

University of Massachusetts Law Review

Volume 11 | Issue 2

Article 2

The Law of the Groves: Whittling Away at the Legal Mysteries in the Prosecution of the Groveland Boys

William R. Ezzell

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Ezzell, William R. () "The Law of the Groves: Whittling Away at the Legal Mysteries in the Prosecution of the Groveland Boys," *University of Massachusetts Law Review*: Vol. 11: Iss. 2, Article 2.
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The Law of the Groves: Whittling Away at the Legal Mysteries in the Prosecution of the Groveland Boys

William R. Ezzell

11 U. MASS. L. REV 194

ABSTRACT

This Article tells the legal story of one of the South's most infamous trials – the Groveland Boys prosecution in central Florida. Called “Florida’s Little Scottsboro,” the Groveland case garnered international attention in 1949 when four young black men were accused of the gang rape of a white woman in the orange groves north of Orlando. Several days of rioting, Ku Klux Klan activity, three murders, two trials, and three death penalty verdicts followed, in what became the most infamous trial in Florida history. The appeals of the trial reached the United States Supreme Court, with the NAACP’s Thurgood Marshall serving as lead defense counsel in the re-trial of the case. The case reads like a Hollywood movie, but with the underpinnings of a classic 20th century southern courtroom drama.

This Article looks not only at the history of the Groveland prosecutions, but undertakes a legal analysis of the trial court decisions made by the trial judge. While the historiographical narrative of the Groveland trials is one of racism and a “legal lynching,” many of the legal decisions made by the trial court were, in fact, surprisingly consistent with legal precedent of the time. Nevertheless, the tragic outcome of the Groveland case inflicted a permanent scar on the reputation of the Florida criminal justice system.

AUTHOR NOTE

The author is a 2002 law school graduate of the University of Alabama, and has worked over 12 years as a state prosecutor, with most of that time spent in the office’s Sex Crimes and Special Victims’ Unit. The author would like to thank his wife, his parents, his academic committee at the University of Florida, and the Department of History—Drs. Spillane, Dale, and Davis.

PART I: THE CASE	197
The Groveland Trouble	197
Spoon-Fed, One-Sided Reporting	202
Clay-Eatin' Crackers	203
May God Rest Your Soul	210
Picking on Very Small Potatoes	212
A Strange Twist or a Slaughter	213
PART II: THE LAW	218
Judge and Jury Were Swept to the Fatal End	218
Like Jerusalem Itself.....	222
I'm Not Going to Tell You What He Told Me.....	228
The Court Takes No Action	230
That Little Black Nigger Boy's Clothes.....	231
A Fair and Clean Prosecutor.....	236
Attorneys in Good Standing	239
A Jury of Their Peers.....	241
A Fresh Complaint	242
Those Shoes Made Those Tracks	244
Tell the Truth for Once in Your Life.....	248
Allow the Jury to be Carried to the Scene.....	251
Bring the Defendant Back to the Stand	252
The State Calls Sheriff Willis V. McCall.....	255
Couched in Different Language	256
By a Technicality He Stopped Me.....	258
With Any Innocent Man's Blood on My Soul	260
PART III: CONCLUSIONS.....	262
The Whittler	262
Victory or Tragedy?	263
Natural Causes.....	265

The case presents one of the best examples of one of the worst menaces to American justice.¹

On July 16, 1949, on a desolate road in rural central Florida, a white woman claimed she was raped by four black men. Norma Lee Padgett and her husband Willie Haven Padgett were driving on Florida State Road 50 towards Groveland, Florida, having come from a dance in Clermont, when Willie stopped the car on a deserted stretch of darkened road, surrounded by the orange groves of Lake County. The truth of what happened next will forever remain one of Florida's greatest legal mysteries. According to Willie and Norma Lee, the couple began experiencing car troubles, and four black men stopped to help them. Allegedly, the men overpowered Willie and drove off into the groves with Norma Lee. When they stopped the car at a secluded location, each of the four men took turns raping Norma Lee in the backseat of their car, at gunpoint. When they had finished, she claimed, the four men drove off, leaving her to wander through the orange trees until she found help. The national and international press called the "crime"² that Norma and Willie concocted³ a farce.⁴ Locals called it the worst crime in Lake County's history.⁵ In the wake of the allegations came riots, burnings, trials, appeals, and murders.

In spite of its front-page news status, for nearly 65 years the story of the Groveland Boys has been a story as much in search of a voice, as it has been a story in search of the truth. Perhaps kept out of the limelight by a state overly concerned with its tourist image, and only covered sparingly by historians⁶ and journalists.⁷ Florida's most

¹ *Shepherd v. Florida*, 31 U.S. 50, 55 (1951) (Jackson, J., concurring).

² James W. Ivey, *Florida's Little Scottsboro: Groveland*, 56 *CRISIS* 266, 268 (1949) (quotation marks used by the original source).

³ *See id.* at 285-86 (explaining local suspicion centered around the rumor that Norma Lee and Willie Padgett created this rape story to hide the fact that Willie had battered Norma Lee; or to hide the fact that Norma Lee had been having a sexual affair with a black man).

⁴ Ramona Lowe, *Judge Whittles as Three Fight Death*, *CHI. DEFENDER*, Sept. 10, 1949, at 3.

⁵ Mabel Norris-Reese, *The True 'Groveland Story' Will be Told in This Week's Life*, *MOUNT DORA TOPIC*, July 28, 1949, at 1.

⁶ *See generally* BEN GREEN, *BEFORE HIS TIME: THE UNTOLD STORY OF HARRY T. MOORE, AMERICA'S FIRST CIVIL RIGHTS MARTYR*. (Free Press 1999); GILBERT KING, *THE DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* (Harper Perennial 2012).

sensational trial has yet to be analyzed through a legal lens. Even after two trials and two appeals, the majority opinion in the United States Supreme Court's only review of the Groveland matter consists of just eight words.⁸ This Article seeks to step past the Bar and look behind the Bench at this truly remarkable legal drama. It can hardly be said that the sad results of the Groveland trials were surprising. No doubt, these defendants were foredoomed.⁹ To that end, this Article does not attempt to make any further social, moral, or political comment on the embarrassing depravities of a legal system based on the white supremacy of central Florida in 1949. Such works undoubtedly exist in deservedly countless numbers based on similar cases and locations throughout the American South. Rather, this Article attempts to examine the legal rulings, strategic motivations, procedural rules, and court precedents in place at the time of these trials, to bring to light the failures and successes of the lawyers and judges involved in this matter. Contrary to modern conventional wisdom, the majority of the rulings made by the trial judge in the case of the Groveland Boys—whether motivated by legal acumen, racism, justice, or luck—proved to be correct under the law of the day. While many of these rulings would not stand the test of time or our current understandings of justice and race relations, they were, in their time, correct. It is to these applications of the law, many of which may sting the modern legal ear, that we now turn our attention.

PART I: THE CASE

The Groveland Trouble

Modern writers say the Groveland trouble was about citrus – not race, or sex.¹⁰ An all-black town¹¹ in Lake County, Florida, just west of Orlando, Groveland was built around a sharecropper mentality which had been in place since the end of the Civil War. For wages of

⁷ See GARY CORSAIR, *THE GROVELAND FOUR: THE SAD SAGA OF A LEGAL LYNCHING* (1st Books 2004).

⁸ *Shepherd v. Florida*, 341 U.S. 50, 50 (1951) (“Per Curiam. The judgment is reversed. *Cassell v. Texas*, 339 U.S. 282.”).

⁹ Brief for Petitioners at 19, *Shepherd v. Florida*, 341 U.S. 50 (1950).

¹⁰ CORSAIR, *supra* note 7, at 110.

¹¹ CORSAIR, *supra* note 7, at 65 (Per local segregation laws, blacks were not permitted to live in the nearby, all white, town of Mascotte, Florida).

fifteen cents a day, the white grove owners in Mascotte counted on the black citizens of Groveland to pick their citrus crops, fertilize their trees, and perform the many hard tasks of maintaining the groves that supported the profitable citrus industries of central Florida.¹² Whites comprised roughly sixty percent of the local population, and they tolerated their black neighbors as long as they continued to work in white-owned citrus groves.¹³ Under this rigid system of racial oppression¹⁴ few blacks owned their own homes,¹⁵ and this *de facto* sharecropper system created a debilitating condition of dependency¹⁶ that cruelly entangled both races.

In the years following the Second World War, black soldiers returned to Groveland only to find it exactly as Jim Crow had left it.¹⁷ Having served in the United States military, and having seen indelible examples of racial horrors and harmonies, returning black soldiers were considerably less acquiescent to this labor system.¹⁸ It was into this society that local black residents Walter Irvin and Samuel Shepherd returned, following their dishonorable discharges from the United States Army and their return from the war in Europe.¹⁹ Not wanting to work in the orange groves, Irvin and Shepherd tried odd jobs in nearby Orlando, strutting the main street of Groveland proudly wearing their Army uniforms. Considered uppity, or smart niggers,²⁰

¹² Steven F. Lawson et al., *Groveland: Florida's Little Scottsboro*, 65 FLA. HIST. Q. 1, 2 (1986).

¹³ KING, *supra* note 6, at 96-97 (referencing a study done on the local Lake County economy in the wake of the Groveland affair by British economist Terence McCarthy).

¹⁴ Lawson, *supra* note 12, at 1.

¹⁵ See CORSAIR, *supra* note 7, at 39; see also KING, *supra* note 6, at 97 (noting that Groveland defendant Samuel Shepherd's father, Henry, was one of the few black grove owners in the area—a fact that made the Shepherd family resented among local whites).

¹⁶ Lawson, *supra* note 12, at 2.

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 2-3.

¹⁹ *Id.* at 4. Irvin and Shepherd were court martialed for misappropriation of government property, and dishonorably discharged from the U.S. Army. *Id.*

²⁰ See Ivey, *supra* note 2, at 266 (adding further to the local white community's scorn of Sammie Shepherd, his father was a rare Negro success story in Groveland, and he not only owned his own house, but owned his own small grove).

they were immediately approached by Lake County Sheriff, Willis V. McCall and ordered to remove their uniforms and take their places in the groves where they belonged.²¹ They refused. When Norma Lee Padgett alleged rape at the hands of four unknown black men on July 16, 1949, Sheriff McCall already had his two prime suspects in mind, and they were quickly arrested. Two other young black men, Charles Greenlee and Ernest Thomas, were rumored around town to be involved in the popular but illegal lottery games known as bolita or Cuba.²² Sheriff McCall, again seizing an opportunity, arrested Greenlee and chased Thomas into a cypress swamp near the Georgia border. Once located, Ernest Thomas was shot and killed 'while resisting arrest.'²³

Lake County, Florida, like much of the American South, adhered to a strict paradigm of chivalry, which was viewed as necessary for the maintenance of racial control. As Steven F. Lawson, professor of history at the University of South Florida and perhaps the leading authority on the Groveland story, explains:

*The protection of southern white womanhood justified racial control. However questionable in specific cases, the word and sexual morality of southern daughters were considered equally pure. The fear of rape and the threat of menacing blacks provided a potent rationale for keeping all Negroes in their subordinate place.*²⁴

Thus, as Gilbert King argues, this southern rape complex had nothing to do immediately with sex, but rather an internal southern fear that any advancement by the black race, beyond its currently limited social situation, might allow blacks to one day advance far enough to lay claim to complete equality.²⁵ Following Norma Lee's allegations, southern white womanhood, and the Lake County way of life, was under attack. A racial battle whose ferocity would be nearly unmatched in American history was about to be waged in Groveland.

To pursue this racial attack the whites of the Lake County would rely on the same justifications their grandfathers relied upon, and the

²¹ Lawson, *supra* note 12, at 3.

²² KING, *supra* note 6, at 114-15.

²³ *Id.* at 117.

²⁴ Lawson, *supra* note 12, at 25.

²⁵ KING, *supra* note 6, at 52.

same justifications that whites all across the American South had been utilizing since the first days that Africans and Europeans shared space on this continent. As phrased by Ida B. Wells, the excuse of the protection of white womanhood was “used to justify their own [white] barbarism.”²⁶ Thus, beginning the day after Norma Lee Padgett claimed rape, insensate, intolerant whites²⁷ from all over Florida and the South, brittle with tension and vengeance,²⁸ converged on this little “festering bowels”²⁹ in Lake County. Traffic patterns were affected as far away as Jacksonville with vehicles bound for Groveland.³⁰ An angry white mob burned black homes in Groveland — including the home of Samuel Shepherd’s father³¹ — and shot into several others. Black residents fled to Orlando or took refuge by hiding in the orange groves. Over 300 National Guardsmen and the 118th U.S. Army Field Artillery Unit were deployed to help quell the three-day reign of terror. The leading local paper, *The Mount Dora Topic*, defended the mobs actions by writing, “the mobs didn’t just wantonly burn Negro homes in wild vengeance for the crime. No – it was a cunning mob . . . the mob burned the homes of a Negro engaged in voodoo, and another who ran a Bolita game.”³² When the mob arrived at the Lake County Jail in Tavares demanding that the Sheriff hand over the suspects, Sheriff McCall hid his prisoners in the groves to prevent what surely would have been a lynching. The local press proclaimed Sheriff McCall earned a badge of honor for his handling of the mobs.³³ The

²⁶ DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE – A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER*, at xvii (Vintage Books 2010) (referencing a quote by Ida B. Wells, editor of the *Memphis Free Press*).

²⁷ Ivey *supra* note 2, at 266.

²⁸ Lowe, *supra* note 4, at 3.

²⁹ Ivey *supra* note 2, at 266.

³⁰ CORSAIR, *supra* note 7, at 59.

³¹ See KING, *supra* note 6, at 97 (referencing Terence McCarthy’s study indicating that the whites of Lake County were less interested in seeking revenge for the rape of Norma Padgett than in seeing the demise of ‘all independent colored farmers’).

³² Norris-Reese, *supra* note 5, at 1. Bolita was a popular lottery game within the local black communities that drew much of Sheriff McCall’s wrath because it involved illegal gambling.

³³ Mabel Norris-Reese, *Honor Will Be Avenged*, MOUNT DORA TOPIC, July 21, 1949, at 4.

stories of the violence in Groveland spread quickly, making headlines in national and international papers the next day.³⁴ Before the last of the house fires had smoldered out, Groveland was already being called “the Florida Terror,”³⁵ and “Florida’s Little Scottsboro.”³⁶

There were no shortages of horrifying comparisons for the national media to make. The sad truth of the matter was that Groveland was hardly unique. From Elaine, Arkansas to Scottsboro, Alabama, the southern race riot, fueled by allegations of black on white rape, was tragically common. Historian Danielle McGuire opines that “[u]nsubstantiated rumors of black men attacking innocent white women sparked almost 50 percent of all race riots in the United States between Reconstruction and World War II.”³⁷ To quell these riots, there seemed only two options: a lengthy and painful occupation by the local National Guard, or a quick trial followed by the imposition of the death penalty for the accused. As Gilbert King, the Pulitzer Prize winning author of *Devil in the Grove* writes, “[i]n the South the bargain between justice and the public was implicit: an expeditious trial with swift punishment by death or else a riot and lynching.”³⁸ Lynching was a very real concern for the black population of Florida. Since 1900, in the decades preceding the Groveland Case, Florida was home to the nation’s highest per capita lynching rate. With a rate of 4.5 deaths by lynching for every 10,000 blacks, Florida’s lynching rate was double that of Mississippi and three times greater than that of Alabama.³⁹ With the National Guard already encamped outside Groveland, and with an intimate knowledge of Florida’s violent tendencies, Sheriff McCall spared the lives of his prisoners and prepared to make them available for their expeditious trial.⁴⁰ In sum,

³⁴ See Lawson, *supra* note 12, at 2.

³⁵ GREEN, *supra* note 6, at 7.

³⁶ “Florida’s Little Scottsboro” references the 1931 Alabama prosecution of nine young black boys for the alleged rape of two white women while on a train southbound from Chattanooga, Tennessee through the northeastern Alabama town of Scottsboro. The trials and appeals of that case have long been considered a dark chapter in American race relations, and a widely accepted low point in American legal history. See Lawson, *supra* note 12, at 7.

³⁷ MCGUIRE, *supra* note 26, at 22.

³⁸ KING, *supra* note 6, at 137.

³⁹ GREEN, *supra* note 6, at 45.

⁴⁰ GREEN, *supra* note 6, at 7 (arguing McCall and the local white power machinery likely protected the Groveland defendants from lynching because the negative

as the British observer Terence McCarthy sadly noted, the Groveland Boys were simply being offered up as a legal blood-sacrifice in an effort to spare the remainder of the local black community from further violence.⁴¹

Spoon-Fed, One-Sided Reporting

With pens in hand and typewriters in tow, the national and local press came to Lake County to cover the events that would comprise one of the greatest race trials in American history. The national media was represented in Groveland by six major media outlets: *The New York Times*, *The Chicago Defender*, *Time*, *Life*, *The Christian Science Monitor*, and *The New Leader*. Of these, the articles written in the *New York Times* and *The Chicago Defender* are of particular importance to the historiography of Groveland, but perhaps just as much for their authors as for their content. *The New York Times* had sent its only black reporter, Ted Poston, to cover the Groveland story.⁴² Poston was uniquely qualified to cover Groveland, since he had covered the 1931 trial of the Scottsboro Boys in Alabama, and had himself been a victim of blackmail over a false rape allegation in the past.⁴³ He was eventually nominated for the Pulitzer Prize for his articles on Groveland.⁴⁴ Similarly, black journalist Ramona Lowe of *The Chicago Defender* was able to scoop several stories on the Groveland saga since she was able to move and interview with relative ease in the local black communities. She even rode back and forth to the courthouse in the same car as the defense attorneys.⁴⁵ Gary Corsair, author of *The Groveland Four: The Sad Saga of a Legal Lynching*, attributes Lowe's investigative success to her being viewed by the local black communities as a fellow black first, a woman second, and a journalist third.⁴⁶

press in the national media was already having an adverse effect on Florida's tourism industry, and any further violence would only bring increased pressure upon the state).

⁴¹ KING, *supra* note 6, at 98.

⁴² CORSAIR, *supra* note 7, at 66.

⁴³ *See id.*

⁴⁴ *Id.* at 380. Additionally, New York University later recognized Poston's work on Groveland as one of the top 100 works of journalism of the 20th Century. *Id.*

⁴⁵ KING, *supra* note 6, at 175.

⁴⁶ CORSAIR, *supra* note 7, at 79.

Drawing up the battle lines opposite the national media outlets in Groveland were the three primary local newspapers: *The Mount Dora Topic*, *The Leesburg Commercial*, and *The Orlando Sentinel*.⁴⁷ The local authorities, namely State Attorney Jesse W. Hunter and Sheriff McCall, used the *Topic* and the *Commercial* as their own private trumpets for information on this drama of the South.⁴⁸ Not surprisingly, many of these stories smacked of spoon-fed, one-sided reporting.⁴⁹ Like the national press, it was the personalities of the local writers that drove the stories, and no local press personality was as intriguing as the editor of the *Mount Dora Topic*, Ms. Mabel Norris-Reese. A northerner by birth, Norris-Reese had emigrated to the South in the years before Groveland, but she seemed to be a Southerner at heart; she refused to sit at the media table in the Lake County courtroom until the black journalists were forced to move at her request and ultimately Judge Truman Futch's order.⁵⁰ Like the *Times*' Poston, however, Norris-Reese's work was also nominated for the Pulitzer Prize.⁵¹

Clay-Eatin' Crackers

The Florida Terror was making for big press in 1949, and it would make for tragic history as well. Like much of history, distinct personalities were at the center of these events, and the Groveland story was long on colorful characters. At center stage sat the alleged victim and prosecutrix, Norma Lee Padgett. The seventeen year-old newlywed daughter of a respected, albeit poor, Lake County citrus grower,⁵² Norma Lee held many secrets inside her slight, blond frame. The girl that State Attorney Jesse Hunter referred to as that "poor, old,

⁴⁷ *The Mount Dora Topic* and *The Leesburg Commercial* were published as weekly papers. *The Orlando Sentinel* was a daily paper, published under two separate titles through the Groveland saga—*The Orlando Sentinel*, and *The Orlando Morning Sentinel*. The author will use the more common title, *The Orlando Sentinel*, throughout this Article.

⁴⁸ Mabel Norris-Reese, *Lake County Awaits Governor's Solemn End to Groveland Story*, MOUNT DORA TOPIC, May 18, 1950, at 1.

⁴⁹ CORSAIR, *supra* note 7, at 79.

⁵⁰ See Lowe, *supra* note 4, at 3 (describing an instance where Norris-Reese refused to sit at a table because there were three negroes present).

⁵¹ Lauren Ritchie, *It Was Long Past Time to Omit McCall's Name*, ORLANDO SENTINEL, Oct. 3, 2007, at 1.

⁵² See Ivey, *supra* note 2, at 266.

honest cracker girl”⁵³ had married an older man, but married down in station. Her husband, Willie Haven Padgett, was of the lowest stratum of Southern white society. Referred to even by the Lake County locals as a “clay-eatin’ cracker,”⁵⁴ Willie was prone to alcohol and violence. On the date of this offense, the couple was not living together due to marital problems.⁵⁵ It was rumored that domestic violence, infidelity, or both were to blame.⁵⁶ Such rumors of infidelity even came in the form of an affair between Norma Lee and Groveland defendant Samuel (“Sammie”) Shepherd.⁵⁷

Ernest Thomas, a friend of both Samuel Shepherd and Walter Irvin, was also in town on the night of July 16, 1949. Thomas was in Groveland to work in a local bolita game that night, but he was not with Shepherd or Irvin at any point in the evening. He was with Charles Greenlee, a sixteen year old from Gainesville who came to Groveland to meet Thomas about the bolita game.⁵⁸ Greenlee was never in the area of the alleged rape that night,⁵⁹ and when Norma Lee and Willie had a chance to identify him as one of the assailants, they both indicated he was not one of the four.⁶⁰ Regardless, Greenlee was arrested for loitering, and Thomas fled toward the Georgia border. Thomas was found by local law enforcement in Madison County, Florida and was shot and killed.⁶¹ Four different types of ammunition were identified in his body.⁶² Norma Lee was driven to Madison County to identify the deceased suspect. She confirmed Thomas was one of the four.⁶³

Even if Norma Lee had failed to implicate Ernest Thomas, as had been the case with Charles Greenlee, it may not have mattered to Lake

⁵³ Mabel Norris-Reese, *Groveland Story May Give High Court New Decision to Make*, MOUNT DORA TOPIC, Feb. 21, 1952, at 1.

⁵⁴ Ivey *supra* note 2, at 285.

⁵⁵ Trial transcript at 311, Florida v. Irvin, (D. Fla. 1952) (removed to Marion Cty.) (on file with author).

⁵⁶ KING, *supra* note 6, at 224-25.

⁵⁷ See generally KING, *supra* note 6, at 35.

⁵⁸ Lawson, *supra* note 12, at 8.

⁵⁹ *Id.* at 15.

⁶⁰ *Id.* at 10.

⁶¹ *Id.* at 4.

⁶² See KING, *supra* note 6, at 118.

⁶³ See Lawson, *supra* note 12, at 4.

County Sheriff Willis V. McCall. A good ole boy type sheriff, straight out of central casting,⁶⁴ McCall seemed a precursor of Birmingham's Bull Connor.⁶⁵ During his twenty-seven year tenure as sheriff of Lake County,⁶⁶ McCall was investigated for civil rights violations thirty-eight times—but was never convicted of any.⁶⁷ An FBI informant would later confirm McCall was an active member of the Ku Klux Klan's Apopka, Florida Klavern.⁶⁸ While the national press reviled the Lake County sheriff,⁶⁹ the local press sang his praises. Referencing McCall's involvement in the Groveland case, Mabel Norris-Reese wrote that he spent night and day working on the case,⁷⁰ and "the full story of his bravery . . . will never be told."⁷¹ While McCall was certainly subject to divergent viewpoints, what was clear was that he understood his constituency. McCall had originally made a name for himself as a union buster while an agent with the U.S. Agricultural Commission, and from his time at the USAC he had developed little patience for blacks that chose not to work in the groves. If there was one thing McCall perhaps policed more than idle blacks, it was their illicit bolita rings.⁷² So when McCall needed four black suspects to firm up Norma Lee Padgett's rape allegations, the idle and uppity Samuel Shepherd and Walter Irvin, and the bolita-involved Charles Greenlee and Ernest Thomas, would close the investigation nicely.

⁶⁴ Jonathan L. Entin, *Litigation, Political Mobilization and Social Reform: Insights from Florida's Pre-Brown Civil Rights Era*, 52 FLA. L. REV. 497, 501 (Apr. 2000) (reviewing BEN GREEN, *BEFORE HIS TIME: THE UNTOLD STORY OF HARRY T. MOORE, AMERICA'S FIRST CIVIL RIGHTS MARTYR* (Free Press 1999)).

⁶⁵ GREEN, *supra* note 6, at 12.

⁶⁶ *See id.* at 51 (explaining that McCall served as sheriff of Lake County from 1944 to 1972).

⁶⁷ CORSAIR, *supra* note 7, at 379.

⁶⁸ *Id.* at 30.

⁶⁹ *See, e.g., Sheriff McCall Shoots New Victim in Florida*, CHI. DEFENDER, June 4, 1955, at 5. The national press kept Sheriff McCall in the news even three years after the end of the Groveland cases with snide headlines such as this one.

⁷⁰ Mabel Norris-Reese, *Grand Jury Indicts Three Negroes in Groveland Case*, MOUNT DORA TOPIC, July 21, 1949, at 1.

⁷¹ Mabel Norris-Reese, *Our Thanks, Gentlemen*, MOUNT DORA TOPIC, Sept. 8, 1949, at 4.

⁷² KING, *supra* note 6, at 78.

Sheriff McCall's right hand man was Deputy Sheriff James Yates. With front page photos captioned, "He Gets Evidence,"⁷³ and over-the-top headlines such as "Scotland Yard, Please Don't Take Our Yates,"⁷⁴ Yates was highly regarded in the local press for his "remarkable police work that put evidence into the hands of the State."⁷⁵ Not surprisingly, the national press saw him quite differently. The most infamous and notably remarkable police work he was responsible for was a series of plaster foot-casts taken at the rape scene that *conclusively* linked defendant Walter Irvin to the scene. The Groveland defense team strongly suspected the casts were a fake, and in a separate 1962 case, Yates was federally indicted for making forged plaster foot-casts in order to assist in framing a defendant.⁷⁶

The Groveland trials would be prosecuted by the elected State Attorney for the Fifth Judicial Circuit of Florida, the Honorable Jesse W. Hunter. Now seventy years old, Hunter had passed the Florida bar exam having never attended law school.⁷⁷ He was sworn into the Florida Bar in 1913, alongside his lifelong friend, Circuit Judge Truman Futch.⁷⁸ The national press called Hunter a tireless, cigarette smoking,⁷⁹ folksy character with a cracker barrel wit.⁸⁰ He referred to the Groveland defendants as "niggers" throughout the course of the case.⁸¹ To his friend Mabel Norris-Reese, the editor of the local

⁷³ Mabel Norris-Reese, *He Gets Evidence*, MOUNT DORA TOPIC, Sept. 8, 1949, at 1.

⁷⁴ Mabel Norris-Reese, *Scotland Yard, Please Don't Take Our Yates*, MOUNT DORA TOPIC, Sept. 8, 1949, at 1. Norris-Reese subsequently writes, "Should Scotland Yard hear of Deputy Sheriff James L. Yates and his work on 'the Groveland Story,' then Lake County might be out a deputy." *Id.*

⁷⁵ Norris-Reese, *supra* note 71, at 4.

⁷⁶ See Jack Greenberg, *War Stories: Reflections on Thirty-Five Years with the NAACP Legal Defense Fund*, 38 ST. LOUIS U. L. J. 587, 593 (1994).

⁷⁷ CORSAIR, *supra* note 7, at 50.

⁷⁸ Mabel Norris-Reese, *At Long Last, the Groveland Story is Put into Production*, MOUNT DORA TOPIC, Sept. 8, 1949, at 1.

⁷⁹ Lowe, *supra* note 4, at 3.

⁸⁰ Lawson, *supra* note 12, at 17.

⁸¹ Lowe, *supra* note 4, at 3.

weekly newspaper *The Mount Dora Topic*, the sage and trial trained⁸² Hunter, was Lake County's "Dean of Law."⁸³

The defense of the 1949 Groveland Three⁸⁴ was conducted by Alex Akerman, Jr. of Orlando. The only Republican in the Florida legislature, Akerman had made his reputation as a civil rights liberal when he filed a desegregation lawsuit on behalf of Virgil Hawkins against the University of Florida in Gainesville. In sum, he was the *only* white Florida attorney the National Association for the Advance of Colored People (NAACP) could find who was willing to accept the case.⁸⁵

Akerman was assisted in the first Groveland trial by Franklin Williams, a black New York lawyer from the NAACP's Legal Defense Fund. Upon stepping foot in the courtroom in Tavares, Williams became the first black attorney to practice law in Lake County.⁸⁶ The colored attorney possessed a "clipped northern accent, answered questions with a cold hardness,⁸⁷ and had a "complete bitterness in [his] eyes," wrote the *Topic*.⁸⁸ To the editor of the *Topic*, Williams personified the racial question.⁸⁹ Under an article featuring Williams, the *Topic* printed a photo on the front page with the inexplicable caption, "Was it Hate?" underneath.⁹⁰ Franklin Williams was trying the Groveland cases on enemy soil.

The biggest trial in Florida history would be tried before the Honorable Truman G. Futch, circuit court judge for the fifth judicial circuit of Florida. Like his lifelong friend Jesse Hunter, Futch never

⁸² Norris-Reese, *supra* note 33, at 4.

⁸³ Mabel Norris-Reese, *Elmo Roper May Prove Length of Leaf, But Not Hunter's Ability*, MOUNT DORA TOPIC, February 14, 1952, at 1.

⁸⁴ The 1949 "Groveland Three" trial in Lake County (Tavares, Florida) involved defendants Samuel Shepherd, Walter Irvin, and Charles Greenlee. Defendant Ernest Thomas was deceased, but his name still appeared on the indictment.

⁸⁵ CORSAIR, *supra* note 7, at 93.

⁸⁶ *Id.* at 105. Williams, a black man without a Florida Bar card, was allowed to assist with the case only because State Attorney Hunter asked that his son be sworn in as his assistant at the same trial. *Id.*

⁸⁷ Mabel Norris-Reese, *Attorney Williams Expresses His Views on 'Faults of the South'*, MOUNT DORA TOPIC, Sept. 8, 1949, at 1.

⁸⁸ Mabel Norris-Reese, *When History Records*, MOUNT DORA TOPIC, Sept. 8, 1949, at 4.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1.

attended law school,⁹¹ but he passed the bar exam with Hunter in 1913 after a self-taught legal education.⁹² The national press dubbed him “The Whittler,” for his incessant practice of whittling fence chips into toothpicks during the trial, and Ramona Lowe of *The Chicago Defender* added to the legend with the Nero-esque article headline, “Judge Whittles While Three Fight Death.”⁹³ Meanwhile, the local press described Futch as at ease on the bench . . . attentive to every word, and completely fair and unbiased.⁹⁴ The transcripts of the trials would both refute and acknowledge such praise.

With the players and press assembled in Tavares, the county seat of Lake County, State Attorney Hunter convened a grand jury on July 20, 1949. In spite of the fact that Norma Lee and Willie Padgett had failed to originally implicate Charles Greenlee in this offense, and the fact that Ernest Thomas had been killed during his capture in north Florida, the four names of Samuel Shepherd, Walter Irvin, Charles Greenlee, and Ernest Thomas appeared before a Lake County grand jury for indictment on the charge of capital rape. All four indictments were returned. Mabel Norris-Reese, editor of *The Mount Dora Topic*, proclaimed that the hasty call of the grand jury “bespeaks of the caliber of the county’s law enforcement officers.”⁹⁵

With the quick return of the indictments and the setting of a trial date just over one month out, the local press went into high gear. The harsh pretrial publicity they generated would constitute a major factor in the United States Supreme Court’s review of the trial.⁹⁶ For starters, *The Leesburg Commercial*, using information likely provided by Sheriff McCall, ran a story confidently detailing the fact that two of the three defendants had confessed while in custody, but failed to discuss how these alleged confessions might have been obtained.⁹⁷

⁹¹ CORSAIR, *supra* note 7, at 50.

⁹² Norris-Reese, *supra* note 78, at 1.

⁹³ Lowe, *supra* note 4, at 3.

⁹⁴ Norris-Reese, *supra* note 71, at 4.

⁹⁵ Norris-Reese, *supra* note 33, at 4.

⁹⁶ *Shepherd v. Florida*, 341 U.S. 50 (1951). While the 1949 trial was reversed on the basis of the improper selection of the county grand jury under *Cassell v. Texas*, 339 U.S. 282 (1950), Justice Jackson’s concurring opinion focused on the negative pretrial publicity as an additional and equal ground warranting reversal. *See* 341 U.S. at 50-54.

⁹⁷ *See* Lawson, *supra* note 12, at 8 (“From a meeting with Irvin, Shepherd, and Greenlee [defense attorney Franklin Williams] learned that despite the sheriff’s

Having absorbed Lake County's opening salvo, the Groveland defense team responded in kind, mostly to the northern and black press, as NAACP attorney Franklin Williams made various impermissible press releases of his own.⁹⁸ Likely a result of ignorance, or perhaps shrewd calculation, the Lake County local press began utilizing the full name of the rape victim,⁹⁹ in clear violation of Florida law.¹⁰⁰ Seemingly skeptical of the formalities of a trial, *The Orlando Sentinel* wrote, "[w]e'll wait and see what the law does, and if the law doesn't do it right, we'll do it."¹⁰¹ Having considerably more confidence in Lake County's brand of justice, Norris-Reese penned an article in *The Mount Dora Topic* on the day after the indictments, entitled "Honor Must Be Avenged." In it she stated, "a sorry thing happened to that young couple . . . their honor must be avenged. And it will be. Revenge will be accomplished by a more frightening and awful means than a mob has at its command."¹⁰² Although the *Topic's* reference to

announcement that the accused had admitted their guilt, they had been badly beaten by the deputies until they had agreed to confess. Their story was corroborated when an examination completed by Williams several days after their arrest revealed numerous cuts and bruises all over their bodies . . . Jefferson Elliot, [Florida] Governor [Fuller] Warren's special investigator, told him that it was evident from the wounds and scars on Green, Irvin, and Shepherd 'that they had been beaten around the clock.' Even so, Irvin had refused to admit his guilt."); *see also Shepherd*, 341 U.S. at 52 (1951) (J. Jackson, concurring) ("But neither counsel nor court can control the admission of evidence if unproven, and probably unprovable, confessions are put before the jury by newspapers and radio. . . It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with the defendants' custody stating that they had confessed, and here just such a statement, unsworn to, unseen, uncross-examined and uncontradicted, was conveyed by the press to the jury.").

⁹⁸ See Answer to Application for Removal of Cause at 2, *Florida v. Irvin*, (D. Fla. 1952) (removed to Marion Cty.) (on file with author). Williams stated the defendants were innocent and indicated local racial motives were driving the case. *Id.*

⁹⁹ The use of the victim's full name by the local press may have been a result of simple ignorance of the applicable Florida statute, or may have stemmed from a desire to educate the potential jury as to the identity of the victim and her family, as her family was reasonably well thought of within the community.

¹⁰⁰ FLA. STAT. § 794.03 (1949); FLA. STAT. § 794.04 (1949) (declaring the publication of a rape victim's name unlawful, and imposing a misdemeanor of the first degree as the sanction).

¹⁰¹ ORLANDO SENTINEL, July 17, 1949, at 1.

¹⁰² Norris-Reese, *supra* note 33, at 4.

the death penalty might have been (more) subtle, *The Orlando Sentinel* was frighteningly less so when they published a full color, front page cartoon of four empty electric chairs and the words, “No Compromise – Supreme Penalty.”¹⁰³ This ill-humored cartoon would form the final straw in the United States Supreme Court’s reversal of the Lake County tragedy.¹⁰⁴

May God Rest Your Soul

On September 2, 1949 the trial of the State of Florida versus Shepherd, Irvin, Greenlee, and Thomas¹⁰⁵ was set to commence in Lake County circuit court. As a row of white reporters snapped photos—Judge Futch did not allow the black media to take any pictures—an all-white, all male Lake County jury heard two days of testimony.¹⁰⁶ Although Willie and Norma Lee Padgett’s testimony differed on some of the details of the case,¹⁰⁷ Norma Lee proved a much better witness than the defense had anticipated. Fearing a black attorney may be seriously injured or killed if he rose to cross examine a white woman in front of a white jury, the NAACP’s legal heavyweights of Franklin Williams — and later Thurgood Marshall — were sidelined in favor of their white co-counsel.¹⁰⁸ It was the relatively inexperienced, but local and white, Alex Akerman, Jr. who was given the thankless task of handling the details of the Groveland defense. But even as a white attorney, he was greatly limited in his ability to put forth a viable defense. From the outset, the defense team was significantly hampered by the fact that southern courtroom decorum essentially required them to limit their defense to that of mistaken identity. The defense team was sadly forced into the unenviable position of conceding that Norma Lee Padgett had been

¹⁰³ ORLANDO SENTINEL, July 19, 1949, at 1.

¹⁰⁴ *See id.*; *see also Shepherd*, 341 U.S. at 53 (acknowledging that although the 1949 trial was reversed by the U.S. Supreme Court on the basis of improper grand jury selection, Justice Robert H. Jackson’s concurring opinion made clear he believed such negative pretrial publicity would also have warranted reversal).

¹⁰⁵ Ernest Thomas’ name, although deceased, still appeared on the indictment, the court docket, and on the trial transcripts.

¹⁰⁶ Lowe, *supra* note 4, at 3.

¹⁰⁷ *See, e.g., Ivey, supra* note 2, at 268. Willie and Norma Lee Padgett differed at times on whether there were three or four possible assailants, but as Ivey writes, “the white woman had said four, so four it must be.” *Id.*

¹⁰⁸ KING, *supra* note 6, at 299.

raped — in spite of reasonable evidence to the contrary — and only arguing that the defendants were not the true offenders. As Gilbert King states, “[t]he defense dared not to question in any way . . . the purity of the Flower of Southern Womanhood . . . So the only practicable strategy for the defense in the Groveland Boys case was to raise reasonable doubt by showing that the state of Florida had arrested the wrong men.”¹⁰⁹ Raising such a doubt, in such a climate, would prove an impossible task.

The homegrown and folksy State Attorney Jesse Hunter also proved a much tougher adversary than the defense team had expected. Perhaps his shrewdest legal maneuver of the three year court drama was seen in the evidence he did *not* seek to put in, rather than the evidence he *did*. Namely, when Hunter declined to offer any evidence of the defendants’ questionable jailhouse confessions, he cut the legs from underneath the defendants’ most anticipated course of argument. Namely, the defense team had planned to introduce testimony from a Jacksonville doctor and dentist who had examined the defendants at Florida State Prison, and who were prepared to testify to the substantial amount of torture and physical abuse the defendants had suffered while in the custody of the Lake County Sheriff’s Office. However, when Hunter astutely decided not to introduce any evidence of the confessions, the circumstances surrounding them became legally irrelevant. With the law enforcement and medical portions of the trial left out, the evidence phase of the capital rape trial of the three Groveland defendants would take only two days to complete.

After the evidence was presented, both sides made their final arguments, and when the jury left the courtroom to deliberate Judge Futch took Hunter’s hand, shook it, and said, “I have never heard a better argument in all my life.”¹¹⁰ Judge Futch was confident in his fellow Lake County jurymen, and he knew the defendants were guilty when the jury filed out.¹¹¹ Mabel Norris-Reese noted that even Charles Greenlee’s father’s own eyes, showed doubt of his son’s innocence.¹¹² Verdict form in hand and hardly needing to read it, Judge Futch imposed a life sentence upon the juvenile Charles Greenlee, and coldly pronounced a sentence of death in the electric chair for Walter Irvin

¹⁰⁹ *Id.* at 307.

¹¹⁰ Norris-Reese, *supra* note 78, at 1.

¹¹¹ *Id.*

¹¹² *Id.*

and Samuel Shepherd. In announcing the sentences of the court, Judge Futch said simply, “May God rest your soul.”¹¹³

Picking on Very Small Potatoes

The most publicized trial in Florida history had cost the citizens of Lake County upwards of \$5,000.00, but the local press proclaimed, the county can well be proud of the results.¹¹⁴ The national press saw the results differently. Claiming the defense faced virtually every legal obstacle imaginable, the national press called the trial “a legal lynching” of three innocent men.¹¹⁵ Ramona Lowe of *The Chicago Defender* claimed the proceeding was a trial of gossip led by a white supremacist judge, and the only crime committed by the defendants was that of being negro.¹¹⁶ Now, Lake County would have to wait and see whether the NAACP would derail the plot of the corrupt story by use of the appellate process.¹¹⁷ Lake County’s citizens feared the verdict and sentence of September 3, 1949 would hardly be the end of the Groveland saga.

As anticipated, the residents of Lake County did not have to wait long to have their fears confirmed. The NAACP quickly announced an appeal on behalf of defendants Irvin and Shepherd. The juvenile Charles Greenlee decided not to appeal since he did not receive the death penalty. On May 16, 1950 the Florida Supreme Court upheld the convictions and the headlines in Lake County proclaimed, “Justice Triumphs.”¹¹⁸ Justice Roy Chapman, writing for a unanimous Florida Supreme Court, said, “the trial showed conclusively that harmony and good will existed between the white and colored races.”¹¹⁹ Seizing on Justice Chapman’s shortsightedness, Mabel Norris-Reese wrote, “Lake County was right, and its accusers wrong . . . the NAACP can now leave well enough alone.”¹²⁰ The NAACP would do no such thing.

¹¹³ Mabel Norris-Reese, *Torch Dies Out for Greenlee as Appeals Are Set For Companions*, MOUNT DORA TOPIC, Sept. 15, 1949, at 1.

¹¹⁴ Norris-Reese, *supra* note 71, at 4.

¹¹⁵ Ivey, *supra* note 2, at 268.

¹¹⁶ Lowe, *supra* note 4, at 3.

¹¹⁷ Norris-Reese, *supra* note 48, at 1.

¹¹⁸ Mabel Norris-Reese, *Justice Triumphs*, MOUNT DORA TOPIC, May 18, 1950, at 4.

¹¹⁹ *Shepherd v. Florida*, 46 So. 2d 880, 883 (Fla. 1950).

¹²⁰ Norris-Reese, *supra* note 118, at 4.

Nearly one year later, on April 9, 1951, the United States Supreme Court reversed the convictions in the case of *Shepherd v. Florida*,¹²¹ and this time the national press took its turn to proclaim Justice in Groveland.¹²² While the opinion overturned the convictions unanimously on the basis of improper grand jury selection procedures, Justice Robert H. Jackson wrote a pointed concurring opinion in which he argued that improper pretrial publicity in the local press could have also constituted a basis for reversal.¹²³ The case was remanded back to Lake County, and the national press—using a different label for the word victim—exclaimed, “the NAACP has won a new trial for the victims of this notorious miscarriage of justice.”¹²⁴ *The Crisis*, a magazine published by the NAACP, agreed with Justice Jackson when it wrote that the local press played an odious part in preventing a fair and impartial trial.¹²⁵ *The Mount Dora Topic*, itself a target of Justice Jackson’s ire, fired back in an April 12, 1951 article entitled, “Final Judging”:

*[The United States Supreme Court] based their decision entirely upon transcripts of the trial, upon the headlines of newspapers and upon what the defense counsel wanted them to know of the case . . . If it is wrong for a newspaper to give full coverage to an event such as the rape of a woman by four men at the point of a gun, then it is wrong for a newspaper to give full coverage to the rape of a county by an army of invaders at the point of many guns . . . The judges picked on very small potatoes . . . [They] should certainly not take chances of starting the Civil War over again.*¹²⁶

A Strange Twist or a Slaughter

On November 6, 1951, the Groveland story would take a true turn for the surreal. The case having now been set for a second trial per the Supreme Court’s order, Sheriff Willis McCall was in the process of

¹²¹ 341 U.S. 50 (1951).

¹²² *Justice in Groveland*, N.Y. TIMES, April 15, 1951, at 134.

¹²³ *Shepherd*, 341 U.S. 50 (1951) (Jackson, J., concurring).

¹²⁴ Edna Kerin, *Another Chance for the Groveland Victims*, CRISIS, May 1951, at 317.

¹²⁵ *Id.*

¹²⁶ Mabel Norris-Reese, *Final Judging*, MOUNT DORA TOPIC, April 12, 1951, at 4.

transporting defendants Walter Irvin and Samuel Shepherd back to the Lake County Jail from the Florida State Prison near Starke. Driving southbound into Lake County on Florida State Road 19 near the Ocala National Forest, Sheriff McCall claimed he suffered a flat tire and ordered his two prisoners to change it. Once out of the car, McCall states, the two prisoners, handcuffed together, attacked him with a flashlight. Acting in self-defense, McCall shot both Irvin and Shepherd, and then called Deputy James Yates to assist him. According to Walter Irvin's later account, when Deputy Yates arrived Yates noticed Irvin was not dead, and after clearing a jam to his service revolver, Deputy Yates shot Irvin again at close range.¹²⁷ Samuel Shepherd died at the scene, but Walter Irvin somehow survived and relayed his account of the shooting to representatives of the NAACP from his hospital bed in Eustis.¹²⁸ A Lake County coroner's inquest into the shooting exonerated Sheriff McCall,¹²⁹ and Judge Futch determined there was no need for a grand jury investigation into the matter.¹³⁰

In the local press, the shooting was only vaguely referenced, and not even afforded headline status in *The Mount Dora Topic*.¹³¹ And what the local press termed a new turn and a strange twist in the case, the national press called a slaughter and a whitewash.¹³² *The Crisis*

¹²⁷ Later FBI investigative analysis determined this second shot into Walter Irvin was fired from close range, and at a directly downward angle. The bullet was recovered in the clay directly below the spot where Irvin was laying. While this evidence clearly supported Irvin's version of the account, and should have directly implicated McCall and Yates in a criminal act, the FBI never provided this information to the defense due to its sensitive nature.

¹²⁸ *Walter Irvin's Story of the Shooting*, CRISIS, Dec. 1951, at 641.

¹²⁹ *The Lake County Shooting*, CRISIS, Dec. 1951, at 637. Not a single witness called at the eleven-hour coroner's inquest had any relevant testimony to provide. *Id.* The three witnesses who could have actually provided meaningful testimony—namely Deputy Yates, Walter Irvin, and the Leesburg fire chief who heard the initial radio reports were not called. *Id.*

¹³⁰ *Judge Closes Case in Slaying of Negro*, N.Y. TIMES, Nov. 13, 1951, at 17.

¹³¹ See, e.g., Mabel Norris-Reese, *Despite New Turn in Lake's Drama, There Was Honor*, MOUNT DORA TOPIC, Nov. 8, 1951, at 1 (referencing the shooting); Mabel Norris-Reese, *Strange Twist to Groveland Story*, MOUNT DORA TOPIC, Nov. 8, 1951, at 1.

¹³² Ramona Lowe, *Supreme Court May Act in Groveland Slaughter*, CHI. DEFENDER, Nov. 24, 1951, at 1; *The Lake County Shooting*, *supra* note 129, at 637.

published a transcript of Walter Irvin's hospital bed statement, endorsed it as a true statement of what actually happened,¹³³ and denounced the state of Florida for its determination "to whitewash the whole affair."¹³⁴ *The Mount Dora Topic* dismissively described Irvin's account as bizarre.¹³⁵

Writing thirty-five years after the event, Steven F. Lawson theorized that Sheriff McCall planned to kill Irvin and Shepherd while transporting them that night, because he thought that would be best for Lake County. He wrote:

Initially [when he hid the defendants from the lynch mob] McCall may have felt confident that the accused would be sentenced to death . . . When the United States Supreme Court overturned the case, however, McCall probably began to have second thoughts. Having promised the lynch mob and local residents that justice would be done, McCall possibly decided on the road to Tavares that the circumstances were convenient for him to take summary action . . . [Local] fruit growers were anxious for the issue to be settled because their black workers were becoming afraid to go to work as the trial approached. McCall may have thought that [this] action would return the county more quickly to normal.¹³⁶

In reality, this act created anything but a return to normalcy. Intense public outcry was led by the outspoken Florida chair of the NAACP, Mr. Harry T. Moore. Moore had worked tirelessly raising money throughout Florida to fund the Groveland Boys' defense, and after the shooting on State Road 19 Moore began pressuring the governor and other state officials to remove McCall from office. Then, on Christmas Eve 1951, Moore and his wife were killed by a bomb placed under their bed at their home in Brevard County. Speaking for a silent majority, historian and author James C. Clark argued that ' a

¹³³ *Walter Irvin's Story*, *supra* note 128, at 641.

¹³⁴ *The Lake County Shooting*, *supra* note 129, at 637.

¹³⁵ Mabel Norris-Reese, *Irvin Sticks to Bizarre Story as He Awaits February 11*, MOUNT DORA TOPIC, Jan. 31, 1952, at 1.

¹³⁶ Lawson, *supra* note 12, at 19.

local Klansmen, at the behest of Sheriff McCall himself, carried out Moore's assassination.¹³⁷

Now only Walter Irvin, alone and friendless,¹³⁸ awaited his retrial. That date would come on February 11, 1952 in Marion County, Florida after Judge Futch granted the defense a change of venue motion and moved the second trial of the case to Ocala.¹³⁹ However, since Marion County is also in Florida's fifth judicial circuit, the presiding judge and the state attorney did not change. And, unfortunately for Walter Irvin, neither did the mindset or makeup of the prospective jury pool.¹⁴⁰

Now sitting at counsel table in the Marion County courthouse with a defiant calm,¹⁴¹ Irvin awaited his inevitable fate. Orlando civil rights attorney Alex Akerman, Jr. would again lead Irvin's defense, but he now had considerably more muscle on his team. Paul Perkins, a black attorney from Daytona Beach was added, as were NAACP Legal Defense Fund attorneys Jack Greenberg and Thurgood Marshall. The addition of Marshall, who fifteen years later would become the first black appointee to the United States Supreme Court, added true star power to the defense team. Regardless of who tried the case for the defense, theirs would be a tough row to hoe. For all the star power at the defense table, they proved no match for Lake County's dean of law, State Attorney Jesse W. Hunter.¹⁴² Hunter, who solemnly informed the jury that because of a fatal malady this would be his last major case as their elected prosecutor,¹⁴³ also made quick work of the new wrinkles in the defense's case, perhaps more so because of his

¹³⁷ James C. Clark, *Civil Rights Leader Harry T. Moore and the Ku Klux Klan in Florida*, 73 FLA. HIST. Q., Oct., 1999, at 166.

¹³⁸ Norris-Reese, *supra* note 135, at 1.

¹³⁹ See, e.g., Ramona Lowe, CHI. DEFENDER, Dec. 15, 1951, at 1. Defense counsel had hoped to move the case out of Florida's fifth judicial circuit entirely, but Judge Futch refused that request. *Id.* Futch also denied motions to have State Attorney Hunter removed from the case. *Id.*

¹⁴⁰ See Stetson Kennedy, *Ocala: Echo of Injustice*, NATION, Mar. 1, 1952, at 203-04. A public opinion poll taken in Marion County preceding the trial showed 43 per cent of those surveyed believed Walter Irvin was positively guilty. *Id.* at 204.

¹⁴¹ Norris-Reese, *supra* note 135, at 1.

¹⁴² Norris-Reese, *supra* note 53, at 1.

¹⁴³ *Florida Negro Given Chair on Rape Charge*, WASH. POST, Feb. 15, 1952, at 7B.

receptive audience than his own legal acumen.¹⁴⁴ Taking no chances, Hunter even flashed the Masonic hand signal for distress to the jurors on several occasions throughout his closing,¹⁴⁵ so as to further impress upon them the importance of the meaning of their verdict to the central Florida way of life. Following the same pattern as the first trial, Walter Irvin's retrial lasted just three days, and an all-white jury of his so-called peers left the courtroom to deliberate once again on the fate of a Groveland defendant. When the jury returned less than two hours later, needing only enough time to finish their cigars,¹⁴⁶ the reading of the verdicts was again a mere formality. On Valentine's Day 1952, Judge Futch once more sentenced Walter Irvin to death. Exasperated, the national media called Irvin's second death sentence in three years a tragic plight.¹⁴⁷

Undoubtedly, the Groveland case was a truly tragic affair, and every stereotype and look of disappointment directed at the citizens of central Florida was certainly deserved. The man at the center of the storm was Judge Truman G. Futch, a self-taught southern lawyer who was every bit the cracker as his constituents, and who was often equally deserving of much of the derision aimed in their direction. While the national media scoffed at the decision, noting Futch stopped whittling long enough only to deny defendants' requests,¹⁴⁸ a thorough legal analysis of the motions, briefs, and transcripts of the Groveland trials evidences the simple fact that Judge Futch was correct in the majority of his legal rulings throughout the two trials. Albeit the application of local prejudice to the Groveland case was tragically misguided and horribly wrong, Judge Futch's application of the law to

¹⁴⁴ See, e.g., Mabel Norris-Reese, *Irwin [sic] Defense Rests Case As Witness is Belittled*, MOUNT DORA TOPIC, Feb. 14, 1952, at 1. The defense called two witnesses at the second trial who did not testify at the first trial—the son of the restaurant owner whom Norma Lee Padgett first contacted on State Road 50, and a private detective from Miami who testified to Deputy Yates' plaster shoe cast evidence. *Id.* On cross examination, State Attorney Hunter discredited the private detective by showing he was making \$800.00 to testify in the case, and his testimony was laughed out of the courtroom. *Id.* As for the son of the restaurant owner, Hunter simply pointed out his failure to testify at the first trial, and argued that the young man must have been confused or mistaken due to the magnitude of the situation. *Id.*

¹⁴⁵ CORSAIR, *supra* note 7, at 332.

¹⁴⁶ *Id.*

¹⁴⁷ Kennedy, *supra* note 140, at 204.

¹⁴⁸ Lowe, *supra* note 4, at 3.

the Groveland trials was, for the most part, accurate. A reexamination using the controlling legal standards of the first half of the 20th century reveals much about the decisions and rulings of the whittling judge who presided over Florida's most notorious legal drama.

PART II: THE LAW

Judge and Jury Were Swept to the Fatal End

The first major decisions presented to Judge Futch came early in the long history of the procedure of the case. As was the common practice of the day, and because the local community demanded swift justice, the Groveland Boys were indicted just four days after the alleged event. They were arraigned three weeks later, and the trial was set to begin in Tavares the following week. Not surprisingly, the defense objected to the timeframe and the location of the trial. For its time, the setting of the trial just over six weeks from the date of the event would not have been unreasonable, or even unusual. But, the Groveland case was anything but usual, and on the eve of the jury trial the defense team filed a motion to continue the trial, and a motion for removal of the cause (change of venue). Judge Truman Futch promptly denied both motions, and the trial was set to commence in Lake County on September 1, 1949—just 49 days after the event supposedly occurred.

In analyzing the motion to continue, the defense relied on two basic grounds in support of that motion. On a practical level, the defense argued they had had inadequate time to investigate and prepare a defense. To support this argument, the defense pointed to the fact that NAACP attorney Frank Williams had only met with the defendants, at Florida State Prison near Starke, on July 31, 1949.¹⁴⁹ After his initial investigation, he and the NAACP began attempting to find a (white) Florida attorney who would agree to represent the accused. After failing to secure retentions of at least eleven Florida lawyers,¹⁵⁰ all of whom feared loss of income, reputation, or safety if they took the case,¹⁵¹ Orlando attorney Alex Akerman, Jr. reluctantly

¹⁴⁹ Transcript of Pretrial Motions Hearing at 4, 12, Florida v. Shepherd, (D. Lake Cty. Fla. 1949) (on file with author).

¹⁵⁰ *Id.* at 6.

¹⁵¹ *Id.* at 7; KING, *supra* note 6, at 137 (discussing Spessard Holland, Jr. tearfully declining the NAACP's plea to represent the Groveland defendants, stating,

agreed to represent the Groveland Three.¹⁵² Akerman's retention was secured on August 22, 1949—just three days before the date of the scheduled hearings on the pretrial motions.¹⁵³ Ten days earlier, Judge Futch had appointed a local member of the Lake County bar, a Harry E. Gaylord of Eustis, to represent the three indigent defendants at their arraignment. Gaylord pled the defendants not guilty, and agreed to an August 29th trial date.¹⁵⁴

For Judge Futch, the analysis to deny the defendants' motion to continue seemed reasonably simple. Using evidence adduced at the pretrial motion hearing by the state of Florida, the applicable Florida statutes, and local custom, Futch denied the motion. He was likely correct in doing so. In support of his decision, Futch could take solace in the following facts. The defendants' appointed attorney at their arraignment had agreed to the trial date.¹⁵⁵ Officials from the Florida State Prison confirmed that attorneys had met with the defendants on three separate occasions,¹⁵⁶ and that they had taken with them a stenographer, a dentist, and a doctor for the purposes of investigating and documenting a defense.¹⁵⁷ Additionally, State Attorney Hunter had offered to use his resources to summon and serve any witnesses the defense may want to call at trial.¹⁵⁸ While Akerman's retention was certainly made late in the process, Judge Futch undoubtedly understood that late retention or substitution of counsel is rarely, if ever, a proper grounds for a continuance. The forty-five days from indictment to trial was consistent with the standards of the day, and was of no concern to either the Florida or United States Supreme Courts.¹⁵⁹ Lastly, the Florida statutes instructed the judges that trials shall be conducted in the same court term in which a defendant, now in

“[y]ou may not understand this, but my wife is a typical flower of southern womanhood and this is a rape case and I can't take it.”).

¹⁵² Transcript of Pretrial Motions Hearings, *supra* note 149, at 7.

¹⁵³ *Id.* at 2.

¹⁵⁴ *Id.* at 22.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 26.

¹⁵⁷ *Id.* at 14, 27.

¹⁵⁸ *Id.* at 22.

¹⁵⁹ See *Shepherd v. Florida*, 46 So. 2d 880, 885 (Fla. 1950). “Frequently the minds of reasonable men differ on what constitutes sufficient time to prepare for trial.” *Id.*

state custody, was indicted.¹⁶⁰ This statutorily authorized speedy trial requirement existed equally for both the state and the defense.¹⁶¹ Under the laws and customs of the day, Judge Futch's denial of the continuance on the grounds of inadequate time for preparation was presumptively correct.

But the greatest motivation for the defense requesting a continuance was not lack of time to prepare for trial, but rather the desire to allow time for local passions to subside.¹⁶² This second prong of their Motion to Continue created a much more difficult legal decision for the trial court. Two major cases gave the defense compelling arguments in seeking such a postponement. The first, *Powell v. Alabama*,¹⁶³ was of particular benefit to the defense because it was the United States Supreme Court's decision from the Scottsboro Boys case — the case with which the Groveland Boys saga was being compared. The second case, *Moore v. Dempsey*,¹⁶⁴ was another United States Supreme Court case that detailed the dangers of public passions controlling legal proceedings. These two cases and the case at bar shared many of the same sad facts: three communities demonstrating great hostility,¹⁶⁵ atmospheres described as tense, hostile, and excited,¹⁶⁶ insurrection throughout the county,¹⁶⁷ a military presence to maintain order, a lynch mob ready to act if the courts did not, and a local press publishing inflammatory articles.¹⁶⁸ Clearly, *Moore v. Dempsey* was a warning to Lake County against falling into the trap

¹⁶⁰ FLA. STAT. § 909.23 (1949).

¹⁶¹ *Id.* at § 916.01 (1949). *But see*, FLA. STAT. § 26.26 (1949), *repealed by* 2013 Fla. Laws ch. 2013-25 § 1. Florida's fifth judicial circuit trial terms, per statute, were the first Tuesdays of May and November, so Judge Futch could have agreed to continue the matter as far as early November without running afoul of Florida's 1949 statutory speedy trial rights.

¹⁶² *Shepherd v. Florida*, 341 U.S. 50, 53 (1951).

¹⁶³ *Powell v. Alabama*, 287 U.S. 45, 57 (1932). The trial of the Scottsboro Boys involved rape allegations by two white women against nine black youths. *See generally* 287 U.S. 45 (1932).

¹⁶⁴ *Moore v. Dempsey*, 261 U.S. 86, 87 (1923). In *Dempsey*, five black men were accused of killing a white man in Elaine, Arkansas during a period of community violence, originally instigated by local whites. *See id.* at 87-88.

¹⁶⁵ *Powell*, 287 U.S. at 51.

¹⁶⁶ *Id.*

¹⁶⁷ *Moore*, 261 U.S. at 88.

¹⁶⁸ *Id.*

demonstrated by *Frank v. Mangum*¹⁶⁹—“If in fact a trial is dominated by a mob so that there is actual interference with the course of justice, there is a departure from due process of law[.]”¹⁷⁰ The *Moore* court was warning of cases where the “[j]udge and jury were swept to the fatal end by an irresistible wave of public passion.”¹⁷¹ The trial of the Groveland Boys seemed to be on a fatefully similar path.

The Lake County court system, for its own practical reasons, wanted the matter of the Groveland Boys handled as quickly as possible. Those practical reasons were, quite simply, a desire to bring the mass demonstrations and violence in Lake County to an end as soon as possible.¹⁷² While this rationale may sound reasonable in light of community safety, it speaks volumes in terms of the true atmosphere of violence that surrounded the trial. Again, in spite of *Powell* and *Moore*, Judge Futch denied the defendants’ motion to continue.¹⁷³ While this legal decision was certainly questionable, Judge Futch was on firm ground in distinguishing *Powell* and *Moore* from the case at bar. In both *Powell* and *Moore* defense counsel was appointed on the same day the jury trial was to commence.¹⁷⁴ They had, literally, no time to prepare or even meet with their clients before jury selection began. This was the only concern the United States Supreme Court had with the *Powell* verdict, and in fact said nothing about the trial atmosphere or the time from event to trial. When Judge Futch eyed his September 1, 1949 trial date, the fact that his defendants had first met with investigative counsel on July 31,¹⁷⁵ had local counsel appointed on August 12, and had trial counsel retained

¹⁶⁹ See *Frank v. Mangum*, 237 U.S. 309 (1915). In *Mangum*, a Jewish factory superintendent, Leo Frank, was convicted of murdering a 13 year old female employee on questionable evidence. *Id.* at 311. When his death sentence was commuted to life in prison by the governor of Georgia, local citizens formed a mob, kidnapped Frank from the state prison, and lynched him.

¹⁷⁰ *Moore*, 261 U.S. at 90-91.

¹⁷¹ *Id.*

¹⁷² Petition for Writ of Certiorari at 11, *Shepherd v. Florida*, 341 U.S. 50, 53 (1951). At a pretrial motion hearing Mabel Norris-Reese, editor of *The Mount Dora Topic*, testified that State Attorney Hunter had confided in her that the reason they wished to hold the trial as soon as possible was to put an end to the violence and demonstrations in Lake County.

¹⁷³ *Florida v. Shepherd*, (D. Fla. Lake Cty. Ct. 1949) (on file with author).

¹⁷⁴ *Powell v. Alabama*, 287 U.S. 45, 57-58 (1932); *Moore*, 261 U.S. at 89.

¹⁷⁵ Transcript of Pretrial Motions Hearing, *supra* note 149, at 4.

by August 22, he may have recognized that *Powell* and *Moore* were not to be the controlling precedents. While Futch's ultimate decision or motives to deny the continuance may be criticized, his conclusion appears solid.

Like Jerusalem Itself

Intimately intertwined with the defendants' 1949 motion to continue was their motion for removal of the cause (change of venue). Understandably, the removal motion relied on essentially the same facts and the same arguments of law as the motion to continue — namely, that adverse pretrial publicity and a pervasive local climate of prejudice and violence precluded the ability to obtain a fair trial in Lake County. Certainly to the modern legal scholar, or anyone applying a modicum of 21st century common sense, this motion should have been granted. But not surprisingly, in 1949, Judge Futch denied it. Ironically, three years later during the 1952 retrial of Walter Irvin, Judge Futch *did* grant a motion to change the venue of Irvin's trial, but only removed the trial to the adjacent county of Marion. Marion County was also in Florida's fifth judicial circuit, had a similar demographic makeup to that of Lake, and was also served by both himself and State Attorney Hunter. To this end, Irvin's 1952 change of venue was hardly that, but Judge Futch's decisions on both were likely correct under the law of the day and the evidence presented. Both decisions are analyzed below.

As to Judge Futch's 1949 decision, Florida statute 911.02 provided for a change of venue when a fair and impartial trial cannot be had,¹⁷⁶ and it would seem that if any case in Florida's legal history should have warranted its application, it was the 1949 Groveland case.¹⁷⁷ Even Judge Futch's own well-intentioned special rules of courtroom decorum, put in place for the 1949 Lake County trial, seemed to evidence the specter of violence surrounding the proceedings.¹⁷⁸

¹⁷⁶ FLA. STAT. § 911.02 (1949).

¹⁷⁷ See, e.g., CORSAIR, *supra* note 7, at 35. In response to the unprecedented violence surrounding the Groveland case, the governor of Florida activated three local national guard units from Leesburg, Eustis, and Tampa and dispatched them to Lake County, where they remained until July 27, 1949.

¹⁷⁸ See *Shepherd v. Florida*, 341 U.S. 50, 54. The trial judge, anxious to assure as fair a trial as possible under the circumstances, was evidently concerned about violence at the trial. *Id.* He promulgated special rules which limited the number of visitors to those that could be seated, allowed no one to stand or loiter in hallways, stairways, and parts of the courthouse for thirty minutes before court

Change of venue (or removal) motions were a peculiar tool in the first half of the 20th century. Their application was subject to wide discretion within the trial courts, and those decisions would not be disturbed on appeal absent a palpable abuse of discretion.¹⁷⁹ A palpable abuse of discretion is arguably the toughest legal standard to surmount on appeal. The standard essentially means that if there is *any* modicum of reason to the trial judge's decision, even a small one, that decision will be upheld. In analyzing Judge Futch's 1949 and 1952 removal rulings, we can find several such modicums of reason, even if they may seem slight or antiquated from the modern perspective.

For starters, it is important to note that changes of venue cannot be granted simply for purposes of forum shopping, selecting a friendlier jurisdiction, or finding a county where a desired outcome is more likely. This rationale would also apply to finding a county with better race relations, or a more progressive outlook within their white community. Secondly, assuming a fair trial can arguably be had in such a location, the state has an equally compelling right to have the case tried in the county where the crime occurred. This is the most basic premise of common law jurisdiction. To that end, State Attorney Jesse Hunter was probably correct when he argued in his answer to application for removal of cause that any such negative pretrial publicity regarding the Groveland case was so pervasive statewide that it would be near impossible to find any other county in Florida—or in the breadth of the South for that matter—that would have provided a more impartial jury pool.¹⁸⁰

convened and after it recessed, closed the elevators except to officers of the court or individuals to whom the sheriff gave special permit, required each person entering the courtroom to submit to search, prohibited any person from taking a 'valise, satchel, bag, basket, bottle, jar, jug, bucket, package, bundle, or other such item' to the courtroom floor of the courthouse, allowed crutches, canes and walking sticks only after inspection by the sheriff showed them to be necessary aids, prohibited demonstrations of any nature and made various other regulations, all of which the sheriff was charged to enforce and to that end was authorized to employ such number of deputies as might be necessary. *Id.* Such precautions, however commendable, show the reaction that the atmosphere which permeated the trial created in the mind of the trial judge. *Id.*

¹⁷⁹ *Shepherd v. Florida*, 46 So. 2d 880, 883 (Fla. 1950); *Jeffcoat v. Florida*, 138 So. 385, 387 (Fla. 1931).

¹⁸⁰ Answer to Application for Removal of Cause, *supra* note 98, at 4; *cf. Shepherd*, 46 So. 2d at 883. The Florida Supreme Court likely grossly overstated Lake County's positive race relations when it wrote, "[o]ur study of the record reflects

Perhaps the most compelling evidence of the fact that Judge Futch's removal rulings carried the necessary legal threshold of the day can be found in two simple facts. First, in spite of the availability of sixty peremptory juror challenges, or strikes,¹⁸¹ juries in both cases were selected with very little difficulty and in a matter of a few hours. Second, as governed by the high courts of the day, in four separate appeals to the Florida and United States Supreme Courts, the issue of venue was never addressed in a negative fashion despite being clearly raised by the defense in both appeals. Silence by the appellate courts regarding matters directly questioned on appeal did, and does, speak loudly.

The 1952 retrial of defendant Walter Irvin forced Judge Futch to make two more major legal rulings in relation to a defense motion to remove. In anticipation of the 1952 retrial, which was removed to Marion County for reasons discussed below, the NAACP hired a professional polling firm¹⁸² to gather race-relations data on four Florida counties.¹⁸³ This data was to be used for purposes of supporting their motion for removal. It should be noted that, as appears to be the common practice of the day, the court stenographer did not take down a verbatim account of the legal arguments surrounding this issue. However, since this matter was briefed by both sides and commented on throughout the appellate proceedings of the case, an investigation can comfortably reconstruct those missing portions of the transcripts.¹⁸⁴

the view that harmony and good will and friendly relations continuously existed between white and colored races in all other sections of Lake County." *Id.*

¹⁸¹ See FLA. STAT. § 913.08(1) (1949). Each defendant in a criminal jury trial was granted 10 peremptory challenges in a death penalty case, and the State received an equal total number. In the 1949 trial there were three defendants, thus thirty total defense strikes, plus a matching number for the State, equals sixty peremptory strikes between the two sides. Additionally, challenges for cause were unlimited in number.

¹⁸² *Irvin v. Florida*, 66 So. 2d 288, 291 (Fla. 1953).

¹⁸³ Transcript of Pretrial Motions Hearing Part 2 at 24, *Irvin v. Florida*, (D. Fla. 1952) (removed to Marion Cty.) (on file with author). The polling data was collected for Florida's Lake, Marion, Gadsden, and Jackson counties. *Id.*

¹⁸⁴ It bears mentioning that throughout the various transcripts of the hearings and trials surrounding the Groveland case there are numerous periods of pure legal argument in which the court reporter notes he will not take down a verbatim record of the account. This seems to be a product of the fact that court reporters of the time viewed their transcription roles as being limited to the recording of

Ultimately, Judge Futch refused to allow the polling data to be entered into evidence, except for that limited data that related to Marion County.¹⁸⁵ This was likely the correct decision, but Judge Futch could have handled the matter in a more prudent manner. Because this was a pretrial motion hearing which took place outside the presence of the jury, the more advisable judicial maneuver would have been for Judge Futch to simply allow all the defendant's polling data into evidence, and then only assign to it what weight he considered necessary. Total exclusion of the defense evidence, in a matter decided by the bench and that would never be seen by any jury, seemed too harsh a remedy. Futch's ultimate decision on the matter was the classic tipsy coachman conundrum of arriving at the correct conclusion through the application of incorrect rationale.¹⁸⁶ In excluding the polling data, Judge Futch found the evidence to be inadmissible hearsay (or perhaps improperly authenticated), because the polling coordinator who was called by the defense to testify at the January 1952 pretrial hearing merely compiled the data and did not conduct the interviews himself.¹⁸⁷ Issues of hearsay and improper authentication awkwardly battled around by the trial court, both parties, and the Florida Supreme Court,¹⁸⁸ were all incorrect paths, which ultimately led to the correct result. The polling data, if properly presented, might have survived hearsay and authentication

witness testimony and evidence introduction (functions of the trial court), and not the recordings of legal arguments (functions of the appellate courts).

¹⁸⁵ Transcript of Pretrial Motions Hearing Part 2, *supra* note 183, at 50.

¹⁸⁶ James A. Herb & Jay L. Kauffman, *Tales of the Topsy Coachman: Being Right for the Wrong Reason – The Topsy Coachman is Alive and Well and Living in Florida*, 81 FLA. BAR J., 11 (Dec. 2007). The first legal reference to the tipsy coachman appeared in the 1879 opinion of the Georgia Supreme Court in *Lee v. Porter*, 63 Ga. 345 (1879), which states the rationale underlying the doctrine: 'It may be that we would draw very different inferences [than those drawn by the trial judge], and these differences might go to uphold the judgment; for many steps in the reasoning of the court below might be defective, and still its ultimate conclusion be correct. *Lee*, 63 Ga. at 346. It not infrequently happens that a judgment is affirmed upon a theory of the case which did not occur to the court that rendered it, or which did occur and was expressly repudiated. *Id.* The human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it. *Id.*

¹⁸⁷ Brief of Appellee at 7, *Irvin v. Florida*, 66 So. 2d 288 (Fla. 1953).

¹⁸⁸ *See, e.g., id.*; Transcript of Pretrial Motions Hearings Part 2, *supra* note 183, at 36; *Irvin v. Florida*, 66 So. 2d 288, 291-92 (Fla. 1953).

objections.¹⁸⁹ The argument that best warranted their exclusion was finally stumbled upon by the Florida Supreme Court when it determined that this type of polling data was not a reliable method of determining the likelihood of a fair trial.¹⁹⁰ In sum, the data was excluded due to unreliability. This determination was firmly within the province of the trial court, and Judge Futch's ruling on such a matter was only subject to review on an abuse of discretion standard.¹⁹¹ Given the facts and limitations of this particular polling data,¹⁹² Judge Futch's decision to exclude it was reasonable.

The second major removal issue facing Judge Futch during the 1952 retrial of Walter Irvin involved the change of the trial venue from Tavares in Lake County, to Ocala in neighboring Marion. On December 6, 1951 State Attorney Jesse Hunter agreed to Walter Irvin's request to remove the trial from Tavares,¹⁹³ which sits only twenty-some miles from the alleged crime scene. In response to this stipulation, Judge Futch ordered the removal of the trial venue to the bordering county of Marion and its courthouse in Ocala. Sitting nearly fifty miles to the north of Tavares and sixty miles north of Groveland,

¹⁸⁹ See FLA. STAT. § 92.36 (1951) (indicating that Florida's Business Records and Evidence Act may have allowed for the admission of such data as a properly compiled business record, but since this data was collected in anticipation of litigation it may have fallen outside of this provision).

¹⁹⁰ *Irvin*, 66 So. 2d at 291. "We cannot approve this method of determining the likelihood of a defendant's being unable to receive a fair trial in a given community and therefore cannot attribute any abuse of discretion to the rejection by the judge of the proposed testimony. As the appellant points out the establishment of adverse sentiment of such degree as to indicate that the victim of it cannot receive a fair trial is informal and largely based upon hearsay. But the result of the poll taken in this case went far beyond the latitude allowed by the statute and by established procedure." *Id.*

¹⁹¹ *Id.*

¹⁹² See Transcript of Pretrial Motions Hearing Part 2, *supra* note 183, at 36, 52. The polling data compiler, while testifying at the hearing, admitted several questions having nothing to do with the case; he could not articulate why Gadsden and Jackson counties were selected for comparison; and he admitted comparing Gadsden to Marion County was unfair due to recent political events in both counties. One of the control questions was clearly misleading, and the pollster admitted he could not draw a conclusion on the ultimate issue inquired of by the poll.

¹⁹³ Transcript of Hearing on Motion for Change of Venue, Disqualification of State Att'y, and Suppression of Evidence at 25, *Florida v. Irvin*, (D. Fla. 1952) (removed to Marion Cty.) (on file with author).

Ocala offered a slightly larger city to host such a major event, but the demographics and racial attitudes of the two locales were nearly indistinguishable. Most importantly, and of the greatest concern to the defense, was the fact that Marion County also sat within Florida's fifth judicial circuit, meaning Judge Futch and State Attorney Hunter would still be handling the case.

Under the rationale outlined above, Judge Futch may well have been justified in refusing to change the venue at all. Even so, the decision to place it in Lake's sister county of Marion may still seem odd at first blush. However, once the order was made to change the venue, the placement of the trial in Marion County was the correct decision under the applicable law of the day. Florida statute 911.02(2) provided that upon the granting of a change of venue motion, the matter shall be removed to the appropriate criminal court "in some *adjoining county* if there [is] one."¹⁹⁴ In 1952 the fifth judicial circuit of Florida was comprised of five counties,¹⁹⁵ but only Marion and Sumter adjoined Lake.¹⁹⁶ Given the option of Marion or Sumter, one might argue that Marion was certainly the lesser of those two evils. Ironically, the selection of this much larger jurisdiction¹⁹⁷ was likely a tiny—albeit understandably unappreciated—victory for Walter Irvin and his defense team.

In support of the selection of Marion County, and in an effort to protect his record on appeal, State Attorney Hunter called numerous civic and community leaders to testify to the positive race relations in that county.¹⁹⁸ This evidence was largely uncontroverted by the

¹⁹⁴ FLA. STAT. § 911.02(2) (1951) (emphasis added).

¹⁹⁵ *Id.* at § 26.06 (1951). Lake, Marion, Sumter, Hernando, and Citrus counties composed the fifth circuit.

¹⁹⁶ Florida County Map, GEOLOGY, <http://geology.com/county-map/florida.shtml> (depicting Lake County bordered entirely to the west by Sumter County, and to the north and west by Marion County). Hernando and Citrus Counties do not adjoin Lake County, as they sit to the west of Sumter County. *See id.*

¹⁹⁷ Richard L. Forstal, *Florida, Population of Counties by Decennial Census: 1900 to 1990*, U.S. BUREAU OF THE CENSUS, (Mar. 27, 1995), <https://www.census.gov/population/www/censusdata/cencounts/files/fl190090.txt> (according to the 1950 U.S. census populations were: Marion County - 38,187, Sumter - 11,330).

¹⁹⁸ *See, e.g.*, Transcript of Pretrial Motions Hearing Part 2, *supra* note 183, at 105 (quoting a Marion County black preacher testifying that "[he] would put this county up against Jerusalem itself"); *Irvin v. Florida*, 66 So. 2d 288, 292 (1953)

defense,¹⁹⁹ as they called no live witnesses to contradict the state's contentions. Additionally, Hunter successfully argued that no other circuit in Florida would be so acutely aware of the proper selection of jurors in compliance with the dictates of *Cassell v. Texas* as would the Fifth Circuit, since a *Cassell* violation was the sole reason they were retrying the matter at all.²⁰⁰ In following the provisions of Chapter 911, the arguments of the state attorney, and the best evidence available to him at the hearing, Judge Futch correctly removed Walter Irvin's 1952 trial to the adjoining county of Marion.

I'm Not Going to Tell You What He Told Me

Since the days of the English Common Law, criminal trial law has never been a trial by ambush.²⁰¹ One of the bedrock concepts of trial procedure is the necessity of the prosecution to share information with the accused. While these requirements of discovery and disclosure have broadened over time, Judge Futch and State Attorney Hunter did correctly comply with the (relatively limited) disclosure obligations of the day.

When State Attorney Jesse Hunter learned from the Lake County clerk that two attorneys, one from Tampa and the other from Miami, might have been retained to represent the defendants in the case, Hunter contacted them both and offered them any information that was available to him. Furthermore, he contacted Florida State Prison on their behalf and asked prison officials there to make the defendants available for interviews with counsel.²⁰² At the August 12, 1949 arraignment, local appointed counsel Harry Gaylord motioned the court for the appointment of a doctor and a dentist to evaluate the defendants, and Futch granted those motions.²⁰³ X-rays taken of the

(citing the fact that Ocala had recently erected a World War II memorial to a colored soldier as evidence of racial good will).

¹⁹⁹ *But see* Transcript of Pretrial Motions Hearing Part 2, *supra* note 183, at 113-14. Irvin's defense team did point out on cross examination of a state's witness that when the well-respected white sheriff of Marion County was shot and killed by a black suspect just a few years before this date, the trial of the black suspect was removed to Alachua County of the eighth judicial circuit of Florida because the court felt he couldn't get a fair trial in Marion. *Id.*

²⁰⁰ Answer to Application for Removal of Cause, *supra* note 98, at 5.

²⁰¹ *See generally* Barrett v. Florida, 649 So. 2d 219, 221 (Fla. 1994).

²⁰² Transcript of Pretrial Motions Hearing, *supra* note 149, at 17.

²⁰³ *Id.* at 22.

defendants at Florida State Prison were also provided to the defense.²⁰⁴ Lastly, State Attorney Hunter included a written version of his trial witness list on the grand jury indictment,²⁰⁵ which was filed with the clerk. In the 1949 trial of the Groveland Three, Florida's statutory discovery obligations had been properly complied with.²⁰⁶

By late 1951 however, on the eve of Walter Irvin's retrial in Marion County, the defense asked the Court to compel the production of the substance of in-office interviews between the state attorney and a key defense witness, a Mr. Lawrence Burtoft.²⁰⁷ Judge Futch correctly, under the controlling law of the time, denied the defense motion. Lawrence Burtoft was the first person to come into contact with Norma Lee Padgett after her alleged rape, and he had knowledge of several facts that directly contradicted key aspects of her testimony. Specifically, Mr. Burtoft would testify that although Norma Lee told him she was abducted, she did not mention the fact that she was raped. Additionally, and most importantly, she clearly indicated she could not identify her assailants.²⁰⁸ Of course, within just a few hours of their arrest or death she had positively identified all four. These pieces of exculpatory information were not relayed by the state to the defense. Clearly, following the United States Supreme Court's landmark 1963 decision in *Brady v. Maryland*, such disclosure of exculpatory information would now be required, and reversal would result should such a disclosure fail to occur.²⁰⁹ Such was not the case in the years in which the Groveland matter was pending. Four years before Judge Futch's correct denial of this 1951 defense Motion to Compel, the

²⁰⁴ *Id.* at 27.

²⁰⁵ Answer to Application for Removal of Cause, *supra* note 98, at 2.

²⁰⁶ See FLA. STAT. § 909.18 (1949) (detailing the discovery obligations of the State Attorney's Office in criminal prosecutions to include allowing the inspection, copying, photographing, and examination of any ballistics, fingerprints, semen, blood, stains, documents, papers, books, accounts, letters, photographs, objects, or tangible things pertinent to the cause).

²⁰⁷ Transcript of Hearing on Motion for Change of Venue, Disqualification of State Att'y, and Suppression of Evidence, *supra* note 193, at 16-18. In over two pages of hearing transcript, State Attorney Hunter tells defense attorney Akerman that he will not divulge the substance of his interview with Mr. Burtoft six times. *Id.*

²⁰⁸ See Transcript of Pretrial Motions Hearing Part 2, *supra* note 183, at 388.

²⁰⁹ *Brady v. Maryland*, 373 U.S. 83, 91 (1963) (reiterating that "the suppression or withholding, by the State, of material evidence exculpatory to the accused is a violation of due process").

United States Supreme Court decided *Hickman v. Taylor*, which established the basic premise that an attorney's work product applied to his written notes and his oral interviews with witnesses made in the course of litigation preparation, and that they were privileged from disclosure.²¹⁰ When *Hickman* is combined with the two major exculpatory evidence disclosure cases of the time, which only required the state to disclose knowingly false or perjurious testimony,²¹¹ we can see that—at the time—Hunter was justified in withholding the information, and Futch was correct in denying the motion to force its production.

The Court Takes No Action

Upon entering the courthouse in Tavares for the 1949 Lake County trial of the Groveland Three, the defense filed a motion to quash the indictment based on Lake County's improper grand jury selection procedures—based specifically on the fact that potentially eligible black jurors were knowingly and systematically excluded from service.²¹² Judge Futch properly refused to hear the motion, as he correctly determined it to be untimely under the law.²¹³

In 1949, Florida law did allow for a defendant to challenge an indictment based on the grounds of unlawful selection procedures²¹⁴ of a grand jury panel.²¹⁵ As this was precisely the issue at hand, the defense motion to quash was properly styled, factually accurate, and legally correct. However, 1949 Florida procedure required a challenge to an indictment returned by such an incorrectly impaneled grand jury to be made at or before arraignment.²¹⁶ Furthermore, if such challenge

²¹⁰ *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

²¹¹ *See* *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (explaining that the prosecution must disclose known perjured testimony); *see also* *Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (declaring unconstitutional the use of perjured testimony to obtain a conviction).

²¹² *See* Transcript of Pretrial Motions Hearing, *supra* note 149, at 177, 179-81, 183. Several county civil officials testified that Lake County's grand jury selection process involved the requirement that the prospective grand juror be a registered voter. This greatly reduced the number of eligible black jurors, and was not a requirement of Florida Statutes, Chapter 40. This additional requirement clearly ran afoul of *Cassell v. Texas*, 339 U.S. 282 (1950).

²¹³ Transcript of Pretrial Motions Hearing, *supra* note 149, at 8.

²¹⁴ FLA. STAT. § 905.03 (1951).

²¹⁵ *Id.* at § 905.02.

²¹⁶ *Id.* at § 909.01.

was not made as of that time, it was deemed waived.²¹⁷ As of August 12, 1949, when the defendants were arraigned under the guidance of locally appointed counsel, no such challenge was made. Therefore, Judge Futch was correct in considering the motion, made on the eve of trial and well after arraignment, to be untimely.

While Futch's ruling on the procedural posture of the motion, as presented to him, was correct, ultimately the United States Supreme Court would agree with the defense that improper grand jury selection procedures did warrant a reversal of the case.²¹⁸ In fairness to Judge Futch, however, it should be noted that *Cassel v. Texas*, the case which served as the precedent for the reversal of the Groveland case, was not decided until *after* the Groveland case had been tried, but *before* its appeal.²¹⁹ Thus, neither Judge Futch nor the defense had the *Cassell* precedent available for consideration when contemplating this matter.

That Little Black Nigger Boy's Clothes

A few hours after Norma Lee Padgett accused four young black men of rape, Lake County Deputy Sheriff James Yates stood at the crime scene with the recently arrested Walter Irvin. Deputy Yates had just arrested Irvin at his home moments earlier, and he had taken Irvin to the site of the alleged rape in the hopes of making a shoe print comparison with tracks at the scene. When none of the prints seemed to match, Yates asked Irvin if he had been wearing different shoes the previous evening. Irvin indicated that in fact he had been, and that the shoes he wore the night before were back at his family's home in Groveland, where he had just been arrested.²²⁰ This interaction would be read with great legal concern by the modern criminal attorney, but Yates' inculpatory interview of Walter Irvin found its way into evidence, before the jury, and without an objection. This was because, in the years before the 1966 *Miranda v. Arizona* decision,²²¹ such

²¹⁷ *Id.* at § 909.06.

²¹⁸ *Shepherd v. Florida*, 341 U.S. 50 (1951).

²¹⁹ *Cassell v. Texas*, 339 U.S. 282 (1950). The case was decided on April 24, 1950, roughly seven months after the 1949 Groveland verdicts were entered.

²²⁰ Trial Transcript, *supra* note 55, at 328.

²²¹ *Miranda v. Arizona*, 384 U.S. 436 (1966) (creating the prophylactic rule that a government official now, upon initiation of custodial interrogation, must advise the suspect of his 5th and 6th Amendment rights).

custodial interrogation was not improper.²²² Armed with this information, Deputy Yates returned to Walter Irvin's home, where he informed Irvin's mother Deliah that he "came for that little black nigger boy's clothes."²²³ Deliah Irvin, a woman with a second grade education²²⁴ and ignorant of her rights,²²⁵ did as the armed²²⁶ representative of the law²²⁷ instructed, providing Yates with her son's clothing and shoes from the previous evening. Deliah Irvin's verbal statements to Yates were objected to by the defense, but their objection was correctly overruled, as such statements of consent would be properly considered as non-hearsay verbal acts.²²⁸

The issue of the search and ultimate seizure of Walter Irvin's belongings, and most notably the shoes he wore during the time of the alleged offense, was argued before the trial court over a two day period during the 1949 trial, and then again during a pretrial motion hearing before the 1952 retrial. Much to the concern of Irvin's defense team, none of those legal arguments were transcribed.²²⁹ Ultimately however, the issue was briefed for appellate purposes and the Florida Supreme Court inexplicably ruled there was no Constitutional 4th

²²² See *Bram v. United States*, 168 U.S. 532, 543 (1897) (indicating that a self-incriminating 5th Amendment statement's admissibility was purely a question of voluntariness); see also *Lisenba v. California*, 314 U.S. 219, 241 (1941) (explaining that suspects have the free choice to admit, deny, or refuse to answer police questioning); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (declaring that the privilege against self-incrimination is fulfilled only when the person was guaranteed the right to remain silent unless he chooses to speak).

²²³ Transcript of Pretrial Motions Hearing Part 2, *supra* note 183, at 144.

²²⁴ *Id.* at 151.

²²⁵ *Id.* at 148.

²²⁶ *Id.* at 145.

²²⁷ Transcript of Pretrial Motions Hearing, *supra* note 149, at 565.

²²⁸ See *Porter v. Ferguson*, 4 Fla. 102, 105 (1851) (instructing that "[t]he declarations of a party, made at the time of a transaction, and expressive of its character, motive, or object, are regarded as verbal acts, indicating a present purpose and intention, and, therefore, admitted in proof, like any other material facts").

²²⁹ After the retrial of Walter Irvin, Akerman wrote to the NAACP's Jack Greenberg, "I am somewhat concerned over Paul [Perkins'] report that the Court Reporter would not honor his order for a copy of Hunter's argument. I am afraid that the record may appear as different from what actually happened but we will see when the record is furnished." Letter, from Alex Akerman, Jr. to Jack Greenberg, (April 13, 1952) (on file with author).

Amendment violation since there were no elements of search or seizure.²³⁰ How the Florida Supreme Court arrived at the conclusion that there was no seizure when inculpatory evidence was removed from the private bedroom closet of a criminal suspect defies all legal logic, but this conclusion was not questioned by the United States Supreme Court.²³¹ For purposes of this analysis, no weight is placed on the findings of these high courts.

At the 1949 trial, Judge Futch denied the motion to suppress, and the Florida Supreme Court affirmed his ruling on the misplaced belief that Deputy Yates had asked politely for the clothing, and that Deliah Irvin freely provided access to the same.²³² In reconstructing the likely arguments of these un-transcribed hearings based on the available legal scholarship and the records on appeal, we know the defense based their arguments around the theories of acquiescence to authority²³³ and third party consent.²³⁴ Specifically, they argued that Deliah Irvin could not have provided knowing and voluntary consent to the search of her home, and specifically to that of Walter Irvin's private bedroom. To support those theories, the defense posited that Mrs. Irvin's consent to search her son's bedroom was only given because of the overt show of police authority exerted upon her by Deputy Yates. Furthermore, even if she did freely consent she was not entitled to grant such consent on her adult son's behalf over his private sleeping quarters. As a corollary argument, the defense also complained of the fact that Deputy Yates failed to obtain a warrant, although obtaining one would have been quite simple. The reliance on

²³⁰ *Irvin v. Florida*, 66 So. 2d 288, 293 (1953).

²³¹ *Irvin v. Florida*, 346 U.S. 927 (1954) (certiorari denied).

²³² *Irvin*, 66 So. 2d at 293. "The mother testified that when the officer appeared, he did not threaten her or attempt to coerce her. *Id.* When asked if 'he [the deputy] just politely asked you for the clothes and shoes', she replied, 'yes, sir, he did, and I got them for him because he was the law.'" *Id.*

²³³ *See generally* *Amos v. United States*, 255 U.S. 313 (1921) (explaining that a consent to a search or seizure will be deemed invalid if the government official makes such a show of his authority so as to negate the free and voluntary choice to refuse said search or seizure).

²³⁴ *See generally* *Fuller v. Florida*, 31 So. 2d 259 (Fla. 1947) (explaining that a third party may consent to a search or seizure on behalf of a suspect is a factual matter determined on a case-by-case basis and relates primarily to the level of independent control said third party exerts over the place to be searched or the thing to be seized).

this argument, however, was clearly as misplaced then as it would be now.²³⁵

Without any articulation of rationale, as was his custom, Judge Futch denied Walter Irvin's Motion to Suppress. We now turn our attention to the accuracy of that ruling. Again, it is the tipsy coachman doctrine that comes to Judge Futch's aid. While Futch presumably denied the motion based on a misguided finding of consent, the denial of the motion was likely legally correct under a different theory in 1949—that of search incident to arrest. The seminal case in this area of the law at the time of the Groveland trials was that of *Agnello v. United States*. Under *Agnello*, police practitioners of the time would have understood “[t]he right without a search warrant . . . to search the place where the arrest was made in order to find and seize things connected with the crime . . . is not to be doubted.”²³⁶ This doctrine was reaffirmed and even extended in the case of *Harris v. United States*, decided by the United States Supreme Court just two years before the Groveland case. In *Harris* the Court wrote, “[s]earch and seizure incident to a lawful arrest is a practice of ancient origin and has long been an integral part of the law enforcement procedures of the United States and of the individual states.”²³⁷ Furthermore, “[i]t is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place . . . is subjected to [the] search,”²³⁸ and such a search “can extend beyond the room in which the [subject] was arrested.”²³⁹ Based on the language above, the *Harris* case is squared with the case at bar. Knowing he had no involvement in wrongdoing, Walter Irvin welcomed Deputy Yates into his home upon Yates' initial arrival at around daybreak of July 17, 1949. Once inside, Yates arrested Irvin, then drove Irvin out to the crime scene somewhere near the Lake-Sumter county border, and then drove Irvin back to his Groveland home upon learning the shoes he was looking for were still in Irvin's

²³⁵ This case was decided while the Groveland case was pending, but the defense was already arguing the wrong test. *See* *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (declaring the relevant test is not whether it was reasonable to procure a search warrant, but whether the search was reasonable).

²³⁶ *Agnello v. United States*, 269 U.S. 20, 30 (1925).

²³⁷ *Harris v. United States*, 331 U.S. 145, 150-51 (1947).

²³⁸ *Id.* at 151.

²³⁹ The defendant in *Harris*, just like Walter Irvin, was arrested in his living room, but the evidence was found in his bedroom. *Id.* at 152.

closet. Upon returning to the Irvin house, Yates encountered Deliah Irvin, effectuated his search, and seized the correct shoes. While this search of Irvin's home occurred after some temporal break, it could certainly be argued that since the search incident to the arrest would have been proper just moments before, it would still be a valid search. Assuming this rationale to be correct, Judge Futch's denial of the motion to suppress was proper.

The defense sought to readdress the matter as the 1952 retrial of Walter Irvin drew near. Judge Futch added a degree of difficulty for the defense in this regard when Walter Irvin himself was not made available to testify at the 1952 suppression hearing, because Judge Futch did not have him transported from Florida State Prison for that hearing. While Futch may very well have understood that Irvin's absence would deprive his defense team of the value of his testimony and insight into the facts supporting the renewing of their motion, his failure to have Irvin transported to the hearing was in accordance with Florida law, which did not require the presence of defendants at pretrial motion hearings.²⁴⁰

The second hurdle facing the defense in their renewed 1952 motion to suppress was the doctrine of the law of the case. When both the Florida and United States Supreme Courts chose to not address Judge Futch's 1949 ruling on the suppression motion, at the 1952 retrial Futch correctly kept the same ruling intact under this doctrine.²⁴¹ The concept of the law of the case stands for the proposition that, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the law of the case, and it remains as the ruling in effect throughout the pendency of the matter.²⁴² It is also worth noting that this application of the law of the case doctrine would have been correct even if a different trial judge had been presiding over the 1952 retrial, because even a successor

²⁴⁰ FLA. STAT. § 914.01 (1951) (codifying that pretrial motion hearings are not one of the enumerated circumstances requiring a defendant's presence).

²⁴¹ Transcript of Hearing on Motion for Change of Venue, Disqualification of State Attorney, and Suppression of Evidence, *supra* note 193, at 24.

²⁴² See *Ball v. Yates*, 29 So. 2d 729, 738 (1946) (clarifying the general rule that "[t]he 'law of the case' has to do with questions of 'law' decided on appeal as applied to subsequent proceedings of the case. . . The decisions agree that as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the 'law of the case' upon a subsequent appeal . . .").

judge would have been bound by Judge Futch's original 1949 ruling once it was passed upon by the appellate courts.

Unfortunately for Walter Irvin and his Groveland co-defendants, who were undoubtedly damaged by association with Irvin's inculpatory evidence, it was not until the United States Supreme Court decided the 1969 case of *Chimel v. California* that the police actions such as those of Deputy Yates' on July 17, 1949 were curtailed.²⁴³ Through the right conclusion but under the wrong rationale, Judge Futch's allowing Walter Irvin's infamous shoes into evidence paved the way for another of the many terrible injustices that compounded themselves into the full tragedy that was the Groveland prosecutions.²⁴⁴

A Fair and Clean Prosecutor

Before the 1952 retrial of Walter Irvin, the defense filed a motion to disqualify J.W. Hunter as State Attorney. In it, they claimed that Hunter had not conducted the prosecution of the case in a fair and impartial manner.²⁴⁵ Specifically, the defense alleged Hunter gave news interviews with false information, that Hunter refused to turn over exculpatory evidence, and that he improperly intervened into the United States Department of Justice's investigation into the shooting death of defendant Samuel Shepherd by Lake County Sheriff Willis McCall.²⁴⁶ These matters and others were taken up at a December 6, 1951 pretrial hearing in Tavares. The hearing was a complete and total victory for the prosecution, and a detailed examination of the legal analysis applied justified this result.

²⁴³ *Chimel* began the process of severely limiting the search incident to arrest exemption by greatly curtailing the timeframes, areas, and propriety of such searches. *See generally* *Chimel v. California*, 395 U.S. 752 (1969).

²⁴⁴ *See* KING, *supra* note 6, at 356. Expert witnesses later concluded that Deputy Yates' plaster cast shoe print evidence in the Groveland case was forged. No human foot was in the shoes from which Yates made the casts. This fraudulent evidence was crucial in linking the Groveland defendants to the crime scene. Even worse, in 1962, Yates was federally indicted by the FBI for criminally falsifying plaster cast evidence in another investigation, but the case against him was dismissed on statute of limitations grounds. Yates was immediately reinstated as deputy by Sheriff McCall, and awarded back-pay for his missed time.

²⁴⁵ Motion to Disqualify State Attorney at 2, *Florida v. Irvin*, (D. Fla. 1952) (removed to Marion Cty.) (on file with author).

²⁴⁶ *Id.* at 2-3.

The pretrial hearing ended as a victory for the state because the defense failed to prove any of their allegations.²⁴⁷ At the hearing, through defense direct examinations, it became clear that it was likely Sheriff Willis McCall—not State Attorney Hunter—who had provided the press with false information.²⁴⁸ Then, as was analyzed earlier in this work, Judge Futch correctly ruled that Hunter’s refusal to disclose the exculpatory evidence provided to him during his investigatory interview with witness Lawrence Burtoft was proper.²⁴⁹ Lastly, no evidence or testimony was presented to support the defense contention that Hunter was improperly involved in the Department of Justice’s investigation of Samuel Shepherd’s death at the hands of Sheriff McCall.

The evidence that the defense did attempt to admit—predominantly local and national news articles—Judge Futch unwisely excluded. While he may have been correct in viewing the defense subpoenas for such information as unduly over-broad,²⁵⁰ Futch would have been wiser to simply admit the evidence and then assign it little weight. Just as he did with the bulk of the defendant’s polling data evidence, Judge Futch overreached in excluding defense evidence from these two non-jury hearings. However, unlike the polling data evidence, there is reason to believe that Futch may have had genuine concerns that if he admitted too many anti-Hunter documents one of them may have contained a true bombshell. His poor decision to keep all of this evidence out of the public record may have been motivated less by true legal acuity than by a desire to protect the good name of a good friend. Either way, this was poor judicial practice.

In response to the defense motion to disqualify him, Hunter filed affidavits from eleven leading local civic and legal personalities²⁵¹ in

²⁴⁷ See Transcript of Hearing on Motion for Change of Venue, Disqualification of State Attorney, and Suppression of Evidence, *supra* note 193, at 4-24.

²⁴⁸ This false information was largely disseminated via press reports, likely provided by Sheriff McCall, that the Groveland defendants had confessed to the crime while in custody, when in fact, there were no such confessions, or the so-called confessions were obtained through unlawful police brutality. *Id.* at 18-19.

²⁴⁹ *Id.* at 17-18. Prior to *Brady v. Maryland*, 373 U.S. 83 (1963), this interview constituted attorney work product and was therefore exempt from disclosure.

²⁵⁰ Futch properly criticizes the defense for utilizing blunderbuss subpoenas that are vague and over broad. *Id.* at 7.

²⁵¹ *Id.* at 22-23.

support of his position as a fair and clean prosecutor.²⁵² Although common sense might tell us that Judge Futch needed little convincing as to the professional reputation of his lifelong friend and colleague, the weight of these affidavits was, no doubt, compelling to the neutral observer.²⁵³ The affidavits described Hunter as a practitioner of eminent fairness and impartiality,²⁵⁴ and relayed a series of cases and anecdotes detailing Hunter's history of fair dealing in race-related prosecutions.²⁵⁵ When the defense objected on grounds that affidavits were an improper form of evidence in such a hearing,²⁵⁶ Judge Futch correctly overruled the objection.²⁵⁷

From an evidentiary analysis alone, Futch's decision and desire to deny the motion to disqualify Hunter would have been relatively easy. All the evidence presented at the hearing was marshaled in favor of Hunter, and in 1949 there was no legal precedent for the disqualification of a state attorney,²⁵⁸ but the state had an additional

²⁵² Affidavit of Clyde H. Lockhart, *Florida v. Irvin*, (D. Fla. 1952) (removed to Marion Cty.) (on file with author).

²⁵³ Affidavits of support came from, among others, the former sheriff of Citrus County, the State Attorney for the Eighth Judicial Circuit, the former State Attorney for the Fifth Judicial Circuit, and the President of the Fifth Judicial Circuit's Bar Association. *See* Transcript of Hearing on Motion for Change of Venue, Disqualification of State Attorney, and Suppression of Evidence, *supra* note 193, at 22-23.

²⁵⁴ Affidavit of Pat Whitaker, *Florida v. Irvin*, (D. Fla. 1952) (removed to Marion Cty.) (on file with author).

²⁵⁵ *See, e.g.*, Affidavit of Charles S. Dean, *Florida v. Irvin*, (D. Fla. 1952) (removed to Marion Cty.) (on file with author) (relaying the story of the prosecution of a black man who killed a white man in which Hunter, unconvinced of the defendant's guilt, asked the judge to enter a judgment of acquittal); Affidavit of Tim M. Sellar, *Florida v. Irvin*, (D. Fla. 1952) (removed to Marion Cty.) (on file with author) (writing about a case in which Hunter successfully prosecuted the unpopular case of three white men who killed a black man).

²⁵⁶ Transcript of Hearing on Motion for Change of Venue, Disqualification of State Attorney, and Suppression of Evidence, *supra* note 193, at 22.

²⁵⁷ *See* FLA. STAT. § 90.19 (1951). As to the form of evidence utilized at a hearing: if the moving party uses affidavits, then the responding party may also use affidavits. Here, it did appear the moving party - the defense - used affidavits from defendants Irvin and Shepherd in support of their Motion to Disqualify State Attorney Hunter. Once the defense utilized affidavits, the State would be able to reply in kind.

²⁵⁸ *See* *Downs v. Moore*, 801 So. 2d 906, 914 (Fla. 2001) (explaining that the current standard for disqualification of a prosecutor is a showing of substantial misconduct or actual prejudice); *see also* *Kearse v. Florida*, 770 So. 2d 1119,

argument that would ultimately carry the day. The state successfully raised the argument that only the Governor of Florida could disqualify a state attorney, and therefore the trial court lacked the jurisdiction to do so. Futch eagerly agreed with this premise and promptly denied the motion to disqualify the State Attorney. The defense did not argue this point at all, and in fact, they seemed to concede the matter.²⁵⁹

Again, Futch's decision to deny the motion was likely correct as the (now modern) legal standard for disqualification had not been met by the defense, but he opted to rely on the lack of jurisdiction argument instead. He could have been correct under either theory. Case law, statutes, and attorney general opinions from before the Groveland trials made clear that a trial judge could *replace* a state attorney upon a vacancy of the position, but no authority seemed to authorize a trial judge's ability to *remove* a sitting state attorney from a case.²⁶⁰ Thus, while a Florida judge in 1952 *may* have had the legal authority to disqualify a state attorney upon proper evidence, the absolute availability of such a judicial action was not clear until 1971.²⁶¹ For either or both of these reasons, the motion to disqualify State Attorney Hunter was properly denied.

Attorneys in Good Standing

During the same December 6, 1951 pretrial hearing in which the motion to disqualify the State Attorney was properly denied, Judge Futch incorrectly barred two of the NAACP's out-of-state attorneys from being able to practice *pro hac vice* during the hearing. When court convened at 10:00 A.M. in the Tavares courthouse, Alex

1129 (Fla. 2000) (defining actual prejudice as a specific legal injury as opposed to a mere racial or societal prejudice, requiring the proponent to show something more than the mere appearance of impropriety).

²⁵⁹ Transcript of Hearing on Motion for Change of Venue, Disqualification of State Attorney, and Suppression of Evidence, *supra* note 193, at 23-24.

²⁶⁰ *See, e.g.*, Advisory Opinion to the Governor, 10 So. 2d 926 (Fla. 1942) (asserting that, upon the disqualification or absence of a state attorney from office, the governor has the authority to substitute or replace said state attorney); FLA. STAT. § 32.72 (1951) (explaining that a judge has the authority to appoint a new prosecutor in any matter whenever there is a vacancy, a non-appointment, or otherwise). The statute does not appear to authorize the judiciary to disqualify or remove a state attorney.

²⁶¹ *See generally* Thompson v. Florida, 246 So. 2d 760 (Fla. 1971) (lending a reasonable inference that a trial court does have the authority to disqualify a state attorney from a specific prosecution).

Akerman, Jr. began his second defense of the Groveland case by asking Judge Futch to allow two NAACP lawyers, Thurgood Marshall and Jack Greenberg, to be especially admitted to practice law in Florida as special counsel in this cause.²⁶² This temporary *pro hac vice* admittance was a relatively common practice for members of the bars of other states whose practice in Florida would be limited to a singular or special appearance. Both Marshall and Greenberg, who practiced law primarily as appellate attorneys in front of the United States Supreme Court, were both members of the Maryland state bar.²⁶³ Under Florida statute 454.03, their admission to practice in Lake County for the limited purpose of the defense of the Groveland case, should have been immediately granted.²⁶⁴ However, State Attorney Hunter objected to their *pro hac vice* admission on the grounds that “they both represent the National Association for the Advancement of Colored People, and [have] been responsible for the vicious, slanderous and libelous matter filed in this Court and circulated against this Court. . . .”²⁶⁵ Despite Florida statute 454.03 seeming to offer no judicial discretion for Judge Futch to disallow special admittance to Marshall and Greenberg, he did so anyway, and his ruling appears wholly incorrect.²⁶⁶ In a silent twist however, Futch’s error seemed to have been quickly remedied. By the January 9, 1952 motion hearing

²⁶² Transcript of Hearing on Motion for Change of Venue, Disqualification of State Attorney, and Suppression of Evidence, *supra* note 193, at 1-2.

²⁶³ *Id.*

²⁶⁴ FLA. STAT. § 454.03 (1951) (codifying that “[a]ttorneys in good standing of other states may appear in particular cases in the courts of this state, when under the rules of comity of such states, attorneys from Florida are similarly permitted to appear; but attorneys of other states shall not do a local or general practice in this state . . .”).

²⁶⁵ Transcript of Hearing on Motion for Change of Venue, Disqualification of State Attorney, and Suppression of Evidence, *supra* note 193, at 2.

²⁶⁶ *Cf.* CORSAIR, *supra* note 7, at 105. Ironically, the 1952 trial was not the first time Judge Futch encountered the question of *pro hac vice* practice during the course of the Groveland prosecutions. On the eve of the original 1949 trial, State Attorney Hunter asked the court to allow the appointment of his son Walter as a special assistant state attorney for purposes of assisting him during the trial. Futch granted the motion for the appointment. Seizing that opportunity, the defense immediately moved to allow NAACP attorney Franklin Williams, a member of the New York bar, to practice *pro hac vice* and assist the defense. Having just granted Hunter’s motion, Futch likely felt compelled to grant the defense’s as well, and he did.

date both Thurgood Marshall and Jack Greenberg *had* been admitted after a subsequent written motion by the defense, and both participated fully in that and all subsequent court events related to the Groveland case.

A Jury of Their Peers

While the 1949 Groveland convictions were overturned on appeal based on *Cassell v. Texas* violations involving improper grand jury selection procedures, the voir dire and selection of the two petit juries, both presided over by Judge Futch, seemed devoid of error. In spite of State Attorney Jesse Hunter's habitually improper leading questions throughout the voir dire process, the defense never raised an objection.²⁶⁷ Judge Futch correctly excused jurors for cause when they indicated they did not fully appreciate the defendants' Constitutional presumption of innocence,²⁶⁸ when they indicated they had already formed an opinion on the case,²⁶⁹ when they were related to the prosecutor,²⁷⁰ and when they indicated they were acquaintances with the family of the alleged victim.²⁷¹ In spite of the difficult task of selecting a jury in a county in which every single potential juror indicated they had already heard of the case,²⁷² the 1952 trial only required fifty-three potential jurors to be questioned before both sides had agreed on a trial jury.²⁷³ Of the fifty-three potential jurors in the

²⁶⁷ See, e.g., Trial Transcript at 256, *Florida v. Shepherd*, (D. Lake Cty. Fla. 1949) (on file with author).

²⁶⁸ Judge Futch sustained a defense challenge for cause after a juror stated, “[W]ell, I don’t know as I could consider them innocent,” and sustained another after a prospective juror indicated it would require some evidence from the defense to remove his current opinion. See *id.* at 257, 407.

²⁶⁹ See *id.* at 408 (noting an example of a challenge for cause granted when a prospective juror was unsure if he could set aside his preconceived opinions of the case); *id.* at 425, 430 (noting additional examples of prospective jurors who were properly excused for cause after indicating unwavering opinions based on newspaper articles).

²⁷⁰ *Id.* at 440.

²⁷¹ *Id.* at 368.

²⁷² Brief of Appellant at 51, *Irvin v. Florida*, 66 So. 2d 288 (Fla. 1953).

²⁷³ Brief of Appellee, *supra* note 187, at 4.

1952 voir dire, only five were African-American.²⁷⁴ None were selected to serve.²⁷⁵

A Fresh Complaint

With juries selected, the evidentiary phases of the Groveland trials commenced. Upon the proper request, Judge Futch correctly read and invoked the rule of sequestration, which required all potential witnesses to remain outside the courtroom during the testimony of all other witnesses.²⁷⁶ The most common and most basic testimonial evidentiary rulings placed before Judge Futch came in the form of objections to hearsay. To his credit, Judge Futch's understanding and application of the rules of hearsay seemed solid.²⁷⁷ Throughout both trials, Futch ruled on several matters touching upon various applications of the hearsay rules, and while many were rather trivial, his rulings on those objections, whether entered by the state or the defense, were largely correct.

The first of several major rulings during the evidence phase of the trial came in the form of a hearsay objection, and it came during the testimony of Willie Haven Padgett. During Willie Padgett's direct examination he was asked by the state attorney what statements his wife had made to him upon his first contact with her after the alleged rape. The defense properly objected to this line of questioning as hearsay, and the state countered that such evidence should be admitted

²⁷⁴ CORSAIR, *supra* note 7, at 311.

²⁷⁵ *See generally* Jury Trial Voir Dire Transcript at 1-266, *Irvin v. Florida*, 66 So. 2d 288 (Fla. 1953) (removed to Marion County). Of the five potential black jurors summonsed, two were struck peremptorily by the State, two were excused for cause based on pre-fixed opinions, and one was excused for cause based on his moral opposition to the death penalty. *Id.*

²⁷⁶ *See id.* at 266-67 (explaining that the rule of sequestration, commonly called "The Rule" by practitioners, is a common law principle of witness exclusion which requires all trial witnesses to remain outside the courtroom during the evidentiary phase of a trial so that no one witness will have the benefit of hearing the testimony of another); *see also* Trial Transcript, *supra* note 267, at 459.

²⁷⁷ *See, e.g.*, Trial Transcript, *supra* note 267, at 598. Ethel Thomas, the mother of deceased defendant Ernest Thomas, was asked to relay what her deceased son had told her when she told him to go home. The deceased party's response, "[n]o," was objected to as hearsay and properly overruled as non-hearsay under the common law res gestae exemption from *Bowen v. Keen*, 17 So. 2d 711 (Fla. 1944).

under the fresh complaint exception to the hearsay rule.²⁷⁸ While the fresh complaint exception is now essentially extinct due to adverse statutory and case law authority,²⁷⁹ in 1949 the exception was well established and constituted competent evidence. This was especially well known in Florida's fifth judicial circuit, as the seminal case on the matter stemmed from a Marion County case decided by the Florida Supreme Court just one year before. In the case of *Custer v. Florida*, the Florida high court ruled that evidence of a complaint of rape soon after the occurrence is admissible to rebut the inference of consent, but it is only the fact of the complaint itself, not the details of the rape, which is admissible.²⁸⁰

Custer made clear that the fact that Norma Lee alleged a rape would be admissible, but her first human contact was with Lawrence Burtoft, not her husband. The defense contended this fact negated the applicability of the fresh complaint exception. Judge Futch disagreed, and allowed Willie Padgett to testify to his wife's rape allegation.²⁸¹ Under the law of the time, Judge Futch was correct in doing so. The fresh complaint exception, as enunciated in *Custer*, did not necessarily require the complaint be made to the *first* person with whom a rape victim came into contact; the language of the case simply required the report be made *soon after* the occurrence.²⁸² The contemporary legal treatise series *American Jurisprudence* acknowledged that delayed complaints were acceptable when supported by the circumstances, or when the victim was only in the presence of strangers.²⁸³ In the Groveland opinion, the Florida Supreme Court explained that, "[f]rom the very nature of such an experience we think [Norma Lee Padgett's] reply to her husband . . . without telling the first man she saw, a virtual if not a total stranger, was entirely natural and that the admission of the

²⁷⁸ Trial Transcript, *supra* note 267, at 472.

²⁷⁹ See FLA. STAT. §§ 90.101 – 958 (1976). When Florida codified its rules of evidence in 1976, it recognized roughly thirty exceptions to the hearsay rule, but chose not to codify the fresh complaint exception; see also *Crawford v. Washington*, 541 U.S. 36 (2004) (abrogating many of the statutory and common law exceptions to the hearsay rule in favor of a renewed emphasis on the right of confrontation of live witness testimony).

²⁸⁰ *Custer v. Florida*, 34 So. 2d 100, 112 (Fla. 1947) (citing *Ellis v. Florida*, 6 So. 768 (Fla. 1889)).

²⁸¹ Trial Transcript, *supra* note 55, at 277.

²⁸² *Custer*, 159 Fla. at 112.

²⁸³ 65 AM. JUR. 2D *Rape* § 63 (2015).

testimony did not violate that spirit of the [fresh complaint] rule.”²⁸⁴ Sadly, this seems to be one of the few legal matters the Florida Supreme Court ruled on correctly in regard to its two Groveland opinions. Nonetheless, the opinion supports Judge Futch’s conclusion as well.

Those Shoes Made Those Tracks

Having shown a clear and accurate grasp of Florida’s common law hearsay rules, the next series of rulings encountered by Judge Futch came in the form of objections to three major items of physical evidence and the testimony surrounding them. Just as was the case with the various hearsay objections, Futch’s legal conclusions as to the physical evidentiary objections proved correct as well. It was in these two areas of the law that Judge Futch seemed to be the most accurate from the point of view of legal retrospection.

The first item to be analyzed was “State’s Exhibit #1”, a dirty, lint covered handkerchief found at the location of the alleged rape, which was purported to belong to Norma Lee Padgett. Introduced during the direct examination of Lake County Deputy Sheriff James Yates, the soiled handkerchief was abandoned in a bushy thicket near the scene, and was located and recovered by Yates. The prosecution argued it was covered in similar lint to that found in the defendants’ vehicle.²⁸⁵ The defense objected to its introduction as irrelevant and improperly authenticated. To this, Judge Futch responded tersely, “[l]et it be received.”²⁸⁶ Overruling the objection on relevance grounds was simple, as the handkerchief, for all the reasons argued by the prosecution above, clearly satisfied the simple threshold for relevance.²⁸⁷ However, while Futch’s ruling on the relevance of the handkerchief was simple and correct, the portion of the defense’s

²⁸⁴ Irvin v. Florida, 66 So. 2d 288, 294 (1952).

²⁸⁵ Trial Transcript, *supra* note 267, at 537-539.

²⁸⁶ *Id.*

²⁸⁷ See FLA. STAT. § 90.401 (1976) (codifying the ancient common law doctrine of relevant evidence that considers evidence relevant if it “tend[s] to prove or disprove a material fact”). Clearly, the soiled handkerchief of the alleged victim, left at the scene of the offense, and covered in a substance consistent with that of the interior of the offenders’ vehicle, satisfies this provision.

objection to improper predicate or authentication requires greater analysis.²⁸⁸

While the chain of custody aspect of authentication was unquestionably satisfied by the fact that Deputy Yates had collected the handkerchief at the scene, brought it into the courtroom, and identified it in open court, Deputy Yates would have had no knowledge of the fact that the handkerchief belonged to the alleged victim unless he was so informed by Norma Lee Padgett. Under this rationale, such testimony may have called for hearsay, or may have supported the defense objection to relevance. However, a hearsay analysis would have shown, that under 1949 common law, any such statement to Deputy Yates by Norma Lee indicating her possessory interest in the handkerchief would have been non-hearsay. Such a statement was non-hearsay because it was not to be offered for its truth, but rather to explain the actions of the listener, or rather why Deputy Yates collected that particular item of evidence.²⁸⁹ Lastly, even if Judge Futch had found the predicate to be lacking, and Deputy Yates' testimony regarding the alleged victim's interest in the handkerchief to be hearsay, the state could have simply recalled Norma Lee Padgett to the stand to lay the final piece of the predicate herself. Therefore, under any such analysis, the introduction of the handkerchief was proper.

Following the proper admission of Norma Lee's handkerchief, and still during the direct examination of Deputy Sheriff Yates, the state sought the introduction of the most contested, the most damning, and the most reprehensible item of physical evidence introduced during the course of the Groveland prosecutions. The centerpiece of Deputy Yates' investigation into the Padgetts' allegations was his taking, or creation, of plaster casts of tire marks²⁹⁰ and shoe prints²⁹¹ from the scene of the alleged rape. From the moment these casts were first offered into evidence, controversy and tragedy closely followed.

²⁸⁸ Trial Transcript, *supra* note 267, at 539 (objecting on grounds of relevance and failure to lay an adequate foundation) .

²⁸⁹ See FLA. STAT. § 90.801 (1976) (defining hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted).

²⁹⁰ See Trial Transcript, *supra* note 267, at 540-551 (dealing with the introduction of the plaster tire casts).

²⁹¹ *Id.* at 556-58.

The defense objection to the tire and shoe casts came via multiple theories of exclusion. First, the defense objected that Deputy Yates lacked the necessary expertise to take or create such casts, and they even interrupted the state's direct examination to *voir dire* Yates themselves to highlight his lack of formal forensic training.²⁹² In spite of excellent legal work on the subject by the defense, Futch correctly dismissed their argument on this ground. Specifically, he was justified in finding that, even though Yates' training on the subject was limited to having studied it from some books,²⁹³ the taking of the plaster casts "by pouring plaster paris into the tracks, letting it harden, and then lifting it out of the ground"²⁹⁴ was not a forensic skill that required education in an advanced scientific technique or specialized expertise. Given the rather elementary nature of the cast-making procedure, and its simple lay applications, this conclusion was likely correct.

Secondly, as it related to the tire casts taken from the dirt road shoulder of the alleged rape location, the defense raised the argument of relevance. Specifically, they argued that the tracks "could have been made by hundreds of cars in Lake County with like treads or tires, and that the casts didn't tend to prove anything at all, let alone a material fact."²⁹⁵ While this rationale is undoubtedly true, such an argument clearly goes to the *weight* of such evidence, and not to the *admissibility*. Judge Futch seems to have correctly understood this legal distinction, and was correctly unmoved by this avenue of the defendants' objection.

The last line of defense posited on the matter of the plaster casts was also the most successful, and it is in this area probable error on the part of Judge Futch exists. This theory of exclusion was centered on a line of Florida case law that limited the testimony of non-expert witnesses in evidentiary matters of comparison. By his own admission, Deputy Yates was not a scientific expert.²⁹⁶ Indeed, under Florida's statutory requirements for expert witnesses in 1949, he could not legally be considered as such since he lacked a professional degree from a university or college, and he did not possess special

²⁹² *Id.* at 541-47.

²⁹³ *Id.* at 542.

²⁹⁴ *Id.* at 543.

²⁹⁵ *Id.* at 540.

²⁹⁶ Trial Transcript, *supra* note 55, at 335, 365 (confirming that Yates is not a scientific expert).

professional training and expertise in the applicable field.²⁹⁷ The state of Florida conceded this point. Given Yates' lay witness status, his testimony would therefore be limited by three major Florida cases.²⁹⁸ Namely, this line of cases stood for the proposition that a lay witness could describe the visible properties of comparison evidence, and could testify to their similar characteristics, but could not opine or conclude that both items of comparison were identical, the same, or from the same person.²⁹⁹ These conclusions, the court reasoned, fell within the province of the jury. Both sides seem to have acknowledged these proscriptions in their subsequent legal briefs,³⁰⁰ but Judge Futch did not correctly curtail Yates' trial testimony so as to keep it within these parameters. To this end, Futch incorrectly allowed Yates to testify to the ultimate and impermissible conclusion that Walter Irvin's shoes specifically made these distinct tracks.³⁰¹ The defense properly objected at the time of the testimony, and properly raised the matter on appeal.

Judge Futch's failed application of the *Ferguson-Johnson-Alford* case law was clearly improper, and was undoubtedly prejudicial to the defense. This assignment of error is true in spite of the fact that the Florida Supreme Court validated Judge Futch's incorrect ruling by extending the *Ferguson-Johnson-Alford* rule to accommodate for Futch's error in the record of this case.³⁰² Being saved by a subsequent and questionable extension of the law by a higher court does not change our analysis and miraculously render the trial court's prior

²⁹⁷ FLA. STAT. § 90.23 (1949).

²⁹⁸ *Ferguson v. Florida*, 28 So. 2d 427 (Fla. 1946); *Johnson v. Florida*, 46 So. 154 (Fla. 1908); *Alford v. Florida*, 36 So. 436 (Fla. 1904).

²⁹⁹ See generally *Ferguson*, 28 So. 2d at 427; *Johnson*, 46 So. at 154; *Alford*, 36 So. at 436.

³⁰⁰ In both the State and Defense Appellate Briefs to the Florida Supreme Court following the 1952 trial of Walter Irvin, both sides agreed on the current status of the law as controlled by *Ferguson*, *Johnson*, and *Alford*. See Brief of Appellant, *supra* note 272, at 104; see also Brief of Appellee, *supra* note 187, at 10.

³⁰¹ See Brief for Appellant, *supra* note 272, at 104.

³⁰² *Irvin v. Florida*, 66 So. 2d 288, 296 (1953) (reasoning that “[w]e do not think it would be logical to hold that in the circumstances a witness could say that in his comparison of shoes and tires with the tracks, he found at the scene, the imprints bore precisely the same characteristic marks as the objects, but that reversible error would result from his stating the conclusion based on these observations that the objects made these imprints”).

ruling correct. In this situation, both in 1949 and 1952, Judge Futch was bound by the rule as laid out in *Ferguson-Johnson-Alford*, and his failure to constrain Yates' testimony to it constituted a harmful error at the time. Here, two wrongs still do not make a right. In conclusion, the admission into evidence of the tire and shoe casts, as well as the testimony regarding their similar characteristics, both over defense objections, was correct. However, Futch's allowance of Yates' ultimate opinion attributing the shoe prints to Walter Irvin himself was a grave trial error under the controlling law of the day. Of course, the confirmation of the fact in later years that Yates had forged the shoe prints, a fact of which we hope Judge Futch was unaware in 1949, casts yet another tragic shadow over the whole of the Groveland story.

Tell the Truth for Once in Your Life

Having seen Judge Truman Futch to be relatively solid in his application of the hearsay rules, and accurate in all but one ruling in the area of physical evidence, we now turn our attention to Judge Futch's hit and miss analysis regarding impeachment and character evidence. In these rulings, Futch was inconsistent and often incorrect. From the standpoint of legal scholarship, this seems to be the area in which his rulings were weakest.

Judge Futch began his back and forth encounters with character evidence objections in the form of the defense impeachment of state witness Henry Singer. Mr. Singer, a member of Groveland's African-American community, testified to defendant Charles Greenlee's involvement in the illicit neighborhood gambling practice of bolita, also known as Cuba. The defense sought to cross examine Mr. Singer on his own involvement in these illegal games, but Singer had never been convicted in court for such an act, so Judge Futch properly sustained the state's objection as it constituted improper character evidence.³⁰³ Immediately thereafter, the defense correctly impeached Singer with a prior court conviction for the offense of impersonating an officer.³⁰⁴

³⁰³ Trial Transcript, *supra* note 267, at 593-94; FLA. STAT. § 90.08 (1949) (instructing that impeachment by evidence of prior criminal activity must only be in the form of a court conviction).

³⁰⁴ While Florida Statute section 90.610 (2015) does not permit the introduction of prior misdemeanor offenses for impeachment purposes, the 1949 version of the statute made no such distinction. *See* FLA. STAT. § 90.08 (1949).

Faced with essentially the same scenario but with the parties reversed, Judge Futch stumbled through the testimony of witness Lawrence Burtoft during Walter Irvin's 1952 Marion County retrial. Burtoft had not testified in the original 1949 Lake County trial, but his knowledge of inconsistencies in Norma Lee Padgett's testimony made him a crucial defense witness during the retrial. Having undertaken great lengths to secure his attendance at the 1952 retrial, in spite of his being stationed with the United States Marine Corp in North Carolina, his testimony was essential to the 1952 defense of Walter Irvin. It was the substance of Burtoft's testimony that Hunter had refused to disclose in 1949, and it was Burtoft's testimony that now formed a key pillar in Irvin's defense strategy.³⁰⁵ On cross examination, State Attorney Hunter sought to impeach Burtoft with the fact that the Lake County Sheriff's Office and the Burtoft family were engaged in a bit of friction over the Burtoft family's ownership of a local dance hall where alcohol was sold.³⁰⁶ The defense objected, and Hunter argued that such evidence was relevant to show the witness' bias against local law enforcement.³⁰⁷ Understanding that since the days of the English common law evidence of bias has long been allowed,³⁰⁸ Judge Futch correctly overruled the defendant's objection. Just minutes later, Hunter was growing increasingly frustrated with Burtoft's testimony, so when Burtoft responded to an inquiry by saying he had helped Norma Lee, Hunter fired back, "[d]on't you think you would be helping her more if you told the truth for once in your life?" The defense immediately objected and moved to strike what was clearly an impermissible and argumentative question, but Judge Futch overruled their objection.³⁰⁹ While such a trite comment was likely of small

³⁰⁵ Trial Transcript, *supra* note 55, at 388. Specifically, Mr. Burtoft testified that although Norma Lee told him she was abducted, she did not mention the fact that she was raped. Additionally, and most importantly, she clearly indicated to Mr. Burtoft that she could not identify her assailants.

³⁰⁶ *Id.* at 389.

³⁰⁷ *Id.*

³⁰⁸ See *Pandula v. Fonseca*, 199 So. 358, 360 (Fla. 1940) (explaining "[i]t is error to exclude questions touching interest, motives, animus, or the statute of a witness in a suit."); see also *Tervin v. Florida*, 20 So. 551, 554 (Fla. 1896) (stating "[t]he fact sought to be elicited tended to show the bias of the witness towards the defendant, which it was competent for the State to show").

³⁰⁹ Trial Transcript, *supra* note 305, at 396-397.

consequence amidst such a trial, this was certainly an objection that Judge Futch should have sustained.

The last matter of impeachment evidence to examine, which was presented to Judge Futch during the cross examination of Deputy Sheriff James Yates, was also the trial's most crucial. Due to Yates' presence at, and alleged involvement in, the State Road 19 shooting which claimed the life of Samuel Shepherd and seriously injured Walter Irvin, Alex Akerman took a brave stab at the deputy while he on the stand. Is it true, Akerman asked Yates, "that the Defendant Walter Irvin has accused you and the Sheriff of Lake County, Florida of attempting to murder him?" The state objected, the defense argued the question was relevant to show the witness' bias, and Judge Futch sustained the state's objection. As discussed above, Florida cases such as *Pandula v. Fonseca* and *Tervin v. Florida* had long held that questions that probe at witness bias are admissible,³¹⁰ but such inquiries should not digress into collateral matters which may be uncalled for by the circumstances.³¹¹

On appeal the Florida Supreme Court agreed with Judge Futch's exclusion of this far-flung question by reasoning that if such questioning was permitted, *any* defendant "could make an accusation, however idle, against a prospective adverse witness, then use his own charge, even if wholly unfounded, to his advantage."³¹² While the Florida Supreme Court was suspiciously cavalier with this hugely important matter, further characterizing its legal credibility in the Groveland matter as questionable, the point of disallowing bias impeachment with wholly unfounded allegations does hold some merit. Looking at this inquiry in a light most favorable to Judge Futch, the attempted murder allegations levied by Irvin against Yates and McCall were, from a purely calloused legal standpoint, still technically unfounded. Indeed, at that point the Federal Bureau of Investigation, a federal grand jury, the state attorney's office, and a coroner's inquest had all failed to return affirmative findings of culpability as to Yates or McCall in the matter of the shooting of Irvin and Shepherd. While these findings were likely influenced greatly by local prejudice, the cold fact remained that, at the time, Futch was dealing with an unfounded allegation. Regardless of technicalities or legal minutia

³¹⁰ *Pandula*, 199 So. at 360; *Tervin*, 20 So. at 554.

³¹¹ *Tully v. Florida*, 68 So. 934, 937 (Fla. 1915).

³¹² *Irvin v. Florida*, 66 So. 2d 288, 295 (1953) (emphasis added).

however, the defense inquiry of Deputy Yates into the attempted murder of the trial defendant was likely substantiated enough to have allowed its admission, and its exclusion probably contributed to a very real miscarriage of justice. Futch's exclusion of this evidence was likely driven more by local allegiances and personal feelings than by any whisper of the law. Therefore, it may be argued that it was Judge Futch's own bias that improperly precluded the evidence of Deputy Yates.

Allow the Jury to be Carried to the Scene

Just before Walter Irvin's 1952 defense team announced rest, Alex Akerman made a rather unusual request of the court. Due to uncertainties in the testimonies of the state's witnesses regarding the actual location of the alleged rape, the defense hoped to raise doubt in the jurors' minds concerning the proper county of venue for the offense. Testimony from Deputy Sheriff James Yates placed the offense occurring so close to the Lake-Sumter county line that a Sumter County road sign was used as a visual point of reference in Yates' investigation. For his part, however, Yates was clear that his investigation revealed the offense did in fact occur in Lake County. Hoping to seize on a possible discrepancy however, Walter Irvin's defense team asked Judge Futch to allow the jury to be carried to the scene of the alleged crime.³¹³ Specifically, they were making a motion for a jury view. Without hesitation, and without any announced analysis, Judge Futch correctly denied the motion.

"When, in the opinion of the court," according to Florida Statute 918.05, "it is proper that the jury should view the place where the offense appears to have been committed . . . it may order the jury . . . to be conducted in a body to such place."³¹⁴ Statutory language that included words like opinion and may would seem to indicate that great latitude was granted to the trial judge in making a determination for a jury view, and the case law interpreting this statute confirms this perspective.³¹⁵ Thus, Futch's decision on the matter would not be

³¹³ Trial Transcript, *supra* note 305, at 440.

³¹⁴ FLA. STAT. § 918.05 (1951).

³¹⁵ *See, e.g., Panama City v. Eytchison*, 184 So. 490, 492 (Fla. 1938) (declaring that "[t]he time, circumstances, and conditions under which a view by the jury will be permitted are at all times in the discretion of the trial court").

disturbed absent a clear abuse of discretion,³¹⁶ and the only conclusive geographical evidence presented at the trial supported the fact that the offense occurred in Lake County.

Indeed, even Yates' sketchy road-sign testimony would have been enough to justify Futch's denial of the motion, but there were also several provisions of law that would have supported his conclusion as well. First, unlike proof of the elements of the crime or the identification of the defendant, venue did not have to be proven to the beyond a reasonable doubt standard. Rather, in 1952, the legal standard of proof for venue was the much more modest standard of reasonable inference.³¹⁷ Secondly, even if the location of the actual rape was unclear, it was undisputed that the initial abduction site was in Lake County. Under the common law doctrine of *res gestae*, which would view an abduction and subsequent rape as part of a common sequence of events, it could be argued that venue was proper in the county where the offense began. This position was supported by Florida's venue statutes of the day, which provided that where several acts are requisite to the commission of an offense, venue is proper in any county in which any of such acts occurred.³¹⁸ Under any or all of these various theories, Judge Futch's decision to deny the defendant's motion for jury view was either correct, or well within his discretion.

Bring the Defendant Back to the Stand

By the time court was adjourned for the evening on February 13, 1952, the defense had called three witnesses of their own, including Walter Irvin himself, and they had rested their case. The next morning, Walter Irvin's retrial reconvened for its final day. When court was called to order at 9:30 A.M., Assistant State Attorney A.P. Buie shocked the court and the defense when he announced, "the State requests the right to bring the Defendant Walter Irvin back to the stand for further cross examination." The defense quickly objected. Perhaps

³¹⁶ See *Tully*, 68 So. 934 (explaining the standard on review for motions for jury view is a clear abuse of discretion).

³¹⁷ Trial Transcript, *supra* note 55, at 446.

³¹⁸ See FLA. STAT. § 910.05 (1951); see also FLA. STAT. § 932.04 (1951). When an offense is committed in one state but acts leading to its commission occurred within another state, venue is proper in either state. *Id.*; FLA. STAT. § 910.04 (1951). When a defendant receives aid in one county to effectuate an offense, but consummates the offense in another county, venue is proper in either county. *Id.*

sensing the storm he had walked into, Buie quickly backtracked on his request by stating, “[w]e do not insist on it; we just have one question to ask him, but it’s within this Court’s discretion.”³¹⁹ In response, Akerman asked Judge Futch to excuse the jury, and after they had left the courtroom, the defense asked for a mistrial.³²⁰ Judge Futch sustained the objection, but denied the motion for mistrial.³²¹

Judge Futch was undoubtedly correct in sustaining the defendant’s objection to being called as a witness by the prosecution in his own trial. Both the United States Constitution and the Florida Statutes clearly forbade such an act, as both specifically protect against compelling a citizen to be a witness against himself.³²² Indeed, the right to silence is one of the greatest fundamental concepts of the American legal system. Under both statutory and case law authority the prosecution was entirely out of bounds in undertaking this request, and to do so in the presence of the jury made the matter even more shameful.³²³ Judge Futch, using more words than at seemingly any other point in the trials, declared, “the objection is good I think and is sustained.”³²⁴ No doubt, the objection *was* good.

The harder legal analysis comes in the form of examining Judge Futch’s denial for a mistrial based on this improper act by the prosecution, in the presence of the jury. Assistant State Attorney Buie’s timid retraction did not make the situation any less harmful, as the jury had already heard both statements, and as the southern lawyers of the day might have said, “that bell can’t be un-rung.” The issue

³¹⁹ Trial Transcript, *supra* note 55, at 446.

³²⁰ *Id.*

³²¹ *Id.* at 445-46.

³²² U.S. CONST. amend. V (declaring “[n]o person shall be . . . compelled in any criminal case to be a witness against himself”); FLA. STAT. § 918.09 (1951) (stating no accused person shall be compelled to give testimony against himself).

³²³ See FLA. STAT. 918.09 (1951) (instructing nor shall any prosecuting attorney be permitted *before the jury* or court to comment on the failure of the accused to testify on his own behalf) (emphasis added); *Rowe v. Florida*, 98 So. 613, 618 (Fla. 1924) (holding that “calling the attention of the jury, by the prosecuting officer of the State, to the failure of the accused to testify in his own behalf, it matters not how adroitly he may attempt to evade the command of the statute, or how innocently it may be done, comes within the exception and deprives the defendant of the protection the statute was intended to secure, and of his constitutional right to a fair and impartial trial”).

³²⁴ Trial Transcript, *supra* note 55, at 446.

presented to Judge Futch, while clearly harmful, was also unique. The case of *Rowe v. Florida* and its early 20th century progeny all dealt with cases where, factually, the defendant *never* took the stand on his own behalf.³²⁵ This case, in which a defendant who *had* taken the stand and the State sought to *re-call* him, seemed to be a matter of first impression. If these facts were consistent with *Rowe*, Judge Futch would have been required to grant the mistrial, as the Florida high court had determined that no trial court remedy would cure such an impermissible comment. In *Rowe*, however, the defendant never testified at all.

The fact that Walter Irvin *had* testified on his own behalf, and then the state improperly sought his return to the witness stand, perhaps takes the Groveland case out of the control of *Rowe*, and places it on its own. Without question, this situation was factually unique, and to seek a mistrial in 1952 meant asking the judge to step very far out onto a very slim branch. Florida's pre-1952 case law greatly cautioned trial judges against granting mistrials, and the case law clearly supported a presumption against them. In this area, wide judicial discretion was afforded, and mistrials were only to be granted for matters of manifest³²⁶ or absolute³²⁷ necessity. "The granting of a mistrial," wrote the Florida Supreme Court in *Perry v. Florida*, "should be only for a specified fundamental or prejudicial error . . . of such a nature as will vitiate the result."³²⁸ The error here would certainly have been fundamental, as per *Rowe*, but perhaps for the fact that the defendant had already testified. If the error was something less than fundamental, and something more akin to merely improper, the *Perry* court advised, "the proper procedure is for the defendant to request the court to instruct the jury to disregard such objectionable remarks, and not that a mistrial be entered by the court. . ."³²⁹ Certainly under today's more cautious approach to improper prosecutorial comments on a defendant's right to remain silent, such an error would be deemed

³²⁵ *Rowe*, 98 So. at 618 (noting that where the defendant did not testify at trial and the prosecution commented on that failure, reversal was the only remedy).

³²⁶ Florida *ex rel.* Wilson v. Lewis, 55 So. 2d 118, 119 (Fla. 1951).

³²⁷ Florida *ex rel.* Alcala v. Grayson, 23 So. 2d 484, 484 (Fla. 1945) (explaining that the power to declare a mistrial and discharge the jury should be done with great care and caution).

³²⁸ *Perry v. Florida*, 200 So. 525, 527 (Fla. 1941).

³²⁹ *Id.*

fundamental and a mistrial would readily be granted. Whether this should have risen to a mistrial in 1952, however, is a tight call. For guidance we might note that neither the United States nor Florida Supreme Courts addressed the matter on appeal, but while their silence is persuasive, it is not definitive. Given the careful protections afforded a defendant's right to be free from adverse comments on his silence—protections firmly enunciated by 1952—the author concludes that Judge Futch should have granted a mistrial under these circumstances. In the interests of practicality, however, we might safely and sadly conclude that the awarding of a third trial would simply have resulted in the same tragic outcome.

The State Calls Sheriff Willis V. McCall

The most controversial, most beloved, and most hated man in the entire Groveland saga had not been called as a witness at any point in the two trials concerning the greatest criminal investigation to ever take place in his jurisdiction. But on the afternoon of February 14, 1952, just before the prosecution intended to announce rest in its rebuttal case, they made another surprising announcement. The state of Florida called Willis V. McCall to the stand.³³⁰ Presumably, the state intended to utilize McCall as a rebuttal character witness to offset the testimony of defense witness Lawrence Burtoft—namely, to testify to Burtoft's reputation for dishonesty within the community, and his family's contentious dealings with Lake County law enforcement due to their operation of an alcohol-serving dance hall. If Hunter intended to utilize McCall's testimony for any other purposes, we shall never know. Two questions after he was sworn in to testify, the defense objected to McCall's ability to serve as a witness. Their argument was based on the fact that, due to his position as sheriff, McCall had been present in the courtroom working as a bailiff throughout the whole of the proceedings, and therefore his testimony would be in violation of the rule of sequestration that Judge Futch had properly imposed at the outset of the trial.³³¹ State Attorney Hunter argued that "the Rule," by

³³⁰ Trial Transcript, *supra* note 55, at 452.

³³¹ *Id.* at 452-453 (arguing against the calling of Sheriff McCall and the defense objection to same); *Id.* at 266-267 (explaining the rule of sequestration, commonly called "The Rule," was a common law principle of witness exclusion which requires all trial witnesses to remain outside the courtroom during the evidentiary phase of a trial so that no one witness will have the benefit of hearing the testimony of another).

local custom, did not apply to law enforcement officers, but Judge Futch correctly sustained the defendant's objection, and Sheriff McCall stepped down from the stand and returned quietly to his post.³³²

Why Sheriff McCall was never called earlier in the trial proceedings, or asked to remain outside the courtroom so as to preserve his eligibility to testify, will perhaps forever remain a well-kept secret of trial strategy for both sides. Likely, both parties viewed him as a potential time bomb that might explode unwittingly in the hands of the questioner. His testimony would certainly have carried great weight for the prosecution, but the risk of exposing him to defense cross examination, especially on the matter of the shooting of defendants Shepherd and Irvin, likely made him a dangerous commodity on the stand. Likewise, the defense may forever regret objecting to his testimony and wish they had seized the opportunity to cross-examine the most contentious figure in this twisted drama; or, they may be relieved that the powerful figure was left guarding the back door. In either case, it is reasonable to assume that both sides equally feared what McCall may have said, and as a result, elected to leave the slumbering giant at rest.

Couched in Different Language

After both sides had rested their cases, but before beginning closing arguments, Judge Futch finalized the compilation of the jury instructions which would be read and provided to the jury. The purpose of jury instructions is to advise the trial jury of the applicable laws relevant to their deliberations. The Florida Supreme Court did not adopt a uniformed set of standard, or pattern, jury instructions until 1981. During the days of the Groveland trials, the task of compiling the jury instructions landed on the trial judge to perform on a case-by-case basis. In addition to the inclusion of the necessary and basic instructions on the elements of the offense, the burdens of proof, the presumption of innocence, the definition of reasonable doubt and several others, the defense sought the inclusion of three special jury instructions. These special requested instructions covered the legal topics of the defense of alibi, the situation of a notorious case, and the special scrutiny of the testimony of a rape victim.³³³ These three

³³² *Id.* 452-53.

³³³ Handwritten Document on Legal-Size paper attached to the Record on Appeal, *Irvin v. Florida*, (D. Fla. 1952) (removed to Marion Cty.) (on file with author).

special instructions were hand-scrawled on a long piece of legal paper and presented to Judge Futch for his consideration.

The only one of the three special defense instructions Judge Futch agreed to give was the special requested instruction on the defense of alibi.³³⁴ The instruction on the alibi defense was proper, and was supported by the facts adduced at trial. Judge Futch was correct to give it. The remaining two requested instructions were refused, and these decisions were also correct. Judge Futch did not give the requested instructions on notorious case³³⁵ or rigid scrutiny for the testimony of a rape accusatrix³³⁶ since the basic set of instructions that was given adequately addressed the same concerns of law.³³⁷ When the standard instruction sufficiently covers a legal matter, it is proper to refuse a special instruction on that same issue.³³⁸ As such, Judge Futch's denial

³³⁴ Trial Transcript, *supra* note 55, at 527. "Defendant's Requested Instruction #2 – Given – The defendant, under his plea of not guilty, sets up as a defense what is known in law as alibi, which means that the defendant was not there when the crime charged was committed, and consequently did not do it. *Id.* If from the evidence in this case you have a reasonable doubt as to the alibi—that is to say, whether the defendant was there or not—then you should give him the benefit of such reasonable doubt, and find him not guilty." *Id.*

³³⁵ Handwritten Document on Legal-Size paper attached to the Record on Appeal, *supra* note 333. "Gentlemen of the Jury, this has been and is a very notorious case, and there has been more or less excitement over it, and that feeling may possibly have crept into the trial to some extent. I am not saying that it has, but for fear that it has and in abundance of caution, that nothing but justice may be done, I deem it my duty to instruct you and caution you, against convicting the defendant though prejudice or upon insufficient evidence and to caution you that in your deliberations you should not be influenced one whit by what is commonly called public sentiment. In other words you must consider the evidence that has been given you on the witness stand and that alone in arriving at your verdict."

³³⁶ *Cf.* Trial Transcript, *supra* note 55, at 521. "You, gentlemen, are the judges of the credibility of the witnesses who have testified in the case, and of the weight and sufficiency of the evidence. To determine what weight you give the testimony of a witness . . . you are to consider the manner and demeanor of the witness upon the stand, the bias, prejudice or interest of the witness, if any appear, the reasonableness or unreasonableness of the testimony, the probability or improbability of it being true, and the intelligence of the witness." *But cf. id.* "In a case of this kind where no other person was an immediate witness to the alleged act the testimony of the prosecutrix should be rigidly scrutinized."

³³⁷ *See, e.g.,* Trial Transcript, *supra* note 55, at 520.

³³⁸ *Blackwell v. Florida*, 86 So. 224, 226 (1920) (stating that "it is not error to refuse to give instructions that have already been given substantially, though couched in different language").

of their inclusion was correct. In fact, it might be noted that after the trial concluded and while awaiting appeal, Alex Akerman was already aware of the propriety of the rulings. In an April 1952 letter to defense co-council Jack Greenberg, Akerman wrote: “I enclose copies of the requested Instructions [which were refused] with citation noted on each Instruction. From a study of the cited cases you will see that our position is not too strong.”³³⁹

By a Technicality He Stopped Me

The last major objection of the trial, and one in which the defense also sought the declaration of a mistrial, came during the prosecution’s closing arguments. In substance this event was linked to the defense’s objection to Sheriff McCall’s ability to be called as a state witness due to the rule of sequestration, and Judge Futch’s correctly sustaining that objection. During his summation, State Attorney Hunter asked defense witness Lawrence Burtoft if he had it in for the Law Enforcement agencies of Florida and Lake County, and claimed, that due to a technicality, the defense prevented him from proving the affirmative nature of the response to this question.³⁴⁰ Hunter was, of course, referring to the fact that he attempted to call Sheriff McCall as a witness to rebut Burtoft’s testimony, but was denied the ability to do so because of the invocation of the rule of sequestration. The defense immediately objected to this argument, asked that the jury be excused, and then sought the remedy of a mistrial. When Judge Futch denied the motion for mistrial, Akerman asked that the court instruct the jury to disregard the statement as made by the States Attorney. As to both requests, Judge Futch simply replied, “[t]he motion is denied.”³⁴¹

Just as was the case with the state’s improper attempt to re-call Walter Irvin to the witness stand, Judge Futch erred again in his failure to deliver a curative instruction to the jury regarding this comment as well.³⁴² Even the Florida Supreme Court, who had essentially rubber-stamped every issue in the two trials thus far, saw fit to call this act irregular, and agreed the “remark should not have been made, and

³³⁹ Letter from Alex Akerman, Jr. to Jack Greenberg, *Re: Groveland Case* (April 13, 1952) (on file with author).

³⁴⁰ Trial Transcript, *supra* note 55, at 508.

³⁴¹ *Id.*

³⁴² *Perry v. Florida*, 200 So. 525, 527 (Fla. 1941).

having been, the court should have instructed the jury to disregard it.”³⁴³

As to the issue of granting a mistrial however, the Florida Supreme Court agreed with the trial court. They found no need for a mistrial, and found any such errors that were committed to be harmless.³⁴⁴ Just as was the case in the request for a mistrial based on the State’s improper attempt to re-call Walter Irvin to the witness stand, the accuracy of Judge Futch’s decision to deny the motion for a mistrial here was a true coin-flip on the spectrum of correctness. There is little doubt that appellate courts were much more forgiving of improper arguments of counsel during the early 20th century than they are today. From the case of *Dunlop v. United States* we can gauge the temperature of the United States Supreme Court in the years before the Groveland case when they wrote:

*There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.*³⁴⁵

While this rather forgiving tone would not be found in a recent court opinion, perhaps the closest precedent to the case at bar came in the form of *Berger v. United States*.³⁴⁶ In the *Berger* case the prosecutor also criticized the technicalities of the rules of trial procedure, and in a similar effort to insinuate to the jury why he failed to prove a certain matter, he explained that he was bound by “the rules of the game, and that he had to play within those rules.” Because the Supreme Court found the case against Mr. Berger was weak and that the pronounced and persistent comments by the prosecution were improper, Berger’s conviction was overturned on appeal.³⁴⁷

³⁴³ Irvin v. Florida, 66 So. 2d 288, 295 (1953).

³⁴⁴ See *id.*

³⁴⁵ Dunlop v. United States, 165 U.S. 486, 498 (1897).

³⁴⁶ See *Berger v. United States*, 295 U.S. 78 (1935).

³⁴⁷ *Id.* at 88-89.

Using *Berger* as the polestar, we may say that an improper comment by the prosecutor regarding technicalities or impediments within the rules of trial procedure should result in a mistrial if the overall evidence in the case was weak and/or the prosecutor's improper comments were numerous. While the modern criminal attorney would certainly find both of these prongs met within the Groveland trials, we cannot simply impose a modern-day analysis onto the courtrooms of 1952. Modern or ancient biases aside however, the best argument to support a finding of correctness here is in the fact that all aspects of the complained of technicality did occur in the presence of the jury. While error occurring in front of the jury is usually a profound negative, here it may have been a positive. Because the jury had heard the Rule of Sequestration invoked, and they heard the defense object to it being violated by placing a man on the stand who the jurors saw standing in the courtroom with them for three straight days, we may conclude that Hunter's reference to this technicality was nothing that the average juror would not have been able to surmise for themselves. If this is true, then Futch's denial of the motion for mistrial was correct under the rather stringent presumptions against the granting of mistrials that were in effect at the time. If not, then Futch's denial was the second very serious error during the trials of this case.

With Any Innocent Man's Blood on My Soul

As the second Groveland trial came to an end in Marion County, four attorneys, one of which would go on to be a United States Supreme Court justice, made closing arguments to the all-male, all-white Ocala jury. All four attorneys made references and arguments of fact and law that would truly appall the modern trial lawyer. For more than 120 pages of court transcripts one can read a series of arguments replete with more improper comments than one could find in a modern law school textbook on that very subject. The only comment objected to by either side, however, was Hunter's technicality comment. Because these comments went without objection at trial, Judge Futch was not asked to make rulings on their propriety. They went subsequently unaddressed through two appeals. Therefore, it would be fruitless to undertake an analysis of these comments in this Article since neither the parties nor the court saw it fit to concern themselves with these issues at the time. To that end, the comments made by both

sides in the Groveland court saga are mere footnotes, both in trial history, and in this Article.³⁴⁸

³⁴⁸ Trial Transcript, *supra* note 55, at 457 (violating the Golden Rule by asking the jury what they would have done in they were in that circumstance); *id.* at 509 (violating the Golden Rule by starting a question in the following manner: “Now gentlemen, would you have told him, or would your wife have told him . . .”); *id.* at 471 (inserting personal information about himself, Buie stated, “I have been in the Army myself . . . I was engaged in that kind of work in the Army, and I participated in many Court Martials . . .”); *id.* at 481 (replying to Buie’s improper insertion of personal information about himself by doing the same, Marshall proclaimed, “I too know about them, I have been in many many court martial proceedings . . . all the way from here to Korea and back”); *id.* at 499-500 (speaking extensively about his personal experiences, Attorney Ackerman said, “I want to give you a little bit of my experience in regard to my personal conduct in undertaking the defense of this case . . . I did not want to defend this case, I don’t want to do it now . . . I am now in the Navy of the United States . . . I knew what the criticism against me would be . . .”); *id.* at 501 (improperly inserting his personal beliefs, Ackerman professed that when he told Irvin to tell nothing but the truth, that he believed that Walter Irvin has done just that; “I believe that he has told you the truth from this stand”); *id.* at 505 (speaking of his career experience, Hunter explained, “I have never prosecuted a man in my career who I believed to be innocent. . . .”); *id.* at 518 (improperly sharing irrelevant personal experiences and beliefs, State Attorney Hunter states, “[g]entlemen, I have been seriously ill . . . I have been stricken with a fatal disease . . . I may soon have to meet the Almighty, and I don’t want to meet the Almighty with any innocent man’s blood on my soul, and Gentlemen, I don’t believe that I will ever do so. . . .”); *id.* at 472 (improperly speaking on the safety of the community, Buie opined, “[g]entlemen, until we get back to the place where our grandfathers started out with the law . . . I don’t know what will happen to this county”); *id.* at 517 (lecturing improperly, Hunter explained that, “in a case of this kind, every sacred tradition of your life and my life, and of our civilization is at stake”); *id.* (explaining improperly his personal beliefs about the safety of Lake County, Hunter stated, “I want to leave this county and this State in such a condition that no bunch of men can come in and snatch up your wife or your daughter and carry her out in the woods and rape her”); *id.* at 474 (attacking a witness at the trial, Buie exclaimed, “the statement that [the witness] made is the most asinine statement that I have ever heard before in a Court of the State of Florida, and yet he sits up here and expects you to believe any such junk as that”); *id.* at 510 (insulting another at the trial, Hunter shouted, “the other one was a damn liar”); *id.* at 516 (offending the fundamental concept of equality and personally attacking a race of people, Hunter asked, “Isn’t that just the colored way of thinking?”); *id.* at 475 (imposing his personal beliefs that law enforcement has no interest in the outcome of the case, Buie asked the jury, “[n]ow, are all these [officers] liars; have they any interest at all in the outcome of this case, have they any reason to lie on this stand, and swear to a lie?”). Buie immediately supplements the question with his personal belief, “[n]o, gentlemen, I don’t believe they would.” *Id.*; *see id.* at 475 (introducing prior

PART III: CONCLUSIONS

The Whittler

For anyone who has ever stepped into a small-town southern courthouse, it is not hard for imaginations to still see Judge Truman “the Whittler” Futch on the bench. Clothed in a black robe, he is sitting in a large chair, leaning back in it as far as the laws of gravity will allow. He is turned at such an angle so that the whole of his body is turned away from the courtroom, and his eyes and hands are fixed on his incessant task of whittling down old scraps of wooden fences. His legal rulings are generally confined to four words or less.

But, we do not need our imaginations to see his results. Those are well preserved in orders, transcripts, and opinions. Those are matters of public record. From those we have learned that Judge Futch, despite the historiography, seemed to be largely correct in his legal rulings through the whole of these two trials. For whatever his reasons or rationales, none of which did he espouse upon verbally, he was overwhelmingly correct in his rulings on pretrial motions, objections to hearsay, and applications of physical evidence. These examples are matters of the cold application of facts to law, and they were impartially governed by the fairly conservative case law of his day. However, Judge Futch was weak on matters of character evidence and impeachment, and he bordered on the overtly erroneous when trial matters delved into improper comments made by the prosecution. Here, there could be no cold application of the law. These issues touched on matters of friendship, community, personality, bias, prejudice, and conscience. In these areas, where a judge needs to be at his strongest, Judge Futch showed his weakness. Like the scraps of wooden shavings scattered under his bench would attest to, Judge Futch was sharp and focused when the wood was hard and the substance firm, but as the pieces narrowed into individual splinters and the blade inched too close to human skin, he cast the piece to the floor and began the process anew.

evidence of bad character, which is now universally irrelevant unless the defense opens the door, Buie informed the jury that, “this boy here has received a general court martial and a dishonorable discharge from the Army of the United States, and there is trouble in this boy’s heart . . . and [trouble] has stayed in his heart . . . after he got back home to Groveland”).

Victory or Tragedy?

After two trials and two sets of appeals, the NAACP had spent nearly \$50,000 on the defense of the Groveland case,³⁴⁹ nearly ten times the amount spent by Lake County to prosecute it. The NAACP had little to show for their efforts. Two defendants were dead, one had been sentenced to death twice, and one was currently serving his life sentence. Groveland was short on results, but long on impact. Few trials can match the chaos, fear, violence, bigotry, and drama of the Groveland case. In all of American legal history, only three or four racially motivated trials can even claim peer status with the Groveland trial. In this respect, Groveland takes its place next to such infamous racial prosecutions as Leo Frank,³⁵⁰ Sacco and Vanzetti,³⁵¹ and Scottsboro.³⁵² Yet, while Groveland is every bit the historical equal of these legal giants, it is by far the least well known.

What then are the morals of this great but forgotten case? Should Groveland be viewed as a victory or a failure of the United States legal system? Overwhelmingly, the current historiography paints Groveland

³⁴⁹ CORSAIR, *supra* note 7, at 347.

³⁵⁰ See THE LEO FRANK CASE RESEARCH LIBRARY, www.leofrank.org (last visited Apr. 13, 2016). The Leo Frank Trial involved the 1915 Georgia prosecution of a Jewish businessman in Atlanta for the murder of a thirteen year-old girl at the factory he ran. After his conviction on thin evidence, Frank was sentenced to death. However, his sentence was later commuted to life by the Georgia governor. In response to the governor's decision, Frank was kidnapped from the Georgia state prison and lynched. The case, and the men responsible for the lynching, led to a revival of the Ku Klux Klan in the south.

³⁵¹ See Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC (Mar. 1927), <http://www.theatlantic.com/magazine/archive/1927/03/the-case-of-sacco-and-vanzetti/306625/>. The Sacco and Vanzetti Trial involved the 1920 Massachusetts prosecution of two Italian immigrants for the alleged armed robbery and murder of two clerks. Convicted on scant evidence and sentenced to death, they were electrocuted in 1927. The Massachusetts government eventually exonerated the two men of all criminal acts some fifty years later.

³⁵² See Daren Salter, *Scottsboro Trials*, ENCYCLOPEDIA OF ALABAMA (Nov. 21, 2013), <http://www.encyclopediaofalabama.org/article/h-1456>. The Scottsboro Trials involved the 1931 Alabama prosecution of nine black boys for the alleged rape of two white women while on a train from Chattanooga, Tennessee into northeastern Alabama. After a local lynch mob was held off by the National Guard, the boys were hastily convicted and sentenced to death. Three appeals and four trials later, the verdicts never changed. Eventually all nine were pardoned by the governor of Alabama.

as a failure, “a legal lynching,”³⁵³ and “a tragedy of the American South.”³⁵⁴ In a practical sense, it surely was. But could the argument not be made for victory? Thurgood Marshall says it was. While racism, hatred, and bigotry exist in all corners of the globe, it was America’s unique constitutional system that ended the Groveland saga with the proper result. Walter Irvin’s successful appeal resulted in a second trial and a stay of his execution, and both he, and Charles Greenlee, were ultimately released from prison having been pardoned by the governor. Only in a legal system founded on a multi-jurisdictional appellate process, one that encompasses both federal and state machinery, would these results be possible. That system is then woven into our three-branch system of constitutional government, each with a measure of checks and balances upon the other. Only through this unique, multi-level form of legal restraint could justice have been ensured. While certainly too long and too costly in the making, could it not be said that the end result of the Groveland case was a win for justice, and a win for the American system of jurisprudence? Groveland’s historiography remains silent on this point, but its transcripts and court files scream to be heard on the matter.

Or, if we are to assume, as Groveland’s historiography always has, that Groveland was indeed a legal failure, then who is to blame for this tragedy? The number of possible scapegoats is many. Blame could equally be assigned to any of several parties, or at the feet of the community as a whole. The Groveland story is ripe with conniving victims, racist sheriffs, dishonest deputies, partial prosecutors, closed-minded jurors, and a community built on prejudice. Perhaps Judge Futch is less to blame than the history books might say.

We may also be wise to look for a new middle ground when we look at Groveland. While much of Groveland’s story took place in the glare of the public forum, two of Groveland’s turning points took place on desolate, darkened roads, far from any objective witnesses. What happened on Florida State Roads 50 and 19 may never be known, but the truth generally lies somewhere between the two extremes we find on the record. Criminal cases are rarely as simple as total innocence, or total guilt. Perhaps Walter Irvin and Samuel Shepherd did commit some offense that night on State Road 50. Perhaps they did make the Padgett’s victims of something –carjacking, robbery, harassment?

³⁵³ See generally CORSAIR, *supra* note 7.

³⁵⁴ Lawson, *supra* note 12, at 25.

What of the fact that Willie Padgett might have found out that one of the Groveland Four was his wife's lover, and the rape story was a simple cover-up? Maybe she had taken another black man as her lover? Maybe Willie had taken to violence against her again? And maybe Irvin and Shepherd did try to escape from Sheriff McCall when he pulled his car onto the side of State Road 19? Like the darkened and cloudy skies that often cover the central Florida geography, this is a story likely made of several shades of gray. While legal analysis is always more comfortable working in the shadows of uncertainty, the historiography of Groveland has yet to consider the fact that perhaps *neither* side is telling the whole truth, and nothing but the truth. Until it does, the study of Groveland will remain a silent witness.

Natural Causes

Since 1952, sixty-three planting seasons have come and gone in Lake County, and the vast orange groves have continued on nature's cycle, unaffected by the ghosts of the Groveland trials. Even as history marched on, the Groveland saga continued to resurface. Walter Irvin's death sentence was commuted to Life in prison by Florida governor LeRoy Collins in 1954. While announcing the commutation, Governor Collins also took time to denounce the NAACP's handling of the case.³⁵⁵ The decision angered Judge Futch to such an extent that he empaneled a Lake County grand jury to investigate Governor Collins on suspicion of his being a communist. While his legal authority to seek such a grand jury probe may be questioned, Judge Futch said the governor's acts were subject to review by God and the people of Florida.³⁵⁶ Somewhat comically, the grand jury concluded that Collins' commutation of the sentence was an honest gubernatorial mistake, but returned no indictment as to any criminal acts.³⁵⁷ In 1956, Governor Collins and his wife rode in a campaign parade in Eustis where they were accosted by Lake County sheriff's deputies and Norma Lee Padgett. Norma Lee screamed at the governor, and asked him if his decision would have been the same had his wife been the victim.³⁵⁸ She and Willie Padgett divorced in 1958.³⁵⁹

³⁵⁵ *Id.* at 26.

³⁵⁶ *Irvin Reprieve Opens Row: Judge Asks Probe of Governor's Act*, CHI. DEFENDER, February 25, 1956, at 1.

³⁵⁷ Entin, *supra* note 64, at 507.

³⁵⁸ Lawson, *supra* note 12, at 24.

³⁵⁹ KING, *supra* note 6, at 358.

Judge Truman G. Futch died in March of 1960, and the news of his death was covered in *The New York Times*.³⁶⁰ A quick summary of the Groveland story formed the lead topic in the article.³⁶¹ Charles Greenlee was paroled in 1962, and Walter Irvin was paroled in 1968. One month later, upon returning to Lake County for the first time in nearly 18 years, Walter Irvin was found dead in his vehicle. Having spent the last 20 years in custody, he had been back within the borders of Lake County for only a few hours. Sheriff McCall declared Irvin's death one of natural causes. Even McCall's most ardent supporters found such a coincidence alarming.³⁶²

Published at his ranch outside Umatilla six years before his death, even Willis McCall's own autobiography contains only one chapter detailing his version of the Groveland narrative.³⁶³ In the Umatilla church that housed his 1994 funeral, the seating conditions were standing room only,³⁶⁴ and the city of Orlando's chief of police served as a pallbearer.³⁶⁵ Before his death, McCall said "[he] never killed anyone who didn't deserve killing."³⁶⁶ In the 1980's, by unanimous vote, the Lake County commission renamed Lake County Road 450A, *Willis V. McCall Road*.³⁶⁷ In October of 2007, by unanimous vote, the Lake County commission removed McCall's name from County Road 450A.³⁶⁸

Currently, other than the laws that governed its proceedings, much of the Groveland story sits unaffected by time. Two other members of the Futch family have served as judges in Florida's fifth circuit. Despite a reward for information and several state and federal investigations, Harry T. Moore's assassination is still one of Florida's great, unsolved cold cases. Charles Greenlee is still alive, but he lives far from Groveland, and he has not stepped foot in Lake County since

³⁶⁰ *Truman Futch, 68, Dies*, N.Y. TIMES, March 26, 1960, at 21.

³⁶¹ *Id.*

³⁶² KING, *supra* note 6, at 359.

³⁶³ See generally WILLIS V. MCCALL, WILLIS V. MCCALL, SHERIFF OF LAKE COUNTY: AN AUTOBIOGRAPHY (1988).

³⁶⁴ CORSAIR, *supra* note 7, at 377.

³⁶⁵ *Id.*

³⁶⁶ KING, *supra* note 6, at 357.

³⁶⁷ Ritchie, *supra* note 51, at 1.

³⁶⁸ *Id.*

his conviction date.³⁶⁹ To this day, there is no reference, by sign or memorial, of these events in Lake County.³⁷⁰ With the courtroom adjourned, Groveland is still searching for its voice.

³⁶⁹ CORSAIR, *supra* note 7, at 379.

³⁷⁰ *See generally* JOHN LEWIS AND JIM CARRIER, A TRAVELER'S GUIDE TO THE CIVIL RIGHTS MOVEMENT (Harcourt, Inc. 2004).