# The Scottsboro Boys

## A Metaphor for Justice

*By The Honorable Victoria A. Roberts*

*The following speech was presented at the State Bar of Michigan Annual Meeting on September 21, 2000.*

Hanging in my chambers is a 24"x36" oil painting by Reginald Gammon of nine young black men dressed in prison garb, standing in a prison cell. They surround an elderly white male. They, themselves, are anchored by two prison guards.

Some of you may recall the famous "Scottsboro Boys" and Attorney Samuel Liebowitz who stepped in to represent them after their death sentences were overturned by the U.S. Supreme Court in 1932. Liebowitz was the "go to" guy at that time for high profile cases—having represented the likes of Al Capone—but he took on the Scottsboro Boys case as a worthy cause, and he refused to be paid.

The Scottsboro Boys were riding a train from Chattanooga headed for Alabama on March 25, 1931. Four were acquaintances and two of them were brothers. The other five were from various parts of Georgia. On board the train was also a group of young white boys, returning to Huntsville, Alabama from unsuccessful job searches in the Chattanooga cotton mills.

Two young females were also on board. They, Victoria Price and Ruby Bates, would become instrumental in the sentences of death the Scottsboro Boys received.

A fight ensued between the two groups of young men, ultimately with the white boys being forced from the train. They reported the "assault" to the railroad master in Stevenson, Alabama. Word spread fast. By the time the train arrived in Paint Rock, Alabama, a large posse of whites had formed.

The record is not clear as to how this "assault" became the rape of the two young females, but that is what this posse of whites believed, and that would be the testimony at trial. At the third trial of the Scottsboro Boys, Ruby Bates would recant her testimony—would finally say that none of the boys so much as spoke to her and Victoria, let alone touch them. Ruby would testify, at this retrial, that Victoria made her lie, to avoid a charge of vagrancy. It turned out that Victoria was married and had left home to work as a prostitute. And this was something she did not want discovered.

Suffice it to say that by the time the train arrived in Paint Rock, the crowd believed that a group of black men had raped the two women. In a line-up held in the jail cell where all nine were put, Victoria identified six as her rapists; the other three were assumed to have raped Ruby.

The boys were roped together and taken to Scottsboro, Alabama.

There the posse swelled in numbers outside of the jail and demanded the release of the Scottsboro Boys so they could be lynched.

The governor ordered the National Guard to protect the young men.

They were ultimately indicted and arraigned. At no point were they asked if they needed the assistance of counsel. As the Supreme Court would say,

> *They were youthful...they were ignorant and illiterate . . . and had little time or opportunity to get in touch with their families and friends.*
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> *Powell v Alabama*, 287 US 45, 52 (1932)

The boys were seized from the train on March 25, 1931. On April 6, they were arraigned on charges that carried the death penalty. Trial of the first two began six days later.

The Scottsboro Boys did not have a "dream team" of lawyers to represent them. In fact, until the very morning of trial, no lawyer represented them. Before the first day of trial, the judge had "appointed all the members of the bar" for the limited purpose of "arraigning the defendants."

On the morning of trial, a drunk real estate lawyer from Chattanooga with no criminal trial experience stood to say he would "like to appear along with local counsel that the court might appoint" to represent the Scottsboro Boys. A 70-year-old local lawyer, Mr. Moody, who had not tried a case in decades, did stand and say he would help with anything he could. With that, the trial on capital charges began.

Three days later, the first of two Scottsboro Boys was found guilty after two hours of jury deliberations. The crowd of thousands outside roared and cheered at the announcement of the verdict. These cheers were heard in the deliberation room and shortly thereafter, the second jury returned the same verdict.

Within two weeks all would go to trial. One mistrial ensued. All others would be found guilty. With the exception of one, they would receive the death penalty. Despite the prosecutor's request for a life sentence, 11 jurors held out for the death penalty for the 12-year-old Scottsboro Boy. He was the youngest of the nine. The oldest was 20.

Their case went to the U.S. Supreme Court under the name of *Powell v Alabama.* It is a landmark case, decided in 1932, on the right to the effective assistance of counsel. The court construed the Sixth Amendment right to the assistance of counsel and held:

> *Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired . . . . The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no*

*skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.* ***If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.*** *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. (Emphasis added.)*

287 US at 69.

The Scottsboro decision was the first case in which the Supreme Court held a state accountable to provide an adequate defense and a fair trial.

In no uncertain terms, the court spoke of the duty of this judicial system to appoint counsel where the accused is

*incapable adequately of making his own defense… it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate…"that there are certain immutable principles of justice which inhere in the very idea of free government which members of the union may not disregard."*

287 US at 71–72.

Despite the proclamation on the outside of the United States Supreme Court building, "equal justice under law," there can be no clearer example than the Scottsboro Boys case of what happens when counsel is not available to adequately represent the poor and uneducated. For them, there is no equality. For them, there is no justice.

While the Supreme Court mandate in the *Powell* case pertained only to criminal cases, it can and should be used as an example for all of us in this legal system, to defend and to represent the poor, the downtrodden, the ignorant, the youthful, the mentally ill—the people on the fringes of our society, who cannot help themselves.

Despite the holding of the Supreme Court nearly 70 years ago, claims in criminal cases of ineffective assistance of counsel, many of them meritorious, abound.

Simply fast forward from 1932 to the year 2000, when an investigation by the *Chicago Tribune* found that at least 33 death row inmates in Illinois had been represented at trial by an attorney who had been disbarred or suspended.

None of this should be.

Some tragic circumstances remain the same.

On the civil side, the claims are less from ineffective assistance of counsel than that there is *no* assistance of counsel.

Far too often I have received complaints, or answers to complaints, handwritten by citizens who cannot afford counsel. Some of these complaints and defenses have merit. Most perhaps would never have ended up in the court had they been able to afford the counsel of a member of the Bar. While the duty of the trial court to appoint counsel in criminal cases is clear, and the court's power to do so unquestioned because of the fundamental nature of the right of the accused to due process, it is unfortunate that there is no such legal mandate in civil cases.

That is why your participation, as a member of the Bar, in the Access to Justice campaign is of paramount importance. You can do that through your financial contributions, which are distributed to various legal services programs. You can work for legal services programs, or you can agree to handle cases on a pro bono basis.

Take, for example, the recent agreement that our federal bench struck with the faculty

at Wayne State University Law School and its Civil Rights Litigation Clinic. This agreement allowed the prisoner civil rights class to accept two prisoner civil rights cases for the fall 2000 term. These cases were selected by Magistrate Judge Paul Komives. This is a pilot program and the hope is that it will be successful, will be continued, and perhaps expanded in future years. It has proved to be a valuable learning experience for the students who have interviewed their clients, participated in factual and legal investigations, and drafted pleadings and briefs. But for now, they are only two cases, and they are being handled by students.

The idea to involve the law school stemmed from the belief that it is critically important to impress upon law students the moral obligation placed on the profession to participate in the goal towards full access to justice. It also stemmed from a frustration and from an inability to get members of the Bar to step up and accept these cases.

We can hardly overlook the work done by the Northwestern University Journalism Students in 1999 that resulted in a convicted double-murderer, Anthony Porter, a man with an I.Q. of 51, being set free only two days before his scheduled execution. The students' tireless efforts resulted in witnesses recanting testimony and another man finally confessing to the murders when confronted with affidavits from the recanters. It was the work of these journalism students that revived the debate on the bias, error, and incompetence of Illinois's death penalty system and that in January of 2000 caused Illinois Governor Jim Ryan to declare a moratorium on executions until all 162 death row inmates could have their cases reviewed. Since reinstating the death penalty in 1977, Illinois has executed 12 death row inmates. However, 13 others facing death have been exonerated.

Again, all of this attention was triggered by the dedication of students.

It is in large measure the work of students at the Yeshiva University's Benjamin Cardozo School of Law in New York, under the supervision of two lawyers who describe themselves as having a passion for social causes, that fuels the Innocence Project. This project has used DNA evidence to free a long list of inmates, many of them from death row, in the last eight years. Law students at the Thomas Cooley Law School are to be commended for recently becoming part of the Innocence Project.

Student sweat, labor, and dedication is good. Perhaps we are now training a generation of lawyers who will enter the profession and maintain throughout their careers a dedication to serve the poor, the illiterate, the downtrodden, the homeless. Indeed, Professor Erica Eisinger, Director of Clinical Education at Wayne State University Law School has reported to our bench that her students "have learned in a dramatic way, crucial lessons about a lawyer's obligation to do pro bono service, the consequences of legal advice, and the dignity of all human beings, even the least among us."

But those already admitted to practice must do more.

I am encouraged by the work of my bench's Pro Bono Committee, chaired by the Honorable Denise Paige Hood. The committee recently reached an agreement with over 30 Michigan law firms to handle prisoner civil rights cases on a pro bono basis. The Michigan Trial Lawyers' Association, in combination with the Detroit Bar Association, is reviewing nonprisoner civil cases, where indigent parties need representation, as part of our Federal Pro Bono Program. But this court, as well as others, needs more help.

All law school graduates took an oath as a condition to practice law in this state. Part of that oath, is that

> *I will never reject from any consideration personal to myself, the cause of the defenseless or oppressed.*

Lawyers, where are more of you, to represent the defenseless, the oppressed?

Bruce Neckers, president-elect of the State Bar of Michigan, recently told me of his 27-year-old daughter who is a lawyer with the legal services program in Grand Rapids. She is often asked "When are you going to get a real job?" I submit to you, that Melissa Neckers is doing the *real* job.

In conclusion, let me say that the Scottsboro Boys portrait hanging in my chambers, this portrait of young boys and young men who stand with Attorney Liebowitz, serves as a constant reminder to me of the moral and professional obligation we have to those who can least protect themselves in this country. We have an obligation to use our skills as trained members of this profession to fulfill our oath completely and to never reject the cause of the defenseless and the oppressed.

Many of you perhaps have heard Dr. Martin Luther King's "drum major instinct" sermon that he delivered from the pulpit of Ebenezer Baptist Church in February of 1968. In that sermon he spoke of the eulogy he wanted at his funeral:

> *I'd like somebody to mention that day, that Martin Luther King, Jr., tried to give his life serving others. I'd like for somebody to say that day, that Martin Luther King, Jr., tried to love somebody. . . . I want you to be able to say that day, that I did try to feed the hungry. And I want you to be able to say that day, that I did try, in my life, to clothe those who were naked. I want you to say, on that day, that I did try, in my life, to visit those who were in prison. I want you to say that I tried to love and serve humanity.*
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> *Yes, if you want to say that I was a drum major, say that I was a drum major for justice; say that I was a drum major for peace; I was a drum major for righteousness. And all of the other shallow things will not matter. I won't have any money to leave behind. I won't have the fine and luxurious things of life to leave behind. But I just want to leave a committed life behind.*
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> *And that's all I want to say . . . if I can help somebody with a word or song . . . then my living will not be in vain . . . . if I can bring salvation to a world once wrought, if I can spread the message as the master taught, then my living will not be in vain.*

I urge all of you to leave behind a committed life as a lawyer, a life not in vain; fulfill your oath; fulfill your moral obligation; be a drum major for justice. ✦

*Judge Victoria A. Roberts was appointed to the federal bench by President Clinton in 1998 with the unanimous advice and consent of the senate. She served as the 62nd president of the State Bar of Michigan, from 1996–1997. Before going on the bench, Judge Roberts was in private practice and provided pro bono service to several nonprofit organizations.*