

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

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Class One - Part Three (Thurgood Marshall)

Thurgood Marshall's defense of capital and other criminal cases

Thurgood Marshall had experiences as a lawyer that no other Supreme Court justice had with regard to capital punishment. Just two years after *Powell v. Alabama* and one year after he graduated from Howard Law School, Marshall defended 25-year-old James Gross, one of three black men charged with murder and facing the death penalty in Prince Georges County, Maryland. At the trial in June 1934, in Upper Marlboro, Marshall argued that Gross drove the car but it was the other two men shot the victim. The jury convicted all three of first degree murder and sentenced them to death. A few months later, the sentence of one of the men – believed to be the ringleader – was commuted to life imprisonment. James Gross was hanged just after midnight on April 19, 1935, at the Maryland Penitentiary.¹

Two years later, Marshall defended another capital case, defending Virtis Lucas, a black man, who was accused of the murder of a white man. The Baltimore police had obtained a confession from Lucas by questioning him for three days and beating him. In a tense trial, Marshall took on the police department, pointing out to the all-white jury how severely Lucas had been beaten. The jury found him not guilty of murder but guilty of manslaughter and sentenced him to just six months in prison.²

1. Juan Williams, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY at 65-66 (1998).

2. *Id.*

In 1941, Marshall defended W.D. Lyons, a black sharecropper, who was charged with the murder of three members of a white family in Hugo, Oklahoma. A husband and wife and one of their children were shot, their throats were slit with an axe and the house burned down. Initially, two white men were arrested and confessed to the murders. However, the governor came under criticism when it was discovered that the two men had been allowed to leave the nearby state prison for visits to bars and prostitutes. The two white men were set free on condition that they go to Texas, and the governor's office announced that the search would begin for the real culprit.

Lyons had been hunting rabbits near the couple's home. He was arrested but denied that he had anything to do with the crime. However, after being beaten for two days, deprived of sleep and food, and having the bones of the murder victims put in his face, Lyons confessed. After being taken to the state penitentiary and shown the electric chair, Lyons signed a second confession.

Marshall spent three days on a train traveling from New York to Oklahoma City and six hours on the bus to Hugo. After Marshall presented a picture, provided by some local residents, of Lyons, bloody and beaten, the judge suppressed the first confession, but not the second. After a five-day trial, the all-white, all-male jury deliberated just five and a half hours before finding Lyons guilty but sentencing him to life in prison. Marshall observed, "life for such a crime as that – three people killed, shot with a shotgun and cut up with an axe and then burned – shows clearly that the jury believed him innocent." However, he was unsuccessful in appeals all the way to the U.S. Supreme Court in getting the

conviction overturned.³

Marshall, along with Tennessee lawyers Alexander Looby and Maurice Weaver, won acquittals in a series of trials in 1946 before all-white, all-male juries for 25 men accused of rioting and attempted murder in Columbia, Maury County, Tennessee. What occurred after the final verdict was returned is described in the following excerpt.

Excerpt from Gilbert King DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA (2012), at 14-20:

Marshall and his lawyers rose from their seats, wanting nothing more than to leave town quickly. Because of the constant threats and concerns for his safety, Marshall had been staying in Nashville, almost fifty miles to the north, and driving back and forth each day with Looby and Weaver. Tagging along was reporter Harry Raymond, who'd been covering the trial for the Daily Worker, a New York newspaper published by the Communist Party of the USA. * * *

Raymond knew the NAACP lawyers had been threatened with lynching, and had been told their bodies would “wind up in Duck River,” which they had to cross each day on the way to court. The white reporters covering the trial pleaded with Raymond to leave town with them, but he had a feeling the story of the Columbia Race Riot hadn't ended with the verdicts, and he chose to ride back to Nashville with Marshall and the NAACP lawyers.

With their heads down, the lawyers humbly exited the courtroom. * * * Marshall walked briskly. * * * Marshall waited impatiently as the lawyers, with Raymond tagging along, hopped into Looby's car. They drove a few blocks [and] picked up soft drinks and crackers at Julius Blair's drugstore – the epicenter of the race riots nine months earlier. * * *

3. *Id.* at 113-19.

With Marshall at the wheel, Raymond beside him, and Looby, in part because of his bad leg, in the back with Weaver amid piles of law books and case files, the four men heaved a collective sigh of relief as they headed out of Columbia. They had seen the signs posted around town during the trials:

NIGGER READ AND RUN. DON'T LET
THE SUN GO DOWN ON YOU HERE. IF
YOU CAN'T READ, RUN ANYHOW!

* * *

The sedan had just crossed a bridge over Duck River when they came upon a car parked in the middle of the road. Marshall honked the horn and waited, but the car did not move, so he drove around it and headed for Nashville. Inside the sedan it was quiet; unspoken went the fear that something was amiss. Then, piercing the silence, the sound of a siren screamed from behind.

“Thurgood,” Looby said. “That siren. It's a police car!”

“Is it following us?” Marshall asked.

“Yes. It's coming after us fast.”

“You'd better stop the car, Thurgood,” Weaver said.

Marshall turned his head and was troubled to see three cars following them. The first, carrying highway patrolmen, roared past the sedan and forced Marshall to jam on the brakes. Quickly, eight men, some in police uniforms and some in civilian clothes, converged on the sedan. Marshall saw that a few of them had their hands on their guns while others shone flashlights on the men inside. Reporter Harry Raymond kept his mouth shut, but he knew this wasn't a routine police stop.

The lawyers and Raymond were ordered out of the car. They froze as one cop approached.

“You men the lawyers for the National Association for the Advancement of Colored People?”

“Yes, I’m Thugood Marshall. This is Maurice Weaver and this gentleman is Alexander Looby.”

The cop looked them over. “Drinking, eh?”

“I beg your pardon,” Marshall replied.

“I said you’ve been drinking. Celebrating the acquittal. Driving while intoxicated.”

Weaver interjected that this stop was a civil rights violation and, furthermore, it was obvious none of them had been drinking.

“Stay out of this, Weaver,” the cop said. “You’re a white man and have no business in this car anyway.”

The police then asserted their right to search the car and Weaver demanded that they produce a warrant. Using flashlights, Marshall was able to read the “John Doe” warrant signed by a deputy sheriff, charging the lawyers with transporting whiskey in violation of “county local option law.”

* * *

The police search of the car turned up nothing, so they decided to search the lawyers.

“You got a warrant to search us?” Marshall asked.

“No,” the officer responded.

“Well, the answer is no,” Marshall said.

The police let the lawyers return to their vehicle, and this time Looby took the wheel.

“You weren’t driving this car, were you?” one cop asked Looby.

“I’m not answering your question,” Looby replied.

The cop then looked to Marshall, who said, “I’m not answering your question, either.”

Confused about what to do next, the police

argued over who had been driving the car when it was stopped. “That’s the one! The tall yaller nigger!” one of them insisted with certainty, and the officers approached Marshall, who was asked to show his license.

The cop took one look. “Get out,” he said. “Put your hands up.”

Marshall was dumbfounded. What is it? he asked.

“Drunken driving,” the officer responded.

“Drunken driving? You know I’m not intoxicated,” Marshall said. “I haven’t had a drink in twenty-four hours!”

“Get in the car,” one of them said.

With guns drawn and flashlights glaring, four men hustled Marshall into the backseat of a nonofficial sedan.

“Keep driving,” they shouted back to Looby and Weaver as they placed Marshall under arrest. With Marshall wedged into the backseat, the car sped away, back toward Columbia. As they picked up speed, the four law enforcement agents were quiet and all business. They drove into the darkness. * * * Marshall knew that the Ku Klux Klan in Columbia was deeply entrenched in the local police; he knew its members served as sheriffs and magistrates. He had read the NAACP reports. This wasn’t the Klan of “cowardly hood,” rather, it wears cap and visor, and shining badge. . . . It is the LAW. It arrests its stunned victims, unlisted.”

Marshall had no idea where they were going. For years his dark humor had horrified young lawyers and assistants when he would go into great detail about what Southern police or the Klan did with uppity Negroes in the woods. Now Marshall was the uppity Negro, alone, and he wasn’t in a joking mood. Looking out the window of the sedan, he could see the cedar trees as the headlights flashed across them. It was under a cedar tree just down the road that hundreds of townspeople had gathered around young Cordie Cheek in his last living moments. They had

watched and cheered as officials pulled down Cordie's pants and castrated him before forcing him up a stepladder and hanging him. Pistols were passed around the crowd; they were fired until all the bullets were gone.

The car began to slow. The lawmen were quietly mumbling and pointing; then the driver turned left down a dirt road, toward "the famous Duck River." Marshall knew that nothing good ever happened when police cars drove black men down unpaved roads. He knew that the bodies of blacks – the victims of lynchings and random murders – had been discovered along these riverbanks for decades. And it was at the bottom of Duck River that, during the trial, the NAACP lawyers had been told their bodies would end up.

The sedan was lumbering forward, bouncing down the dirt road, when Marshall caught his first glimpse of the men waiting down by the river. The headlights illuminated their stern faces. The car slowed, then stopped. Suddenly headlights appeared behind them. Had word spread about the lynching of the NAACP lawyer? Glimpsing the glare of the lights behind them, one of the policemen in Marshall's car stormed out of the sedan to confront the driver of the second car. Marshall craned his neck to see; he recognized the limp.

It was Looby!

Instead of driving to Nashville as the police had ordered, Looby had spun a U-turn and followed the police sedan. As soon as it turned left off the main road, he knew Marshall was in trouble. He'd been teaching at Fisk University, just down the block from where the Maury County officials "arrested" Cordie Cheek, threw him into a sedan, and drove him to these same woods along Duck River. Well, they'll have to kill me, too, Looby thought. He wasn't going to leave Marshall to the devices of murderous law enforcement officers.

Once again the policemen ordered Looby to leave the scene. Waiting to be arrested, or worse, the slight, gimpy lawyer stood his ground; he refused to budge. He'd had these same police and town officials on the witness stand, and he'd

wanted to question each one of them about the lynching of Cordie Cheek so that he could rightfully raise the issue of self-defense during the trial, but the judge had refused to allow it. Now Looby spoke his mind: he wasn't leaving without Marshall, he said. Livid, the deputies and police conferred to the side. Whatever the plan had been, there were now too many witnesses, and there was sure to be another riot if things got out of hand with the lawyers. The police returned to the car and made a loop back up to the main road, with Marshall's eyes lingering on the lynch party waiting by the river, while Looby, the man Marshall called a Rock of Gibraltar, followed close behind with Weaver and Raymond. This time the police drove Marshall back to the courthouse in Columbia, where he was pointed toward a magistrate's office.

"You go over there," one of the policemen said. "We'll be over."

"No, you won't. I'm going with you," Marshall replied, reminding the police that they had placed him under arrest. "You're not going to shoot me in the back while I'm 'escaping.' Let's make this legal."

"Smart-ass nigger," one said, and they shuffled Marshall up to the second floor of the courthouse, with Weaver trailing behind to serve as Marshall's lawyer. Once there, they met Magistrate Jim "Buck" Pogue, a small, bald man not more than five feet tall.

"What's up?" Pogue asked police.

"We got this nigger for drunken driving," one officer told him.

Weaver was fuming. He accused the officers of being "frame-up artists" and demanded that Pogue examine Marshall.

Pogue looked Marshall up and down. "He doesn't look drunk to me," he observed.

"I'm not drunk," Marshall exclaimed.

"Boy, you want to take my test?" Pogue asked.

Marshall paused and looked quizzically at the magistrate. “Well, what’s your test?”

“I’m a teetotaler,” Pogue said. “I’ve never had a drink in my life. I can smell liquor a mile off. You want to take a chance?”

Marshall stepped forward. “Sure,” he said, and leaning his tall, lanky frame down to Pogue till his mouth was just an inch from the magistrate’s nostrils, Marshall blew so hard he “almost rocked this man.”

Pogue took a deep whiff and exploded at the police. “Hell, this man hasn’t had a drink. What are you talking about?”

The arresting officers quickly filed out of the office.

“What else is there?” Marshall asked.

Pogue told him that there was nothing else and stated that those officers had come to the wrong man if they wanted to frame Marshall. He said he was the one magistrate in Columbia who had refused to sign warrants for the arrests of Negroes during the February trouble, and then he extended his hand to Marshall, saying, “You’re free to go.”

Marshall quickly left the courthouse for the second time that day. He noticed again that the streets were deserted. * * * [H]e understood why. “Everybody,” Marshall realized, “was down at Duck River waiting for the party.”

He and Weaver hurried over to the [black section of town], where Looby and Raymond were waiting at Sol Blair’s barbershop. They made sure Marshall was okay, but they also suspected Marshall wasn’t out of danger just yet. The officers, they figured, had probably been hoping to bring Marshall before Magistrate C. Hayes Denton, who surely would have locked Marshall up for the night. Then, in “the pattern of all recent Maury County lynchings,” it would only have been a matter of storming the jail with some rope and finishing the job.

Looby thought it likely the officers might not yet be ready to give up on their party. He came up

with a plan of his own. “Well, Thurgood,” he said, “we’ll put you in another car.”

They decided to send a decoy driver out with Looby’s car, which would head toward Nashville, while Marshall and Looby in a different car sneaked out of town on back roads. * * * [Marshall] would later learn that Looby’s car was indeed pulled over, and when the pursuers discovered that Marshall wasn’t in it, “they beat the driver bad enough that he was in the hospital for a week.”

In another car, Maurice Weaver made it back to Nashville that evening along with Harry Raymond, who immediately began typing his story for the Daily Worker. “I am certain ...a lynching was planned,” he wrote. “Thurgood Marshall was the intended victim.”

* * *

Safely back in Nashville and his heart still pounding, Marshall made a late-night phone call to U.S. Attorney General Tom C. Clark to tell him what had happened.

“Drunken driving?” Clark asked.

“Yes.”

Clark paused. He had come to know Marshall well since being appointed attorney general in 1945 by President Truman, and he had just one question for the man who would one day replace him on the U.S. Supreme Court.

“Well,” Clark asked, “were you drunk?”

“No,” Marshall asserted, “but exactly five minutes after I hang up this phone I’m going to be drunk!”

[end of excerpt]

King's *DEVIL IN THE GROVE* provides an excellent account of the plight of black youths accused of rape in Groveland, Florida, that was similar in many respects to the Scottsboro case. Thurgood Marshall handled other capital cases, filing petitions for certiorari and appeals for people condemned to die.

In 1961, President John F. Kennedy appointed Marshall to the Court of Appeals for the Second Circuit. He was the first African American to serve on the Court. In 1965, President Lyndon B. Johnson appointed Marshall Solicitor General of the United States, and, in 1967, appointed him to the Supreme Court. Marshall was also the first African American to serve in those positions. All of President Johnson's extraordinary political skills were needed to obtain confirmation over the objection of segregationist Senators.⁴ Marshall privately took the oath of office on September 1, 1967, in the chambers of Justice Hugo Black, a former Ku Klux Klansman from Alabama.

When the Supreme Court considered capital punishment, the right to counsel, racial discrimination and other issues, Marshall had a unique perspective from his experience representing clients in courtrooms and communities across the South.

4. Juan Williams, *THURGOOD MARSHALL* at 332-38.