VOTER REGISTRATION AND VOTING ACTIVITY

UNITED STATES
V.
BLANCHARD McLEOD
(SOLICITOR OF DALLAS COUNTY, ALABAMA)

BRIEFS

Reel #58 2 documents

DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Voting

UNITED STATES v. McLEOD

Briefs

Briefs. U. S. v McLeod
Dallas County Ala

72-3-51

15, 353

Brief

November 9, 1963

MEMORANDUM - re claim of privilege

Re: Dallas County, Alabama, Grand Jury Subpoenas

As a result of the Thelton Henderson incident involving the transportation of Martin Luther King from Birmingham to Selma, Alabama on October 13 in a car rented by the Department of Justice for official use, the Dallas County Grand Jury has instituted an investigation. The only information available regarding the subject of the investigation is the statement of the County Solicitor that the principal business of the Grand Jury when it meets on November 12 will be to investigate the role of the Department of Justice in the racial unrest in the area. In an earlier letter of the then Solicitor of Montgomery County to the local United States Attorney he stated that while there appeared to be no violation of State law involved in the Henderson-King incident, he was submitting "such evidence as may be available to our November Grand Jury as a matter of public interest'.* The Clerk of the Circuit of Dallas County has issued subpoenas directing the appearance before the County Grand Jury of certain officials and attorneys of the Civil Rights Division of this Department "to testify

* Presumably the reference was to the Montgomery County Grand Jury.

in regard to certain matters pending before them". This memorandum considers (1) the extent to which the Attorney General, as head of the Department of Justice, may properly claim that the testimony of such officials and attorneys is privileged, and (2) the remedies which may be available in the event the claim of privilege is denied by the judges of the County Court. The discussion below indicates that in the circumstances here involved it will be necessary to file a somewhat excessive claim of privilege if it is to be at all effective and that doubt exists as to the availability of a speedy remedy for obtaining the release of witnesses incarcerated for contempt. This emphasizes the desirability of securing relief, if possible, through a federal court injunction rather than through reliance on a claim of privilege.

I.

THE PRIVILEGE QUESTION

The courts have recognized that in certain circumstances the Executive branch of the Federal government is entitled to claim a privilege against the disclosure in judicial proceedings of information in its possession. At the outset it should be noted that the Supreme Court has held that the claim must be formally made by the head of the agency involved and

that the court itself is to determine whether the circumstances are appropriate for the claim. United States v. Reynolds, 345 U.S. 1. Circumstances which have been recognized by the courts as appropriate are the following:

(a) State secrets, military and diplomatic. United States v. Reynolds, supra, 7, Wigmore, Evidence, (McNaughton rev. 1961), 2378.

(b) The identity of informers. Roviaro v. United States, 353 U.S. 53, 59, Wigmore, op cit., pp. 761-772.

(c) Internal communications within the Government. Kaiser Aluminum Co. v. United States, 141 Ct. Cl. 38, 157 F. Supp. 938; Continental Distilling Corp. v. Humphrey, 17 F.R.D. 237 (D.D.C.), E.W. Bliss Co. v. United States, 203 F. Supp. 175 (N.D. Ohio).

(d) Probably matters subject to a pending investigation which would be prejudiced by a disclosure and which may involve charges as yet uncorroborated. Wigmore, op. cit., pp. 807-808.

Much of the testimony to be sought by the Grand Jury from officers of the Department of Justice will undoubtedly fall within the last three of the privileged categories. On the other hand, it may well be that the Grand Jury will propound questions relating to the official duties of the witnesses or concerning matters they learned in their official capacity, neither of which fall within any of these categories of privilege. In this posture two alternatives are analytically open: (1) to claim privilege with regard to all matters involving official duties or knowledge; (2) to assert privilege only as to the recognized categories and instruct the witnesses that as to other questions, following the procedure specified in Departmental regulations, 28 CFR 16.1-2,* they are to ask the court for leave to refer the matter to the Attorney General for his determination as to whether it is

* 28 C.F.R. 16.1 is probably not limited to documents and information contained in the files of the Department but is broad enough to cover information or material dealing with governmental information acquired in the course of the officer's official duties. Prior to the 1958 amendment to R.S. 161 (5 U.S.C. 22) that section was frequently regarded as a statutory basis for claiming privilege against disclosure of official information. Since the amendment it would appear that this privilege rests on rules established in the law of evidence (United States v. Reynolds, supra, 6-7), or on the constitutional doctrine of separation of powers (see Wigmore, op. cit., pp. 800-808; Schwartz & Jacoby, Government Litigation (1963 ed.) 529-530), or both.

privileged and, if so, whether he desires to claim it. It is evident that the latter procedure is neither desirable nor practical. First, since it concedes that some of the questions to be asked may not be privileged, it will encourage the Grand Jury to adopt a policy of prolonged harrassment, and embroil the Department in numerous and potentially endless controversies with the court. Second, it is apt to jeopardize the witnesses in that an unfriendly court may possibly refuse to grant the witness any opportunity to obtain a ruling from the Attorney General and then take the position that the witness has no valid excuse for not testifying since the Attorney General has not claimed privilege. The witness will either have to answer or be held in contempt. While the alternative procedure may involve an excessive claim of privilege in some marginal situations, it would seem to be the only realistic course to adopt if privilege is to be relied on at all.

It should also be noted that in Reynolds, involving the disclosure of military secrets, the Supreme Court stated that in ruling on the claim of privilege it is relevant to inquire into the necessity for the evidence; "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot

overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori where necessity is dubious, a formal claim of privilege made under the circumstances of this case, will have to prevail." 345 U.S. at 11. In the context of the present circumstances it is difficult to see how a convincing showing of necessity can be made in behalf of the Grand Jury to overcome a formal claim of privilege made by the Attorney General.

II.

Remedies

This portion of the memorandum examines the question of what remedies are available in the event the judge of the county court rejects the Attorney General's claim of privilege and initiates contempt proceedings against the witnesses for their failure to answer questions on the basis of the claim. The two possible federal remedies are removal of the contempt proceeding to the federal courts pursuant to 28 U.S.C. 1442, or in the event of commitment of witnesses for contempt their release through federal habeas corpus proceedings under 28 U.S.C. 2241.

a. Removal. 28 U.S.C. 1442(a) authorizes the removal to the federal courts of "a civil action or criminal prosecution commenced in a State court" against--

> "(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

The right of removal under section 1442 has been narrowly construed by the Supreme Court. Thus in Maryland v. Soper

(No. 2), 270 U.S. 36 (1926), the Court held that an indictment in a State court charging federal prohibition agents with a conspiracy to obstruct justice by giving false testimony at a coroner's inquest was not removable under that section since the response of the officers was not "an act . . . under federal authority" (p. 42), and hence not within the scope of section 1442. The State was therefore permitted to try the agents, even though the subject under investigation by the coroner had been a homicide allegedly committed by the agents in the course of a raid on an illegal still. Both Maryland v. Soper and Colorado v. Symes, 286 U.S. 510 (1932), make it clear that a federal officer, to remove a State criminal case against him to a federal court, must "be candid, specific and positive in explaining his relation to the transactions growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer," see Maryland v. Soper (No. 1), 270 U.S. 9, 33 (1926).

Here, the acts charged would be refusals to testify which in the view of the State court justified contempt proceedings. The federal officer, in order to remove these proceedings, would have to show that his refusal to testify was itself clearly

directed by the Attorney General and thus within the performance of his official duties. As indicated above, it is contemplated that the claim will extend to any testimony regarding the performance by the officer of his official duties or involving information acquired in the course of such duties. But the Grand Jury may be expected to propound questions about alleged activities of the officers which, if true, might not be protected by the claim of privilege. As to such questions a simple refusal to answer on the ground of superior orders would probably be inadequate under the decisions to justify removal of a contempt proceeding, whether civil or criminal, to the federal courts. Thus the officer's right to removal may not be perfectly clear in all cases, depending on the questions asked. Moreover, one District Court has held that contempt proceedings, even those involving federal officers, are inherently incapable of removal under section 1442, since they are neither "civil actions" nor "criminal prosecutions commenced in a state court." In re Heisig, 178 F. Supp. 270 (N.D. Ill., 1959). Although the court also relied on the insufficiency of the removal petition, the decision would support a remand of any contempt citation to the State court--

an order which is non-appealable. See 28 U.S.C. 1447(d). Moreoever, the contempt may be tried summarily, with sentence passed and commitment ordered immediately. In such a case the application of section 1442 seems completely foreclosed since section 1446 provides that removal petitions may be filed only before trial. Accordingly, reliance on removal would seem to be dangerous.

b. Habeas corpus. Habeas corpus is probably unavailable to a federal officer held in custody pursuant to a State court contempt judgment. 28 U.S.C. 2254 declares that the writ shall not be granted in behalf of a person in custody pursuant to the judgment of a State court unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. This section, adopted in 1948, no longer permits habeas corpus where adequate State corrective remedies are available.* It is difficult to argue that section 2254 would

* The decisional law prior to 1948 was to the effect that while habeas corpus would normally not issue before State appeal remedies were exhausted, in cases of urgency, in-

be inapplicable to the instant case, since 28 U.S.C. 2241(c), which specifies the cases in which habeas corpus may be granted, specifically refers to "custody for an act done or omitted in pursuance of an Act of Congress", and to "custody in violation of the Constitution or laws or treaties of the United States." Indeed, the Senate Report accompanying its amendment of section 2254 (in which form it was enacted) stated that its purpose as it related to federal officers was--

> "* * * to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty." S. Rep. 1559, 80th Cong., 2d Sess. (1948).

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* (continued)
volving the authority and operations of the General Government," Ex parte Royall, 117 U.S. 241, 251 (1886), federal courts could exercise their discretion to discharge federal officers from State custody even though those remedies had not been exhausted. See Banks v. Cunningham, 177 U.S. 459 (1900); Ohio v. Thomas, 173 U.S. 276 (1899); Hunter v. Wood, 209 U.S. 205 (1908); In re Neagle, 135 U.S. 1 (1890). In several cases the writ was refused prior to exhaustion of State remedies either because the officer appeared unimportant to government functioning or the alleged crime was serious (usually homicide). See Drury v. Lewis, 200 U.S. 1 (1906); Binns v. Tumblenon, 31 F. 2d 811 (C.A. 4, 1929).

This seems to imply that federal officers are protected by habeas corpus only prior to judgment. Thus it is difficult to envisage habeas corpus as a remedy for obtaining the release of federal officers held in custody pursuant to a State court judgment of contempt prior to exhaustion of available State appellate remedies. Of course, if the local authorities should place the officer in custody prior to a judgment of contempt, whether the custody is valid or not, habeas corpus would be available. This would be a preferable remedy to removal, since a denial of habeas corpus is appealable.

In the event it is decided to invoke the claim of privilege or it is necessary to do so, a draft of a formal claim for the signature of the Attorney General is attached.

CIRCUIT COURT OF DALLAS COUNTY
STATE OF ALABAMA

IN THE MATTER OF	)
	)
GRAND JURY INVESTIGATION	)
	)
NOVEMBER, 1963	)

CLAIM OF PRIVILEGE BY THE
ATTORNEY GENERAL OF THE UNITED STATES

1. On or about October 17, 1963, George C. Wallace, Governor of the State of Alabama, issued a public statement charging that the United States Department of Justice had provided the Reverend Martin Luther King with transportation while in the State of Alabama, and that the said King, "a racial agitator and troublemaker who has caused demonstrations to occur throughout the United States can now apparently travel at the expense of the United States Government." A copy of said statement as reported in the Montgomery Advertiser and Birmingham Post Herald of October 17, 1963, is annexed as Exhibit A.

2. In a letter dated October 28, 1963, William F. Thetford as Solicitor of the Fifteenth Judicial Circuit of Alabama (Montgomery County) wrote to the United States

Attorney for the Middle District of Alabama reciting the above charge, and, referring to a denial thereof by the Department of Justice, stated that "[w]hile there is no violation of state law involved, I am submitting such evidence as may be available to our November Grand Jury as a matter of public interest"; in the same letter he invited the Department of Justice to provide witnesses for the Grand Jury. A copy of the said letter is annexed as Exhibit B.

3. By letter dated November 4, 1963, addressed to Mr. Thetford, Burke Marshall, Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice, declined the aforesaid invitation on the ground that there was no purpose "in furnishing witnesses to testify in a secret proceeding on a matter admittedly beyond the scope of the Grand Jury's legitimate inquiry." A copy of the said letter is annexed as Exhibit C.

4. On November 4, 1963, the Clerk of this Court issued identical subpoenas commanding the appearance before the above Grand Jury on November 13, 1963, of the following officers of the Civil Rights Division of the Department of

Justice: Burke Marshall, Assistant Attorney General; John Doar, First Assistant; and Richard Wasserstrom, David H. Marlin, Arvid A. Sather, and Kenneth McIntyre, attorneys. An identical subpoena was also issued for Thelton Henderson, an attorney in the Civil Rights Division, who resigned from the Department of Justice on November 6, 1963. Copies of the aforesaid subpoenas were transmitted to the Department of Justice by registered mail on November 4 and were received on November 6. A copy of the Marshall subpoena is annexed as Exhibit D.

5. On November 6, 1963, the Department of Justice issued a statement regarding the transportation of the Reverend Luther King. It was stated therein that the Department's earlier denial on October 18, 1963, of the use of an automobile in connection with Reverend King's transportation from Birmingham to Selma was based on misinformation and was therefore erroneous. It was further stated that the misinformation was based on statements given to the Department by the aforesaid Thelton Henderson, who on November 5 voluntarily gave the Department a correct statement of what had occurred, namely, that an automobile rented by the Department and being

used by him for official business had been loaned by him to a private citizen who subsequently used the automobile to drive the Reverend King from Birmingham to Selma on October 13. The use of the automobile for unofficial business was contrary to Department of Justice regulations. Mr. Henderson thereupon submitted his resignation which was accepted by the Department of Justice. A copy of the Department of Justice statement of November 6, 1963, is annexed as Exhibit E.

6. On November 7, 1963, Blanchard McLeod, Solicitor of Dallas County, made a public announcement stating that the aforesaid subpoenas had been issued and that the principal business of the grand jury would be to investigate the role of the Department of Justice in the racial unrest in the area. In this connection Mr. McLeod is quoted as stating: "We do not intend to call off our investigation just because a part of the truth has been told. We intend to let the American people know who are the leaders in fostering the activities of Martin Luther King. We intend for that to be our main business and we intend to remain in session as long as necessary to get the facts." A copy of Mr. McLeod's statement as reported in the November 7, 1963 issue of the Selma, Times Journal is annexed as Exhibit F.

7. On November , 1963, the following officers of the Civil Rights Division of the Department of Justice were personally served with subpoenas commanding their appearance before the above Grand Jury on November , 1963:

8. The Department of Justice has made a complete disclosure regarding the incident which has precipitated the Grand Jury investigation. A responsible official of the State of Alabama has stated that in connection therewith no violation of the laws of that state has occurred. It appears that the Grand Jury in investigating the role of the Department of Justice in racial unrest in the area will seek to elicit from the aforesaid officers of the Civil Rights Division of the Department of Justice testimony regarding the performance by them and other officers of the Department of Justice of their lawful official duties, and other information acquired by them in the course of their official duties.

9. Pursuant to the authority vested in me by the Constitution and laws of the United States, I have determined that any such testimony would be prejudicial to the efficient operation of the Department of Justice and not in the public

interest. Therefore, as head of the Department of Justice, I hereby assert the privileged status of such testimony and have directed each of the said officers on the basis of such claim of privilege respectfully to decline to give any testimony to the said Grand Jury regarding the performance by them or any other officer of the Department of Justice of their official duties or relating to any other information acquired by such officers in the course of their official duties.

_____
Attorney General

Dated:

Washington, D. C.

November _____, 1963.

Put in file in McLeod case

U. S. v. CLARKE (b)

Statement of Facts

In 1960, Dallas County had a total population of _____ persons. _____ of these persons were white and _____ were Negro. There were approximately 29,515 persons of voting age in Dallas County: 14,400 were white, 15,115 Negro. Of these persons, approximately 9,000 white citizens were registered to vote and only 250 Negro citizens were registered. On April 13, 1961 the United States of America filed a suit against the Dallas County Board of Registrars claiming that the Board had engaged in a pattern and practice of discrimination against Negro citizens of Dallas County, and on May 14, 1962 the Federal District Court found that the Board of Registrars had so discriminated between 1952 and 1960, but that the present Board of Registrars was not engaged in discriminatory acts of practices. The Court declined to issue an injunction against the present Board. The United States appealed this decision of the trial court and on September 30, 1963 this Court reversed the trial

court and ordered, inter alia, the trial court to issue an injunction against the present Board of Registrars.

It was against the background of these registration statistics, much of this litigation, and the social and political factors which produced them, that in November of 1962 the Dallas County Voters League — a Negro organization — invited Bernard Lafayette, a 22 year olf Negro field secretary of SNCC, to come to Selma for the purpose of organizing and supervising a voter registration drive of Dallas County Negro citizens. Lafayette took up residence in Selma in February, 1963 and remained there, at least through July 25, 1963. (Affidavit of Bernard Lafayette pp. 1-2)

In Selma, Lafayette devoted himself almost exclusively to voter registration activities. He organized and conducted voter registration clinics at which he and other Negroes taught prospective registrants how the Dallas County Board of Registrars desired the Alabama Application for Registration to be executed. He organized door to door canvasses of the Negro residential districts

in which workers urged unregistered Negroes to attend the clinics and to attempt to register to vote. He helped to plan and to participate in voter registration mass meetings at which outside speakers came to talk about voter registration and civil rights in general. And he arranged for the production and distribution of mimeographed handbills and leaflets which urged the desirability of the exercise of the franchise by Negro citizens. (Affidavit of Bernard Lafayette, pp. 2-3)

The activities of Lafayette and the members of the Voters League were successful. The clinics, which were begun about the first of February, attracted a substantial number of potential applicants. (Affidavit of Bernard Lafayette, p. 3; P's exhibits #34 and #50). The mass meetings, the first one of which was held on May 14, 1963, attracted sizable audiences. (Affidavit of Bernard Lafayette, p. 4). Approximately _____ Negro citizens of Dallas County attempted to register between January and August of 1963. In general, voter registration activity by the Negro citizens of Dallas County was more

intense than at any time in the past. (T, pp. _____

_____).

This increased activity on the part of the Negroes, and particularly on the part of Lafayette and his workers, did not go unnoticed in the white community. The Selma Times-Journal carried news accounts of the mass meetings, the trials and tribulations of Lafayette, his workers, and at least one advertisement by the White Citizens Council. (P's exhibits #'s 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28). At some date prior to May 14, 1963, James G. Clarke, the Sheriff of Dallas County, and one of the defendants here, had received information from the State of Alabama concerning Lafayette's background and affiliation. (T. p. 14, P's exhibit #5, pp. 15-16). At the mass meeting of May 14, 1963 and at all subsequent mass meetings both county and city police patrolled the area around the mass meetings, sometimes in large numbers. (T, pp. 11-12, 28) The license numbers of cars parked in the area were recorded. (T, pp. 28, 27; Affidavit of

Lafayette, p. 6, Affidavit of James Geldersleeve, p. 4) And several members of the County and City police were assigned to stations inside the mass meetings. Notes were taken by these officers of what was said at the meetings; and one officer broadcasted a running commentary of the proceedings over a walkie talkie to county law officers stationed outside. (T, p. 12, p. 36; Affidavit of Lafayette, pp. 4 and 7; Affidavit of James Geldersleeve, pp. 3-4).

And the workers in the voter registration drive - particularly the more youthful ones - were subjected to more direct interference. On the evening of June 11, 1963, Bernard Lafayette was assaulted by two unknown white men who struck him severe blows on the head (Addidavit of Lafayette, p. 5). On June 17, 1963, a registration day at the courthouse, two of Lafayette's workers - Rosie Reese and Alexander Brown - went down to the Dallas County Courthouse for the purpose of observing the registration line and making a record of the names of Negro applicants for registration. They asked one of the

Negroes there whether they could take a picture of him waiting to register. He told them his name and permitted them to take his picture. Then Alexander Brown left and Bosie Reese remained in the hall of the Courthouse. Shortly thereafter, Sheriff Clarke came along, asked Reese his name, and his reason for being there, and then ordered him to leave the Courthouse. (Affidavit of Bosie Reese, pp. 1-3; P's exhibit #5, pp. 52-53). Reese did so but returned sometime later with Alexander Brown. As they were leaving the Courthouse once again, Reese was grabbed by Sheriff Clarke, struck several times and then arrested. (Affidavit of Bosie Reese, pp. 3-5). He was charged originally with failing to obey an officer and resisting arrest. (T, pp. 14-15). The charge of failing to obey an officer was subsequently altered to that of engaging in conduct calculated to cause a breach of the peace. (T, p. 16). After several postponements, Reese was prosecuted on these charges by Blanchard McLeod, Circuit Solicitor of Dallas County and another defendant here,

and convicted of both offenses. He was fined $150.00 for resisting arrest and $50.00 for disturbing the peace; his convictions have been appealed and the appeals have not yet been heard in the Dallas County Circuit Court.

On the day following Reese's arrest by Clarke, June 18, 1963, Sheriff Clarke executed an affidavit and warrant for the arrest of Bernard Lafayette on the charge of vagrancy. (P's exhibit #3). Lafayette was arrested that same day; his appearance bond was set at $500.00. He was released on that bond on June 19, 1963, and tried in the Dallas County Court on June 20, 1963. (P's exhibit #3). The prosecutor was Blanchard McLeod. Lafayette was acquitted. (P's exhibit #3).

Approximately one month later, on July 22, 1963, Alexander Brown was arrested by Sheriff Clarke at about 8:30 p.m. in the vicinity of the mass meeting being held that night. Brown was originally stopped because the car he was driving had only one headlight working. Sheriff Clarke asked Brown for his driving license and he produced one issued to Alexander L. Love, (without permitting

Brown to explain the discrepancy) , Sheriff Clarke caused Brown to be arrested on the charge of concealing his name and had him placed in jail. (P's exhibit #4). Bond for this offense was also set at $500.00. (P's exhibit #4). Brown was tried on August 1, 1963 and acquitted on the charge of violating Title 14 Paragraph 229, Code of Alabama. (P's exhibit #43). Brown did however plead guilty to operating a car with improper lights. (P's exhibit #49).

I. The Finding of Fact By The Trial Court That The Evidence Did Not Show The Defendants Acted With A Purpose To Interfere With A Purpose To Interfere With A Right Guaranteed By 1971(a) of Title 42 U.S.C. Was Clearly Erroneous.

Before discussing in detail the particular intimidatory acts of the defendants and the evidence which conclusively demonstrated that they had violated 1971(b) of Title 42, U.S.C., there are two preliminary matters

objections which must be put aside. The first is that the actions directed against Bosie Reese, Alexander Brown, and Lafayette could not have come within the powers of the statute because none of these persons were qualified to vote under Alabama law. The second is that circumstantial evidence is necessarily insufficient to establish that a defendant acted with the purpose required by 1971(b).

The defendants, in the questions they asked both at the hearing on the plaintiff's motion for a preliminary injunction and at the trials which were conducted in the Dallas County Court, proceeded, apparently, on the assumption that the arrests and prosecutions of Reese, Lafayette and Brown could not have been intimidatory vis-a-vis voter registration because none of the three was himself eligible to vote in Dallas County, Alabama. (See e.g. p. 22, T, pp. 45-46, p. 75). Concomitantly, they seem to have assumed that as long as no prospective registrant was directly prevented from filling out an application for registration at the Dallas County Courthouse, there

can have been no violation of §1971(b).

In these two assumptions the defendants are clearly mistaken. The gravemen of the plaintiff's complaint is that the defendants - Sheriff Clarke through his arrests and Solicitor McLeod through his prosecutions - sought to purposely intimidate and threaten those persons who were actively engaged in promoting the Negro voter registration campaign and thereby to intimidate and threaten prospective Negro registrants. See U. S. v. Wood, etc. For this reason it is quite irrelevant that none of the persons selected as the direct recipient of the intimidatory actions was himself entitled to vote. And similarly, it is at best inconclusive that the defendants eschewed the most blatant devices of intimidation in favor of less direct but no less effect've ones.

As to the way in which the plaintiff may prove a defendant's purpose in acting, it is evident that circumstantial evidence is as permissible here as it is in any other comparable inquiry into a person's state of mind. In order to show a violation of §1971(b) the

plaintiff must of course prove that the defendant intimidated, threatened or coerced, or attempted to intimidate, threaten or coerce, some other person from voting for a candidate for federal office. And furthermore, the plaintiff must prove that the defendant's purpose in acting was to interfere with another's right to vote. Typically, the evidence which will establish this must be largely circumstantial, for it is clear that, short of an admission by the defendant that he acted in this fashion with this purpose, the case against the defendant can be proved only by demonstrating that the most reasonable inferences to be drawn from the defendant's conduct are that the elements defining a violation of 1971(b) were present.

In this connection it is the belief of the plaintiff that there are at least two questions which, if properly answered, go a great distance toward establishing the basis for making just that inference. The two questions are these: (1) Does the evidence in the record reveal that a person acting in the way in which the defendant acted, would reasonably understand that the

most likely effect of his completed or attempted action would be to intimidate or otherwise frighten another person or other persons from exercising his or their right to vote for federal officials? (2) Does the evidence in the record indicate that there is any plausible justification which was offered or was capable of being offered by the defendnat for his action? If the first question must be answered in the affirmative and the second question must be answered in the negative, then, the plaintiff submits, the evidence inexorably implies a violation of 1971(b).

A. The Evidence Against Defendant Clarke Unmistakably Disclosed Violations of 1971(b).

The evidence revealed at least four intimidatory actions undertaken by Sheriff Clarke for the purpose of interfering with the rights of Negro citizens to vote for federal officials. They are: the arrest of Bosie Reese; the arrest of Bernard Lafayette; the arrest of Alexander Brown; and the surveillance of the voter

registration mass meetings. The character and nature of the evidence as to each of the four actions will be discussed seriatim.

(1) The Arrest of Bosie Reese - Relevant both to the question of the intimidatory quality of his action and to his purpose in acting, is the fact that Sheriff Clarke knew that Bosie Reese was at the Courthouse on June 17, 1963 for the purpose of engaging in work related to voter registration. At the trial of the case of Alabama v. Reese, defendant Clarke testified as follows: "I asked him what his purpose was there and he said that he was checking on the line there and he was waiting for a friend . . ." (Plaintiff's exhibit #6, p. 52, underlining added)./

/ /At the hearing on the plaintiff's motion for a preliminary injunction Sheriff Clarke testified that Bosie Reese had told him only that he was waiting for a friend (T. p. 18), but Clarke also testified that his testimony in Alabama v. Reese was more accurate. (T. p. 19)./

Furthermore, at the same trial, the Sheriff also testified that he had been led to investigate occurrences in the Courthouse hall because someone had told him that there had been "kids" in the hall of the Courthouse that morning, ". . . going up and down the line asking questions and talking to them in line" (Plaintiff's exhibit #6, p. 57). Thus, there was no question but that at the time of Bosie Reese's arrest Sheriff Clarke knew that he was arresting someone who was working on the voter registration campaign and who was attempting at that time to engage in conduct related to voter registration activities, namely, keeping a record of prospective Negro registrants. Sheriff Clarke could only have known that an arrest under these circumstances would intimidate others trying to keep a record in this fashion.

Furthermore, a careful reading of the full record in the case of Alabama v. Reese and of the relevant testimony elicited at the hearing on the plaintiff's motion for a preliminary injunction, makes it unmistakably clear that there was nothing known to Sheriff Clarke at the time of Reese's arrest which indicated that Reese had engaged

in conduct calculated to cause a breach of the peace. Indeed, the Sheriff himself conceded that the only conduct which he thought relevant was Reese's coming back into the Courthouse after he had been ordered to leave. (P's exhibit #6, p. 62).[1]

There was no evidence, for example, that anyone had complained to Sheriff Clarke of Reese's conduct - indeed, if there had been, the appropriate thing would

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[1] Particularly revealing is the reason given by Judge Mallory of the Dallas County Court for denying the defendant's motion for a direct verdict of acquittal. Judge Mallory said: "The Court would like to state at this time that the Court takes judicial knowledge of the fact that there has been certain tension between the races, certain acts have gone on that have made people tense, and for that reason I thing that things, acts which ordinarily would not be considered a breach of the peace might be considered a breach of the peace under the circumstances which now exist." (P's exhibit #6, pp. 72-73).

have been to arrest Reese rather than to order him to leave the Courthouse. And there is, moreover, evidence that Reese and Brown had secured the permission of the one person - Pettus Gilford - whom they did photograph. (Affidavit of Pettus Gilford, defendant's exhibit #1) More significantly, the circumstances immediately surrounding Bosie Reese's arrest indicate that the Sheriff had little if any regard for whether he was justified in arresting Bosie Reese. According to the Sheriff's own testimony, he had ordered Reese out of the Courthouse and had seen him head for the Lauderdale Street doors of the Courthouse (P's exhibit #6, p. 52). Later, he had seen Reese standing inside the Courthouse in front of the Sheriff's office at the Alabama Avenue doors of the Courthouse (p's exhibit #6, p. 60). There is no indication that Reese was anywhere near the voter registration line. When asked about this, the Sheriff could say only that Reese was in the same hallway as the voter registration office. (Plaintiff's exhibit #5, p. 61). Nonetheless, upon seeing Reese re-appear inside the

Courthouse, the Sheriff placed his hand on Reese's shoulder and said, "come with me". (P's exhibit #6, p. 53, p. 59). Thus, acting in accordance with a pattern which manifests itself in each arrest, the Sheriff made the arrest without seeking an explanation of any sort from the person arrested and without seeking in any bona fide way to determine whether the person arrested had engaged in conduct which justified arrest. Under such circumstances it is hard to believe that the sheriff had a purpose other than that of deliberately interfering with legitimate voter registration activity.

(2) The Arrest of Bernard Lafayette -

There is no question whatsoever but that Sheriff Clarke knew who Bernard Lafayette was, the date he had come to Selma, and the type of work Lafayette was engaged in, when Sheriff Clarke executed the affidavit and warrant for Lafayette's arrest on June 18, 1963 on the charge of vagrancy. For Sheriff Clarke testified that he had known for several months of Lafayette's presence in Selma and

knew of his "reputation" prior to the date of his arrest. (Testimony of Sheriff Clark, Alabama v. Lafayette, Plaintiff's exhibit #5, pp. 15 and 16). And Sheriff Clark also testified that prior to June 18, 1963 he had received a report from the F.B.I. that Lafayette was a SNCC worker and a report from the State of Alabama that Lafayette was trying to "organize the niggers" (Transcript, p. 14). There is in fact evidence that at some time in May, members, apparently of the Sheriff's force, attempted to arrest someone whom they took to be Lafayette (Transcript pp. 95-97. Sheriff Clark had also talked with Lafayette, himself, on June 17, 1963 and been told by Lafayette of his SNCC affiliation (Transcript, p. 24). While the sheriff was unable to remember whether he knew that Lafayette was working on voter registration (Transcript, pp. 14, 24, 26), the sherrif did, of course, have in his possession the written report made by his deputies and others of the mass meeting of May 14, 1963. This

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report makes it unmistakably plain that the meeting was concerned primarily with voter registration and that Bernard Lafayette was organizing and urging general Negro voter registration. [See, Plaintiff's exhibit #29 Note taken by Boone Aiken: Reverend Bernard Lafayette said that "The coming Monday, the third Monday, the registrars [sic] office will be open. I want every Negro 21 years and up to go down there and register to vote. Voting is our security." Notes taken by Francis Pace: "Bernard Lafayette, Approximately 30 years old, Spoke several times during the meeting. His talks were inflammatory and inciting. The theme of the entire meeting was to get Negroes to the polls Monday to register to vote." Notes taken by V. Bates: "Every few minutes he [Lafayette] would urge all to come to Court House Monday 5-20-63 and register." See also Plaintiff's exhibit #5, P. 17].

There is no question, too, but that there was absolutely no possible justification for the sheriff to order the arrest of Lafayette for vagrancy. And this must have been as apparent then to the sheriff as it is now to anyone who reads the record in this case. In the first place, the sheriff was unable even to make up his mind as to what it was that constituted Lafayette's vagrancy. At times, the ostensible basis of the offense was that Lafayette was not gainfully employed (Transcript, p. 21, Plaintiff's exhibit #5, p. 15). At other times, however, the graveman of the offense consisted in Lafayette's having begged for money. (Transcript pp. 23-24; Plaintiff's exhibit #5, p. 18). Manifestly, there was no basis for either accusation.

As to the claim that Lafayette was not gainfully employed, the chief justification advanced by the sheriff for believing it to be true was that he had received "reports" to the effect from numerous unnamed and unremembered persons (Transcript, p. 21, Plaintiff's exhibit #5, pp. 15,

16, 19). /The Sheriff did not, of ourse, "know" whether the reports were made because of the work Lafayette was doing in relation to voting. (Plaintiff's exhibit #5, p. 16./ The sheriff also testified that he had been unable to learn whether Lafayette was gainfully employed (Transcript, p. 26, Plaintiff's Exhibit #5, pp. 15, 16.) However, it is very difficult to ascertain precisely what kind of inquiry, if any, the sheriff undertook. At one point, he testified that inquiries had been made of people who knew Lafayette, and that from these inquiries the sheriff had learned that Lafayette was a volunteer worker for SNCC. (Plaintiff's exhibit, #5, p. 19). Yet at another point, the sheriff testified that he had thought it would be a "waste of time" to ask any of the Negro citizens of Dallas County what Lafayette was doing. (Transcript, page 26) More significantly still, although the sheriff had a conversation with Lafayette on June 17, 1963, he did not, apparently, see fit to ask Lafayette about his means of support. (Transcript, page 24.)

As to the charge that Lafayette's vagrancy consisted in begging for money, this reduces itself to a report received by the sheriff that Lafayette had been begging for money on June 17, 1963 (Plaintiff's exhibit #5, page 20, Transcript, pp. 24). [It is noteworthy, too, that the sheriff could not make up his mind whether this report had come from his deputies or an informer (Transcript, p. 23, p. 24, Plaintiff;s exhibit #5, p. 20] It is evident that the "begging" occurred at the June 17, 1963 mass meeting. (Plaintiff's exhibit #5, pp. 20-21). The sheriff did not know whether Lafayette had been "begging" money for his own personal needs or for a cause. "I know nothing but begging for money," he said. (Plaintiff's exhibit #5, p. 18). That, apparently, was good enough for the sheriff. It was good enough to justify the execution of a warrant for the arrest and incarceration of Lafayette. It was good enough for the sheriff even though he know that funds had been solicited for voter registration activities at the May 14, 1963 mass meeting (Report of Deputy Sheriff Bates, Plaintiff's ex-

hibit # 29), even though he knew Lafayette was working on the voter registration drive and was in charge of the mass meeting (Plaintiff's exhibit #5, p. 17) and even though he must have known, what any reasonable man surely knows, that funds are necessary to support the expenses of any sustained educational and civic undertaking and that solicitations are the order of the day at all such gatherings. [Acting pursuant to a subpoena duces tecum the sheriff produced at the hearing on July 25, 1963 the notes made by his deputies at each of the mass meetings. While the sheriff had men taking notes at each of the meetings he was, inexplicably, unable to produce any notes made of the June 17, 1963 meeting. (Transcript, p. 11, 12)]

If the claim that there was any sufficient cause to justify the shariff's execution of the affidavit and warrant for Lafayette's arrest strains credulity, the circumstances

surrounding the arrest of Lafayette fare no better. To begin with, he had $27.75 in his possession when arrested by Deputy Sheriff Weber (Plaintiff's exhibit #5, pp. 13, 14). Then, when Webber asked Lafayette whether he was employed, Lafayette responded that he was indeed working for the Dallas County Voters League. (Plaintiff's exhibit #5, p. 25). Deputy Webber understood Lafayette to have said that he was working with "the Dallas County Voting Registration" (Plaintiff's exhibit #5, p. 10). And Deputy Webber apparently chose to construe this as proof that Lafayette was unemployed because he, Deputy Webber, knew that Lafayette was not an employee of the Dallas County Board of Registrars. (Plaintiff's exhibit #5, p. 10). Thus, was Lafayette's vagrancy firmly established. Suffice it to say, Lafayette was acquitted of the charge in the Dallas County Court on June 20, 1963.

Any fair reading of the testimony elicited at Bernard Lafayette's trial for vagrancy, and of Sheriff