial, pleading formalities of the time required that their motion explicitly state an assignment of error. The state moved to dismiss the appeal. In response, Downer’s attorneys, former Judge Hammond and Hammond’s law partner, filed an amendment to the writ of error to supplement the original pleading. Following the language, “and refused the defendant a new trial,” they proposed adding the following: “to which judgment the plaintiff in error then and there excepted, now excepts and assigns thereon.”¹⁴⁵ They attached an affidavit, dated December 13, 1933, confirming that this language was part of the bill of exceptions and that its omission was a clerical error.¹⁴⁶

On December 14, 1933, the Georgia Supreme Court dismissed the appeal, and on January 18, 1934, the court denied Downer’s motion for rehearing.¹⁴⁷ Downer was foiled twice in his attempt to reach the Georgia Supreme Court. After the first verdict, his court-appointed attorneys agreed to the trial court abruptly terminating the special term of court, although that action extinguished Downer’s right to file a motion for new trial, the predicate to an appeal. After the second verdict, the Georgia Supreme Court’s insistence that the “magic words” appear in Downer’s writ of error and its refusal to allow amendment of the writ denied him a hearing on the merits before the court once again.¹⁴⁸ John Downer’s last appeal, on which his life depended, was dismissed on a technicality.¹⁴⁹

Blocked in their efforts to appeal, Downer’s attorneys sought clemency,

¹⁴³ Writ of Error from the Superior Court of Oglethorpe County, Ga. at 2, *Downer v. State*, 172 S.E. 463 (Ga. 1933) (No. 9774).

¹⁴⁴ *Id.*

¹⁴⁵ Amendment to the Bill of Exceptions at 1, *Downer v. State*, 172 S.E. 463 (Ga. 1933) (No. 9774).

¹⁴⁶ *Id.* (Exhibit “A”).

¹⁴⁷ *Downer v. State*, 172 S.E. 463 (Ga. 1933).

¹⁴⁸ An editorial in the *Macon Evening News* took the court to task:

Was there not enough in a formal bill of exceptions to show that it was a bill of exceptions, even though a stenographer omitted the words that the plaintiff “excepted and assigns the same as error?” In any circumstances what excuse could there be for the court’s refusal to allow the bill to be amended?

Says Section 6181 of the Code:

No writ of error shall be dismissed in the Supreme court of this state where, by an amendment to the bill of exceptions, which is hereby declared to be lawful and allowable, any imperfection or OMISSIONS of necessary and proper allegations could be corrected from the record in the case.

Editorial, *Georgia Justice*, *MACON EVENING NEWS*, Mar. 17, 1934, at 4.

¹⁴⁹ Tuttle, *supra* note 99, at 328.

first from the prison commission and then from the governor. On March 13, 1934, the *Elberton Star* reported that Downer's plea for clemency was denied by the prison commission "over [the] impassioned pleas of Judge Henry Hammond of Augusta and Attorney Harry Strozier of Macon."¹⁵⁰ On March 14 and 15, Downer's attorneys argued unsuccessfully for clemency before Governor Eugene Talmadge.¹⁵¹ Harry Strozier made one final effort. Learning from friends that the governor passed through Macon around mid-day on March 15, he sent a long telegram to be delivered when the governor's train reached Jacksonville. Strozier described the telegram to Tuttle as

begging him to change his mind, and telling him that I did not see how he could let this lowly negro die when he had saved the lives of Haden and Hatcher, two Macon white boys in a similar case. There was in fact no doubt that Haden and Hatcher were guilty.¹⁵²

Governor Talmadge did not respond.

F. *John Downer Is Executed*

On March 16, 1934, the *Elberton Star* reported with pride that John Downer had been executed. "The execution at Milledgeville today records the final triumph of law over mob violence, at a great sacrifice of treasure and a heavy tax upon the patience of those good citizens who worked hard to keep an unbroken record in Elbert County."¹⁵³

To the end, John Downer proclaimed his innocence.¹⁵⁴ He was not alone. "I am firmly convinced that the State of Georgia put to death this morning an innocent man," Harry Strozier wrote to Elbert Tuttle.¹⁵⁵ A few days later, Strozier wrote Will Alexander, whose organization had funded Downer's defense, and shared his hard earned cynicism and dismay: "I am as certain as I can be of anything without absolute certitude, that John

¹⁵⁰ *Prison Board Refused Plea of Jno. Downer*, ELBERTON STAR, Mar. 13, 1934, at 1.

¹⁵¹ *No Statement by John Downer at Execution*, ELBERTON STAR, Mar. 16, 1934, at 1.

¹⁵² Letter from Harry Strozier to Elbert Tuttle (Mar. 16, 1934) (Commission on Interracial Cooperation Papers, on file with the Atlanta University Center Woodruff Library).

¹⁵³ *No Statement by John Downer at Execution*, *supra* note 151, at 1.

¹⁵⁴ Paul M. Conaway, *Electric Chair Takes Two Men*, MACON EVENING NEWS, Mar. 16, 1934, at 1.

¹⁵⁵ Letter from Harry Strozier to Elbert Tuttle, *supra* note 152.

Downer was innocent. If he had been a white man he never would have been convicted on any such evidence."¹⁵⁶

EPILOGUE

Nothing that Elbert Tuttle encountered in the two years that began when General Parker first called him to protect John Downer surprised him.¹⁵⁷ Far from being instilled with the traditions of the South, Tuttle was born in California and raised in Hawaii (a remarkably multiracial society) by a mother who was outspoken in her abhorrence of racial discrimination and a father whom he described as the gentlest man he had ever known.¹⁵⁸ He recognized the inhumanity of Southern white society's virtually complete subjugation of black people, but he did not, as a general matter, find himself forced to confront it. Tuttle knew many black men and women who managed to distinguish themselves despite segregation, but he remained keenly aware of both the limitations under which they labored and their vulnerability. Recalling those years, Tuttle often remarked, not without some bitterness, that "a black man had no rights which a white man was bound to respect."¹⁵⁹

Though none of what he experienced surprised him, the events no doubt forced on him a higher degree of cognizance. John Downer was saved from a lynch mob only to be turned over to a judicial system in which his fate was foreordained: Downer was a dead man the moment a young white woman identified him as her assailant.¹⁶⁰ In 1931 in rural Georgia, no power, human or otherwise, could save Downer. It was a time and a place in which a federal district court could attribute to "well-meaning people" the argument that, regardless of whether Downer received a fair trial, the execution should not be interfered with because to do so would be to encourage a new mob to further violence.¹⁶¹

¹⁵⁶ Letter from Harry Strozier to Will Alexander, *supra* note 119.

¹⁵⁷ See Kuhn, *supra* note 47, at 154; Interview with Judge Tuttle, in Atlanta, Ga. (June 7, 1993).

¹⁵⁸ Interview with Judge Tuttle, in Atlanta, Ga. (Oct. 26, 1992).

¹⁵⁹ Tuttle was quoting the Supreme Court opinion in the Dred Scott case. *Scott v. Sanford*, 60 U.S. 393, 407 (1856). The Court was discussing the position of African-Americans at the time of the American Revolution.

¹⁶⁰ Bill Stevenson, *Principle, Conviction and Fate in the Remarkable Career of Judge Elbert Tuttle*, SOUTHERN CHANGES, Dec. 1988, at 11, 13.

¹⁶¹ Although the court disavowed this view, the sentiment was expressed clearly in an editorial in the Washington, Georgia *Forum*:

Those well-intending souls who find fault with the trial that was given the negro John Downer at Elberton . . . are playing with fire. . . . A great victory was won at Elberton by those who contended for a legal trial of the negro John Downer[.] Of course the trial, attended by many soldiers and special officers and by large

It has been said, though not by counsel, that some well meaning persons think the sentence of death should be carried out for the reason that the trial, whether legal or not, prevented a disgraceful lynching, and that a discharge of the petitioner on habeas corpus might in the future cause like mobs to take the law into their own hands.¹⁶²

Which was worse, Tuttle wondered, lynching by a recognizably lawless mob or permitting "passion and violence . . . to operate through the machinery of the law?"¹⁶³ A team of Georgia's finest and most respected attorneys managed only to delay the inevitable and, ironically, to add to the cloak of respectability that covered the process. His involvement in the Downer case both heightened Tuttle's appreciation of the importance of the constitutional guarantee of due process and made him acutely aware of the gap between the ideal and reality.¹⁶⁴

In 1931, Tuttle had tried to save John Downer's life by arranging for Downer's representation. Decades later, in writing and speaking of his case, he tried to grant Downer the dignity denied him in life. Downer, he wrote, like Leo Frank, "although not personally protected by it, made his contribution to the development of Constitutional Law for the protection of many others unknown to him."¹⁶⁵

Actually, Downer's greatest contribution was both more fortuitous and more fateful. Thanks to his participation, Tuttle understood firsthand the critical role the federal writ of habeas corpus played in the protection of constitutional rights. The only legal relief Downer won, the only fair treat-

and curious crowds had some unusual appearances. These hasty trials of men charged with rape always have about them the groups of excitable men that have been stirred to a frenzy almost by the unspeakable crimes. But a hasty trial in court with lawyers appointed to represent the defendant is far better than lynching or burning at the stake. It is a first step, and a very important one.

Editorial, *Playing With Fire*, FORUM (Washington, Ga.) June 25, 1931 (page cite unavailable).

¹⁶² Downer v. Dunaway, 1 F. Supp. 1001, 1003 (M.D. Ga. 1932) (commenting on the competing viewpoint).

¹⁶³ *Asks Only Justice for Downer, Says Sutherland, Outlining Case*, *supra* note 104, at 1.

¹⁶⁴ To highlight but one example, Tuttle realized that a full measure of due process required unprecedented intervention by the federal court in state processes, such as an order by the federal court that the second trial be held more than one hundred miles from Elberton. Such an order was necessary if Downer was to be provided a trial by a jury unintimidated by a mob. It was an order Downer's attorneys had no hope of procuring. *See supra* note 120 and accompanying text.

¹⁶⁵ Tuttle, *supra* note 99, at 328-29.

ment he received, came when the federal courts heard and granted his petition for the great writ. Twice more in the next decade, Tuttle would find his only recourse in the writ of habeas corpus.¹⁶⁶ It is not without significance that Tuttle's path to the federal bench included protecting individuals from the unconstitutional deprivation of life or liberty through reliance on the great writ.

Downer's arrest, trial, and execution informed Tuttle's perspective on legal processes: on the writ of habeas corpus; on the role of the federal courts; and on the meaning of due process and the wrenching deprivation of rights, even of life itself, that can occur when it is honored in the breach. At the time, no one could foresee how critical Elbert Tuttle's perspective would be. Three decades later, however, as the furor that followed the Supreme Court's decision in *Brown* intensified, Elbert Tuttle, as Chief Judge of the United States Court of Appeals for the Fifth Circuit, sat in the eye of the storm. When Tuttle stepped down as Chief Judge in 1967, Chief Justice Earl Warren wrote a moving letter to him:

I take this opportunity to express my profound admiration for the manner in which you have administered your court during the trying years of your Chief Judgeship. No court in the country has had the problems which yours has had, and no court has met its problems with greater fidelity. I feel certain that history will record that, under your leadership, the Court of Appeals for the Fifth Circuit has done more to make the Fourteenth Amendment meaningful than any of the others.¹⁶⁷

Calmly and firmly, Elbert Tuttle led his own court through the formative years of the civil rights revolution, and in doing so, he helped to lead the country as well.

¹⁶⁶ The first case was *Herndon v. Lowry*, 301 U.S. 242 (1937). *Herndon* began as a state habeas cause of action; Tuttle won in the Fulton County Superior Court, but the judgment was reversed on appeal. *Lowry v. Herndon*, 186 S.E. 429 (Ga. 1936), *rev'd*, 301 U.S. 242 (1937). The United States Supreme Court then granted *Herndon*'s petition for writ of certiorari and ruled in favor of *Herndon*, holding that Georgia's statute criminalizing attempts to incite insurrection violated the Fourteenth Amendment. *Herndon*, 301 U.S. at 264.

Tuttle's second case in which the writ proved essential was *Johnson v. Zerbst*, 304 U.S. 458 (1938). For a discussion of both cases, see Tuttle, *supra* note 99, at 329-32.

¹⁶⁷ Letter from Chief Justice Earl Warren to Judge Tuttle (June 21, 1967) (on file with the author).