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Anne S. Emanuel

Georgia State University College of Law, aemanuel@gsu.edu

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The Tuttle Trilogy: Habeas Corpus and Human Rights

BY ANNE S. EMANUEL*

Elbert Parr Tuttle joined the federal bench in 1954, shortly after the Supreme Court decided *Brown v. Board of Education*.¹ In 1960 he became the Chief Judge of the United States Court of Appeals for the Fifth Circuit, the court with jurisdiction over most of the deep south. As Chief Judge, he forged a jurisprudence that effectively overcame the intransigence and outright rebellion of those who denied fundamental constitutional rights to African Americans.

This Article revisits three cases Tuttle worked on while he was a practicing attorney. Each case involved "the Great Writ," the Writ of Habeas Corpus, and in each, Tuttle worked on a pro bono basis. In *Downer v. Dunaway*,² Tuttle tried to obtain a fair trial for John Downer and save Downer's life. Tuttle failed on both counts; his reward lay in the justness of his effort which was enough to sustain him. Later in *Herndon v. Lowry*³ and *Johnson v. Zerbst*,⁴ Tuttle's work was rewarded when the United States Supreme Court rendered landmark decisions in favor of his clients.

Elbert Tuttle's pro bono work as an attorney helped shape his jurisprudence.⁵ By taking as clients men who could not afford his services, Tuttle experienced the sometimes rank failings of the judicial system as it dealt with citizens who were

* Professor of Law, Georgia State University College of Law. Professor Emanuel is working on an authorized biography of Judge Tuttle. Previous articles arising from this work appear at "Forming the Historic Fifth Circuit: The Eisenhower Years," *Texas Forum on Civ. Lib. & Civ. Rts.* 6 (2002): 233; "Turning the Tide in the Civil Rights Revolution: Elbert Tuttle and the Desegregation of the University of Georgia," *Mich. J. of Race & Law* 5 (1999): 1; and "Lynching and the Law in Georgia circa 1931: A Chapter in the Legal Career of Judge Elbert Tuttle," *Wm. & Mary Bill Rts. J.* 5 (1996): 215.



Photograph of Justice Harold Hitz Burton swearing Judge Elbert Parr Tuttle in as a Judge of the Fifth Circuit on September 1, 1954 at the Supreme Court. (Photograph courtesy of the *Tuttle Family*)

disfavored and disadvantaged, whether because of race, ideology, or simple poverty. Whatever illusions Tuttle had held, he was disabused of. But he was neither discouraged nor deterred in his personal creed; as an attorney, and later as a judge, he would seek to obtain justice whenever he could. Decades later, he advised college graduates: "The job is there, and you will see it, and your strength is such . . . that you need not consider what the task will cost you. It is not enough that you do your duty. The richness of life lies in the performance which is above and beyond the call of duty."⁶

I. John Downer

In 1931 Elbert Tuttle was a rising legal star in Atlanta. Seven years earlier Tuttle and his brother-in-law, Bill Sutherland, former clerk to Justice Louis Brandeis, founded a law firm that special-

ized in corporate work, particularly in corporate tax work. The firm, Sutherland and Tuttle, enjoyed success even in the Depression years. Married to Bill Sutherland's sister Sara, Tuttle had two young children, and he and Sara enjoyed an active and gracious social life.

Then, as now, few attorneys, and precious few of Elbert Tuttle's rank and class, took on pro bono work for society's outcasts. In 1931 in Georgia, a black man accused of raping a white woman could not expect many helping hands to be extended to him. Had Elbert Tuttle not been a Captain in the National Guard, he might never have known John Downer. But he was, and on the afternoon of May 19, 1931, he was ordered to Elberton, Georgia to help hold the jail against the violent attack of a mob attempting to lynch two black men held there. One of them was John Downer.

That night Tuttle and others managed to stave off the mob. They held the jail with the help of several national guard units, tear gas, and machine gun fire. A week later, on May 26th, Tuttle was back in Elberton commanding troops and keeping order at John Downer's trial. Standing guard in the courtroom, Tuttle watched as Downer's attorneys went to trial only two hours after having been appointed to represent him. At the end of a long day, Tuttle watched as the judge charged the jury, and waited as the jury deliberated—for six minutes. He watched as the jury returned a guilty verdict with a recommendation of execution, and as the trial court pronounced sentence: death by electrocution.

Over the next few weeks, Tuttle put together a team of attorneys to pursue relief for John Downer. Because Tuttle had been personally involved in Downer's trial and needed to be available as a witness to what had transpired, he was never attorney of record for Downer. Nonetheless, Tuttle spearheaded Downer's successful petition for a writ of habeas corpus and remained involved until Downer's death in Georgia's electric chair on March 16, 1934. During the three years between the first trial and Downer's execution, Downer's attorneys succeeded in obtaining a writ of habeas corpus and a new trial. The second trial produced another conviction and a sentence of death. This time the jury deliberated for an hour.⁷

Downer's execution was particularly bitter to Tuttle because

Tuttle believed Downer to be an innocent man. Still, Tuttle took from the case a measure of satisfaction: good men had joined together in an all but hopeless cause. They had not, in the end, prevailed. They had not been able to afford John Downer a truly fair trial before a jury of his peers, untainted by extreme racial bias. But they had done what they could against enormous odds. They had afforded John Downer a modicum of dignity, and their work reaffirmed a nascent principle. Only eight years earlier, in 1923, the United States Supreme Court first held that allegations of mob dominance of a trial, raised in *Moore v. Dempsey*,⁸ authorized the federal district court to proceed with a hearing on a habeas corpus petition, that is, to proceed to consider the validity of the conviction.⁹ Eight years before that, in 1915, ruling on an appeal by Leo Frank from his conviction for murder in an Atlanta courtroom dominated by anti-Semitic bias, the United States Supreme Court deferred to the courts of Georgia and found no due process violation.¹⁰ In 1931, *Downer v. Dunaway*¹¹ marked the first time a federal court in Georgia invoked the principle that dominance by a mob could result in a violation of the accused's right to due process to strike a state court conviction.¹²

II. Angelo Herndon

In the next two habeas matters he handled, Elbert Tuttle had little doubt that his clients had violated the law. Angelo Herndon had, quite deliberately. Serious beyond his years and brave beyond all measure, the nineteen-year-old black man organized a multi-racial protest of the City of Atlanta's decision to end relief funding. The year was 1932, and the circumstances could not have been more dire nor more dangerous. The Emergency Relief Committee, which had provided the only source of support for many of the four thousand families it served, had run out of money. The county government slashed salaries—some, including the salaries of the district attorney and superior court judges, by as much as twenty-five percent—but the money saved was pledged to reduce the deficit, not to provide relief. Many wage earners were suffering, albeit not as much as the unemployed. Still, the county commission had resisted raising taxes.¹³

Leftists, communists, and other activists in the Atlanta area formed the Unemployed Council. As the voice of the dispossessed, the Council worked hard aiding the unemployed in finding work and assistance. When the Emergency Relief Committee was forced to announce it was closing its doors, the Council decided to take direct action. Angelo Herndon and his colleagues prepared and distributed pamphlets calling for a rally at the Fulton County Courthouse. On June 30, 1932, some one thousand desperate people, black and white, gathered. The stunned county commissioners met with a small delegation of unemployed white workers and barred black demonstrators from the meeting. Then they promised an appropriation of six thousand dollars to buy groceries for families cut off earlier and suggested that the county would pay transportation costs for anyone who had family outside Atlanta and who wanted to leave. The crowd dispersed.

A few days later, Atlanta detectives arrested Angelo Herndon as he picked up mail from a post office box used by the Unemployed Council. He was taken in under a charge of "on suspicion." On the ledger at the police headquarters, the vague charge was clarified—one word, "Communist," was scribbled across from his name. Herndon was held without bond for investigation until a Superior Court judge ordered that he be indicted or freed. On July 22, eleven days after Herndon's arrest, he was indicted for attempting to incite insurrection. By calling meetings, making speeches, and circulating pamphlets, the indictment charged, he was inciting insurrection, uprisings, and riots and attempting to overthrow the lawful authority of the State of Georgia.

Given the temper of the times when Angelo Herndon was tried, his conviction was a foregone conclusion; the only surprise came when the jury took three hours to return a verdict. The delay, it turned out, had nothing to do with the verdict. The jury had been unable to agree on the sentence because two jurors wanted to impose the death penalty. In the end, his sentence of eighteen to twenty years to be served on a Georgia chain gang was the equivalent of the death penalty.

Angelo Herndon's attorneys appealed his conviction. While Herndon's appeal was pending, John Downer was executed on March 16, 1934. Two months later, on May 24, 1934, the

Georgia Supreme Court issued its opinion in Herndon's case.¹⁴ His objections to the all-white jury panel and to the constitutionality of the statute were dismissed as not timely raised.¹⁵ The Court addressed one First Amendment issue raised by Herndon.¹⁶ Herndon argued that even if the statute was constitutional, the evidence was insufficient to establish that his speech was so imminently dangerous as to be subject to suppression. The Georgia Supreme Court disagreed.¹⁷ Angelo Herndon's conviction was affirmed.¹⁸

The case became a *cause celebre*, locally and nationally. In mid-June, probably in an effort to deflect criticism, the State agreed to bail. The defense team's sense of victory evaporated when Judge Wyatt, who had tried the matter, set bail at fifteen thousand dollars. Despite the fact that the figure was almost prohibitive, the International Labor Defense ("ILD"), which some saw as the legal arm of the Communist party,¹⁹ and which had sponsored Herndon's defense team, now committed itself to raising bail. On August 4th, Angelo Herndon left the Fulton Towers, where he had been imprisoned, in the company of two of his attorneys and two detectives sent by the Seaboard Railroad. The day before his release, the National Committee for the Defense of Political Prisoners received a call warning that the Ku Klux Klan would not let Herndon leave Georgia. Herndon planned to take the train to New York that evening, so the railroad assigned the two detectives to accompany him from the jail to the train and to remain with him on the train until he left the South. Governor Talmadge took the threats less seriously. When the nationally acclaimed novelist Theodore Dreiser called the Governor, Talmadge reassured him: "I get letters and telegrams every day from people worried about the matter, . . . but the people down here don't molest a nigger for any crime except raping a white woman."²⁰

Angelo Herndon was free but only until the legal proceedings were concluded. In late September, the Georgia Supreme Court denied his petition for rehearing. Now his only recourse was the United States Supreme Court. At this juncture, the ILD recognized the need for distinguished counsel. Carol Weiss King, a leftist New York city attorney, sought help.²¹ She enlisted Whitney North Seymour, a prominent attorney and dedicated civil libertarian who would later become the president of the

American Bar Association. At age thirty, he had served as first assistant to the Solicitor General. A Republican, an Episcopalian, and a graduate of Columbia Law School, Seymour's credentials were impeccable. His connections matched his credentials. He contacted Harvard law school graduate and former law clerk to Justice Brandeis, William A. Sutherland, in Atlanta and sought his help.²² Sutherland signed on and enlisted his brother-in-law, Elbert Tuttle. Walter Gellhorn and Herbert Wechsler, two young Columbia law professors who would be luminaries of the profession completed the team.²³ Herndon could not have had stronger representation.

Nor could Herndon's timing have been better. On February 15, 1935, the Court heard oral argument in one of the infamous Scottsboro boys cases.²⁴ On April 1st the Court announced its decision and reversed the conviction of Clarence Norris, holding unconstitutional the systematic exclusion of black citizens from jury service.²⁵ Herndon's attorneys had not perfected their challenge to the Fulton County jury panels, so the issue was not before the Court in Herndon's case; nonetheless, everyone knew that he had suffered the same injustice. Moreover, Herndon's case had captured the attention of the national press. On April 10th the *New Republic* carried an editorial which concluded that "[f]ew cases in American jurisprudence have been of greater importance than the appeal of Angelo Herndon."²⁶

On April 12, 1935, Whitney North Seymour, accompanied by Bill Sutherland at counsels' table, arose and eloquently argued the First Amendment issues presented by the Georgia statute. Seymour's brilliance and the weight of the matter notwithstanding, the Court did not reach the issues he argued. On May 20, 1935, a scant six weeks after oral argument, the Court dismissed Herndon's appeal, ruling that because he had failed to raise his constitutional arguments at the earliest opportunity and failed to allow the trial court to address them, there was no federal question on appeal that would give the United States Supreme Court jurisdiction.²⁷

At the beginning of the next term, the Court denied Herndon's motion for rehearing. On Monday morning, October 28th, accompanied by Elbert Tuttle, his attorney, and by Joseph North, a sympathetic journalist, Angelo Herndon surrendered to

Sheriff James Lowry and re-entered the Fulton Tower prison in Atlanta.²⁸

With his client in jail, Tuttle prepared to file his petition for writ of habeas corpus. The great writ allowed Herndon to challenge his conviction on federal constitutional grounds. The Georgia statute Tuttle asserted on behalf of his client was too vague to be enforceable. A plain reading would render criminal great amounts of speech that was clearly protected by the First Amendment.

The Superior Court of Fulton County, the county in which Herndon was incarcerated, had jurisdiction over the petition. At the time, it was possible to file a petition with a particular judge, as opposed to the current practice of filing the petition with the Clerk of the Court, who then distributes all cases using a random assignment system. Tuttle chose to file the petition with Judge Hugh M. Dorsey, a former governor of Georgia.

Two decades earlier, while Hugh Dorsey was district attorney, he won the conviction of a young Jewish man, Leo Frank, for the rape and murder of Mary Phagan. Marked by intense anti-semitism, the Frank trial remains one of the most notorious in American legal history. Leo Frank had been raised in Brooklyn and educated at Pratt and Cornell, where he earned a degree in Mechanical Engineering in 1906. A year or two later, he moved to Atlanta to work with his uncle in opening a pencil factory in downtown Atlanta. Frank was a part owner of the company and the superintendent of the factory. In the early morning hours of April 27, 1913, the Negro night watchman, Newt Lee, found the body of a fourteen-year-old employee, Mary Phagan, lying lifeless in the basement. An inept police investigation immediately focused on Newt Lee and Leo Frank. Frank saw Mary Phagan when she collected her pay and was apparently the last person other than her murderer to see her alive. Frank was arrested for the crime on April 29th.

History's verdict is that Leo Frank was innocent of the crime. Jim Conley, the Negro janitor who was used as a witness against Frank, was more likely the perpetrator. But once the police arrested Frank, the press seized upon him, and the public was all too easily convinced of his guilt. Frank was a perfect target, as the pastor of the Phagan family's Baptist Church explained:

"My feelings, upon the arrest of the poor old negro nightwatchman, were to the effect that this one old negro would be poor atonement for the life of this innocent girl. But, when on the next day, the police arrested a Jew, and a Yankee Jew at that, all of the inborn prejudice against Jews rose up in a feeling of satisfaction, that here would be a victim worthy to pay for the crime."²⁹

Frank was convicted and sentenced to die after a trial dominated, by virtually all accounts, by an anti-semitic mob. Nonetheless, in 1915, the United States Supreme Court denied relief.³⁰ Frank then sought clemency from the Georgia Prison Commission. By then, his case was so strong that his supporters dared to hope that clemency would be granted. In October 1914, Jim Conley's attorney had announced that his client had killed Mary Phagan. He contended that it was his duty to come forward to save the life of an innocent man and that his disclosure could not harm his client because he had been convicted of complicity in the crime (Conley had claimed to have helped Frank move the body to the basement) and could not be retried. Even the trial court judge, who had since died, had written Frank's attorney to state his own lack of certainty in Frank's guilt and to admit that "perhaps he had shown 'undue deference to the opinion of the jury.'"³¹ In point of fact, he had no doubt deferred to the mob, not the jury. Judge Roan's letter accounted for the vote of one commissioner that Frank's sentence be commuted, but that lone commissioner did not carry the day. The final vote was 2-1. Frank's last hope was an appeal for clemency from the Governor of Georgia.³²

Governor John Slayton was by then near the end of his term. His successor, Nathaniel Harris, would be sworn in on June 26, 1915. Frank's attorneys hastened to get his petition for clemency on Slayton's desk before he left office. Harris, they knew, was a close friend and political associate of Tom Watson, the one-time populist who had retreated to Georgia's White Democratic Party with all of its prejudices. Tom Watson fed the vituperative anti-semitic campaign against Leo Frank, using his weekly newspaper, *The Jeffersonian*, and his magazine, *Watson's Monthly*. Governor Slayton could have left the matter for his successor to handle. Instead, after agonizing deliberation and painstaking review, he commuted Frank's death sentence. The public reacted swiftly.

Angry mobs attacked the capital and the governor's mansion, forcing Slayton and his wife to leave the state. Two months later, twenty-five community leaders from Mary Phagan's hometown, Marietta, drove the 125 miles from Marietta to the state prison farm at Milledgeville where Frank was held, overcame the two guards on duty, and seized Frank. The cavalcade then drove back to Marietta, where Leo Frank was hanged.

Decades passed before the Jewish community in Atlanta regained a sense of security.³³ John Slaton, once considered a certain candidate for a seat in the Senate, would never hold political office again. For the prosecutor, Hugh Dorsey, however, the episode provided a great political boost. In 1916, the year after the lynching, "the demand for his entrance into the gubernatorial race was so strong 'that it swept the state like a prairie fire, rolling from the mountains to the sea.'"³⁴ He won overwhelmingly.

After his term as Governor and after being defeated by Tom Watson in a three-way race for the Senate,³⁵ Dorsey became a judge, first on the Atlanta City Court and then on the Fulton County Superior Court. Many were startled when Tuttle chose to file Herndon's petition for writ of habeas corpus with Dorsey, but Tuttle had good reason for his choice. He knew Dorsey personally and got along with him well. He also knew that during his term as Governor, Dorsey had been a moderate on race. R.B. Eleazer, of the Commission on Interracial Cooperation, described Dorsey as "'quite fair-minded in his interracial attitudes.'"³⁶ The reason Tuttle gave for choosing Dorsey was both the simplest and the most compelling. "I thought," Tuttle would say quietly, "that he might be ready to atone."³⁷

The hearing on Herndon's petition for a writ of habeas corpus began on November 12, 1935. Herndon, who was still being held in Fulton Towers, was allowed to attend. Dressed in a suit and tie, Herndon sat at counsel table with a large book in front of him with lettering so clear that observers could see the title: *The Letters of Sacco and Vanzetti*.

Whitney North Seymour traveled to Atlanta for the hearing. He shared the time for argument with Bill Sutherland. Elbert Tuttle, who drafted the petition and handled the legwork, deferred to Seymour and to his brother-in-law. Seymour handled the formal First Amendment argument, contending that the



Photograph from the swearing in ceremony on September 1, 1954 of Judge Elbert Parr Tuttle. *From left to right:* Chief Justice Earl Warren, Justice Harold Hitz Burton, and Judge and Mrs. Tuttle. Judge Tuttle knew Chief Justice Warren from their work on the Eisenhower campaign, and he had asked Warren to swear him in. Warren declined with regrets because his schedule took him out of town on the designated day. As it happened, Warren was in Washington that day after all, and he joined Tuttle's family and friends at the ceremony. (Photograph courtesy of the *Tuttle Family*)

statute violated the principle that speech not presenting a clear and present danger could not be suppressed and that the statute was too vague to be enforceable. Sutherland, a native Georgian, was blunt: "[T]his conviction," he argued, "places the state of Georgia in a ridiculous position before the people of this country and the world."³⁸

Three weeks later, Judge Dorsey handed down his opinion: the statute was too vague to be enforceable; it did not set "a sufficiently ascertainable standard of guilt."³⁹ A valid law protecting against insurrection could be drafted and survive constitutional muster, but this one did not. Dorsey gave the state twenty days to file a notice of appeal and ordered Herndon released on a bond of eight thousand dollars pending appeal.

Tuttle lost no time; before one o'clock that afternoon, he met his client in the sheriff's office at Fulton Towers. Cliff

Mackay, a reporter with Atlanta's black-owned newspaper, *The Daily World*, was there as well. Tuttle paid the bond, and the three men left together. Later that evening, Herndon left Atlanta on a train to New York. As a precautionary measure, Sutherland and Tuttle delegated a young attorney from the firm, Ed Kane, to travel with Herndon. Even though Kane's sole reason for the trip was to accompany Herndon, when they boarded the train they had to part company. In the 1930s, in the American South, passenger trains' cars were segregated by race.⁴⁰

The Herndon case was far from over. The Georgia Supreme Court reversed Judge Dorsey's ruling, only to be reversed itself by the United States Supreme Court. The final opinion, *Herndon v. Lowry*,⁴¹ remains a landmark in First Amendment jurisprudence.

III. John Johnson

When Angelo Herndon boarded the train to leave Atlanta in December 1935, Tuttle's next habeas corpus client, John Johnson, had been languishing in the Atlanta Federal Penitentiary for nearly a year. Monroe Bridwell and Johnson, two young marines stationed in South Carolina, were arrested in the fall of 1934 at a Charleston brothel for passing forged bills. Indicted for possessing and uttering counterfeit money and unable to raise bail, they remained in jail until January 23, 1935, when they were taken to court for arraignment and trial.

Exactly what happened that day in the courtroom has never been resolved. When the court proceeded with the arraignment, notified the defendants of the charges against them, and asked for their pleas, they pleaded not guilty. The court asked if they had counsel but did not ask if they wished to have counsel appointed. On those points, all parties agree. However, Johnson and Bridwell later contended that they did want representation, that they asked the district attorney to arrange for counsel,⁴² and that the district attorney told them that in South Carolina counsel was only appointed in capital cases. The district attorney denied that any request was made.

They proceeded to trial. Johnson and Bridwell contended that they told the judge they were ready to proceed because the district attorney told them it was too late to subpoena witnesses.

The district attorney denied having said that as well. Having just learned of the charges against them, and with no access to the advice of counsel, Johnson and Bridwell acquiesced in the proceedings. By the end of the day they stood convicted; each was sentenced to four years and six months imprisonment. Two days later they were transported to the Atlanta Federal Penitentiary and placed in isolation for sixteen days, as was the custom with new prisoners. Nearly four months later, on May 15th, they filed notices of appeal, which were quickly dismissed as untimely.

Johnson and Bridwell then filed petitions for writs of habeas corpus. Because they were incarcerated in Atlanta, jurisdiction lay in the federal district court in Atlanta. When they appeared, Judge Underwood, noting that they "were men of little education and without counsel or funds to procure same," offered to appoint counsel to represent them.⁴³ They accepted.⁴⁴

Judge Underwood appointed Atlanta attorney Frank Doughman, who investigated and took depositions in preparation for the hearing. At the hearing, Doughman convinced Judge Underwood of a critical point: the defendants had a constitutional right to have counsel appointed before they were tried for felonies in federal court.⁴⁵ The judge agreed but ruled it was too late to raise that claim. It should, he found, have been asserted on appeal. Judge Underwood was troubled by the convictions, but he did not think that he had jurisdiction.⁴⁶

Judge Underwood's opinion clarified the unfairness of the result, and his own dissatisfaction seemed apparent. On one hand, that gave ammunition to Bridwell and Johnson. On the other hand, it strengthened the order that even a sympathetic judge could not find a way to rule for them. Judge Underwood's description of the defendants conveyed his concerns: "Both petitioners," he wrote, "lived in distant cites of other states and neither had relatives, friends, or acquaintances in Charleston. Both had little education and were without funds."⁴⁷ And both stood convicted.

Appointed counsel did his job and lost; he would not go forward. At that point, Judge Underwood contacted Elbert Tuttle.⁴⁸ For a federal judge to seek pro bono counsel to defend a criminal prosecution or to file a petition for habeas corpus was not unusual. Seeking out an attorney to handle an appeal from his own order was unusual. Tuttle took Judge

Underwood's call seriously. He went to the prison to meet Johnson.⁴⁹ Johnson explained that he would be happy to have Tuttle represent him, but he could not afford to pay.

The ACLU was interested in the litigation. It could not pay attorney fees, but it did pay for the printing costs in the Fifth Circuit Court of Appeals. When the three judge panel unanimously affirmed in a brisk opinion, ruling that habeas corpus was not a substitute for a writ of error on appeal, further appeal seemed futile, especially because there was no further appeal of right. The matter could only go forward on writ of certiorari. The ACLU could not continue financial support. That meant Tuttle himself had to pay court costs, printing costs, and his own travel expenses.

Tuttle decided to continue alone. He filed a petition for writ of certiorari in the United States Supreme Court. Certiorari was granted, and the case was set for oral argument. Tuttle argued the case himself; it would be the only case he argued before the United States Supreme Court. "I quit while I was ahead," he would say with a smile. *Johnson v. Zerbst* would also prove to be one of the most significant constitutional criminal procedure cases ever decided.⁵⁰

Tuttle had to win on two grounds to secure a real victory for his client. First, he had to convince the Court that a defendant in a federal felony trial had a constitutional right to appointed counsel.⁵¹ At that time, it was not uncommon for federal judges to appoint counsel and it may even have been more common than not.⁵² Had Bridwell or Johnson asked the federal district court judge for counsel, an attorney may well have been provided. As it was then understood, however, the Constitution did not require that counsel be provided. In only one case, *Powell v. Alabama*,⁵³ one of the Scottsboro boy cases, had the Supreme Court found a constitutional right to appointed counsel.⁵⁴ *Powell*, however, was a death penalty case. In *Powell*, a case replete with egregious injustice, the Court held that the due process clause of the Fourteenth Amendment required appointment of counsel in capital cases. It was a long step from a rule applying only in capital cases to a rule applying in all federal felonies.

The second ground on which Tuttle had to prevail was even more intractable. It was the point that had bedeviled Judge

Underwood, who had been sympathetic to Bridwell and Johnson on the appointment of counsel issue. Even if you assumed that they did have a right to counsel, how could you get around the fact that they had waived it? The judge had asked them if they were ready to proceed, and they said “yes.” They had not said, “no, because we don’t have a lawyer,” or “may we have a lawyer.” By deciding not to raise the issue, by simply going forward, they had waived any right they might have. The waiver issue had enormous ramifications, and the members of the Court could be expected to be sensitive to them.

Justice Black wrote the opinion for the Court, and only four other Justices joined it.⁵⁵ That was enough. On behalf of his client, John Johnson, Tuttle won a sweeping victory. The Sixth Amendment, Justice Black wrote, required that before a defendant could be tried in federal court for a felony, he must be provided with the assistance of counsel, unless he had waived his right to counsel.⁵⁶ That the due process clause required waivers to be voluntary had already been established.⁵⁷ Justice Black went considerably further by ruling that a defendant could not be considered to have waived a right he did not know he had; that is, even a voluntary waiver would only be effective if it was also knowing and intelligent.⁵⁸

Both rulings made by the Court in *Johnson v. Zerbst*⁵⁹ were important, but the ruling on the right to counsel applied only in federal felony proceedings. The waiver rule, on the other hand, applied to the waiver of most federal constitutional rights.⁶⁰ Over the next few decades, *Johnson v. Zerbst* became the most often cited opinion in American jurisprudence.

By the time the Supreme Court ruled, Johnson had been imprisoned for three years. Tuttle went back to the Atlanta penitentiary to tell him the good news. Tuttle had not yet had the order releasing Johnson signed because the Supreme Court had ordered the matter remanded for determination of whether there had been a knowing, intelligent, and voluntary waiver of the right to counsel. If Tuttle had the order signed, and if on remand the lower court found there had been no waiver, the original conviction would be set aside and Johnson could be tried again. That was unlikely but possible. It gave Johnson pause. He was getting out anyway, within days, on good behavior. He could just let things be, but then he would have a felony

conviction on his record. Johnson decided to take the chance; he directed Tuttle to have the order signed.

Before Tuttle left, Johnson asked him a question: "You must have put up some money?" Tuttle responded that he had spent a couple of hundred dollars. "Well," Johnson said, "I'll send you a check someday." Someday never came. Tuttle did not particularly mind. He had never expected to be repaid in money, and he considered himself well compensated: he had been able to secure justice for an individual who had been ill-served. Moreover, he had made an enormous contribution toward securing justice for multitudes whom he would never know.⁶¹

*"The job is there, and you will see it, and your strength is such . . . that you need not consider what the task will cost you. It is not enough that you do your duty. The richness of life lies in the performance which is above and beyond the call of duty."*⁶²

ENDNOTES

1. 347 U.S. 483 (1954).
2. 53 F.2d 586 (5th Cir. 1931).
3. 301 U.S. 242 (1937).
4. 304 U.S. 458 (1938).
5. See Elbert P. Tuttle, "Reflections on the Law of Habeas Corpus," *J. Pub. L.* 22 (1973): 325.
6. *Id.* at 334.
7. The full story is told in Anne S. Emanuel, "Lynching and the Law in Georgia Circa 1931: A Chapter in the Legal Career of Judge Elbert Tuttle," *Wm. & Mary Bill of Rights J.* 5 (1996): 215.
8. 261 U.S. 86 (1923).
9. *Id.* at 91.
10. *Frank v. Mangum*, 237 U.S. 309, 323 (1915).
11. 53 F.2d 586 (5th Cir. 1931).
12. *Id.* at 589-90.
13. Charles H. Martin, *The Angelo Herndon Case and Southern Justice* (Baton Rouge, LA: Louisiana State University Press, 1976), 1-5. Much of the material about Herndon is from Martin's book, a thoroughly researched analysis of the Herndon litigation. Herndon told his own story in *Angelo Herndon, Let Me Live* (New York, NY: Arno Press, 1969). See also Kendall Thomas, "Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case," *S. Cal. L. Rev.* 65 (1992): 2599.
14. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934).
15. *Id.* at 836, 174 S.E. at 600.
16. *Id.* at 853-69, 174 S.E. at 609-16.
17. "The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration." *Id.* at 868, 174 S.E. at 616.
18. *Id.* at 869, 174 S.E. at 616.
19. Dan T. Carter, *Scottsboro: A Tragedy of the American South* (Baton Rouge, LA: Louisiana State University Press, 1969), 53.
20. Martin, *The Angelo Herndon Case*, *supra* note 13, at 117.
21. *Id.* at 140.

22. Prior to the first trial, the ILD retained Oliver Hancock, an Atlanta attorney, on Herndon's behalf. The ACLU decided to support the defense also and provided funds to retain W.A. McClellan, a Macon attorney. On June 29, 1932, Roger Baldwin, founder and Director of the ACLU, wired Will Alexander of the Commission on Interracial Cooperation that Hancock was unsatisfactory, and they had asked McClellan to take over and to select an attorney to assist. Baldwin asked Alexander to recommend an Atlanta attorney. On July 1st Alexander wired back recommending Bill Sutherland: "Has standing in community courage of his convictions integrity and intelligence." *Wires on File in the Herndon Collection at Clark University, Atlanta, Georgia*. Baldwin did not contact Sutherland at that time, and Herndon was represented at trial by two young black attorneys, Ben Davis and John Geer. Martin, *The Angelo Herndon Case*, *supra* note 13, at 34.

23. Martin, *The Angelo Herndon Case*, *supra* note 13, at 140-02.

24. *Norris v. Alabama*, 294 U.S. 587 (1935).

25. *Id.* at 596.

26. Martin, *The Angelo Herndon Case*, *supra* note 13, at 145.

27. *Herndon v. Georgia*, 295 U.S. 441, 446 (1935).

28. Martin, *The Angelo Herndon Case*, *supra* note 13, at 160-61.

29. Leonard Dinnerstein, *The Leo Frank Case* (Athens, GA: University of Georgia Press, 1987), 33 (quoting L.O. Bricker, "A Great American Tragedy," *Shane Q.* IV (April 1943): 90).

30. *Frank v. Mangum*, 237 U.S. 309, 345 (1915).

31. Dinnerstein, *Leo Frank*, *supra* note 29, at 121.

32. *Id.*

33. Melissa Fay Greene, *The Temple Bombing* (New York, NY: Ballantine Books, 1997), 74-76, 244-47.

34. Dinnerstein, *Leo Frank*, *supra* note 29, at 159 (quoting Lucian Lamar Knight, *A Standard History of Georgia and Georgians* (Chicago, IL: The Lewis Pub. Co., 1917), 2:1208).

35. In 1920 he was defeated in a race for the Senate by his old ally, Tom Watson. Watson served only until September 26, 1922, when he died of respiratory failure. The Ku Klux Klan sent a cross of roses some eight feet high to his funeral. Dinnerstein, *Leo Frank*, *supra* note 29, at 161.

36. Martin, *The Angelo Herndon Case*, *supra* note 13, at 162.

37. Conversations with Judge Elbert Tuttle, Atlanta, Georgia, 1991-1994 *passim*.

38. Martin, *The Angelo Herndon Case*, *supra* note 13, at 162.

39. See *Lowry v. Herndon*, 182 Ga. 582, 584, 186 S.E. 429, 430 (1932) (quoting the constitutions of the United States and the State of Georgia); "Conviction Called Void by Court, Herndon is Freed on \$8,000 Bond," *Atlanta J.* (Dec. 8, 1935), at 1.

40. Herbert Elsas, then an associate at Sutherland and Tuttle, recalled that Kane was selected partly because he had worked on the matter, and partly because he "was a hard nosed s.o.b." Interview with Herbert Elsas, Offices of Sutherland, Asbill & Brennan, Atlanta, Ga., March 25, 1993. Whitney North Seymour had implored the firm to get Herndon to Washington safely and explained that he had planned a celebration. When the train pulled into Union Station, enthusiastic supporters, including a number of white women, embraced Herndon. "Ed Kane came back thoroughly disgusted," Elsas recalled. *Id.* Elsas also recalled that everyone in the firm supported the work on the *Herndon* case: "We recognized that serious injustice was being done." *Id.*

41. 301 U.S. 242 (1937).

42. At this time, United States Attorneys were called District Attorneys.

43. *Bridwell v. Aderhold*, 13 F. Supp. 253 (N.D. Ga. 1935).

44. *Id.* at 255.

45. *Id.* at 256.

46. *Id.*

47. *Id.* at 254.

48. Tape 3 of 5, Interview with Judge Elbert Tuttle, conducted by Fred Aman in Atlanta, Georgia. The videotapes of the interviews are on file at the Cornell University School of Law.

49. Although in recounting how he came to handle the case in a 1962 letter Tuttle does not mention Bridwell, he did represent both defendants on appeal. Bridwell, however, did not join in the petition for writ of certiorari. Letter from Judge Elbert Tuttle to Professor Elliott Cheatham of Vanderbilt University, August 7, 1962 (on file with author).

50. See, e.g., William M. Beaney, *The Right to Counsel in American Courts* (Westport, CT: Greenwood Press, 1955), 29.

51. "An Historical Argument for the Right to Counsel During Police Interrogation," *Yale L.J.* 73 (1964): 1000, 1003-04.

52. Beaney, *Right to Counsel*, *supra* note 50, at 29-30, 32.

53. 287 U.S. 45 (1932).

54. *Id.* at 73.

55. Of the remaining four justices, Justice Reed concurred in the reversal but did not join the opinion. Justice McReynolds stated, without explanation, that the court of appeals should be affirmed. Justice Butler stated that in his opinion the record showed a waiver and the court of appeals should be affirmed. Justice Cardozo did not participate. *Johnson v. Zerbst*, 304 U.S. 458, 469.

56. *Id.* at 463.

57. *Bram v. United States*, 168 U.S. 532 (1897) (arising under the Due Process Clause of the Fifth Amendment). *See also* *Brown v. Mississippi*, 297 U.S. 278 (1936) (arising under the Due Process Clause of the Fourteenth Amendment).

58. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" 304 U.S. at 464. Later writers describing or relying on the opinion distilled the holding into the phrase "knowing, intelligent, and voluntary."

59. 304 U.S. 458 (1938).

60. The waiver of a Fourth Amendment right, at least as long as the right waived does not implicate the right to a fair trial, need only be voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-47 (1973).

61. In later years, he recalled with humor and pleasure one exchange during argument. The Chief Justice had interrupted his argument to remark, "Mr. Tuttle, the next thing you'll be arguing is that before a man pleads guilty he'll be entitled to have a lawyer." "Fortunately, Mr. Chief Justice, that's not the issue before the court today," Tuttle responded. Aman Interview with Judge Elbert Tuttle, *supra* note 48.

62. Elbert P. Tuttle, "Heroism in War and Peace," *Emory Univ. Q.* XIII (October 1957): 129, 139.