

# Washington University Law Review

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Volume 18 | Issue 2

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January 1933

## The Aftermath of Moore v. Dempsey

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### Recommended Citation

John S. Waterman and Edward E. Overton, *The Aftermath of Moore v. Dempsey*, 18 ST. LOUIS L. REV. 117 (1933).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol18/iss2/3](https://openscholarship.wustl.edu/law_lawreview/vol18/iss2/3)

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THE AFTERMATH OF *Moore v. Dempsey*\*

BY J. S. WATERMAN AND E. E. OVERTON

The inclusion of *Moore et al. v. Dempsey, Keeper of the Arkansas State Penitentiary*,<sup>1</sup> a decision of the Supreme Court of the United States, in recent case-books on constitutional law and on federal procedure<sup>2</sup> has aroused interest as to the fate of the five petitioners who sought by a writ of habeas corpus, in the federal court of the eastern district of Arkansas,<sup>3</sup> to secure their release after conviction of murder and sentence of death in a state court.<sup>4</sup>

The indictments came as a result of an alleged negro "insurrection" near Elaine, Phillips County, Arkansas, which began on September 30, 1919.<sup>5</sup> Race disturbances occurred in other parts of the country about that period.<sup>6</sup> Five whites were killed in the Elaine riot, one of whom was a corporal in the United States army, a member of a military detachment sent there for a short time at the request of the governor.<sup>7</sup> At least eleven negroes were killed, though some estimate the number as high as one hundred.<sup>8</sup>

The grand jury on October 29, 1919, at a regular term of court, indicted one hundred and twenty negroes and in trials, beginning

\* Listed after publication as Research Paper No. 299, Journal Series, University of Arkansas.

<sup>1</sup> (1923) 261 U. S. 86.

<sup>2</sup> McGovney, *Cases on Constitutional Law* (1930) 591; Rottschaefter, *Cases on Constitutional Law* (1932) 577; Dodd, *Cases on Constitutional Law* (1932) 1177; Frankfurter & Katz, *Cases on Federal Jurisdiction and Procedure* (1931) 487.

<sup>3</sup> 28 U. S. C. A. secs. 452, 453.

<sup>4</sup> *Hicks v. State* (1920) 143 Ark. 158, 220 S. W. 308.

<sup>5</sup> *The Negro Year Book* (1922) 79. Most available discussions of the Elaine conflict have been decidedly biased, and are as a rule favorable to the negroes. See, however, the remarks of the late U. S. Senator T. H. Caraway: 58 Cong. Rec. (1919) 8818-8821. Ferguson, *The Elaine Race Riot* (1927) is a very careful and comprehensive study of the disturbance. Since this work is an unpublished master's thesis, it is unfortunately not easily available.

<sup>6</sup> *The Negro Year Book* (1922) 73: "Some of the most serious riots . . . in the history of the nation occurred from 1919 to 1922." Phillips County, in eastern Arkansas, bordering on the Mississippi River and south of Memphis, Tennessee, had a population in 1920 of 44,530, of which 32,929, or 73.9 per cent., were negroes. *Fourteen Census* (1922) III, 96.

<sup>7</sup> *Arkansas Gazette*, Nov. 4, 1919, p. 1, col. 4.

<sup>8</sup> *White, Massacring Whites in Arkansas* (1919) 109 *Nation* 715.

on November 3, 1919, and extending over a total of five days, eleven were sentenced to death and fifty-four given penitentiary sentences, none of which was less than one and none over twenty-one years.<sup>9</sup> About two weeks later a twelfth negro, not apprehended until then, was also sentenced to death.<sup>10</sup> At least one white was indicted for barratry.<sup>11</sup> The feeling alleged to have been aroused by the race conflict, the rapidity with which the trial juries returned the verdicts, and other circumstances said to have existed at the time of the trial, were the basis of the efforts of the twelve sentenced to death to secure new trials.

## II

This article deals primarily with the twelve who received the death sentence. In the appellate reviews of the convictions these twelve were considered in two groups of six each. As a result, in discussing their fate, the two groups have been confused and so it is necessary to treat both groups in this article. The group whose conviction was not reviewed by the Supreme Court of the United States will be disposed of first. This group will be referred to as group one, while the group considered in *Moore v. Dempsey* will be referred to as group two.

On March 29, 1920, the convictions of both groups in the Phillips County Circuit Court were reviewed by the Supreme Court of Arkansas. Group one was granted a new trial because the verdicts against them were defective in form.<sup>12</sup> A second conviction of this group in May, 1920, in the same county, was reversed on December 6, 1920,<sup>13</sup> because in selecting the panel of the petit jury negroes were systematically excluded, thereby violating the Fourteenth Amendment.<sup>14</sup> The group was then granted a change of venue from Phillips to Lee County, in May, 1921.<sup>15</sup> After hav-

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<sup>9</sup> See the files of the Arkansas Gazette, published in Little Rock, Arkansas, November 4-8, 1919; New York Times, Nov. 6, 1919, at p. 17, col. 3. On special terms of circuit court to prevent mob violence see Ark. Dig. Stat. (Crawford 1921) sec. 2211.

<sup>10</sup> Arkansas Gazette, Nov. 18, 1919, p. 1, col. 8.

<sup>11</sup> *Ibid.* Nov. 4, 1919, p. 1, col. 4. Ark. Dig. Stat. (Crawford 1921) sec. 2764.

<sup>12</sup> *Banks v. State* (1920) 143 Ark. 154, 219 S. W. 1015.

<sup>13</sup> *Ware v. State* (1920) 146 Ark. 321, 225 S. W. 626.

<sup>14</sup> 2 Warren, *The Supreme Court in United States History* (rev. ed. 1932) 609; Long, *Cases on Constitutional Law* (2nd ed. 1932) 508, n. 2.

<sup>15</sup> (1923) 159 Ark. at 544, gives the date as May, 1920, but this is obviously

ing agreed to a continuance in Lee County in October, 1921, it demanded a trial both in April and in October of 1922 but this was denied over its protest and the case continued. By a statute of Arkansas the defendants were entitled to a discharge as two terms of court had passed without trial.<sup>16</sup> Accordingly the state supreme court, on June 25, 1923, ordered the sheriff of Lee County to discharge these six from custody.<sup>17</sup>

But on June 25, 1923, the judge of the first judicial circuit of Arkansas, which includes both Lee and Phillips Counties, ordered the sheriff of Lee County to convey the six prisoners to the state penitentiary for safe keeping, they then being confined in the Lee County jail. The warden of the penitentiary declined to receive them as the decision of the state supreme court on June 25, 1923, directing the sheriff of Lee County to discharge the prisoners from custody, had been rendered before the order of the circuit court was made. The circuit court of Lee County cited the warden for contempt and later fined him five hundred dollars. On certiorari the cause was dismissed in January, 1924, as the court said that one cannot be held in contempt for disregarding a void order. The order of the circuit court was void, since the negroes were no longer under sentence and the circuit judge was empowered to send to the state penitentiary only convicted persons.<sup>18</sup>

The six men in group one, who were abandoned by the sheriff of Lee County at the gates of the penitentiary, wandered off unmolested as the warden refused to admit them.<sup>19</sup>

### III

On March 29, 1920, the conviction of group two, however, was confirmed by the Supreme Court of Arkansas despite allegations that the verdicts were not supported by sufficient evidence and that the trials of these six, five of whom were tried jointly, were conducted under such circumstances that due process of law was lacking. The Supreme Court of Arkansas stated that the evi-

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erroneous as the second reversal of the Phillips Circuit Court did not occur until Dec. 6, 1920. See n. 13 above.

<sup>16</sup> Ark. Dig. Stat. (Crawford 1921) sec. 3132.

<sup>17</sup> *Ware v. State* (1923) 159 Ark. 540, 252 S. W. 934.

<sup>18</sup> *Martin v. State* (1924) 162 Ark. 282, 257 S. W. 752.

<sup>19</sup> *Arkansas Gazette*, June 26, 1923, p. 1, col. 6, 8.

dence was legally sufficient to support the verdicts and that in the face of this affirmative showing it could not assume the trials to be an empty ceremony.<sup>20</sup>

A petition for a rehearing was denied April 26, 1920.<sup>21</sup> A petition for certiorari, filed May 24, was denied by the Supreme Court of the United States on October 11, 1920.<sup>22</sup> The governor on April 19, 1921, set the date of execution as June 10, 1921. On June 8, Chancellor Martineau of the equity district in which the state penitentiary is located, later to become federal judge of the eastern district of Arkansas, granted a writ of habeas corpus and enjoined the execution of the death sentence. On June 20, the state supreme court granted a writ of prohibition against the chancellor and quashed the writ of habeas corpus and the injunction,<sup>23</sup> on the ground that equity had no jurisdiction to issue a writ of habeas corpus<sup>24</sup> nor to interfere with criminal proceedings. The supreme court in a dictum drew a distinction between the scope of the hearing under the federal statutes on habeas corpus and the Arkansas practice in such a hearing.<sup>25</sup> Another petition for certiorari was dismissed by the Supreme Court of the

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<sup>20</sup> *Hicks v. State* (1920) 143 Ark. 158, 220 S. W. 308; note (1923) 37 Harv. L. Rev. 265. "This assignment of error [exclusion from the grand and petit jury of negroes] is answered by saying that the question was first raised in the motion for a new trial, and it, therefore, comes too late to be considered now": (1920) 143 Ark. at 160. See n. 28 below.

<sup>21</sup> (1920) 220 S. W. 308.

<sup>22</sup> (1920) 254 U. S. 630.

<sup>23</sup> *State v. Martineau* (1921) 149 Ark. 237, 232 S. W. 609.

<sup>24</sup> The statement of the Arkansas Supreme Court that the chancellor had no jurisdiction to issue a writ of habeas corpus seems to ignore the state statute. See Ark. Dig. Stat. (Crawford 1921) sec. 5084. This section appeared, before amended, as Section 388 of the Criminal Code of 1868. See Ark. Code of Practice (1869) p. 344. For legislative power in Arkansas over chancery courts, see *Walls v. Brundidge* (1913) 109 Ark. 250, 258, 160 S. W. 230, 232. It should be pointed out that by the Habeas Corpus Act of 1679 (31 Car. II, c. 2) courts of chancery had power to issue the writ. I Mordecai, *Law Lectures* (2nd ed. 1916) 47; 9 Holdsworth, *History of English Law* (1926) 118. For the history of the Arkansas habeas corpus act see the minority opinion in (1924) 162 Ark. 382, 394, 259 S. W. 754, 758. See also Ark. Acts 1855, p. 139, sec. 11, conferring the power to issue writs of habeas corpus on the first separate chancery court created in Arkansas.

<sup>25</sup> 149 Ark. at 247. Mr. Justice Holmes states that this dictum perhaps suggested the petition for the writ of habeas corpus in the federal court. 261 U. S. at 92.

United States in October, 1921, on motion by counsel for the petitioners.<sup>26</sup>

A justice of the Supreme Court on August 4, 1921, had denied a writ of error sought by this group.<sup>27</sup> The governor then set September 23, 1921, as the date of execution. On September 21, 1921, a petition for a writ of habeas corpus was filed in the federal court for the eastern district of Arkansas by the six prisoners in group two.<sup>28</sup> District Judge Trieber, who had served with distinction for over twenty years, granted the writ but disqualified himself for the hearing because of his long years of residence in Phillips County, Arkansas.<sup>29</sup> Judge Cotteral of Oklahoma City, Oklahoma, who was assigned to sit, heard the demurrer of the state of Arkansas on September 27. The demurrer was sustained and the writ discharged, but Judge Cotteral certified that there was probable cause for appeal to the Supreme Court.<sup>30</sup> For some reason the records were signed by Judge Trieber.

It should be noted that in the dissenting opinion in *Moore v. Dempsey*, Mr. Justice McReynolds said: "With all those things before him, I am unable to say that the District Judge, acquainted with local conditions, erred when he held the petition for the writ of habeas corpus insufficient."<sup>31</sup> It is submitted that in this statement Mr. Justice McReynolds was in error in two particulars. First, the judge of the eastern district of Arkansas did not hold the petition for the writ of habeas corpus insufficient, but granted the writ. Second, at the hearing on the demurrer, if local conditions were inquired into, this was done not by Judge Trieber

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<sup>26</sup> *Martineau v. Arkansas* (1921) 257 U. S. 665.

<sup>27</sup> 261 U. S. at 98. For the various statutory changes on writs of error to a state court see: 2 Foster, *Federal Practice* (3rd ed. 1901) sec. 500; Zoline, *Federal Appellate Procedure* (2nd ed. 1924) sec. 367; Dobie, *Federal Procedure* (1928) sec. 218.

<sup>28</sup> The petitioners alleged mob domination and the systematic exclusion of negroes from the jury panel. Note (1923) 37 Harv. L. Rev. 265. See n. 20 above.

<sup>29</sup> See Rep. Bar Ass'n. Ark., 1928, at 131, for a life of Judge Jacob Trieber. What is the effect of filing a petition for a writ of habeas corpus on state control over the petitioner? See *Rogers v. Peck* (1905) 199 U. S. 425, 435.

<sup>30</sup> 28 U. S. C. A. sec. 466. Dist. Judge Morton in the *Sacco-Vanzetti* case refused to certify there was probable cause for an appeal when he denied the writ of habeas corpus. 5 *The Sacco-Vanzetti Case* (1929) 5536.

<sup>31</sup> 261 U. S. at 101.

but by Judge Cotteral of Oklahoma City, Oklahoma, who lived a great distance from Phillips County, Arkansas.

#### IV

An appeal was taken directly to the Supreme Court of the United States.<sup>32</sup> On February 19, 1923, Mr. Justice Holmes said at the end of the majority opinion:

. . . it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged [in the petition for the writ of habeas corpus] are true, and whether they can be explained [by the state of Arkansas] so far as to leave the state proceedings undisturbed.

Order reversed. The case to stand for hearing before the District Court.<sup>33</sup>

The hearing ordered by Mr. Justice Holmes was never held. One authority, confusing group two with group one, which was freed by the ruling of the state supreme court on June 25, 1923, stated that group two was released, after the decision of the Supreme Court of the United States in *Moore v. Dempsey*, without punishment other than that resulting from imprisonment from 1919 to 1923.<sup>34</sup> This was not the fate of group two, however.

Governor T. C. McRae on November 3, 1923, commuted the sentence of death of group two to twelve years in the penitentiary.<sup>35</sup> March 1, 1924, an order was entered on the docket of the federal district court dismissing the case of *Moore v. Dempsey* for want of prosecution.<sup>36</sup> On January 14, 1925, just before the

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<sup>32</sup> For direct appeals before 1925, in habeas corpus proceedings, from the district court to the Supreme Court see: Zoline, *Federal Appellate Procedure* (2nd ed. 1924) sec. 519. For the present statute governing appeal see 43 Stat. 940 (1925), 28 U. S. C. A. sec. 464. For certiorari to Circuit Court of Appeals see Dobie, *Federal Procedure* (1928) sec. 213.

<sup>33</sup> 261 U. S. at 92. Cf. *Johnson v. Middlebrooks* (C. C. A. 5, 1927) 21 F. (2d) 964.

<sup>34</sup> I Thomas, *Arkansas and its People* (1930) 294.

<sup>35</sup> *Arkansas Gazette*, Nov. 4, 1923, p. 1, col. 1.

<sup>36</sup> Information in letters as to records of Federal District Court, Little Rock, Ark.

end of Governor McRae's second term, he granted indefinite furloughs to the six prisoners in group two. The furloughs have never been revoked.<sup>37</sup>

The hearing ordered by the Supreme Court of the United States was not held for several reasons. Counsel agreed to dismiss the petition for the writ of habeas corpus if the death sentences were commuted to twelve years. This period was decided upon by the defense counsel as the prisoners would be eligible to parole<sup>38</sup> at once, having served one-third of the twelve years by being in prison from November, 1919 to November, 1923. It was thought that this would be perhaps lighter punishment than might result in a second trial, if the hearing in the federal court ordered the discharge of the group. The penitentiary commission, which serves as the state parole board, did not parole the six prisoners in group two, however, but in January, 1925, as has been stated, the governor granted them indefinite furloughs.<sup>39</sup>

The willingness of the governor and of the attorneys for the state to agree to commute the sentence to twelve years was in part prompted by the fact that a petition had been presented signed by eighteen residents of Phillips County, including some of the Committee of Seven,<sup>40</sup> court and county officials, and other leading citizens. This petition stated that since six of the twelve negroes, referring to group one, had been freed from their sentence and since the prosecution entailed a heavy financial burden on Phillips County, it seemed wise to commute the death sentence of the remaining six and terminate the case.<sup>41</sup>

Some of the expense referred to in the petition of the citizens of Phillips County should be discussed. Under an act of 1921, ef-

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<sup>37</sup> Information in letters as to records of State Penitentiary, Little Rock, Arkansas. Hon. J. S. Utley, former Attorney-General of Arkansas, was of invaluable aid in the preparation of this article.

<sup>38</sup> On parole, with particular reference to eligibility after "serving one-third of a definite sentence", see: Ark. Acts 1907, No. 440, p. 1174, sec. 1. The clause "one-third of a definite sentence" appears also in Ark. Dig. Stat. (Kirby & Castle 1916) sec. 7364. This clause, however, was omitted in Ark. Dig. Stat. (Crawford 1921) sec. 9703. On confinement in penitentiary instead of county jail see: Ark. Dig. Stat. (Crawford, 1921) sec. 3418.

<sup>39</sup> On "indefinite furloughs" see *Williams v. Brent* (1926) 171 Ark. 367, 284 S. W. 56.

<sup>40</sup> This committee was appointed by Gov. Chas. H. Brough to investigate the race conflict. Ferguson, *op. cit.*, 69.

<sup>41</sup> Arkansas Gazette, Nov. 4, 1923, p. 1, col. 1.



fective February 1, 1921, a county was made liable at the rate of \$1.00 a day to the penitentiary commission for each prisoner from that county confined in the death chamber at the state penitentiary.<sup>42</sup> On January 29, 1923, some three weeks before the decision of the United States Supreme Court, the state supreme court held Phillips County liable for about \$8,000.00, for money due for the twelve prisoners held under sentence of death.<sup>43</sup> By an act of the General Assembly, approved March 27, 1923, Phillips County was relieved of the payment of this judgment.<sup>44</sup>

## V

Another aspect of this situation may be of some interest. Robert L. Hill, a negro, the organizer of the society,<sup>45</sup> the activity of which was one of the alleged causes of the race conflict, was indicted in Phillips County for night riding and for inciting a riot.<sup>46</sup> The requisition for extradition of Governor Chas. H. Brough of Arkansas, was dishonored on March 23, 1920, by Governor Henry J. Allen of Kansas, the state to which Hill had fled, as he believed that Hill would not receive a fair trial in Arkansas.<sup>47</sup> Hill had also been indicted by the federal grand jury of the eastern district of Arkansas for impersonating a federal officer<sup>48</sup> and, on April 6, 1920, for conspiracy to impersonate such an officer.

After the dishonor of the requisition by Governor Allen, Hill was immediately seized by a United States marshal<sup>49</sup> of the first district of Kansas under the earlier federal indictment. District Judge Pollock set a date early in April, 1920, for a hearing on the issuance of the warrant of removal.<sup>50</sup> It is submitted that the

<sup>42</sup> Ark. Acts 1921, No. 44, p. 50, sec. 8.

<sup>43</sup> Phillips County v. Arkansas State Penitentiary (1923) 156 Ark. 604, 247 S. W. 80, 248 S. W. 11.

<sup>44</sup> Ark. Acts 1923, No. 708, p. 628.

<sup>45</sup> 146 Ark. at 325; Notes (1923) 37 Harv. L. Rev. 247, n. 8; 58 Cong. Rec. (1919) 8819. For the constitution and by-laws of The Progressive Farmers and Household Union of America see Ferguson, *op. cit.*, App. For a discussion of the activities of Hill see *ibid.*, p. 31.

<sup>46</sup> Ark. Dig. Stat. (Crawford 1921) secs. 2795, 2799.

<sup>47</sup> New York Times, March 24, 1920, p. 13, col. 4. See on extradition: Kentucky v. Denison (1861) 24 How. 66. 18 U. S. C. A. sec. 662.

<sup>48</sup> 18 U. S. C. A. sec. 76. Arkansas Gazette, April 9, 1920, p. 11, col. 2.

<sup>49</sup> *Ibid.*, March 24, 1920, p. 1, col. 5.

<sup>50</sup> Dobie, Federal Procedure (1928) sec. 26; 18 U. S. C. A. sec. 591.

order of the federal court was a most unusual one. In substance it required that, before the warrant of removal would be issued, the federal judge of the eastern district of Arkansas and the United States district attorney should agree in writing that if Hill was acquitted he would be placed in the custody of a marshal who was to convey him to the borders of Arkansas so that he might find again asylum in Kansas.<sup>51</sup> Both the district judge and the district attorney refused to sign such an agreement, on the ground that there was no authority for them to assent to the act required by the order of the federal district court in Kansas.<sup>52</sup>

On October 7, 1920, on motion of the district attorney of the eastern district of Arkansas an order of *nolle prosequi* was entered.<sup>53</sup> The indictments in Phillips County against Hill were never tried.<sup>54</sup>

#### CONCLUSION

Of the twelve sentenced to death six were discharged in 1923, after serving less than four years in the penitentiary, because the state had permitted two terms of court to pass without bringing them to trial. These six had twice been granted new trials by the state supreme court, then granted a change of venue, and finally ordered discharged by the state supreme court on a third appeal. The second group of six, only five of whom appear in *Moore v. Dempsey*,<sup>55</sup> after a legal battle extending over four years,

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<sup>51</sup> Arkansas Gazette, April 10, 1920, p. 1, col. 8.

<sup>52</sup> This information acquired by means of letters to counsel involved in the case. To the effect that an order on removal is not appealable see: *Murray v. U. S. (C. C. A. 2, 1921) 273 Fed. 522.*

<sup>53</sup> Information in letters as to records of Federal District Court, Little Rock, Arkansas.

<sup>54</sup> Information in letters from counsel for Robert L. Hill. For an indictment of Hill on another charge see *Hill v. U. S. (C. C. A. 10, 1931) 54 F. (2d) 599.*

<sup>55</sup> Group two was indicted for the killing of Clinton Lee. Frank Hicks, who was tried separately, was charged with firing the fatal shot and the other five were tried jointly as principals in this act. The Supreme Court of the United States referred to only five petitioners, though it appears that Frank Hicks also sought a writ and appealed from the order of the district court. He was furloughed with the other five on Jan. 14, 1925. This information is based on numerous letters advising as to court records.

261 U. S. at 87 reads: "there were two cases originally, but, by agreement, they were consolidated into one." Apparently this statement refers to the two appeals, one of Frank Hicks and one of the other five who appear in

received a final sentence of twelve years in the penitentiary and then, after serving less than six years, was given an indefinite furlough. Hill, the fugitive, successfully fought extradition by the state and also the request by the federal authorities for a warrant of removal. Thus ended the attempt of Arkansas to punish the leaders indicted because of the Elaine riot.

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Moore v. Dempsey. It is believed that the opinion in that case overlooked the appeal of Frank Hicks when it referred to only five petitioners. Court records show that the mandate of the United States Supreme Court, sent to the federal district court in Arkansas on April 11, 1923, included Frank Hicks as well as the other five petitioners.