



Greensboro Truth and Reconciliation Commission Final Report

**Injustice in the justice  
system**

# Chapter 10

*“(The response to the acquittals in my congregation was) anger. Frustration. (My) message had to be a message of reassurance because at that point people were of the opinion, “What is the purpose of us doing anything? Why not just give up?” So, I said in my statement that the only way to deal with that is to have a faith and a hope that in some way, in God’s own time, this matter will come to bear, that right temporarily defeated is better than evil triumphant. Truth crushed to the ground will rise again. You have to do that because otherwise people just come to the point where they don’t have any feelings, they become numb and a person who is not able to have the sense of fear will do anything. So keeping people from losing their mind became an issue.”*

Reverend Cardes Brown<sup>1</sup>

Many people have told the Commission that the murder acquittal was its own form of trauma, creating its own confusion, fear and distrust over whether our system of law enforcement and justice will protect them. Our principle purpose in this section is to explain to a lay audience what happened in the three sets of trials, which were lengthy and dealt with complex legal issues. The three public trials are particularly important to the public consciousness of Nov. 3, 1979. Given the extensive media coverage, these events are the source of many beliefs in the Greensboro community and beyond about what happened and whether justice was served. Many key factual questions alive in the community today relate to the judicial process:

- How could the court have convened an all-white jury?
- Why didn’t the relatives of the victims and people involved in the Nov. 3rd march testify at the murder trial?
- How was an acquittal possible when there was a videotape of the shooting?
- Why in the civil case was only one victim compensated?
- Why did the City pay the judgment for the individual police officers, but also the KKK and Nazi members found liable?

These are some of the questions that the Commission considered, along with broader inquiries into the role of the justice system and its impact on the events and consequences of Nov. 3, 1979.

As discussed in previous sections of this report, the aim of TRCs is not to “re-try” trials, nor would it be within our competence or capacity to do so. Rather, after 25 years, our purpose is to take a fresh and more dispassionate look at the procedural and substantive issues involved in these trials and make our own assessment of what transpired and whether there were noticeable flaws in the process, either in violation of legal standards or basic notions of justice.

Another of our aims in this inquiry is to reveal how the legal system inevitably reflects and also is influenced by the prevailing social and political contexts, and how in this particular case the system failed some expectations for justice. Our final purpose is to recognize the different impacts the trial had on those directly affected and on the community at large. In seeking reconciliation, we aim to examine the cracks in public trust in the justice system that were created or exacerbated by these events.

The chief purpose of a trial, whether criminal or civil, is not to uncover the “truth” of the events about which it is concerned. In this way, trials are fundamentally different from the task the Commission has undertaken. Understanding the inherent limitations of what was accomplished, and what could have been accomplished at these trials, helps us clarify and distinguish our own mission.

The three trials have illustrated, each in its own way, the limits of our court system as it is structured. The “retributive justice” model of the U.S. legal system confines judicial inquiries to the proof of a defendant’s guilt (criminal cases) or liability (civil cases), under a narrowly defined set of laws and rules of procedure. As a result, the examination of the role of individuals and institutions, outside of the particular defendants on trial, is limited solely to their relevance to those particular proceedings. Similarly, the scope for defining and addressing other types of harm and other stakeholders in the incident is also very narrow. The courtroom is the realm of technical knowledge and expertise, with little leeway for richness of context or consequences that surround wrongs.

This narrowness is appropriate to the task of trials because they must protect the rights of accused individuals whose liberty is at stake. The issue of collective harm or collective responsibility most often lies outside the grasp of the court system;<sup>2</sup> yet, it is what makes a group of people living near each other into a “community.” The retributive justice system is a rather blunt instrument for addressing these issues. Indeed it was not intended to do so. The promise of “restorative justice” is in drawing the community to the table to discuss what wrongs were done and to whom and by whom. Restorative justice also facilitates exchange of diverse perspectives on why these wrongs occurred and what should be done. In this way, restorative justice works in concert with retributive justice, not as a repeat or replacement of it. By looking at the issues more holistically, truth commissions can better diagnose the underlying causes and consequences, which may not be relevant to particular legal proceedings.

### Availability of research materials

Our analysis of the three trials was somewhat limited because certain documents were not available. Transcripts for the state murder trial were eventually destroyed pursuant to the time limitation for keeping such records on file. However, pre-trial motions and orders, as well as verdict sheets, are still on file at the Guilford County Courthouse. Also, the presiding judge in the case, Judge James Long, provided transcripts of some testimony and his jury instructions, which will be preserved in our archives with our other documentary evidence. Also, because there were no appeals in the federal civil rights trial or the trial of the civil lawsuit, no transcripts were available for either of those proceedings. Again, however, we were able to access some testimony through the cooperation of lawyers and others, including playwright Emily Mann, who used interviews and portions of depositions in the dialogue for her play, “Greensboro: A Requiem.” Finally, although we made extensive use of her book, “Codename Greenkil,” and spent several hours interviewing her, author Elizabeth Wheaton told us she had destroyed all of her interview notes and other related documents.

## **STATE MURDER TRIAL: Aug. 4, 1980, to Nov. 17, 1980**

Myriad legal issues and social contexts complicated a murder case that seemed cut and dried to many in the Greensboro community and beyond. A public that had watched news footage of the shootings was left surprised and confused by the acquittal of the Klan and Nazi members charged with murder in the Nov. 3, 1979, violence. Extensive interviews with prosecutors and defense lawyers in the case, as well as a review of available court documents and media coverage, helped the GTRC arrive at an understanding of the trial and its outcome that we now share here. Our analysis covers the court proceedings from the initial charges through the verdicts, including jury selection, witnesses, testimony, jury instructions and deliberations, as well as charges lodged against CWP members and the influence



those charges had on the Klan/Nazi trial.

### Charges against Klansmen and Nazis

In the early morning hours of Nov. 4, 1979, Assistant District Attorney Jim Coman, one of two lead prosecutors in the murder case, issued warrants for all 14 Klansmen and Nazis who had been arrested in the yellow van. Police were still looking for Jack Fowler, who had fled the state to Chicago. The charges were for four counts of first-degree murder (Michael Nathan was still in a coma), one count of felony riot, and one count of conspiracy.

Conspiracy is legally defined as the agreement by two or more people to commit a crime. Coman and fellow state prosecutor Rick Greeson say that they initially filed the conspiracy charge because they had information that those in the caravan had held numerous meetings about going to Greensboro to confront the march. From interviews with the defendants on the day of the killings, prosecutors knew of the Klan and Nazis meeting in Winston-Salem at Roland Wood's house on Nov. 1, 1979. They also knew about other Klan meetings in Hickory, Gastonia and Lincolnton, and that the passengers in the caravan met beforehand at Brent Fletcher's house. Rick Greeson recalled,

*So we inferred a conspiracy. But subsequent investigation concluded that there was not sufficient evidence of an agreement. There was talk about throwing eggs and heckling, which is a misdemeanor. So we dropped the conspiracy charge, which would have only added three to five years to the sentence anyway since each defendant was charged with offenses that carried up to five death sentences or five life sentences. Dropping the conspiracy charges didn't change the evidence that was admissible ...<sup>3</sup>*

*Trying a murder case is a many-faceted situation. We are trying to keep our eye on the ball. Prosecutors are often accused by the jury of overcharging. If we had needed the "conspiracy to disrupt" charge to make our case, then we would have stuck it in. But we thought we had the evidence already of riot in our murder charge and if we had stuck in a conspiracy to riot as well, it would look like we were overcharging. They were already up for death or life in prison if they were convicted on murder one.<sup>4</sup>*

In sum, the prosecutors maintain that they did not have sufficient evidence to support the charge of conspiracy. With insufficient evidence, it would have been unethical for the prosecutors to file that charge. Statements from those present at the Klan/Nazi meetings provided evidence only of plans to disrupt, and possibly commit assault by throwing eggs. Since the State was bringing capital murder charges, the introduction of such lesser crimes might have undermined the prosecution's argument of premeditated murder.

However, for some people with a layperson's knowledge of the law and trial strategy, dropping the conspiracy charges added to suspicion that the prosecutors did not want the full story to come out because it would have brought in evidence of government involvement. Dropping the charges is not a measure of whether or not a conspiracy actually took place, since defendants may well have been withholding information about what was discussed.

## Definition of Charges

1. FIRST-DEGREE MURDER IS:
  - a) An intentional killing committed with malice, premeditation and deliberation.
  - b) A killing committed during the perpetration of a felony involving violence (such as a riot), also known as “Felony Murder.”
2. SECOND-DEGREE MURDER IS an intentional killing committed with malice but not with premeditation and deliberation.
3. VOLUNTARY MANSLAUGHTER IS:
  - a) An intentional killing committed without malice and without premeditation and deliberation.
  - b) A killing committed in the heat of passion without adequate provocation.
  - c) A killing committed by one acting in lawful self-defense but who was an aggressor (i.e. joined with another in starting the affray that culminated in the killing).
  - d) A killing committed by one acting in lawful self-defense but who uses excessive force.

Judge Long instructed the jury on all three crimes in *State v. Fowler et al*, meaning that the jurors had the option to find any or all of the defendants guilty on any of the above charges.

## The jury selection process

One of the most striking aspects of the state murder trial in many people’s recollection is the fact that an all-white jury was convened in the trial of Klansmen and Nazis.

In North Carolina, jurors are initially chosen randomly from three official governmental lists that are designed to obtain a broad cross-section of the county’s population as potential jurors. The Jury Commission uses the county tax roll as well as lists of registered voters and licensed drivers. Once the jury panel members are selected, they are directed to appear in court to be examined by the attorneys in the case. Every aspect of the jury selection process is controlled and directed by statute. Judges are not allowed to vary from the designated methodology.

In North Carolina, there are two methods available for attorneys to dismiss potential jurors from the jury panel. The North Carolina General Statutes<sup>5</sup> provides each attorney with an unlimited number of challenges “for cause,” which address the statutory qualifications for a person to serve as a juror, e.g. residence, age, current felony charge, mental and/or physical impairment, a previously formed or expressed opinion, and whether the person can be fair. The presiding judge must decide all questions as to the competency of jurors.

The second method used to challenge jurors is the exercise of “peremptory challenges,” which allow attorneys to dismiss, without having to give any explanation or reason, seven people in non-capital cases and 14 in capital cases. Both the state and the defense are entitled to the same number of peremptory challenges. Although no longer the case, at the time of the trial a party’s reason for using a peremptory challenge could not be questioned.

At all times, the State is the party that must first accept any given juror before the defense is given the opportunity to examine the defendant.

In a capital case involving multiple defendants, each defendant has 14 peremptory challenges while the State has only a total of fourteen challenges. As a result, where six defendants are on trial, the defense team has 84 peremptory challenges, which provide a better opportunity to reject those jurors who are found to be most objectionable by the defendants. Although the right to exclude jurors is personal to each defendant, attorneys work together in a joint trial in order to maximize their power over the selection process.

In this case, jury selection information tends to show that a large number of African Americans were included in the original jury panel. Those who were not excused by the court for cause were accepted by the State, but the defendants were able to use their large number of peremptory challenges and challenges for cause to effectively select an all-white jury. As stated above, in 1979, this racial discrimination in jury selection was entirely legal. However, it was clearly morally wrong, as further evidenced by the fact that this practice was prohibited in 1986.<sup>6</sup>

The following numbers on jury selection were provided to the Commission by former District Attorney Michael Schlosser:<sup>7</sup>

|   |     |
|---|-----|
| Prospective jurors examined                                       | 616 |
| Number excused by court for cause                                 | 377 |
| Number of blacks excused for cause                                | 63  |
| Number of blacks accepted by State                                | 31  |
| Number of blacks challenged by defense for cause                  | 15  |
| Number of blacks removed by defense through peremptory challenges | 16  |

In addition to race, anti-communism played a role in jury selection during the state murder trial. Paul Bermanzohn recalled,

*Jurors were asked, do you think it is less of a crime to kill a Communist? At least one person answered yes. That it was less of a crime to kill a Communist than to kill a human being, presumably as an alternative. At least one person who answered yes to that question was on the jury. ... The foreman of the jury, a man by the name of Octavio Manduley, was known to be a right wing, anti-Castro terrorist who had been operating in Miami before moving to Greensboro and becoming a foreman of a jury.<sup>8</sup>*

As an indication of what they believed was the anti-communist sentiments of the prosecutors, the former CWP often point to the prosecutor's question to the jurors, "Do you think you could be fair in this case even though the victims were communists who stood for everything we *hate* in America?"<sup>9</sup>

Rick Greeson explains that line of questioning was intended to determine whether the potential juror harbored any biases that would affect his or her ability to be impartial:

*Anti-communism was very common and we only asked that question to make sure they were telling us the whole truth about whether they could be fair. <sup>10</sup>*

The *Greensboro Record* reported that Octavio Manduley, who fled Castro's Cuba, was accepted as a juror by the State even though he was "active in a group called 'the 20<sup>th</sup> of May' that opposed Castro and Communists," and said that he believed the CWP was like "any other Communist organization" in that "they need publicity and a martyr." The paper further reported that Manduley said he sees the Klan as "patriotic" and the Nazis as "strongly patriotic."<sup>11</sup>

Coman, however, denied that Manduley was the one that made those particular comments. "That was someone else. No one who said anything like that made it on to the jury," insisted Coman.

*Octavio Manduley, the Cuban exile, was not stricken by the prosecution because he was a college-educated chemist who worked at Lorillard. He would be the only one who could truly understand the testimony we would put on about neutron activation analysis that demonstrated who killed each victim. It was crucial evidence to our case and he was the only one who would know what that witness was talking about. He was NOT the juror who said that the Klan was a patriotic organization. No one who said those things actually made it onto the jury. In fact, he (Manduley) was very opposed to the Klan...<sup>12</sup>*

Because the jury selection transcripts are no longer available, it is not clear how many of the other 200 potential jurors would have been similarly suitable. Likewise, because the jury selection transcripts are no longer available and Manduley declined to speak to the GTRC, we cannot know for sure whether he was indeed the one who made the anti-Communist, pro-Klan/Nazi comments.

Nevertheless, the fact that they were reported as his words in the major daily newspaper led many in the community to believe it was true. This news naturally gravely concerned many in the community about the objectivity of the jury.

Meanwhile, the prosecutors had grave concerns of their own, as Coman recalled.

*We never excused one African American. I am angry, not so much at the African Americans for taking themselves out, but the upper middle class white community who were called to the jury box and didn't want to serve. They made up all kinds of excuses. They said they had already made up their minds because of the TV coverage. College-educated white people who might be more sympathetic and less threatened by the ideology of the Communists – those are the people we wanted on the jury and they wouldn't serve. They tend to be pro-death penalty, so the capital case doesn't knock them out. We had a jury consultant who was a psychologist sit down with us and help us think about what kind of jury we wanted. Once it was obvious that the middle class people were taking themselves out, we changed our strategy and stopped asking if they supported the death penalty and started going for young people. But in any case, there was no way we were going to get an entire jury made up of people sympathetic to the Communist Party no matter what we did.*

*The jury was not all white because the prosecution wanted it that way. African*

*Americans were either stricken because they were honest about their feelings about the Klan or they were afraid for their safety. They were stricken for cause because they were honest people who said they couldn't be neutral.<sup>13</sup>*

Defense attorney Robert Cahoon, attorney for Roland Wood, offered his own recollections of the jury selection to the GTRC:

*This was an unusual jury selection because they had six defendants, each charged with five first degree capital murders. There were so many challenges available to both sides....*

*The Defense had so many challenges that we could exclude anybody we had a feeling at all would be prejudiced. The State could do that and we could do that. And the result--I always want black people on my jury particularly in criminal cases because black people know how it is to be on the short end of the stick... But we had to excuse all black people because this was the Ku Klux Klan. If a black person didn't understand the Ku Klux Klan he just didn't understand life... (If a black juror acquitted a Klansman) he couldn't bear to go back into the black community and not be, you know, the pressure would be unbelievable. On black people.*

*There are two categories of people I've always liked to have on juries, one is black and the others the Jews. Jews have a sense of compassion in my experience ... But in this particular trial I wouldn't risk having Jew or a black person either one on the jury. If you are a Jew then your ancestors were kin folks, those with whom you identify have been slaughtered, tortured, murdered by Nazis ... I owe it to my clients to try and keep anybody off the jury that might be subject to have an overwhelming emotional commitment that would call out to find him guilty.<sup>14</sup>*

The prosecution's strategy notwithstanding, it is also true that they did not use all of their peremptory challenges. The state had three unused challenges, which understandably added to the suspicions of many that the jury was not fairly selected.<sup>15</sup>

### Why didn't the CWP testify in the state murder trial?

A question that seems to puzzle many in the community is why the grieving families of those murdered and those living with debilitating injuries would not wish to cooperate with the trial. People with different views and experiences with the justice system have profoundly different opinions on this decision.

Former members of the CWP have told the GTRC that the hostile and distrustful relationship between the CWP and the justice system led to their decision not to testify in the state murder trial. They said they did not have confidence in the District Attorney's good faith to win the case and felt that if they took the stand they would suffer more attacks on their politics, which could ultimately land them or their comrades in jail for rioting. Further, as described below, in May 1980 (during the preparation for the murder trial), five CWP members were charged by the District Attorney with engaging in a felony riot. The CWP felt that testifying in the Klan/Nazi trial might incriminate them or their comrades in their own riot trials. Perhaps most importantly, they believed that the other witnesses and the videotape of the shootings should have been sufficient without their testimony.

Paul Bermanzohn explained his reluctance to testify this way,



*...(T)he circumstances surrounding the first trial made it clear that the trial was not going to be an impartial examination of the alleged crime that was committed on the corner of Everitt and Carver. And there was abundant evidence that our view was correct; that what happened in the court room was going to be essentially an attempt to finish the job that was not finished on the street. The reason I say that is, the attorney who was prosecuting the Klan/Nazis, the District Attorney at that time, Michael Schlosser, if I am not mistaken; he made two statements to the press that indicated that his heart was not in this case. He said, the two things he said were "People around here say the Communist Workers Party got about what they deserved." That was one thing he said, not something you want to hear from your lawyer. The second thing he said was "I fought in Vietnam and you know who my enemies there were." ...*

*The jury selection for this first trial was astonishing and questions were asked of the jurors that should have not been allowed to be asked...*

*The third big thing on the first trial that convinced me we had no business going in there was that there was a witness list of some 273 names that was released that were going to be potential witnesses for the trial. Many of them were CWP leaders who had never set foot inside North Carolina. They could have no possible relevance to a case about allegations of murder. So all those things combined and the intense hostility led us to say that we are not going to testify at this trial and make it look like it was fair.<sup>16</sup>*

Schlosser told the GTRC that the often repeated quote about "you knew who my adversaries were then" has been misrepresented. He recalls that he was asked by the reporter if he had strong feelings about either the defendants or the CWP. He said he answered,

*I had no good feelings about any of them. I said my father fought in WWII and so I did not look kindly on the Nazis; I was a Catholic and so did not have good feelings about the Klan and also that I fought in Vietnam and you know who our adversaries were then. But the reporter chose to only quote the last part and did not print the first part of that quotation.<sup>17</sup>*

Schlosser further contends that this could not have been the cause of the poor relationship between his office and the CWP because the widows and their lawyers had been uncooperative from the very beginning.

Aside from their reasons for not testifying, there is also debate and conflicting evidence about whether the CWP were in fact even asked to testify in the murder trial. Floris Weston:

*Pardon me, I don't recall ever receiving a subpoena in the mail asking me to come testify; it was 25 years ago but I tell you what, if I'd received a subpoena I would still have it with the rest of my papers. The police never called me. They never asked for my statement. They never asked me to corroborate what was on the videotape and according to Judge Long (in his testimony at the public hearing), the video couldn't have been entered into the evidence unless there was eyewitness testimony to back it up. Well, they never asked me. I was there. I never had the opportunity to say anything in court, on the witness stand, during the first trial.<sup>18</sup>*

A letter to the GTRC dated September 1, 2005, from widows Marty Nathan, Signe Waller, Dale Sampson Levin and Floris Weston restated their recollection that they had never been

approached. “(I)t was only when once more attacked for our publicly stated choice not to testify that we began to ask each other, ‘Did anyone even bother to ask us?’ No.”<sup>19</sup>

However, the prosecutors counter that they did in fact seek CWP testimony, but were ethically bound to do so through the CWP’s lawyers, who arrived in Greensboro shortly after the shooting. The prosecutors say they met with CWP attorney Earle Tockman to try to arrange interviews. This is how they say they were able to arrange a meeting with Paul Bermanzohn in the months preceding the trial, “But all we got was a harangue.”<sup>20</sup>

Paul Bermanzohn commented in reply that,

*I told them (Coman and the other investigators present at the meeting) repeatedly that I did not see who had shot me. I did not even know I had been shot until I came out of anesthesia from my brain surgery ... By that meeting with Coman, I was fairly confident that the Klan and Nazi gunmen had been assisted by police agents. So I thought the people with whom I was meeting may well have been part of the group that had tried to kill me. I doubt I was very friendly but I do not remember delivering any harangues. In fact I was still very weak, unable to do any haranguing if I had wanted to ... I remember leaving the meeting with a certain bitterness. But the interview convinced me I had nothing to add to the proceedings in terms of what I had actually seen.*<sup>21</sup>

Jim Coman expressed frustration that the CWP now claim they were not contacted,

*Isn’t it incredible that now, 25 years later, they are having this realization, saying the lawyers never told them we wanted to talk to them? ... We absolutely told Tockman that we wanted to talk with the CWP! He would have to own up to that if he were here. That’s how we got to Paul (Bermanzohn). He’s the only one they would let us talk to, and he didn’t know anything. I think they did that on purpose ... If their clients didn’t know we wanted to talk with them, it is because their lawyers didn’t tell them that.*<sup>22</sup>

Prosecutors told the GTRC that if the CWP had agreed to meet they would have provided either an oral or written agreement not to use the information they provided against them in court (which is different from an agreement not to charge using other information). But because the prosecutors did not know what the CWP would say before they had ever entered into a discussion with them, the prosecutors say they could not have offered blanket immunity against all charges until after they had met with the demonstrators. Jim Coman commented that, “The CWP could have shot one of their own people for all we knew at that time.”<sup>23</sup>

If that proposal was indeed communicated to the CWP attorneys, the CWP attorneys apparently did not trust the DA’s word. In fact, CWP attorney Earle Tockman recently stated categorically that the district attorney’s office never reached out to the widowed family members or other march participants to seek their cooperation and testimony.<sup>24</sup> However, in his personal statement to the GTRC, Tockman was more circumspect,

*There was certainly a generalized feeling of hostility from the DA from the very beginning. He never reached out for our cooperation. It’s been a long time, but I really don’t recall them ever contacting me to say let’s work together on this thing...*<sup>25</sup>

Tockman did not recall arranging the meeting with Paul Bermanzohn. However, the riot charges as

the major obstacle to CWP cooperation stood out clearly in his memory.

*The idea of non-cooperation wasn't anyone's strategy in the beginning. It evolved as it became clear that they had no intention of seeking justice in this case. I mean, the fact that they brought these indictments (the CWP demonstrators for riot) a month before the Klan trial was starting – I mean you hardly need more proof than that. They were such bogus charges. If they were seriously interested in getting them (the CWP) to testify they never would have brought those charges to begin with.<sup>26</sup>*

Mike Schlosser objects to the assertion that his office was not sufficiently motivated to win the case.

*The prosecution did not take this case lightly. The team gave up all other cases and worked seven days a week, eight to 16 hours a day for a whole year on trial. There were extra resources from the AOC (Administrative Office of the Courts) and Governor's office. The number of pieces of evidence submitted to FBI was second to Wounded Knee and more than the JFK investigation.<sup>27</sup>*

Rick Greeson added:

*It was like we had five bodies entrusted to us, and we couldn't get a conviction. It stays on your conscience afterwards. That's why their failure to cooperate is so frustrating to us.<sup>28</sup>*

Coman added that if the CWP testified, in exchange the State would have ended up dismissing any charges against the person who testified. But that was a moot point for most of them, he said, since the widows and seriously injured (whom they most wanted to testify) were never even charged with anything.<sup>29</sup> However, this does not address the fact that the widows and those injured were concerned that information they provided might be used not against them but against their fellow demonstrators.

Two months into the trial, the DA's office obtained a letter from the N.C. Attorney General's office granting immunity to Tom Clark (injured), Frankie Powell (injured), Paul Bermanzohn (seriously injured), Conrad Powell, Rand Manzella (injured), Floris Cauce (widowed) and Jim Wrenn (seriously injured)<sup>30</sup> if they were to testify truthfully in the Klan/Nazi murder trial. Mike Schlosser could not recall when, or if, this offer was communicated to the CWP.

Ultimately, Tom Clark, a demonstrator who was wounded on Nov. 3, 1979, was subpoenaed and called to the stand. He refused to answer any questions and when cautioned that he would be held in contempt, replied, "I have nothing but contempt for this court." He was removed and jailed. Rick Greeson recalled,

*He wouldn't even identify the photographs of the dead people! We had to put names on these victims and he wouldn't do it. I made a fool of this whole prosecution team that day by putting him up because I felt like we had to try.<sup>31</sup>*

Meanwhile, survivors did attempt to make their voices heard, as on the first day of trial when two of the widows stood in the courtroom and began loudly decrying the trial and the government. Marty Nathan began shouting that the trial was "a sham," and that the federal government was responsible for the five deaths. Bailiffs grabbed her and taped her mouth shut as the judge ordered the jurors removed from the courtroom. Judge Long had Nathan brought before the bench and told her he would cite her for contempt of court. He ordered the tape removed so that she could speak in her defense. "I will never remain silent while the bourgeoisie brings fascism and world war on the heads of the American people,"

she shouted. When the jury was reseated and Judge Long again began his instructions, Floris Cauce dumped a vial of skunk oil on the floor, stood and also began shouting derision. The judge ordered the jury removed again. Long sentenced Cauce, as he had Nathan, to thirty days in jail.<sup>32</sup>

These recollections attest to the deeply adversarial relationship between the CWP and the justice system in general, and the state prosecutors specifically. Former CWP members say they were terrified and deeply suspicious of government involvement in their loved ones' deaths. So they lashed out. Prosecutors on the other hand say while they certainly had no sympathy for the CWP's political views or tactics, they saw themselves as charged with defending the rights of murdered people who could not speak for themselves. It was a matter of professional and personal pride, and they say they are frustrated and deeply emotionally affected by what they viewed as an unnecessary hampering of their ability to present the best case possible. As men who have labored all their professional lives in the justice system, the prosecutors told us that they simply could not fathom distrust so deep that victims would not try to use the system to their advantage.

Floris Weston offered this explanation.

*All I had was my gut and my belief that something was wrong and that someone had helped this to happen. So what else was I supposed to do but to cry out, make charges, call for trials, call for special prosecutors. I didn't have any facts. I didn't have any transcripts.*<sup>33</sup>

Marty Nathan expressed a similar sentiment:

*My life from then on focused on how this could happen even as the avenues to finding out what had happened were cut off ... six demonstrators were arrested for felony riot, threatening them including (two other protestors) the Blitzes, who had two small children, each with 20 years in prison. The papers and the courts were filled with stories describing how foreign and threatening we the victims were. I knew that my friends and I were neither foreign nor threatening, just jobless, impoverished and grieving. I went to bed every night not able to sleep, fearing that my small family's house would be fire-bombed or the windows would be shot into.*<sup>34</sup>

More than anyone else, prosecutor Jim Coman blamed the CWP lawyers.

*I appreciate (the CWP's) fearful mindset and distrust of the law, and believe me, I have done lots of soul searching over this. I've tried to put myself in their shoes ... All I can say is, when those (CWP) lawyers showed up the problems started for us. A wall went up that we were never able to get past it.*<sup>35</sup>

Michael Schlosser agreed.

*Several days after the shooting and after the CWP attorneys were in place, I met with Signe Waller to give her Jim's glasses and wedding ring. The meeting seemed agreeable. Perhaps if the attorneys had not intervened the relationship could have continued to be agreeable. That was "reaching out" that we have heard so much about, while the embers were still hot in the fire ... It seemed like the right thing to do ... We can't address their paranoia. Our position was that some of those (CWP) people were involved in wrongdoing, and would be prosecuted for that. But we made a decision that we would not prosecute any widows or anyone seriously injured. We did not consider Nelson (Johnson) seriously injured.*<sup>36</sup>



## The effect of the CWP absence on the verdict

Almost as soon as the verdicts were in, the prosecutors pointed to the failure of the CWP, especially the widows, to testify at the murder trial as a major cause of the acquittal of the murder defendants.<sup>37</sup> This is because, they argue, the State was not able to provide any counter to the defense's portrayal of the demonstrators as aggressively provocative Communists or their account of the shootings as self defense. Prosecutors needed, in Schlosser's words, to "give life" to the still photographs of the slain victims.<sup>38</sup>

Rick Greeson:

*Without them (the CWP widows) we weren't able to humanize these people. By not only refusing to testify and humanize themselves and their loved ones, but by also causing these disruptions (in and outside the courtroom), the CWP made themselves into cardboard cutouts, and cutouts of Communists at that.*

Jim Coman:

*These highly educated people ...want you to believe that they didn't know they could pick up the phone and call us, that they didn't understand that their lawyers were in communication with us and that we couldn't talk to them directly? You know better than that! They didn't want us to win that case because if we did, that would mean that the system works. As imperfect as it may be, the system works, even for them. And they didn't want that. The Cause was more important.*<sup>39</sup>

The other reason the CWP might have played a useful role in the trial is as witnesses who could counter the defendants' testimony that they shot in self-defense or that some of the people who were shot down were unarmed and posed no threat to any of the caravan members who attacked them. The demonstrators who struck the caravan cars could have testified that they did this because they believed the cars were swerving to hit them.<sup>40</sup>

However, there were other witnesses to the event available including media personnel and Morningside residents, who could (and did) testify and authenticated the several videotapes that were made of the shooting. In fact, the videotapes were the best evidence, despite the blocking of some of the camera views by vehicles, and the cameramen who shot that footage could have been called as witnesses. There was no one person on the scene or in the CWP who had a wide-angle view of what happened and most witnesses' testimony would have been narrowly focused on just what they saw as they ducked and dodged. In fact, subsequent statements from many of the CWP members about what happened after the caravan stopped demonstrate that they would have yielded little firm evidence of what transpired.<sup>41</sup>

The most panoramic view was recorded by the several photographers who were on the scene and each of them was a competent and available witness; all were in fact called by the State. Unfortunately, even these journalists also had only a limited view from the opposite side of the street and could offer no testimony as to what happened on the far side of the truck where defendants said CWP were firing at them.

In addition, arguably the CWP's testimony need not have played such a pivotal role in "humanizing the victims." Although no substitute for a widowed spouse, also available to the State were grieving family members, former classmates and co-workers who could have testified to the victims' character. Many family members were deeply embittered toward the CWP for their loved ones' deaths and may well

have taken the stand if called to do so. However, no such witnesses were called by the State.<sup>42</sup>

In addition, it is not clear that the jury would have been sympathetic to the avowed communist widows, if as Greeson put it, “Anti-communism was very prevalent at the time. There was no way we were going to get an entire jury made up of people sympathetic to the Communist Party.” Indeed, CWP members did testify in the federal criminal trial and their testimony did not change the jury’s disposition toward the victims or the defendants’ successful claim of self-defense.

Further, calling the CWP members to the stand would also have made them subject to cross-examination, a possibility that defense attorney Bob Cahoon viewed as favoring the defense:

*I felt all the time that the thing I was most wanting to do was get those CWP members on the stand so that I could cross-examine them. Because they had made a multitude of threats and they put out all of these writings in which they were strategizing saying they were going to physically exterminate the Klan and would say things like the police, and the city and everyone in a government position was in a conspiracy to support the Klan in order to divide the working class and beat down poor people. Well I wanted to cross-examine about all these threats they had made and I wanted to examine about where they were standing when the shots were fired. I thought that we would make a lot of hay cross-examining if they would show up. I don't believe that the State would have gained any ground by that, they would have been very vulnerable to cross-examination.<sup>43</sup>*

### The State’s failure to call Dawson or Butkovich as witnesses

Another lingering question about the murder trial is why the prosecutors did not call government intelligence sources Eddie Dawson or Bernard Butkovich as witnesses, which the CWP saw as evidence of collusion to cover up any government involvement in the shootings.

Prosecutors Coman and Greeson say they thought Dawson would hurt their case. They believed Dawson would “ingratiate himself to the Klan” and would not counter defendants’ claim that there was no plan. They felt he was a highly unpredictable witness and therefore too risky to call to the stand. Likewise, Butkovich was also a hostile, difficult witness. His “seeming lack of candor,” as Coman put it, was something that the defense could exploit. He would not help their case. Coman believed:

*Were there mistakes in the GPD? Certainly! We didn't try to sugarcoat that. When we met with Dawson the first time and he threatened to get up on the stand and tell all kinds of things about the GPD if we didn't quash his subpoena, and I said, “I don't give a damn what you say, but it better be the damn truth. We ain't hiding anything from the jury.” We were the ones who brought out that Dawson was an informant when we called Cooper as our first witness! We weren't hiding that.<sup>44</sup>*

However, while it is true that Coman did ask Cooper about Eddie Dawson’s activity as an informant when he called Cooper to the stand, the questioning was quite limited, quoted here in its entirety:

*Coman: Now just tell the ladies and gentleman of the jury, if you would please sir, what did you do upon arriving at work on November 3 at approximately nine o'clock?*

*Cooper: ... (Sgt. Burke and I) proceeded south to the intersection of U.S. 220 and South Elm to the residence of an individual where I had information from an informant by the name of Eddie Dawson, that the Klan was going to meet there that*

morning.

*Coman: You had an informant by the name of Eddie Dawson?*

*Cooper: Yes sir.*

*Coman: Who was Eddie Dawson?*

*Cooper: He is a citizen of Greensboro who I knew to be a member of the Klan.*

*Coman: How many times had he given you information?*

*Cooper: Several times prior to this day.*

*Coman: What was that information regarding?*

*Cooper: Different things, information about activities at different meetings he had attended, information about meetings he had attended in relation to the Klan and their activity.*

*Coman: And this is why you were going to the house on Randleman Road?*

*Cooper: Yes it is.*

*Coman: Now would you please continue?<sup>45</sup>*

This cursory probing did little to expose the amount of discussion and information that Dawson was party to (and that he communicated to the police). However, under cross-examination, presumably because they wished to establish Dawson as the one who led their clients to this confrontation, defense attorneys did establish that Dawson had met with or called Cooper on three occasions prior to November 3<sup>rd</sup> (but the attorneys did not inquire about the information Cooper and Dawson discussed).<sup>46</sup>

In addition, Cooper said on the stand that he couldn't remember if Dawson had told him that he himself (Dawson) had seen the guns at the Klan and Nazi gathering point, or if Dawson said someone else told him about the guns. As a result, the information about Dawson telling Cooper about the guns was disallowed as hearsay.<sup>47</sup>

When Dawson met with prosecutors to ask them to quash his subpoena, he threatened to "blow the lid off the GPD" if he took the stand. Dawson said what he meant by this was that when he met with Cooper and Talbott, Cooper had told him there was a new starting point for the parade and that he should get a copy of the permit to find out the new route.<sup>48</sup> This assertion is supported by Talbott's recollection that after the meeting with Dawson, Talbott told Cooper, "we obtain information from informants, we don't give information."<sup>49</sup>

Dawson presented a risk to anyone who considered calling him as a witness. He was clearly a mercurial personality with his own agenda. It is standard practice for trial lawyers not to call witnesses to the stand unless they know 1) exactly what the witness will say, and 2) that the testimony will be helpful to their case. "You don't put a witness up just to see what they will say," Greeson pointed out.<sup>50</sup>

However, judging from their outbursts in court, the CWP could also be reasonably considered "loose cannons" and also clearly had their own agenda, yet the State was very anxious to for them to take the stand. Rick Greeson explained the difference this way:

*We could have called (Dawson) just to see, but we couldn't risk it. The same with Tom Clark – we thought he probably wouldn't talk, but it was a calculated risk. If we hadn't tried, then people would say that we never called any of the CWP.*

If Dawson had been questioned on the stand about what the Klan's plans and discussions were – that Klansmen had asked about bringing guns and discussed getting into "street brawls" – he may have revealed the extent of police knowledge of these discussions. However evidence of police foreknowledge would have been of little use to the murder trial the State was prosecuting. Further, Dawson may have testified only of plans to heckle

and throw eggs. This would have also been of little use to the State's murder case against the Klan. We further note that Dawson did eventually testify in the second trial and neither "blew the lid off" the GPD nor noticeably undercut the defense's argument for self-defense. Likewise, Butkovich also testified in the civil trial and was not found liable (see section below on the civil trial).

Was the State's failure to call Dawson and Butkovich a reflection of reluctance to reveal the fact that Dawson had provided information regarding the threat of violence, thereby potentially implicating the police, or was it a prudent and even standard strategic choice to avoid difficult and unpredictable witnesses? We do not know the answer to this question, yet we note that the decision clearly added to the overall feeling of suspicion that the CWP and many in the community had about the willingness of the DA's office to investigate police wrongdoing. Within a context in which the state's role in the killings was viewed with suspicion, it is understandable how this decision raised even more doubts.

The murder trial aside, questions raised by the DA's decisions to drop the conspiracy charges and not to call Dawson and Butkovich as witnesses reflect an underlying concern that government wrongdoing was being covered up. Questions linger about the existence of an adequate investigation into potential criminal charges relating to police involvement. DA Schlosser responded to the allegation this way:

*We would have brought charges of conspiracy involving the police and the Klan if there had been a crime. We could not show – well, we didn't believe it happened – that there was an agreement. There was no evidence at all of an agreement between the police and these groups to commit a crime. The question of what the police did or didn't do, the proper forum for that was in civil court. And that's where it ended up.<sup>51</sup>*

This difference in perspectives between the DA's office and the victims' families addresses the fundamental issue with the role and scope of the murder trial and how it often differs from our community sense of justice. CWP members and their allies wanted the trial to investigate the wider role of institutions other than the Klan and Nazis, but that information was not relevant to the murder case against the five Klan and Nazi defendants indicted for murder. Many felt that there were issues that were not fully examined and, therefore continued to linger in the minds of many.

On the first day of jury selection, a group of CWP members and supporters engaged in a scuffle outside the courtroom as they tried to gain entrance after the judge had ordered the doors locked, resulting in some arrests. Elaborate security measures were taken to prevent disruptions and secure safety of court officials; spectators and reporters entering the courtroom were searched, and surrounding offices were searched for explosives. The "tactics" of the CWP to interrupt and denounce the trial, such as those used by Nathan and Cauce on the opening of the trial, stood in sharp contrast to the clean-cut, "respectful demeanor" and patriotism of the defendants to the conservative jury. One reporter notes, "While sympathy for victims of a murder usually can have a profound emotional impact on a jury, the CWP's performance plus testimony that they were looking for a martyr neutralized that hold for them."<sup>52</sup>

### FBI testimony on the origin of shots

A critical question in the trial was the issue of whether caravan members acted in self defense. A key witness in providing evidence on this question was Bruce Koenig, head of the FBI's Video/Audio Signal Processing Unit. Koenig's testimony used a controversial and relatively untested analysis of sound waves produced by gunshots recorded on the TV journalists' footage. Koenig analyzed the



“sound fingerprint” of the shots to determine the amount of echo and calculate the likely location that would have produced such a pattern.

The first two shots, Koenig concluded, came from the Klansmen at the front of the caravan. This testimony coincided with the video footage that showed black smoke hanging in the air and Mark Sherer waving his powder pistol out of the window of the pickup truck. Brent Fletcher testified that he fired his shotgun in the air or in the ground also from that same area, which was confirmed by one of his passengers. A spent shotgun shell was also found in this area.

However, the third, fourth and fifth shots had no echo. As a result, Koenig inferred the possible locations least likely to produce an echo. Given the uncertainty involved, this description of the “possible locations” is significantly different from pinpointing a precise location for the three controversial shots.

In addition, Koenig contradicted himself repeatedly in his calculations of the likely origin of these shots. During the state trial, he first calculated the shots to come from the front of the caravan (where the Klansmen and Nazis were). When Koenig returned to the stand after a lunchtime recess, however, the defense attorneys pressed him to be more specific about where the shots had been fired. Koenig outlined an area north of the intersection, in front of the pickup truck □ precisely where the defendants said they first saw demonstrators firing guns and where Toney struggled with Waller over the shotgun. In this later testimony, Koenig had not only changed the size of the area in question but increased the probability that the three shots had been fired from the smaller area north of the intersection to 90 percent.<sup>53</sup>

Jim Coman recalled Koenig’s change in testimony in the state trial with some emotion.

*I was outraged at what he did. I wrote the FBI and told them Koenig was a perjurer and should be disciplined, and I never even got a letter back.<sup>54</sup>*

As confusing as this all sounds, it must have been infinitely more so to listen to such technical testimony in person. Yet both defense and prosecutors nevertheless saw the FBI sound analysis of the shots as key to the self-defense argument for the Klan and Nazis, and the basis for their ultimate acquittals. Jim Coman recalled,

*Even if the Klan claimed self-defense because of provocation by the CWP banging on cars, we believed the response was grossly excessive. The Klan were the ones who introduced shooting into the equation, so they were responsible for the firearms being used. The CWP had guns too, we knew that. But they didn’t fire first. But that’s where we got screwed by Koenig ... In my view, he lied to us. He told us before the trial that the first two shots happened at the front of the caravan where the Klan was. But he winds up changing his testimony ... Koenig gets on the stand and draws a big box around the entire caravan and says this is where shots 3, 4 and 5 came from. Then when we come back from lunch, he all of a sudden draws this little bitty box in front of the truck in the intersection and said 3, 4 and 5 came from there, where the CWP were. But you can’t see anything on the video because the pickup truck is in the way. So Bob Cahoon can then say that shots 1, 2 from Mark Sherer at the front of the caravan, which you can see on the video – they didn’t mean anything. They were “friendly shots.” They can say, “Our guys were shooting from the back of the caravan because they (the CWP) were firing back from shots 3, 4 and 5.” And that’s how they fell on this defense theory. Before that, it was all this patriotism stuff, not self-defense. I was flabbergasted. We were stuck with what he said because we couldn’t rebut him (because the CWP didn’t testify that they had not fired those shots).<sup>55</sup>*

Defense attorneys and prosecutors alike ultimately were disappointed with Koenig (see federal trial below). Said prosecutor Rick Greeson,

*Every one of them (the defendants) had already said on the stand that “we had to shoot back at the CWP.” But they didn’t have any evidence for it. In fact, they said they were firing back at a black man with a shotgun, and we were able to use the video – which we got admitted (as a result of letting the defense use Koenig as their witness) – to show there wasn’t any guy there. So from our perspective, the introduction of the video was a big help, but they were going to get self-defense up there no matter what and the jury was going to find for that. In retrospect, it was the predominant feeling of the jury no matter what we said.*

We find Koenig’s later claim in the federal testimony (see discussion below) that his testimony changed because of an incomplete map is not credible. Common sense dictates that it is impossible that he could have done acoustic analysis without an entire schematic of the area with precise location of all buildings (including their height and material), location of cars, trees and anything else that would have produced an echo. If he did his acoustic analysis without a complete map of these features, it would have been incompetent. Certainly the prosecution should have emphasized these inconsistencies to the jury.

Taken even in its most favorable light, Koenig’s internal inconsistencies make it impossible to know which version of the analysis is most credible. In addition, his methodology has since been called into question by other scientists.<sup>56</sup> We are not competent to judge the rigor of the scientific validity of his method, or that of his critics’, or of the technique overall. However, we find that the inconsistency – if not outright falsehood – of Koenig’s testimony make it of little use as credible evidence.

### The self-defense claim

As stated in *State of North Carolina v. Joe Mark Herbin*, 298 N.C. 441, 259 S.E.2d 263 (1979), “a killing would be excused entirely on the ground of self-defense ... if it appeared to the defendant and he believed it to be necessary to ... save himself from death or great bodily harm; and second, the circumstances as they appear to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.” Additionally, the use of self-defense “rests upon necessity real or apparent; and, in the exercise of his lawful right of self-defense, an accused may use such force as is necessary or apparently necessary to protect himself from death or great bodily harm.”<sup>57</sup>

So, in North Carolina, self defense – in this instance, the use of fatal force – is available to the innocent victim of an attack that places the person in imminent fear of death or serious bodily injury. Self-defense is never available to one who has, by his or her action, provoked or caused the confrontation. In *State of North Carolina v. George Junior Jennings*, 276 N.C. 157, 171 S.E.2d 447 (1970), the U.S. Supreme Court explained that “the requirement that a defendant must be free from fault in bringing on the difficulty before he (may utilize) the doctrine of self-defense ordinarily means that he himself must not have precipitated the fight by assaulting the decedent or by inciting in him the reaction which caused the homicide.” Usually, determination of the defendant’s role in bringing on the conflict hinges on his conduct at the time and place of the killings as well as in a time and place closely related enough as to be reasonably regarded as contributing to the difficulty.<sup>58</sup>

Moreover, the focus of self-defense is on the person who is in imminent danger of death or serious bodily injury. The defendant’s conduct must be judged by the facts and circumstances as they appeared to him at the time he committed the act, and it should be ascertained by the jury on the evidence and proper instructions of the court, whether he had a reasonable apprehension that he was about to lose his

life or to receive enormous bodily harm.<sup>59</sup>

## Jury instructions

Based on this case law in effect at the time (see above), Judge Long instructed jurors that in order to excuse the killings on the basis of self-defense, the defendant needed to establish:

*First, it appeared to the killer and he believed it to be necessary to shoot the person killed in order to save himself from death or great bodily harm, and*

*Second, the circumstances as they appeared to the killer at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you the jury to determine the reasonableness of such a belief from the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the number, size and methods of those who may have attacked the killer; **the fierceness of any assault upon him and whether or not the deceased person had any weapon in his possession.** (emphasis added)*

*The third thing necessary to excuse a killing on the ground of self-defense is that the killer was **not an aggressor**. If he voluntarily and without provocation entered the fight, he was an aggressor.*

*The fourth thing required is that the killer did not use excessive force, that is more force than reasonably appeared to be necessary to the killer at the time. Again, it is for you, the jury, to determine the reasonableness of the force used under all the circumstances as they appeared to him at the time.*

*The **burden is on the State** to prove beyond a reasonable doubt that the Defendant or the person with whom he was acting in concert, **did not** act in self-defense in shooting the deceased. (emphasis added)*

*However, if the State proves beyond a reasonable doubt that the defendant, or the person with whom he was acting in concert, though otherwise acting in self-defense, **used excessive force or was an aggressor**, though he had no murderous intent when he entered the fight, the defendant would be **guilty of voluntary manslaughter** (emphasis added).<sup>60</sup>*

Therefore, to be acquitted of all charges, each defendant who used a deadly weapon to kill had to satisfy all four elements.

The judge further instructed that, if a bullet is fired with the intent to kill one person but kills another, the law implies that the intent to kill is transferred to the actual (inadvertent) victim; that is, it would be an intentional and not an accidental killing. “Likewise, if a bullet is fired in proper self-defense at one person but kills another, the killing would not be unlawful.”<sup>61</sup>

In addition, to be acquitted of all charges, each defendant who used a deadly weapon to kill must satisfy each element of self-defense for every victim for which they were charged. There is a legal term of “imperfect self-defense,” which requires that only the first two requirements must be satisfied. A jury finding of imperfect self-defense, in which a defendant was an aggressor and used excessive force, would still leave open the charge of voluntary manslaughter.

Likewise, the Judge's instructions concerning "Engaging in a Riot" included a discussion of self defense and defense of third parties. During that discussion, the Judge told jurors that a person "has a right to go to the defense of another if he has a well-grounded belief that an assault or physical attack is about to be committed upon such other person" and that "it is his duty to interfere to prevent such an assault or attack." But the person going to the defense of another who uses excessive force or coming to the aid of a person who was an aggressor may be found by a jury to have imperfect self-defense and, therefore, be found guilty of voluntary manslaughter.

### Verdicts

Jurors took at least 12 major votes over six days (jury deliberations began on 11/10/80)<sup>62</sup> before reaching a unanimous decision on Nov. 17, 1980, that the defendants were not guilty of either murder or riot. The Klansmen and Nazis were acquitted on all counts. Juror Robert A. Williams told the press that ultimately, their decision turned on the question of self-defense. "From the very beginning, it was the Communists who did the attacking," Williams said. "It was the Communists who started beating the cars with sticks. From then on, it was a case of self-defense."

Another juror, 22-year-old former Marine Robert Lackey, said five members of the 12 juror panel initially "contended they (the Klan/Nazis) had to be guilty of something." He said he held out until the end for a guilty verdict. "I was one of the last to contend they were guilty," Lackey said. "I held out for voluntary manslaughter." Lackey said the claim of self-defense was a critical factor because of evidence that the Communists began hitting the cars of Klansmen and Nazis who drove up to the site of the rally. "The CWP struck the cars first," he said. "Then the first shot was fired, the Communists produced weapons and the Klan started shooting. Once the ball started rolling, it was a snowball effect."<sup>63</sup>

Twenty-five years later, Lackey reflected on the murder acquittals this way, "Well, I always thought they were guilty of something, you know, not just to say Not Guilty across the board, because of what they did. But you know, with the facts that we had – and we saw only one side of the thing since there was no people from the CWP to come in and state their cause, and what they did and why they did it – it was probably just the easy way out was to say Not Guilty, let's go home. We'd been there long enough. But I've said many times I shouldn't of went that way, I should've just hung the jury and said, this ain't right, these guys did something that's not the way that we should behave in this area, in this country, in this nation."<sup>64</sup>

Some jurors' comments following the verdict, however, reflected that their decision was likely colored by the political disposition and attitude of the CWP. Diane Jordan, a juror and the wife of a sheriff's deputy, said that immediately afterwards that she was "still a little paranoid" and frightened of the CWP. She said "I worry about what's going to happen to Greensboro because of the shootout, and I'm really worried about the spread of communism."<sup>65</sup>

Lucy Lewis, a former CWP member recalled the reaction to the verdicts.

*When the not guilty verdict came out it was horrible and sickening but not a total shock. A lot of people were surprised, a lot of students were surprised, a lot of community people were surprised. But there was also this element of "Well, you know, maybe they were to blame for what happened." But there was a lot of spontaneous response. I know that students here at UNC came out on the streets, and I know that groups were formed in Greensboro of church people and community people, and that those groups who had been tracking what happened were really upset by the verdict and came out and had vigils and rallies and organized.<sup>66</sup>*



One prominent community member recalled,

*I was real upset about it and spoke to a very highly educated person. Not a black person, this was a white person, you know. And I said, 'I can't believe that . . .'*

*He said, 'They should have turned them loose, them old communists around here doing all these things. That's the problem,' he says, 'these communists, that's the problem.'*

*And, it just shocked me; it took me a long time to get over that. But that was the feeling, I found out later, of several people that 'these communists, you know, they nothing but communists disturbing everything.' And they goaded them all, you know, that type of thing. It just – it was a terrible time. It was an absolutely terrible time.<sup>67</sup>*

## CWP criminal charges

### Incitement to riot

Upon seeing the bodies of his dead and wounded friends at the intersection of Carver and Everitt streets on Nov. 3, 1979, Nelson Johnson began to make an angry speech to the assembled Morningside residents, “We declare war on the Police Department, war on Jim Melvin, war on the city of Greensboro ...”

Given the hostility toward the police, officers on the scene reported that they felt Johnson’s words presented a danger to them, because they believed Johnson was encouraging the growing crowd to attack the outnumbered police.

Officer Bell, one of the officers on the scene, recalled Johnson’s words this way,

*(A) black male (was) waving his arms and yelling to the crowd in front of us to, 'Kill the Police. Mayor Melvin and the Police set this up. They told the Klan where we were so they could gun us down. They let them slaughter us on purpose. Declare war on the Police. Kill the pigs. Arm yourself.'<sup>68</sup>*

Another officer on the scene, Lt. Daughtry (the officer with his foot on Johnson’s neck), recalled Johnson’s words as, “Go home and get your guns and attack the police.”

Lt. Spoon recalled,

*I can't remember exact words but he was talking in terms of the police allowed them to get shot. So 'You all go home and get you'all's guns and come back and we'll kill us some police officers.' Those were not his exact words but I did hear him say 'go get your guns.' Yes, sir ... the way I worded it would be the gist of it – the way I understood it. I can testify under oath that he talked about guns.<sup>69</sup>*

The footage of Johnson’s speech, however, shows no such statements. Nevertheless, Johnson was arrested for incitement to riot. No riot in fact occurred as a result of Johnson’s speech, making any charge for incitement against him unfounded and the charge was later dropped.

### Interfering with an officer

Willena Cannon was arrested at the scene of the shooting for interfering with the arrest of Nelson

Johnson. She intervened because she said one of the arresting officers had his foot on Johnson's neck as they tried to subdue him, and she believed he was in danger of being killed. We cannot know whether or not Johnson was in real danger of bodily harm during his arrest, but Cannon's fear for his safety can be seen as reflecting a larger reality for people of color who often face disproportionate threat of bodily harm from police during arrests. While not every arrest poses a threat of harm, the lived experience of racial profiling and police brutality often provokes bystanders to interfere with arrests that they believe pose a danger to the person being detained.

Charges against Cannon were later dropped and she was released after five hours.

In addition to Johnson and Cannon, other demonstrators arrested were Rand Manzella, for being "Armed to the Terror of the Public" for carrying Sampson's gun when police arrived, and James Carthen for disorderly conduct.<sup>70</sup> Both were released on bond of \$50.<sup>71</sup>

### Riot

In May of 1980 a Grand Jury issued indictments for Johnson and four other CWP members, Lacy Russell, Rand Manzella, Alan and Dori Blitz, as well as Percy Sims for engaging in a felony riot. Bail was set at \$15,000 for Manzella and Johnson, \$5,000 for Russell, the Blitzes, and Sims.<sup>72</sup> However, Sims' bail was later reduced to \$1,000 because he was not a member of the CWP.<sup>73</sup> Sims was charged for verbally challenging caravan members to get out of their cars as they drove through the intersection of Carver and Everitt, Russell was charged because he struck one of the cars in the caravan with a piece of firewood, Johnson was charged because he engaged in the stick fight, the others were charged for firing shots during the melee.<sup>74</sup>

Assistant District Attorney James Knight asked the court to raise Johnson's bail from \$15,000 to \$100,000 because of Johnson's actions after Nov. 3, 1979, to disrupt City Council meetings, hold demonstrations in front of the police department,<sup>75</sup> disrupt a press conference by Gov. Jim Hunt in July 1980 and cause a disruption on the first day of the murder trial.<sup>76</sup> The transcript of the bail hearing documents Knight's argument:

*Mr. Knight stated that Mr. Johnson might say that he is not legally responsible for the death of five people on November 3, 1979... but he's morally responsible ... Whether or not Mr. Johnson is to be detained in the Guilford County Jail is not up to our Office. It's not up to the Court, it's up to him. It's up to him. Can he regulate his conduct so as to respect the rights of others? We hear a lot from him about his rights, but what about the rights of other people to be free from intimidation, the imminent danger of being killed, the presence of violence any time he is supposedly exercising his First Amendment rights? He's not exercising his First Amendment Rights, he's going way beyond that. What he's doing is engaging in conduct which is dangerous. Bring people to the point of frenzy, precipitating and then quietly backing out of ... precipitating situations where violence is imminent and on November 3rd it happened, and people died. And we don't want it to happen again.<sup>77</sup>*

Many have questioned the proportionality and rationale for this high bond and questioned whether it was in effect a form of preventive detention. The \$100,000 bond is especially striking given that it was twice that of the murder defendants.<sup>78</sup> The highest bond on the indicted Klan and Nazi members was \$52,000 (for Fowler, who was a flight risk) and was as low as \$4,000 (for McBride, who was a minor).

In determining the conditions of a defendant's pretrial release, the Magistrate is directed to consider, based on the available information: (1) the nature and circumstances of the offense, (2) the weight of

the evidence against the defendant, (3) the defendant's family ties, employment, financial resources, character and mental condition, (4) whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision, (5) the length of his residence in the community, (6) his record of convictions, (7) his history of flight to avoid prosecution or failure to appear in court proceedings, and (8) any other evidence.<sup>79</sup> Preventive detention is not supposed to be one of the considerations for bail or other pre-trial release conditions.

Michael Schlosser emphasized the District Attorney doesn't set bond, although he/she can make recommendations to the Magistrate. Schlosser explained why he did so in the case of Johnson, whom Schlosser believed posed a danger to the public, "I held him if not legally, then morally responsible for Nov. 3, more so than any other person."<sup>80</sup>

Guilford County District Court Judge Elreta Alexander-Ralston ultimately dropped Johnson's disorderly conduct and resisting arrest charges and set bail at \$200 for the remaining contempt and felony riot charges.<sup>81</sup>

At the same time, murder defendants filed motions to dismiss murder charges because they believed that the CWP wasn't charged in the case and the defense attorneys claimed Schlosser was engaging in selective prosecution.<sup>82</sup>

All charges related to Nov. 3 were all eventually dropped by DA Schlosser following the state acquittals:

*The "gunslingers" (defendants for murder) have been acquitted. There is no useful purpose served by prosecuting the "stick people" (the remaining 10 passengers in the caravan charged with aiding and abetting). In the "sense of evenhandedness," likewise, no meaningful purpose is served in proceeding in the prosecution of the members of the CWP who have been indicted for rioting ... There is no perfect decision I can make, but I feel it is the best decision given the circumstances.*<sup>83</sup>

## FINDINGS: STATE CRIMINAL CASES

### Jury selection

Flaws in the system, which amounted to institutional racism, undoubtedly affected the jury makeup by allowing potential jurors to be removed on the basis of their race and drawing potential jurors from sources that under-represent the poor and people of color: tax rolls, voter registration and driver's license records.

Because it is an inconvenience, people of all races are often reluctant to serve on a jury and go to great lengths to exhibit bias for which they hope they will be excused from duty. In addition, in this case, many potential jurors expressed fear to serve on a jury that might convict Klansmen and Nazis, for which they might suffer retaliation.<sup>84</sup> Further, because the case was a capital murder case, using the qualification that potential jurors must agree with the death penalty also removed people who were less politically opposed to the CWP's views. These factors all undeniably further skewed the representativeness of the panel and affected the outcome of the verdict.

### CWP testimony

The widows have told us that it was because of their fear and distrust of the legal system that

they did not testify in the murder trial. With the evidence available to us, we cannot determine with certainty the extent of the prosecutors' efforts to engage the CWP or whether these efforts were in fact communicated to the CWP by their lawyers. However, if the decision was made not to testify, it stands to reason that the CWP must have known that they had the opportunity to do so. What is clear, however, is that outstanding felony riot charges against some of their fellow CWP members exacerbated the widows' fear and mistrust and were therefore a major impediment to the investigation and successful prosecution of the case.

We can only speculate on what impact the widows' testimony would have had. However, we note that they did, in fact, testify in the federal trial and this did not ultimately change the jury's finding of self defense.

### **Shots fired and self-defense**

The origin of the first two shots fired on Nov. 3, 1979, is not disputed by any version of the FBI acoustic evidence. Indeed, caravan members admitted to firing these shots, and as Rick Greenson put it, "introducing guns into the equation." Under the circumstances – a caravan of armed Klansmen driving slowly through a black neighborhood where a "Death to the Klan" march was assembling – we find it extraordinarily disingenuous to claim these two shots were intended as "non-hostile" or "calming" shots, especially when they were accompanied by shouts of "Show me a nigger with guts and I'll show you a Klansmen with a gun!" and "Shoot the niggers!" As seasoned police officer Sgt. Michael Toomes put it, "All shots are aggressive as far as I'm concerned."

After these shots were fired from the caravan, and witnesses reported demonstrators fleeing, it seems reasonable that any subsequent shots fired by demonstrators could be considered by demonstrators as defending themselves.

Yet these first two shots, although undisputed, somehow were discounted in the trial. Instead, the focus turned to shots 3, 4 and 5, for which the shooter, origin and target were unclear.

In any case, we find the FBI testimony itself was inconclusive evidence that the defendants acted in self-defense. Nonetheless, the initial FBI testimony that the shots came from north of the intersection (where some demonstrators were located) was convincing to jurors. This may have been because the testimony of the defendants that they were returning fire from demonstrators went unanswered – in part because there was no testimony from the CWP to deny that they shot at the defendants. The view of the television cameras was obstructed and did not show if shots 3, 4 and 5 were fired at or by the defendants. The jury was also probably inclined to view the CWP as violent because of the defense's introduction of aggressive rhetoric in rally fliers and the demonstrators' use of sticks to strike the Klan/Nazi cars; there also was a general environment of distrust of Communists.

We find that a commonsense understanding of self-defense would dictate that because the Nazi/Klansmen in the caravan came to Greensboro expecting to provoke a fight, self-defense cannot be invoked by them as an excuse for the fact that a fight did ensue. Further, the fact that four of the five demonstrators shot to death (one of whom was shot in the back) were unarmed seems to us to make the defendants' argument and the jury's decision of self-defense that much more difficult for the community to understand.



## CWP charges

Although ultimately cleared, the cumulative impact of arresting traumatized demonstrators on the scene, the pending charges and high bail undeniably had a chilling effect on the investigation of the killings by intimidating the CWP from giving statements and adding to their suspicion and sense of persecution. Further, bail was abnormally high for some CWP members and disproportionate to their alleged crimes – Johnson’s bail on riot charges was twice the highest amount set for the Klan/Nazis charged for murder (whose bail, according to press accounts, ranged from \$4,000 - \$50,000).<sup>85</sup> The GTRC believes this was an attempt to curtail the CWP’s outspoken protests following the shooting, which, although discomforting and disruptive to some of the public, were not dangerous.

## Failure to investigate government involvement

The GTRC is satisfied that decisions to drop conspiracy charges and not to call Dawson and Butkovich were not, in themselves, indicative of any cover-up. However, we do find that inconsistencies in the GPD’s own reporting, the flawed Internal Affairs Division report, and the false statements by the city manager (see Police Investigations), appear to indicate reluctance to vigorously investigate the government’s role in the tragedy. Certainly there was a deliberate attempt by the city manager to mislead the public. It is this lack of transparency and good faith that has lingered for many and continues to feed distrust and suspicion about official government agencies.

## Verdict

We commend the jurors for serving their civic duty in what must have been an emotionally agonizing trial. However, our own assessment of the facts, as we have had access to them including our lack of access to the full transcript, leads us to believe that those in the caravan acted as aggressors and with excessive force, and therefore, at a minimum, should have been found guilty of voluntary manslaughter. Not only does this finding reflect our commonsense understanding of self-defense, but also our review of the legal standards the jury was instructed to apply to the facts.

## **FEDERAL CRIMINAL TRIAL: Jan. 9, 1984 to April 15, 1984<sup>86</sup>**

*(T)his particular transaction in my part of the country has created a deep sense of grief and a considerable sense of perplexity. There is unquestionably profound local dissatisfaction among some on the outcome of the State criminal prosecution. There is beyond that, in my opinion, an honorable sense of quandary as to what appears to be at least a current inadequacy of federal response. Now I measure my words. It appears to be. We have ultimately to trust those in federal office. But the circumstance, the history, the germaneness of these statutes, the irony of their caption as the Ku Klux Klan Act, all suggest to me as an attorney and citizen that this is one of those instances where the Government should be at its greatest aggressive, its most concern to do justice and to appear to do justice.*

William Van Alstyne, Perkins Professor of Law  
Duke University School of Law<sup>87</sup>

## **Federal investigation**

When Federal Agent Thomas Brereton got news as he played golf on the afternoon of Nov. 3, 1979, that there had been a shooting at the CWP's anti-Klan rally, he says he immediately assumed there would be a federal investigation because "a parade is a Constitutionally protected activity."<sup>88</sup> FBI agents were therefore involved in jointly questioning suspects from the first hours of the investigation on Nov. 3. However, for months after the murder acquittals the Justice Department maintained that there was no federal jurisdiction over the matter. Along with other factors detailed in this report, this reluctance to bring a federal prosecution raised suspicions of government cover-up with many in the community, especially after the State murder trial had produced acquittals. The CWP, in particular, accused the Justice Department and the FBI of refusing the case in order to avoid investigating involvement of government actors, including federal law enforcement officers.

After Nov. 3, 1979, the surviving demonstrators founded the Greensboro Justice Fund<sup>89</sup> as the legal advocacy organization for the CWP, and made a request supported by 1,175 signatures from Greensboro citizens groups, asking that the Justice Department appoint a special prosecutor to lead a federal criminal investigation. The GJF made this request because it alleged that the FBI had a conflict of interest in investigating the case. The GJF alleged that because various agents were named as defendants in their civil suit, this called into question the FBI's ability to be impartial in its investigation. The Justice Fund's allegations against the FBI included:

1. FBI hostility toward and targeting of CWP leaders;
2. Prior knowledge of likely violence on Nov. 3, 1979, that was not communicated to local authorities;
3. Cover up of that knowledge after the shootings;
4. Questionable rigor of Special Agent Thomas J. Brereton's<sup>90</sup> investigation;
5. Intimidation of citizen protest by the Justice Department's Community Relations Service.

The substance and evidence for these allegations is explored below.

### FBI concern about CWP organizing and/or involvement in targeting CWP leaders

In 1980, Cannon Mills employee Daisy Crawford<sup>91</sup> claimed that immediately prior to Nov. 3, 1979, FBI agents came to her home and showed her photos of people, some of whom were union organizers:

*Within several weeks of November, 3, 1979, definitely on a Tuesday, and probably October 30, 1979, two men came to my trailer home where I stepped outside to converse with them. They flashed FBI identification. The men then showed me pictures of several people and asked me to identify them. One picture was of a black female and the others were of white men. I identified the black female as Sandi Smith. I did not identify the others. The others may have been Paul Bermanzohn, William Sampson, James Waller, Cesar Cauce, and Michael Nathan.<sup>92</sup>*

### Concealment of prior investigation of the WVO

Andrew Pelczar, chief supervisory agent in the FBI's Greensboro office, denied to the press that the FBI had investigated the WVO prior to Nov. 3, 1979.<sup>93</sup> However, internal reports and correspondence later obtained through discovery in the civil trial demonstrated an investigation on the WVO was in fact ordered on Oct. 23, 1979.<sup>94</sup>

### Prior knowledge of violence not communicated to local law enforcement

As demonstrated in earlier sections, FBI and ATF records reveal that the ATF communicated to the FBI information about on-going investigations of possible weapons violations by Wood and other Winston-Salem Nazis, yet neither the ATF nor the FBI shared this information with local law enforcement. (See Federal Law Enforcement chapter.

Civil suit depositions demonstrate that, prior to Nov. 3, Klansman Joe Grady told FBI special agents Alznauer and Schatzman of likely “bloodshed” should WVO and Klan confront each other again because of heightened tensions at China Grove. The agents didn’t fill out a report, but told their supervisor, Andrew Pelczar. Pelczar did not communicate this information further.<sup>95</sup>

On Oct. 31, Eddie Dawson called his former FBI handler Len Bogaty and told him that the Klan and Nazis were planning to come confront the WVO on Nov. 3, 1979, and that he wanted to seek an injunction to stop the march. Bogaty told Dawson to speak to the GPD about his concerns, and neither made a formal report nor informed anyone of the conversation.<sup>96</sup>

According to N.C. Attorney General Mickey Michaux, Brereton and Pelczar told him a few days before Nov. 3, 1979, that violence was likely on Nov. 3 because the Klan might seek retaliation for China Grove. Michaux says he asked them to “keep an eye on it.”<sup>97</sup> Brereton and Pelczar deny they discussed it with Michaux.<sup>98</sup>

On Nov. 2, 1979, Mordechai Levey of the Jewish Defense League reportedly received information that prominent North Carolina Nazi Harold Covington and his men were training with weapons and planning to come “attack and possibly kill” anti-Klan marchers on Nov. 3, 1979. Levey phoned the FBI and asked to speak to Special Agent Goldberg, mistakenly believing he was Jewish. He passed this information on to Goldberg,<sup>99</sup> whose position in the FBI was investigating political “extremist” groups, including Communists. Goldberg did not communicate the information to local law enforcement because he “did not think it was significant.”<sup>100</sup> Goldberg denied getting a call from Mordechai Levey in his deposition, but later recanted.

## Questions about whether the FBI investigation was tainted

The Greensboro Justice Fund made allegations that someone had tampered with interview transcripts and tapes. For example, 20 minutes of Jerry Paul Smith’s taped Nov. 3, 1979, interview with Brereton were erased. At the time, Smith talked of being very nervous about the Klan killing him for talking or naming names.<sup>101</sup> In addition, Wood claims he discussed Butkovich in his GPD interviews with Brereton, saying Butkovich urged them to bring weapons: “He wanted to know if I was going to take a gun. I said, ‘No.’ He (Butkovich) said, ‘Well, why aren’t you?’” Wood said he told Butkovich he was afraid he could get in trouble if he took a weapon. “He said, ‘You can conceal it, can’t you?’”<sup>102</sup> However, there is no mention of Butkovich in the interview transcript.<sup>103</sup> Brereton denied that Wood had named Butkovich.<sup>104</sup>

During the course of his investigation after Nov. 3, 1979, Brereton conducted excessively long, “COINTELPRO type” investigations of Signe Waller and Nelson Johnson, reportedly impugning their character and focusing on the ideological goals of the WVO rather than on the facts of the Nov. 3, 1979, shootings.<sup>105</sup>

The Fund claimed that the Justice Department exonerated the police but also tried to argue that it had no jurisdiction in the case, which many interpreted as an attempt to forestall any investigation into local or federal involvement in the shootings. In April 1980, Brereton wrote a letter to City Manager Osborne exonerating police of any wrongdoing.<sup>106</sup> However, the summary of Brereton’s report (obtained through discovery for the civil trial) leaves the extent and nature of investigation unclear and the full report has

not been made public.

Meanwhile, the CWP raised questions about Brereton's personal connections to the Klan and his hostility toward the WVO. Brereton admits to having "personal dealings" with Dawson, having hired Dawson as a contractor.<sup>107</sup> In addition, Pitts recalled that Brereton attempted to have him disbarred for attempting to introduce information regarding FBI prior knowledge to a federal Grand Jury:

*In order to get to that criminal trial, first there had to be a federal investigation, and I've mentioned how much effort it took to force the investigation. Eventually, there was a federal Grand Jury. Who's controlling the Grand Jury but the Washington lawyers ... we weren't thoroughly confident that they were going to do anything but nail the same bad guys ... So (Nelson) Johnson and I prepared a packet of materials (of evidence of government involvement) and carried it over to Winston-Salem, to the federal Grand Jury Room with a letter on it, after we tried to go through the judge to get it introduced ... (A Grand Jury takes place) behind closed doors, it is secret, and they get led around by the nose by the U.S. Attorney – possibly. There's been a concern of that. So we went over there with our packet. Luckily, a media person with a camera went with us. We knocked on the door, we put it down, asked for the Foreperson, put it down, closed the door – they were at lunch.<sup>108</sup>*

*And next thing you know, Tom Brereton and others are on us, and we're then the subjects of a federal criminal investigation for attempting to interfere with the deliberations of the Grand Jury. And they hold that open for a year, and try to use it as a way to get me off the case from representing my clients.<sup>109</sup>*

### Justice Department's Community Relations Service intimidated citizen protest

Immediately following Nov. 3, 1979, a team of the Justice Department's Community Relations Service arrived in Greensboro ostensibly to "diffuse racial tension," but instead acted to undermine citizen protest (See City Response chapter).<sup>110</sup>

### Special Prosecutor request denied

The Greensboro Justice Fund's request for a special prosecutor was based on the 1978 Ethics in Government Act, which authorized special prosecutors to investigate "wrongdoing by high level government officials." U.S. Assistant Attorney General D. Lowell Jensen denied the request, saying the charges were too vague to warrant an investigation and that the Justice Fund had no standing to make the request.<sup>111</sup>

U.S. District Judge Gerhard Gessell, although lecturing the Justice Fund for its "sloppy" and "contradictory" case, also chided the Justice Department, saying "Here are a bunch of people who got killed or wounded in a civil rights atrocity. If they don't have the rights to enforce it (the law permitting special prosecutors), who does?" Gessell ordered the Justice Department to undertake an investigation into the merits of the case.<sup>112</sup> Ultimately, however, after the investigation the request was denied.<sup>113</sup>

## Findings on the federal investigation

The evidence supporting the claims of FBI prior knowledge of violence and the attempted concealment of this fact is substantial, and we make findings to this effect elsewhere in this report. Certainly a strong case has also been made for the animosity toward Nelson Johnson in particular and could be made for animosity toward Communist groups in general, given the history of FBI actions to undermine and

disrupt these groups in the COINTELPRO program of the 1950s and '60s.

But evidence we have seen for specific allegations of targeting WVO leaders and bad faith investigation on the part of the FBI is either ambiguous or largely unsupported. At the same time, it should be noted that the lack of evidence to support the allegation that the FBI failed to rigorously investigate or engaged in other misconduct is largely due to the inaccessibility of data controlled by federal authorities. We do not have sufficient evidence to make a finding one way or another on these latter claims.

## Federal criminal indictments

A federal Grand Jury issued indictments 83 53-01 through 83 53-07 that charged Virgil Griffin, Ed Dawson, David Matthews, Roland Wayne Wood, Jerry Paul Smith, Jack Fowler, Roy Toney, Coleman “Johnny” Pridmore, and Milano Caudle with conspiracy to commit an offense or to defraud United States;<sup>114</sup> conspiracy to violate the civil rights of persons because of their race or religion and their participation in an activity administered by any state or its subdivision; and conspiracy to violate the rights of persons because of their participation in an integrated activity.<sup>115</sup> There were additional charges, including against Matthews, Wood, Smith, Fowler and Toney, for actions that resulted in injury or death, and against Dawson and Griffin for conspiring to interfere with the federal investigation. No government or police official was indicted.

## THE KU KLUX KLAN ACT

Title 18 of the U.S. Criminal Code Section 241 (§241) prohibits two or more people from conspiring to “injure, oppress, threaten or intimidate any person in any state ...” from the use and enjoyment of any Constitutional or federal right. The original form of this act, known as the Ku Klux Klan Act of 1871, was passed as result of a “campaign of terror” perpetrated by the Klan in the early days of Reconstruction from 1866-1869, crimes that state judiciaries were not sufficiently addressing.<sup>116</sup> The Klan Act of 1871 represented the first time the federal government unequivocally declared that certain conspiracies by individuals would be punishable as federal crimes. The Act was directed against and intended to fight conspiracies that nullified citizens’ right to vote, hold office, serve on juries and enjoy the full benefits of the Fourteenth Amendment’s guarantee of equal protection of law.<sup>117</sup> The Act vested the federal government with sweeping powers to indict, to militarily intervene and to suspend habeas corpus.<sup>118</sup> Shortly after the passage of the Act, hundreds of Klansmen were indicted in North Carolina and arrested with the assistance of federal troops. By late 1872, use of federal law and troops in North and South Carolina and federal indictments in Kentucky and Mississippi “produced a dramatic decline in Klan violence.”<sup>119</sup> Frederick Douglass, remarking on these events and the laws’ efficacy, stated, “The law on the side of freedom is of great advantage only where there is power to make it respected.”<sup>120</sup>

Unfortunately, after a promising beginning, the Ku Klux Klan Act and its use for indicting criminal conspiracies against blacks fell into disuse in the early 20th century as a means of suppressing violent Klan attacks. Courts began to shrink the law’s reach by excluding those rights authorized by state law and only authorizing prosecution for violation of federal rights and privileges.<sup>121</sup> By 1966 the U.S. Supreme Court held that §241 protects only those fundamental rights contained within the equal protection and substantive due process clause of the Fourteenth Amendment.<sup>122</sup> A review of the published federal court opinions between 1892 and 2002 shows a profound hesitancy on the part of U.S. attorneys to use §241 in crimes of violence. The period of 1903 to 2002 saw only 74 successful prosecutions on conspiracy for deprivation of civil rights approved by federal district trial courts or circuit courts of appeal. The overwhelming majority of these cases were for election fraud and voting rights issues.<sup>123</sup> Only two cases, one in 1892 and another in 1909, used §241 where violence was perpetrated against a citizen in an effort to deny basic civil rights.<sup>124</sup>



Congress' frustration with the failure to use §241 in prosecuting crimes of racial violence led to the more precise construction of §245, federally protected activities. Sen. Jacob Javits documented the numerous race-related murders of the 1960s that gave rise to §245 in an effort "to provide a federal remedy for victims of racially motivated violence."<sup>125</sup> With this explicit intent, §245 was added as an assured *de jure* method of prosecuting racial violence in the exercise of constitutionally protected activity. Conversely, §241 had devolved in its *de facto* use to primarily address election franchise issues.

Section 245 (b)(2)(B) prohibits any actor "whether or not acting under color of law, by force or threat of force who willfully injures, intimidates, or interferes with, or attempts to injure, intimidate or interfere with" any person "because of his race, color, religion or national origin" in the enjoyment of any right or privilege provided by the government. The statute can be used to convict perpetrators of violent crime, even if they are not participating in federally protected activities if it can be shown that the purpose of the crime was to intimidate others from participating in those activities.<sup>126</sup> At least one respected scholar argued that Section (b)(1)(B), which does not require racial animus, could have been invoked, but charges were not filed under this provision.<sup>127</sup>

In the case of the Nov. 3, 1979, shootings in Greensboro, the core issue for the federal civil rights prosecutors in determining whether they could use 18 USC § 241 was whether they could demonstrate state action as part of a conspiracy, which is required under that statute. In 1937 the Eighth Circuit held that simple acquiescence, silence or failure of a state agent to perform a duty was insufficient to make the state agent a participant in the conspiracy. The state agent must act or fail to act with full knowledge of assisting, aiding or protecting the conspiracy.<sup>128</sup>

Michael Johnson, Assistant U.S. Attorney for the Criminal Division of the Justice Department's Civil Rights Division and one of the chief architects of the §245 Greensboro indictment, was acutely aware of the need to show state action for the §241 indictment. When Elizabeth Wheaton interviewed Michael Johnson for her book "Codename: Greenkil" and questioned him on the decision not to indict under §241, Johnson cited the Supreme Court case law mandating state action (see box above). In his estimation, the role of police informant Dawson and ATF informant Buktovich was insufficient to establish state action. Johnson believed that he lacked any evidence to establish that police worked with Dawson to incite the Klan shooting.<sup>129</sup> Therefore, the Justice Department prosecutors chose §245 as a basis for the indictments, which did not require state action but as charged did require that racial hatred be the prime motivation for the crime.

### Were the indictments based on racial hatred appropriate?

Although the jury apparently did not find it convincing, there was evidence of racial hatred: posters the Klan/Nazis plastered in Greensboro prior to Nov. 3, 1979 (with a picture of a lynched body and the words "WARNING to communists, race mixers and black rioters"), hate-filled speeches used to rally people to go to Greensboro to confront Communists and "big buck niggers," and racist slurs shouted from the caravan as it drove through the intersection on Nov. 3, 1979. The most inflammatory included "Show me a nigger with guts and I'll show you a Klansman with a gun!" and "Shoot the niggers!" These actions were coupled with the fact that the CWP was working explicitly for racial cooperation in its union and class-consciousness work, and the Klan and Nazis clearly intended to intimidate the CWP and others who might join them from freely organizing and expressing views on integration and communism that the Klan and Nazis found threatening.

### Federal trial: Jury selection

Presiding Judge Thomas Flannery took the unusual step of ordering the jury selection in the federal criminal trial conducted in secret in the hopes that potential jurors might speak frankly and without fear. Newspapers went to court to try to overturn this order on the basis that the jury trial is an essential component of democracy and the public had a right to be present for the selection of the jury. Transcripts of the examination of the potential jurors were prohibitively expensive (over \$3000) and would take several months to prepare. However, the appeals court upheld the ruling that, although there is a presumption of openness, proceedings may be held in secret “for good cause.”<sup>130</sup> Although the closed session may indeed have produced more candid responses from potential jurors, it also deepened a sense of dread for many trial observers who imagined the worst about what went on behind closed doors of the courtroom.<sup>131</sup>

The jury selection transcripts have since been destroyed, but according to press accounts, of 75 jurors who were not stricken for cause in pre-screening, ten were black. Defense attorneys used their peremptory challenges to strike all of them to get another all-white jury.

News reports of the jury selection quoted eventual jurors, six men and six women, as having little knowledge of either the Klan or the CWP. One juror said of the Klan, “I know they wear white. I don’t know what they stand for.” Another had both “positive and negative” feelings toward the Klan. “Back years ago, they was taking the law, actually, into their own hands. But there was disciplining done that needed being done ... (But) the Klan has outlived their usefulness.”

### Trial arguments: racial hatred and self defense arguments revisited

Based on the statute used to charge the defendants, the prosecution was required to show racial hatred was the motivation for the shootings and interference with the march. The prosecution again used nuclear resonance testing to demonstrate who fired bullets that killed or wounded particular victims, drew heavily on the news videos, and in this trial had the benefit of CWP testimony.

The defense in turn argued that it was not hostility toward blacks but patriotic opposition to communism that inspired their actions. The defense further argued, as they successfully had done in the first trial, that they had fired in self-defense, not out of racial hatred. They argued that the Communists came expecting and provoked a fight. They also cast doubt on the prosecution’s expert evidence linking individual defendants with particular guns or victims.

### More FBI sound analysis reversals

Koenig had proven a critical witness for the defense in the state trial, where he had surprised prosecutors by testifying that his analysis suggested that shots 3, 4 and 5 had come from areas occupied by demonstrators. However, when Koenig took the stand in the federal criminal trial, he reverted back to his original conclusion, which was that those shots had come from the front of the caravan. He explain this reversal by saying that in the first trial he had not been asked to consider the full area of the caravan, but rather only the immediate area of the intersection.

Hal Greeson, defense attorney for defendant Coleman Pridmore in both the state trial and the federal criminal trials, called Koenig on his reversal:

*There were five Washington prosecutors who decided that they didn’t like the way he had testified before, and so they had him come in and testify that “oh no, they gave me a folded map in the state trial to look at. So I was unable to see the part down*

*the road.” Well that’s not true because he had already said that shots one and two came from down the road, but I listened. He said, “I have reassessed that and they must have come from down the road, now that I see the other half of the map.” I got up out of my seat and I grabbed Tom (Brereton), the FBI agent who was in charge of evidence. We, I asked the judge, could we, could I have five minutes. We marched across the hall to where Tom had all the exhibits from the state trial. Evidently Mr. Koenig didn’t know that, and the prosecutors from Washington hadn’t looked. Tom Brereton and I brought in the exhibit that the state had used in the state trial and there pretty as you please was that pentagon drawn on there (in front of the truck in the intersection), and the map was long, and took in the whole area. And Mr. Koenig decided that he must have been mistaken in trying to change his testimony.<sup>132</sup>*

Another key source of evidence of the previously unresolved shots 3, 4 and 5 was the plea bargain of Mark Sherer, the Klansman who fired the first shot. Sherer admitted in his statement that the Klan also fired shots 3 and 4.<sup>133</sup> Roy Toney told the federal Grand Jury that he fired shot number 5 when struggling with Jim Waller over the shot gun.<sup>134</sup>

In addition, Sherer had also claimed in this statement that Griffin had planned to incite a race war throughout the state and that Sherer and Jerry Smith had experimented with making pipe bombs, which Smith had wanted to bring to Greensboro on Nov. 3. Sherer summarized the caravan members’ expectations this way,

*(I)t was generally understood that our plan was to provoke the communists and blacks into fighting and to be sure that when the fighting broke out the Klan and Nazis would win.”<sup>135</sup> Sherer further recalled in his written statement that “Griffin told me that I should deny either having a gun or firing a shot on Nov. 3 if questioned by law enforcement although I had told Griffin that I had in fact fired a weapon at the scene.”<sup>136</sup>*

During the trial, however, Sherer attempted to retract his agreement and refused to testify, because he said he had been “browbeaten” by prosecutors into the agreement. The prosecution countered that his reversal was due to pressure from Griffin and other Klansmen. Sherer ultimately was forced to testify as a hostile witness and the prosecutors had to convince the jury that Sherer was at times lying to appease his fellow Klansmen.<sup>137</sup>

### Jury instructions

On April 12, 1984, Judge Flannery, in his instructions to the jury before deliberation, explained that for all charges except interference with the investigation, the prosecutors had to prove beyond a reasonable doubt the following:

1. The defendants willfully conspired to interfere;
2. They used force or the threat of force;
3. The activity that was interfered with was administered by the City of Greensboro, and
4. The defendants acted because of the race or the religion of the participants and because they were taking part in a racially integrated activity. Race has to be a “substantial motivating factor – one without which the defendants would not have acted.” It was reported in press accounts that prosecutors claimed this was an incorrect charge.<sup>138</sup>

He also instructed that self-defense was to be considered only “if the government has proved all other elements” and that it was for the government to prove that the defendants did not act in self-defense.<sup>139</sup>

## Verdict

On April 15, the jury concluded its deliberation and submitted its verdict: all the defendants were acquitted of all charges. The jurors said they had no disagreements, except for the final count which charged Griffin and Dawson with conspiring to withhold information from investigators, which they discussed for five hours.

One juror commented that their decision was based on the fact that they felt the demonstrators made the first aggressive move by hitting the cars. One juror commented that if demonstrators had not hit the cars, the jurors believed the cars would not have stopped.<sup>140</sup> In addition, jurors believed that the exchange of gunfire was equal and that the prosecution’s evidence of racial motivation rather than anti-communism was unconvincing.<sup>141</sup>

One editorial expressed the dismay at a second blanket acquittal as “contradicting reality.”

*The charges were narrow and difficult to prove. The evidence was voluminous. The defense team was skilled. The jury was all white and little is known about how they were chosen because the judge barred the press and public from jury selection proceedings. It was unlikely that every defendant would be found guilty of every charge against him. Yet the implicit message the system has set forth—that no one was really murdered, that no one’s rights were really violated—stands in shocking contradiction to the bloody events recorded on the video tape that day. Until reality and the verdicts are reconciled, justice has not been done.*<sup>142</sup>

## FEDERAL CRIMINAL TRIAL FINDINGS

### Indictments

When people feel that the state courts have failed to address wrongs by seeing that justice is done, we look to our federal government. Therefore, when it, too, is seen as failing to provide justice, it is particularly damaging to our trust in the judiciary to protect us.

The two statutes chosen by federal prosecutors presented their own challenges, and thus a strategic choice had to be made: §241 required proof of government action, and §245 required racial hatred as the impetus for the Klan and Nazi action.

We believe that there could have been a reasonable argument to make about government action under § 241 because of

- the leadership role of police informant Dawson in bringing about the conflict,
- the awareness of his police handlers of Dawson’s lead role and their failure to intervene, and
- the action of the police in deliberately being absent from the parade starting point.

The prosecutors ultimately chose § 245. Certainly suspicions were raised by this choice, coupled with the overall reaction of government officials to the shootings. But we do not know for certain the prosecutors’ reasons for making this choice, or even if it was the best

one.

However, we also believe that ample evidence of racial animus also made §245 a reasonable choice:

- The explicitly racist language used by Dawson and Griffin and others to encourage their membership to confront and potentially assault the marchers,
- the posters hung by Dawson, and
- the racist slurs shouted at demonstrators as the caravan drove through the parade assembly point all point to racial animus as a cause of the confrontation.

This animus is further demonstrated when coupled with Klan ideology, which makes both people who advocate for black rights (“race mixers”) as well as blacks themselves targets for hate and violence.

### **The verdict**

The question is, then, why did the jury not find this to be a convincing argument? Was it because the marchers were Communists or because the prosecution did an inadequate job of investigating and arguing its case, or perhaps both? We cannot answer that question.

We do note, however, that one of the hallmarks of racism is the willful invisibility of racism to those who benefit most from it. As a result, it may have been more palatable for the jurors, and indeed for the public more generally, to view Nov. 3, 1979, as a “shootout” between extremists for which both sides were equally to blame, than to examine the racist elements of the killings.

## **CIVIL TRIAL: March 11, 1985 to June 7, 1985<sup>143</sup>**

The civil lawsuit, *Waller et.al. v. Butkovich et. al.*,<sup>144</sup> was filed on Nov. 3, 1980, one year from the day of the shootings.<sup>145</sup> In this case, the complaint<sup>146</sup> was amended twice, in order both to add parties and to attempt to clarify some of the allegations, especially given the short time frame in which the lawsuit had to be prepared. If anything, the original complaint was over-inclusive in order to insure that no possible defendants would be left out, given the constraints of the one-year filing deadline.

### **Parties to the lawsuit:**

**Plaintiffs (the party initiating the lawsuit)** – There were 16 plaintiffs, comprising the 11 demonstrators injured or arrested at the scene of the Nov. 3, 1979, shootings<sup>147</sup> and the spouses of the five people who were killed.<sup>148</sup> The spouses sued both as personal representatives of the deceased persons and in their individual capacities as next of kin.

**Defendants (the parties being sued)** – Initially, the plaintiffs sued 87 different persons and entities and unknown “John Doe” defendants. The following were individual defendants in the lawsuit: 13 individually named “Klan defendants;”<sup>149</sup> seven individually named “Nazi defendants;”<sup>150</sup> 34 named members of the GPD;<sup>151</sup> two persons termed in the lawsuit as “informant-provocateurs” working for the GPD, the FBI or the ATF; two officials of the State Bureau of Investigation (SBI);<sup>152</sup> three officials of the city of Greensboro, including the mayor;<sup>153</sup> three officials of the state of North Carolina;<sup>154</sup> six officials of the FBI, including the director;<sup>155</sup> two officials of the BATF, including the director;<sup>156</sup> two officials of the Community Relations Service (CRS);<sup>157</sup> and three present or former Attorneys General of the United States.<sup>158</sup> The institutional defendants were: the city of Greensboro; the GPD; the State of North Carolina (including the governor); the SBI; the North Carolina Department of Crime Control



and Public Safety; the FBI; the CRS and the BATF.

In addition, the complaint included unnamed “John Doe” defendants,<sup>159</sup> who were members of the Ku Klux Klan or Nazis, members of the GPD, or members of the FBI, BATF or other federal agencies. In all likelihood, these “John Does” were included in the pleadings because on Nov. 3 1980, the plaintiffs did not know the names of all the people who might have been involved in the conspiracy they were alleging. Especially at the pleading stage, the plaintiffs would have wanted to insure that no potentially responsible defendant was left out of the lawsuit.

## **Legal basis of the lawsuit:**

*Waller* was a civil lawsuit for money damages. As a civil case, not a criminal case, the standard of proof, that is, the standard by which the plaintiffs had to convince the jury to rule in their favor, is known as “the preponderance of the evidence,” rather than “beyond a shadow of doubt.” As Judge Robert R. Merhige Jr. explained to the jury, when instructing them on the relevant law, “to establish by the preponderance of the evidence means to prove that something is more likely so than not so.”<sup>160</sup> Further, the instructions did emphasize that it was the plaintiffs’ burden to prove “every essential element of (their) claims.”<sup>161</sup>

In the complaint, the plaintiffs sought the remedy of monetary damages, which was the only relief the jury is empowered to order in a civil case. The plaintiffs sought two forms of damages. They sought compensatory damages, which serve to reasonably compensate the victim for his or her injury, humiliation, emotional distress and/or violation of his or her constitutional rights.<sup>162</sup> They also sought punitive damages, which serve to punish defendants for their extraordinary misconduct and set an example to deter others from that conduct. The plaintiffs sought in excess of \$45 million in damages.

## **Claims based on federal law:**

The lawsuit was brought under the federal statutes, 42 United States Code (U.S.C.) Sections 1981, 1983, 1985 and 1986. These statutes originated in the Civil Rights Act of 1871 and complement the criminal law provisions reviewed above in connection with the federal criminal case. Like its criminal counterpart, these laws were designed to protect newly enfranchised blacks against terror caused by the Ku Klux Klan or other racist groups and to ensure that they could fully benefit from the new Thirteenth (abolishing slavery), Fourteenth (forbidding the individual states from abridging the privileges and immunities of citizenship or denying due process or equal protection of the law), and Fifteenth Amendments (protecting voting rights against discrimination) of the to the Constitution. Consequently, this statute has been labeled the “Ku Klux Klan” law.

42 U.S.C. §1985 (3) is the section of this law that addresses conspiracies. The U.S. Supreme Court has ruled that four elements are necessary to proof of a claim under this law: (1) a conspiracy; (2) for the purpose of depriving either directly or indirectly, any person or class of persons, the equal protection of the laws, or of equal privileges and immunities under the law; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured personally injured or suffers property loss or is deprived of any right or privilege as a U.S. citizen. The second element requires animus based on race, gender, religion or national origin to be a motivation of the conspirators’ actions.

Section 1981 provides that all persons, regardless of race, have equal rights to make and enforce contracts, to participate in lawsuits, and to provide evidence in lawsuits. Section 1983 allows individuals to sue state actors in federal courts for civil rights violations.<sup>163</sup> Section 1985(3) provides a cause of action in federal court against those who have conspired, either directly or impliedly, to deprive a person or a class of persons of their civil rights. Section 1986 provides a cause of action in federal court against those who had knowledge of a conspiracy and failed to prevent the action from taking place, either by neglect or by refusal to do so.

Under 42 U.S.C. §1985 and §1986, *every* person “having knowledge that any of the wrongs conspired to be done ... or about to be committed, and having the power to prevent or aid in prevention of the same, neglects or refuses to do so ... shall be liable.” In other words, a person who has knowledge of a pending violation could be liable for conspiracy if he or she does not prevent or assist in preventing the violations, whether he or she intentionally refuses to do so or whether he or she neglects to do so.

The jury instructions, discussed in more depth below, laid out the five elements necessary to prove a claim under this section of the statute: (1) a conspiracy; (2) for the purpose of depriving either directly or indirectly, any person or class of persons, the equal protection of the laws, or of equal privileges and immunities under the law; and (3) that the conspiracy was predominantly motivated by a dislike of black people or of advocates of equal rights for black people; and (4) one or more conspirators engaged in an act in furtherance of the conspiracy; and (5) an act or failure to act was the proximate cause of the plaintiffs’ injuries or deprivation of constitutional rights. The third element requires dislike for either black people (racial animus) or for advocates for equal rights of black people. If the plaintiffs do not show this dislike as the “predominant motive” of the defendant, then the defendant is not liable. Further, conspiracy requires an act, or a failure to act, by at least one member of the conspiracy in furtherance of the conspiracy that is the cause of the plaintiff’s injury.<sup>164</sup>

The essence of the plaintiffs’ federal law claims was that their rights to freedom of speech and assembly and the equal protection of the laws had been violated by the defendants. They alleged that the defendants were motivated by racial discrimination or discrimination against them because they were advocates for the equal rights of black people. They alleged that the defendants were acting in a conspiracy by meeting to plan their activities, communicating with informants in the Klan, Nazis and CWP (thereby having prior knowledge of the attacks), attacking and injuring the plaintiffs and then covering up their actions. The plaintiffs alleged that the police defendants also failed to provide police protection to prevent the attacks (third Cause of Action). They further alleged that the local and state police defendants had engaged in a pattern and practice of illegal policies that had led to the violation of the plaintiffs’ civil rights and that these defendants had a legal duty to screen and train police and informants to insure that constitutional rights would not be violated (fourth, fifth Causes of Action). They alleged that the defendants had the power to prevent the conspiracy but did not do so (sixth Cause of Action). The plaintiffs asserted that their constitutional rights were violated because of their support for equal rights for black people and for integration as expressed through their “anti-racist organizing of black and white workers” (seventh Cause of Action). The eighth, ninth and tenth Causes of Action were directed at the federal defendants for their role in the conspiracy and cover-up, their policies and practices which led to the denial of the plaintiffs’ rights, and their failures in their supervisory responsibility for informants.

### **Claims based on state law:**

The lawsuit also alleged four violations of North Carolina law.<sup>165</sup> These state law claims are all “civil wrongs” or “torts” under state law. The first state law claim was for “wrongful death.” A person may be liable for wrongful death when (1) the death was caused by the conduct of the defendant, (2) the defendant was negligent, (3) there is a surviving spouse, children or other beneficiaries, and (4) monetary damages have resulted from the victim’s death. In their wrongful death claim, the plaintiffs stated that the defendants had engaged in the wrongful acts of planning, participating in and/or failing to prevent the attacks on the plaintiffs (11th Cause of Action).<sup>166</sup>

The second state law claim was for “assault and battery.” The assault or battery claims specified that the Klan and Nazi defendants and Dawson and John Doe “informant-defendants” intended to damage the plaintiffs by their specified actions against them (12th Cause of Action).<sup>167</sup> The jury instructions stated the following elements of assault: (1) that the defendant threatened or attempted, by force or

violence, to injure the plaintiff; (2) the defendant had the ability to commit the act; and (3) the plaintiff reasonably thought he would be injured. Battery is touching another person without their consent in a “rude or angry manner.”<sup>168</sup> Neither of these state law claims requires proof that an official was involved in inflicting the injury (“state action”).

The last two state law causes of action were for malicious prosecution and abuse of process (13<sup>th</sup>, 14<sup>th</sup> Causes of Action).<sup>169</sup> A person may be liable for malicious prosecution when: (1) “he initiates the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice” and (2) the proceedings have ended in favor of the accused.<sup>170</sup>

(See annex for table of counts and defendants)

## **Trajectory of the lawsuit:**

After the lawsuit was filed, all of the defendants filed motions to dismiss the case. Under Rule 12 of the *Federal Rules of Civil Procedure*, a defendant may make a motion to dismiss on several grounds, including a lack of jurisdiction of the federal court, a lack of jurisdiction over a particular party to the lawsuit, insufficiency of service of process notifying the defendant of the lawsuit, or failure to state a claim upon which judicial relief can be granted.

No action was taken on these motions for several years. The state and federal governments were given the opportunity to prosecute the two criminal cases first.

Because the motions to dismiss were not acted on, no discovery was allowed to proceed in the case. Discovery is one of the unique qualities of a civil lawsuit. In this process, both parties are allowed to “discover,” or obtain information, from the opposing side which, conceivably, enables that party to better prove their own case. One of the important by-products of a delay of several years can mean the loss of certain evidence, either because people forget important facts or because documents or other primary source materials are lost.

In this case, however, there were also some advantages to a delay in discovery. The plaintiffs had the opportunity to benefit from the testimony in both the state and federal criminal trials, the transcripts of which could be and were used in the civil case. Further, they might become aware of certain documents that became public during these cases.

## **Civil trial judge:**

After all the other North Carolina federal district court judges for the Middle District of North Carolina disqualified themselves from taking the case, a judge outside the district was brought in to preside. Judge Robert R. Merhige Jr., a federal district court judge in Richmond, Va., was appointed to *Waller* on Dec. 3, 1983. Judge Merhige had already presided over a number of very high-profile cases, including the defective Dalkon Shield birth control device, Watergate-related prosecutions, the gender integration of the University of Virginia, and the Richmond, Va., desegregation by cross-town busing order. If anything, he was generally known as a liberal judge and was criticized by conservatives for being too much of an “activist,” a codeword for any judge who was willing to wade into the treacherous waters of contentious issues such as desegregation, the Vietnam War and environmental protection. His desegregation order in Richmond resulted in threats to his family, weekly protests at his home, the killing of his dog and the necessity of 24-hour security for him and his family for two years. He had a reputation for non-tolerance of delays or grandstanding in his courtroom, an attribute amply displayed in his rulings and actions in *Waller*.

### **Decisions on the motions to dismiss:**

Judge Merhige's first, important decision was on the pending motions to dismiss particular defendants and some of the specific claims in the complaint.<sup>171</sup>

He dismissed the "John Doe" defendants because the allegations against them were too vague.

He dismissed the federal agency defendants under the doctrine of sovereign immunity. Sovereign immunity is a legal doctrine that prevents people from bringing lawsuits against a government without its consent. This doctrine protects all federal agencies and federal officials, acting in their official capacity, from liability for money damages.<sup>172</sup> The judge ruled that all the federal defendants, similarly, were immune from the state law claims.<sup>173</sup> It should be noted, however, that a federal, state or municipal official can be sued in his or her individual capacity.<sup>174</sup> These dismissals were based on a matter of law and do not address the involvement or lack of involvement of the dismissed federal agencies or officials.

The sovereign immunity doctrine also applied to the state of North Carolina agencies and officials in their official capacity. Thus, Judge Merhige dismissed these defendants.<sup>175</sup> These dismissals were based on a matter of law and do not address the involvement or lack of involvement of the State or State officials.

The doctrine of sovereign immunity did not apply to the City of Greensboro and its employees because 42 U.S.C. 1983 specifically defines the word "person" to include these entities. The Supreme Court has ruled that municipalities and other local government units are "persons" for purposes of the statute.<sup>176</sup> "Local governing bodies, therefore, can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers."<sup>177</sup> But the Greensboro Police Department was dismissed as a separate defendant on the representation of the City of Greensboro that any liability to the GPD would be borne by the city.<sup>178</sup> These dismissals were based on a matter of law and had no bearing on the accountability of the GPD.

According to the court, several defendants were never served with the papers informing them that they were the subjects of this lawsuit, as required by law. Thus, those five defendants (U.S. Attorney General Bell; Civiletti, Smith and Robert Ensley of the CRS; and FBI Agent Monahan) were dismissed.<sup>179</sup> These dismissals were based on a matter of law and had no bearing on their involvement.

Further, to subject a defendant to suit, the court would need personal jurisdiction over a defendant. Personal jurisdiction is the power of a court to require a person or party to appear before it. Without personal jurisdiction, a court can not enforce judgments against the party. For a court to have personal jurisdiction over a party, the party must typically have at least some contacts in the state in which the court is located.<sup>180</sup> To establish personal jurisdiction, a defendant must be given legal notice that he is a party to a lawsuit; this notice, often called "service of process," notifies the party that he is the subject of proceedings in a certain court.

A long-arm statute gives a court in one state jurisdiction over a business or an individual who is not a resident of that state but who caused harm in the state or to a local resident. In North Carolina, the long-arm statute provides that a North Carolina court will have jurisdiction over a party to a lawsuit when that person "is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise."<sup>181</sup> The statute also provides that a North Carolina court will have jurisdiction over a party to a lawsuit when the lawsuit alleges injury to person or property or wrongful death in or out of North Carolina, arising from an act or omission within the state of North Carolina.<sup>182</sup>

The plaintiffs alleged that certain defendants were subject to jurisdiction in North Carolina, despite their absence from the state, because of their supervisory responsibility for subordinates who participated in the civil conspiracy.<sup>183</sup> The judge ruled that the complaint had not alleged sufficient facts to include CRS Director Pompa in the suit under this theory of liability. Thus, Pompa was dismissed from the case. This dismissal had little significance for Pompa's accountability since the plaintiffs failed to supply the court with the minimal evidence needed on a motion to dismiss to establish personal jurisdiction.

The Court also dismissed the claims against District Attorney Schlosser, the Guilford County District Attorney, under the doctrine of prosecutorial immunity, a doctrine which allows prosecutors immunity from suit. This doctrine is premised on the notion that prosecutors have broad discretion to decide how to pursue cases and, thus, should be immune from suits that seek to question the wisdom of their decisions.<sup>184</sup> The court ruled that the underlying facts that the complaint alleged regarding Schlosser's involvement were those that were within his "prosecutorial function." The only allegation that was not was the accusation of his making "false, inflammatory public statements" that the court ruled would be an exception to Schlosser's absolute discretion. However, the court ruled that the complaint did not allege facts with sufficient specificity to show false and inflammatory public statements that would have warranted waiving his prosecutorial immunity.<sup>185</sup> This dismissal had little significance for Schlosser's accountability in the case, as the court's ruling was premised on Schlosser's prosecutorial immunity.

At this preliminary stage of the proceedings, the court accepted the pleadings as sufficient and rejected the defendants' motion to dismiss on the basis that the complaint failed to state "facts on which the allegations are based."<sup>186</sup> The court specifically rejected the argument that as a civil rights and conspiracy case, the plaintiffs should be held to a heightened standard of clarification at this stage. Judge Merhige found that, as to the allegation of facts about a conspiracy before the Nov. 3, 1979, attacks, the complaint was sufficient.<sup>187</sup>

The court next turned to the motions to dismiss the allegations of a cover-up after the shootings.<sup>188</sup> The court dismissed Brereton of the FBI from the lawsuit on the basis that the complaint had failed to allege sufficient facts to sustain an allegation of agreement or cooperation between Brereton, who conducted the FBI investigation after the incident, and any other defendants, nor did it "apprise him of how his role in the investigation is alleged to have constituted participation in a cover-up conspiracy." This dismissal, on the basis of "sufficiency of the pleadings," has little significance for Brereton's accountability as it is premised solely on the insufficiency of the complaint.

The Court also dismissed Mitchell, Starling, Ray and Lovelace from the cover-up charges. These dismissals have little significance for the issue of the accountability of these defendants as they are premised on the insufficiency of pleading particular facts in the plaintiffs' complaint.

The Court found that the complaint had not sufficiently described the role of several of the defendants with supervisory responsibilities, thus Count Five was dismissed, releasing Hunt, Starling, Ray and Mitchell from the lawsuit. These dismissals have little significance for the issue of the accountability of these defendants as they are premised on the insufficiency of pleading particular facts in the plaintiffs' complaint.

In sum, 63 defendants remained: 19 Klansmen and Nazis, 36 GPD officers and other Greensboro officials, four BATF agents, three FBI agents, and the City of Greensboro.<sup>189</sup>

### **Rulings on Claims:**

Several other issues were raised at this stage as to particular claims in the complaint.

First, the defendants argued that the conspiracy claim under §1985(3) should be dismissed. The first argument focused on the requirement that a defendant must be motivated by a discriminatory "animus"



or hatred of the plaintiff. The Court ruled that a relatively recent U.S. Supreme Court decision was controlling as to plaintiffs' allegations that they were subject to a conspiracy because they were labor organizers. In that case, *Carpenters v. Scott*, the Supreme Court had ruled that the plaintiffs' political status as labor organizers was not relevant to a 1983 conspiracy claim.<sup>190</sup> While Judge Merhige was bound to follow that ruling, he did rule that the plaintiffs' argument that the defendants conspired against them because they were "advocates for the equal rights of black people" (as well as because of the defendants' bias against black people) was clearly sufficient for the "animus" requirement of the statute.<sup>191</sup> The Court further ruled that the plaintiffs' communist ideology and their advocacy for black people "may be inextricably intertwined." The Judge left until the taking of evidence his final ruling on whether discrimination based on political association alone is sufficient for §1985(3) conspiracy purposes.<sup>192</sup>

Second, the federal defendants argued that they were not subject to suit under §1985(3) as it was intended only to reach the actions of officials of the individual states. The Court cited a long string of cases, especially the U.S. Supreme Court's decision in *Griffin v. Breckenridge*, to support its ruling that federal officials are subject to liability under this act, and, thus, their motion to dismiss on this basis should be denied.<sup>193</sup>

Third, to the extent that the complaint charged them in a cover-up, the defendants moved to dismiss these charges. The Court ruled that defendants who were alleged to have joined the conspiracy only after the Nov. 3, 1979, attacks could not be held liable for damages caused by the attacks. Thus, no recovery was possible against them in connection with the deceased plaintiffs. The only question remaining for the living plaintiffs would be whether the defendants might have engaged in some action after the attacks that injured these plaintiffs.<sup>194</sup> The Court sided with the plaintiffs that their complaint alleged sufficient facts about cover-up actions by the defendants on which to premise a claim for the deprivation of their constitutional and federally protected rights.<sup>195</sup>

Fourth, the complaint alleged various examples of the failures of police protection in Counts Three (as to GPD), count Ten (as to BATF and FBI) and Count Six (GPD, FBI, BATF, and informants). The defendants argued no "protected right to police protection" that gives rise to a "private right of action" or right to an individual lawsuit. While Judge Merhige conceded that this was the general rule, exceptions exist, including the right to police protection for civil rights demonstrators.<sup>196</sup> The Court noted the similarity between this case – where it was alleged that the police had advance knowledge of the Klan's planned attack and failed to arrive at the rally site until after the attack – and the actions of the Montgomery, Ala., Police Department in failing to protect the Freedom Riders from the Klan. However, the court ruled that the failure to provide police protection could not be applied to the federal defendants since he found that the provision of policing at the Nov. 3, 1979, demonstration was purely a local policing function.<sup>197</sup> Nonetheless, the court ruled that the federal defendants could be susceptible to a finding of liability under the federal statute §1986 if their participation in a §1985(3) conspiracy charge is demonstrated at trial. Thus, the Court rejected the motions to dismiss as to Counts Three and Six and dismissed the part of Count Ten as to the federal defendants only.

Fifth, Judge Merhige dismissed Count Seven at this stage. That count articulated the plaintiffs' claims under §1981. The Court ruled that that claim is only viable for persons who alleged that their rights were violated on the basis of their race alone. As the complaint did not do this, this count was dismissed.<sup>198</sup>

Sixth, the Court addressed the motions to dismiss premised on the argument that supervisory defendants could not be held responsible on that basis alone. The Court agreed that supervisors can not be found liable under §1983 and *Bivens* unless they acted personally to deprive plaintiffs of their rights. Similarly, a municipality can only be held liable if its employees' acts implemented an unconstitutional policy. The Court ruled here, however, that the complaint did sufficiently outline the basis for the city of

Greensboro's having advance knowledge of the attack.<sup>199</sup> The Court cautioned again that it might be very difficult to prove the deficiencies of the supervisory practices at trial.

Seventh, North Carolina law required the plaintiffs to give the City written notice of the claims against it within six months of the injuries.<sup>200</sup> Consequently, the state law claims of four plaintiffs, Cannon, Allen and Dori Blitz, and Russell, were dismissed for failure to comply with this notice requirement. However, their federal claims were not dismissible on this basis.

Finally, The Court considered the claims based on policies and practices of the governmental agencies. The Court quickly dismissed altogether the claims in Counts Four and Nine as repetitive to Counts Five and Ten.

**In sum, Counts Four, Seven and Nine were dismissed. For Count Eleven, Westra, Conroy, Butkovich, Pence, Moses and Pelczar were dismissed and for Count Ten only insofar as it charged them with breaching a duty to protect the plaintiffs. For Counts One and Two, Lovelace was dismissed. Counts Eleven, Thirteen and Fourteen were dismissed for plaintiffs Cannon, the Blitzes and Russell against the City.**

**Discovery:** The stay of discovery was finally lifted in April 1984, at the end of the federal criminal trial. The judge set a trial date for September 1984 and ordered that all discovery should be completed in four months.<sup>201</sup> The plaintiffs took some 200 depositions, some lasting two or three days, and obtained over 100,000 pages of documents in discovery. They also reviewed the transcripts of the trials and the federal Grand Jury. The defendants also conducted extensive discovery. They deposed all the plaintiffs as well as many of the people with whom the plaintiffs had worked in their various organizing campaigns. The defendants also sought discovery of the written documentation from the CWP, particularly in regards to the rally on Nov. 3, 1979, as well as other anti-Klan activities.<sup>202</sup>

It became quickly evident that this was a totally unrealistic amount of time in which to carry out the discovery necessary for the case. Further, the plaintiffs alleged that the defendants were obstructing discovery – refusing to give them documents or giving them incomplete documentation. The plaintiffs sought a continuance of the trial, which was reluctantly granted by Judge Merhige until March 1985. Discovery continued throughout this period. It was the subject of numerous motions to the court to compel evidence.<sup>203</sup>

## **Trial Pleadings/Motions:**

Over 100,000 pages of pleadings and documents were lodged with the Court regarding this case. The papers were bound in 20 volumes for the Judge. As discovery proceeded, the plaintiffs attempted to further amend their complaint to add defendants whom they were discovering were implicated in the conspiracy. Due to a failure to timely file, which the plaintiffs blamed on a faulty computer, the judge rejected the motion to amend.<sup>204</sup>

## **Counter-claims:**

One of the important aspects of the pleadings was the Klan and Nazi defendants' filing of counter-claims against the plaintiffs. In this pleading, they alleged that their civil rights had been violated, on the same legal basis as the plaintiffs (but, obviously, for the opposite reasons – that is, that the Communist Workers Party had conspired to deprive the Klan and Nazi members of their rights to free speech, assemblage and travel). For the plaintiffs, these counter-claims must have been particularly infuriating because the defendants were attempting to clothe themselves in a statute that was specifically written to prevent the Klan's racist and violent actions.<sup>205</sup> Nonetheless, Judge Merhige issued a lengthy written opinion on the subject in which he defended his decision to allow the counterclaims to go forward. He premised his decision on the equal protection clause of the Constitution, which he ruled would not

permit him to exclude any group from invoking the protections of the Civil Rights Act. However, he quickly moderated the power of this decision by ruling that the counterclaims would have to be heard in a separate trial. Thus, the jury in *Waller* would not even be aware of the defendants' counter-suit.

### **Motions for summary judgment:**

A motion for summary judgment is the process by which each party attempts to get the Court to rule on important issues of law that, therefore, will not be considered by the jury. At this stage of proceedings, these motions may effectively function as motions to dismiss since they may be attempts to get certain parties thrown out of the case, based on the information then available, which can include information obtained through the discovery process.

In March 1985, right before trial, Judge Merhige issued decisions on these pending motions. In his March 5, 1985 order, Judge Merhige addressed the motion for summary judgment of the FBI defendants, Pence, Moses and Pelczar. Judge Merhige first considered whether Count Ten, the count addressing improper supervision of an informant, could stand against these three men. He ruled that summary judgment on Count Ten was only appropriate as to defendant Pence. The plaintiffs failed to submit any information that Pence was in any way personally responsible for informant Dawson's supervision.<sup>206</sup>

Next, Judge Merhige turned to the FBI defendants' arguments that no evidence of any sort existed that they entered into any sort of agreement to deprive the plaintiffs of their civil rights or to engage in the planning, organizing of, participating in or failing to prevent the November 3 attacks. While the court cautioned that circumstantial evidence was a legitimate form of evidence in a conspiracy case, it, nonetheless, found that summary judgment was appropriate for Moses and Pence.<sup>207</sup> However, the Court found that, given Pelczar's contacts with other informed FBI agents and the U.S. attorney in Greensboro, the plaintiffs might be able to prove his involvement in a pre-attack conspiracy.

As to the issue of a possible cover-up, Judge Merhige reiterated his view that the cover-up claim was a legitimate issue for the jury. However, he ruled that no genuine issue of fact existed as to Pence, who did not take charge of the Charlotte, N.C., FBI office until March 1980 and who did not take an active part in the post-attack investigation; therefore, he dismissed the cover-up claims against Pence.<sup>208</sup> However, Moses and Pelczar were personally involved in the FBI investigation of the November 3 attacks, and both gave misinformation to the public; therefore, the Court denied their motions for summary judgment as to the cover up.<sup>209</sup>

Finally, as to Count Six (failure to prevent the attacks), the Court ruled that it would be unreasonable to infer that Pence or Moses had any awareness that the Klan or Nazis were planning the attack; thus, they could not have prevented the attack. The Court granted a motion for summary judgment in their favor on this count. By the same token, the Court ruled that summary judgment for Pelczar was inappropriate since it could be inferred that he was aware, prior to November 3, of a possible conspiracy to commit violence. As a point of clarification, the Court also noted that Count Six (the plaintiffs' §1986 claim) applied to the conspiracy to commit the November 3 attack and the conspiracy to fail to prevent it, but not the cover-up conspiracy.

**In sum, the March 5, 1985, ruling led to the dismissal of all claims against Pence. It led to the dismissal of Counts One, Two and Eight (as to pre-attack and attack conspiracies) and Count Six against Moses. Moses remained in the suit for cover-up purposes only.<sup>210</sup>**

The Court made an additional ruling on a pending Motion for Summary Judgment on March 11, 1985.<sup>211</sup> The Court noted again that the applicable standard for ruling on a motion for summary judgment is whether "a genuine issue of material fact remain(s)," which should be decided by the jury. As a result, he denied the motion for summary judgment of the defendants on all bases, except for that filed by

defendant Melvin, the mayor of Greensboro at the time of the shootings.<sup>212</sup>

The entirety of the March 11 ruling focused on Melvin. The Court concluded that the evidence did not support a reasonable inference that Melvin even knew about the planned attack by the Klan and Nazis, much less failed to take any steps to prevent it. On the day prior to the attacks, Melvin appeared to have been informed by the City Manager about the planned march and was assured it was a police matter that was being handled by the GPD. The Court ruled that greater knowledge could not be imputed to him and that any post-attack statements by Melvin do not indicate that he knew about the attack beforehand. Thus, the Court granted the motion for summary judgment as to Melvin's pre-attack conspiracy involvement.<sup>213</sup> Similarly, the Court found that no material issue existed as to former Mayor Melvin's post-attack conspiratorial involvement as his post attack statements could not be inferred to be false or deceptive: thus, summary judgment was appropriate here as well. Consequently, the Court declined to exercise jurisdiction over the state law claims against him.<sup>214</sup> **As a result of the March 11 ruling, former Mayor Melvin was dismissed from the lawsuit.**

### **Jury Selection:**

The plaintiffs strongly contested the way that the six person jury was going to be selected because they believed that it would lead to the unconstitutional under-representation of African-Americans. The plaintiffs had studied the method that the clerk's office used to select the jury. On July 2, 1984, they asked the judge to allow them to take an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit, the court of appeals designated to review decisions of the North Carolina federal district courts, on the issue of the methodology of jury selection. If granted, this would have allowed the plaintiffs to litigate the issue of the jury selection first and then return to the trial after an appellate decision on that issue. It would have been highly unusual for Judge Merhige to allow such an appeal.<sup>215</sup> Understandably, the plaintiffs were very concerned about the make-up of the jury panel, given that, as discussed previously in this section, in the two prior criminal trials, all-white juries had been empanelled and had acquitted the defendants.<sup>216</sup>

Judge Merhige allowed the plaintiffs and defendants to develop an extensive written questionnaire to be distributed to jurors before the trial began. Then, on the first day of trial, March 11, the questioning of the jury pool began. This pool included nine African-Americans. Judge Merhige conducted detailed questioning (or "voir dire") of the individual jurors to determine their biases. As discussed above, the relevance of this questioning is to assist in the process of striking potential jurors for "cause." Relevant here is that "cause" means that the juror will not be able to set aside his or her own prejudices in deciding the case, and, thus, cannot be a fair and impartial juror. The question of which jurors should be struck for "cause" was hotly contested by both parties. Each party has the right to request the judge to strike a juror for cause.

In addition to "cause" challenges, each side is given a certain number of "peremptory" challenges. These are challenges which either side can exercise without having to explain the basis of the challenge. Even before absolutely required by law, Judge Merhige ruled that the defendants could not use their peremptory challenges to strike only black jurors. This was a significant step taken by the Judge that recognized the likely unfair result in empanelling a jury that was unrepresentative of the community.

In the end, one African-American male and five whites, including one who was not a native Southerner, were seated as the jury for this case.

### **The trial itself:<sup>217</sup>**

The trial began on March 25, 1985. The plaintiffs presented 75 witnesses over a period of approximately eight weeks.<sup>218</sup> The defense case lasted only about four days. At trial, Judge Merhige was extremely courteous to the jury and bent over backwards to insure their comfort. In this regard, he had zero

tolerance for delays, repetitiousness or any form of grandstanding in the court room. Despite the fact that he was sometimes perceived as trying to speed up the trial or inappropriately commenting on evidence, the overall assessment is that he was a positive force in the trial. One of his more helpful rulings is that he did not impose a gag order on the parties. Further, he regularly admonished the jury not to allow prejudices to influence their views.<sup>219</sup>

The plaintiffs began the trial with the testimony of two cameramen who were present at the shootings. The videotaped evidence of the shootings was an important part of this presentation. TV monitors were set up in the courtroom, which, at that time, was an unusual occurrence. This evidence was supplemented by an FBI sound expert who analyzed the sound track of the videotapes for the echoes of each of the gun shots.<sup>220</sup> The attorneys interspersed the testimony of the 16 plaintiffs or their family members with the testimony of 30 of the defendants who were called as adverse witnesses. As an adverse witness, the witness is subject to questioning that is more akin to “cross-examination” than “direct examination.” Cross-examination allows the attorney a greater scope in the form of the questioning. This was a strategy that was possible because the plaintiffs had taken extensive depositions of defendants and had the benefit of the testimony of some defendants at the previous criminal trials. Therefore, they knew what information a particular defendant had and to which they would be required to testify. Thus, the plaintiffs could use the defendants themselves to tell the story of what had happened on November 3 and to build the case for civil conspiracy and cover-up. The plaintiffs also used sections of the trial transcripts of the previous cases, which were read into the record for the jury.<sup>221</sup>

The plaintiffs’ final witness was an expert witness, former Boston Police Department Superintendent Robert di Grazia. As an expert, di Grazia was allowed to offer opinion testimony. He said that he believed the GPD should have stopped the Klan/Nazi caravan and should have had a police presence along the caravan route and at the demonstration. He also criticized the way the police handled their informant, Dawson.<sup>222</sup>

### **Motions for judgment as a matter of law at end of plaintiffs’ presentation:**

At the end of the presentation of the plaintiffs’ evidence, the defendants moved for a judgment as a matter of law. Under Rule 50(a) of the *Federal Rules of Civil Procedure*, during a jury trial, a party may make a Motion for Judgment as a Matter of Law against the opposing party in which they may claim that the evidence is not legally sufficient for a reasonable jury to find for the party on that certain issue.<sup>223</sup> If the court finds that this is true, it may grant the motion against the opposing party.

A party may make this motion at any time during trial before the case has been submitted to the jury for deliberation. This is a common practice in a civil case, given that the burden to prove the case rests with the plaintiff.

**Of the 60 defendants who were on trial, at this point, Judge Merhige granted the motion for judgment as a matter of law in favor of 15 of them, a group that included the former city manager of Greensboro and 14 members of the GPD.<sup>224</sup> In addition, he dismissed the claim regarding informant policy and practices and the claim regarding abuse of the criminal proceedings.<sup>225</sup> This decision signifies that the judge was ruling, as a matter of law, that the plaintiffs had not met their burden of proof as to these defendants or as to these particular claims, and, therefore, there was no basis for sending these claims or any claims against these defendants to the jury.**

### **Defendants’ presentation of their case:**

The defendants presented four days of trial testimony and evidence. The defense set out to accomplish several things. First, they wanted to show that the plaintiffs and the CWP had provoked the confrontation with the Klan and the Nazis. Second, as in the first two trials, the defense wanted to show that the Klan and the Nazis acted in self-defense because they were attacked by the demonstrators. Third, they wanted to show that the police acted reasonably and responsibly. They also used portions of the trial transcripts



from the criminal trials to bolster their case. They entered into the record documents created by the CWP about the anti-Klan rally and their anti-Klan work. They recalled several defendants.<sup>226</sup> They also presented an expert witness, Glenn Murphy, a police consultant on police procedure, who stated that no probable cause or reasonable suspicion existed to stop the caravan. He further stated that few police departments of the size of the GPD would have written guidelines on the use of informants.<sup>227</sup>

## **Plaintiffs' rebuttal:**

The plaintiffs offered one witness on rebuttal, another expert who demonstrated that there was ample cause to stop the caravan.

**This analysis has made no attempt to evaluate in any way the trial itself. We have not had access to complete trial transcripts, nor did time or resources permit us to systematically interview trial participants about day-to-day events in the trial. Therefore we cannot draw conclusions as to what was “proven” at trial or even as to the content of the testimony of key witnesses and how they handled cross-examination.**

## **Jury instructions:<sup>228</sup>**

Judge Merhige read the jury instructions on June 6, 1985. It took 2.5 hours to read them, an unusually long amount of time. The instructions were close to 100 pages long. At the time he read the instructions, Judge Merhige commented that he knew the jury could not absorb all that he was telling them. He stated, “Your mind must be popping with all this legal mumbo jumbo ... My personal feeling is I (wish) I could sit down and talk to you. ... But (the attorneys) won’t let me, so I’ve got to do it this way.”<sup>229</sup>

The jury instructions particular to this case were voluminous. First, they laid out the nature of the complaint with a fair summary of the plaintiffs’ allegations in their complaint; the instructions further laid out the basic defenses offered by the city, police, federal and Nazi and Klan defendants.<sup>230</sup> They also helped clarify the issue of “official” capacity versus “individual” capacity of the Greensboro City defendants. The instruction advised the jurors that they could only find a defendant liable in his “official capacity” if he failed to act “in accord with an official or *de facto* policy, practice or custom” of the city.<sup>231</sup>

The most important, and most complex, jury instructions were those concerning conspiracy. First, these instructions laid out the general parameters. They stated that “a conspiracy is, in short, an agreement between two or more people to carry out a common plan, with the intent to either accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means.”<sup>232</sup> The instructions went on to emphasize that no formal, written or oral agreement was needed, and the agreement can be explicit or implicit. A participant has to share the objective of the conspiracy but does not have to know all the details or possess the same motive as another co-conspirator. Within this instruction, the court emphasized that simply because defendants might work for the same organization did not make the existence of a conspiracy more likely. The instruction cautioned that the jury had the burden to figure out who was in and who was not in the alleged conspiracy.

The instructions emphasized that to be a member of a conspiracy, a person must knowingly (meaning voluntarily and intentionally) participate in it with the intent of helping carry it out. The person’s own conduct must establish this, based on his words or actions. He is not liable if he does not know of the conspiracy’s existence and did not do something to show he joined the conspiracy. Once a person is found to be a member of a conspiracy, then the jury can consider the actions of other members against that defendant because he has now associated himself in a kind of “partnership.”<sup>233</sup> The instructions noted that if there was no finding that a conspiracy existed, then the jury would have to find for the defendants on the counts claiming conspiracy.

The instructions next moved to a consideration of conspiracy under the federal statute, 42 U.S.C. 1983.<sup>234</sup> The instructions reiterated the basic allegations in the case. They also made clear that the plaintiffs were alleging that the defendants acted maliciously and without regard for their safety, requirements to sustain their burden of proof for punitive damages. The City defendants did not deny that the plaintiffs had been injured or killed but claimed that their actions had nothing to do with it.

In explaining the requirements of the federal statute, the court advised the jury that at least one of the conspirators had to be acting “under color of state law.” Hidden within the jury instruction defining “color of law” was the statement to the jury that “as a matter of law,” the city defendants were acting under color of law; thus, the jury would not need to deliberate on that finding.<sup>235</sup> That instruction also, importantly, noted that a private actor can be considered to be acting under “color of law” if he conspires with a state actor.<sup>236</sup>

Further, the instructions noted that conspiracy was not a necessary element of the federal claim, but that it would be a sufficient finding, if the defendant(s) were found to have committed an act during the course of and in furtherance of the object of the conspiracy. The instructions noted that the act could be a knowing or intentional act or a failure to act which had the effect of depriving the plaintiffs of their civil or constitutional rights. In a later jury instruction, the elements of §1983 conspiracy were outlined in greater depth: (1) the defendant acted in concert with others, (2) the defendant acted under color of state law, (3) an act was committed by the defendant in furtherance of the conspiracy to deprive the plaintiff of his or her rights, and (4) the acts proximately caused the plaintiffs’ injuries. The instructions also explained the rights that the plaintiffs alleged were abridged by the defendants’ conspiracy. These included the denial of due process;<sup>237</sup> the right to equal protection which requires a showing of intentional discrimination;<sup>238</sup> and the rights to free speech and assembly.<sup>239</sup>

Buried in the conspiracy instructions was a crucial instruction concerning the concept of “proximate cause.” This is the requirement that the plaintiffs’ injuries can be attributed to the defendant only if the defendant’s acts or failures to act, in the natural or probable sequence of events, produced the injury. As the instructions explained, this “cause” does not have to be the last or nearest in time or the only cause of the injury. In fact, many factors can independently or together cause an injury. This instruction is not even entitled “proximate cause.”<sup>240</sup>

The instructions also addressed the important issue of direct versus indirect responsibility for the federal civil rights claims. The instruction noted that a superior is only responsible for the actions of a subordinate if his failure to control a subordinate rose to the level of “deliberate indifference” or “tacit authorization,” not merely that he had the right to control a subordinate. The instruction goes on to say that any defendant who was not personally involved in the “things alleged” cannot be liable under the relevant federal counts.<sup>241</sup> This extremely important instruction is confusing even for a legal expert, and must have been especially so for the laypersons sitting in the jury box.

Next, the instructions considered the liability of City defendants for their collaboration with an informant. The instruction stated that a law enforcement officer could be liable for the acts of an informant in one of three scenarios: (1) if the law enforcement officer authorized the acts or knowing that the informant planned acts was “deliberately indifferent” to them; or (2) the law enforcement officer authorized the informant’s wrongful acts; or (3) the informant committed acts at the instruction of the law enforcement officer. Once again, the instructions note that liability may be premised on turning a blind eye, or “deliberate indifference,” to the actions of the informant. But this point is buried in a longer instruction that generally seems to emphasize that an informant is not an employee of the city nor does his giving information to the city make the city liable for his actions.<sup>242</sup>

The instructions go on to explain the elements required for the plaintiffs' claim under Section 1985(3). The court emphasized that here the plaintiffs must shown not only that a conspiracy existed but that it was motivated by dislike for blacks and/or advocates of equal rights for blacks and led to the plaintiffs' injuries or deprivation of rights.<sup>243</sup> The instructions next addressed the plaintiffs' claim under Section 1986. After reciting the statutory terms, the instructions laid out the elements of the claim as follows: (1) a conspiracy to plan, organize or fail to take proper action to prevent the violence on Nov. 3, 1979; (2) the defendant knew of this conspiracy; (3) the defendant knew that the wrong that was the object of the conspiracy was about to be committed; (4) the defendant, by reasonable diligence, had the power to prevent or aid in preventing the wrong; (5) the defendant refused or neglected to prevent the wrong; and (6) the defendant's refusal or neglect was a proximate cause of the plaintiff's injury. This instruction contains no further explanation of these elements but merely emphasizes that the plaintiff has to prove each and every element.<sup>244</sup>

The instructions next moved to a consideration of conspiracy under the federal statute, 42 U.S.C. §1983.<sup>245</sup> The instructions reiterated the basic allegations in the case. They also made clear that the plaintiffs were alleging that the defendants acted maliciously and without regard for their safety, requirements to sustain their burden of proof for punitive damages. The City defendants did not deny that the plaintiffs had been injured or killed but only claimed that they had nothing to do with it.

Next, a set of instructions explained the claim that the police failed to protect the plaintiffs in the exercise of their constitutional rights. The instructions make clear that the defendant would have to act intentionally, knowingly or recklessly as to his general duty to protect the gathering on Nov. 3, 1979. It notes that mere negligence is not sufficient.<sup>246</sup>

The jury instruction addressing the responsibility of certain defendants to properly supervise police or informants is interestingly unique as it names two particular defendants. It emphasizes that the jury would have to find that the defendant had a duty to and was responsible for screening, training and/or supervising police and informants. It also required that he have the actual knowledge that his subordinates would injure another person or deprive them of their rights, if the defendant failed to properly supervise. The defendant's acts or conduct would have to show "deliberate indifference" to or tacit approval of the injuries and thereby deprive the plaintiff of his rights and proximately cause the injury.<sup>247</sup> This instruction does not elaborate on that explanation.

The instructions outline the "good faith" defense, which allows a defendant to avoid liability if he neither knew nor reasonably should have known that his acts or failure to act was unlawful. This defense was available to the public officials as to the federal counts.<sup>248</sup>

The jury instructions next went on to define the state law claims. On wrongful death, the instruction recited the N.C. statute, in and of itself a fairly confusing section of law. The instructions then broke down the requirements of proof: (1) that the plaintiff is the personal representative of the named five deceased persons; and (2) that the death was proximately caused by a defendant's wrongful act. To prove this the plaintiff must show that a defendant acted intentionally or recklessly in causing the death. The defendant could also be liable for wrongful death because of his participation in the various acts that constitute his participation in the conspiracy to commit the federal civil rights violations.<sup>249</sup>

The assault and battery instruction defined an assault as a threat to injure another person by force or violence. The plaintiff must demonstrate that the defendant had the ability to commit the injury and that, in the circumstances, it was reasonable for the plaintiff to think he would be injured. An assault claim also can be established by proving battery. Battery is the willful touching of the plaintiff without his or her consent in a rude or angry manner. The force does not have to be direct. The instructions gave the example that it would be sufficient to prove that a defendant fired a gun that in fact resulted

in the injuring of the plaintiff. A concerted action also can be the basis for this claim and exists when there is a common intent to assault or beat the plaintiff.<sup>250</sup>

The false arrest count focused on the arrests of Nelson Johnson and Rand Manzella, both named in the jury instruction. The instruction made clear that an arrest is lawful when the officer arrests without a warrant for a crime committed in his presence or for a felony that he has reason to believe was committed outside of his presence. The instruction notes that Manzella was arrested for the crime of “going about armed to the terror of people.” Johnson was arrested for inciting a riot. The instructions define both crimes. Finally, the instruction notes that if these plaintiffs proved that they were restrained against their will unlawfully, then they should prevail on this count.<sup>251</sup> As the reasonableness of a defendant’s action is crucial here, the court included a general instruction that what is reasonable must be determined in light of all the facts of the whole incident.<sup>252</sup>

A full seven pages is devoted to the judge’s instruction on self-defense. This instruction noted that the Klan and Nazi defendants justified their actions based on this doctrine. The court noted that self-defense is justified when a reasonable person thinks force is necessary to protect himself from serious injury even if the danger is apparent (though not necessarily real). The jury instructions included the following elements: the force cannot be excessive, the defendant cannot be the aggressor; the defendant cannot provoke the conflict himself. The instructions stated that the defendant may act to defend someone other than himself (within certain spelled out limitations), and the defendant may be justified in using deadly force in certain situations. If the defendant succeeded at proving self-defense or a defense of another, then this defense could apply to both the wrongful death count and the assault and battery count. These instructions are another example of a highly sophisticated instruction on the law that would be exceedingly difficult to comprehend, much less reasonably apply.<sup>253</sup>

On the whole, the jury instructions are very difficult to understand. They often are convoluted and confusing. They do not use the same format for similar instructions. They repeat certain points unnecessarily in several instructions. They fail to highlight certain key points; at the same time they emphasize other less important points. It would be literally impossible for the laypeople sitting on the jury to grasp fully the charge they had been given in this case, based on these instructions. No doubt it would have contributed to a deliberative environment in which jurors might feel like they did not know how to grapple with the issues they were confronting.

### **Verdict:**

Even before the jury verdict was announced, some inkling of serious divisions among the jurors was evident. On the morning of June 7, 1985, after approximately five hours of deliberation, the jury had indicated to Judge Merhige that they could only agree on one count in the case, which was the one alleging that plaintiffs Johnson and Manzella were falsely arrested.<sup>254</sup> He admonished them to go back and try harder, a charge that would be typical in any court after so little time of deliberation.<sup>255</sup> They ended up deliberating for about 11.5 hours in total.<sup>256</sup> The jurors returned their liability verdict on the afternoon of June 7, 1985.

The next day, the jury held separate deliberations on the monetary damages. At that point, the jury would have applied the jury instructions on compensatory and punitive damages. The compensatory damages instruction emphasized that only actual and reasonable damages were recoverable. The factors the jury could consider were the actual monetary losses, the nature, extent and duration of the injury, the pain and suffering that resulted from the injury, emotional distress of the plaintiffs and any pre-existing conditions.<sup>257</sup>

The punitive damages instruction required the jury to award this form of damages if they made a finding that the defendant acted “maliciously, wantonly, or oppressively.” These terms were each defined in the

instructions and signaled to the jury that they would have to find that the liable defendant acted with ill will, was callously indifferent, or was unnecessarily harsh. The instructions emphasize that these are “extraordinary” damages and can only be awarded if the above findings are made.<sup>258</sup>

The jury deliberated for about three hours in reaching its monetary awards, for compensatory damages only.

## **The jury’s findings:**

Jurors found GPD Lt. Paul W. Spoon, field commander on Nov. 3, 1979, and Det. Jerry Cooper, the GPD intelligence officer who was Dawson’s “handler” and who followed the Klan and Nazi caravan and reported on its progress to others in the GPD, along with Edward Dawson, the Klan informant, and Klansmen Mark Sherer, David Matthews, Jerry Paul Smith and Nazi Party members Roland Wood and Jack Fowler jointly liable for the wrongful death of Dr. Michael Nathan. They awarded Martha Nathan, Dr. Nathan’s widow, \$351,500 in compensatory damages. In addition, they found four Klansmen and Nazis – Matthews, Wood, Smith and Fowler – jointly liable for assault on Dr. Nathan; for this, they awarded \$3,500. They also found these same men liable for assault on Dr. Paul Bermanzohn and awarded \$38,358.55 in compensatory damages. Finally, they found Matthews and Wood liable for the assault of Tom Clark and awarded \$1,500. Thus, all the findings of liability were premised solely on the state law claims of wrongful death or assault. The costs for those plaintiffs who were awarded damages were also to be borne by the liable defendants.<sup>259</sup>

The jury did not find any liability for any of the other four deaths, for any of the other plaintiffs’ injuries, or for the arrests of the plaintiffs. They did not determine that civil rights violations, under the applicable federal law, had occurred. They did not find any of the remaining 40-plus defendants liable. They did not overtly find that there was a conspiracy. They did not award punitive damages to any plaintiff.<sup>260</sup>

Despite Judge Merhige’s admonition that the jurors not subject themselves to interviews and his protective order preventing the questioning of jurors about their deliberations,<sup>261</sup> some information about the jury deliberations was revealed by jurors. These conversations revealed that the jury was badly divided. The African American jury foreman and the white woman from the North urged a verdict for the plaintiffs on the civil rights conspiracy charges against defendants Butkovich, several members of the GPD, and several members of the federal agencies. They also favored a substantial award. The others were in favor of a narrower verdict or no award. They did not want extensive recovery in any event.<sup>262</sup>

Plaintiffs’ attorney Lewis Pitts recalled,

*We did a sampling of the population, we got some hired experts to poll 559 people. And 97 percent of them had heard of (the civil suit), 71 percent of them had heard of it a lot, and something like 37 percent said even assuming that the Klan and Nazis were wrong we would not compensate the victims. And that figure went down if we asked them, assume that the Greensboro Police Department was at fault, would you compensate the victims, and it was only something like 34 percent. So roughly three-quarters of the people said “we don’t care.”...*

*So we know in our jury, we had one African-American man and five white folks, and we talked with that man afterwards, as you’re allowed to do. And he said it was immediately polarized, that he and another – and a woman, kind of saw it together as a civil rights atrocity. The other four were saying, “I don’t want anything to do with it.” It was ideologically charged. They debated, they discussed, and as a compromise, I think, and how they resolved and sorted it out I didn’t get the benefit of, they said*



*we'll give some award, that added up total to about \$400,000 for wrongful death for Michael Nathan, and assaults on I think it was Dr. Bermanzohn and seems like one other person. And more detail than that I don't know, because once you're in that jury it's subject to how they want to play it out. I don't know if they were making a statement that they didn't want to label this a civil rights issue. I just have no idea how they did it.*<sup>263</sup>

Thus, it can be reasonably speculated that the verdict was a compromise between the two factions on the jury. Several factors seem to be at work in the verdict. First, the only GPD officers who were found liable were the two with the closest involvement to the events. Second, in addition to Dawson, the Klan informant, the other Klan and Nazi members found liable were those who most visibly on the videotape were seen firing weapons.

Third, victim Dr. Michael Nathan had several distinguishing attributes. He was not seen with any type of weapon in any of the videotapes and was shot running to the aid of another victim; he was the only one of the five murder victims who was not a member of the CWP<sup>264</sup>; his surviving spouse, Martha Nathan, was and he worked as a pediatrician in a underserved community health center, not in a mill trying to organize workers.<sup>265</sup> He was the only victim with a child who would benefit from the award of damages and could be viewed by jurors as an “innocent victim.”<sup>266</sup> However, Sandi Smith was also unarmed and not in the fray, yet her ex-husband, Mark Smith, was not awarded any damages.

Among the two assault victims who recovered damages, Dr. Paul Bermanzohn was seriously and permanently injured, which might account for why the jury chose to compensate him. However, it is not clear why Jim Wrenn, who was unarmed and shot in the head while running to Nathan's aid, was not compensated.

Fourth, the case was extraordinarily complex. There were multiple defendants, multiple plaintiffs and multiple claims. The jury instructions were extensive and inartfully drafted. In addition, it is likely also that the jury would have found it extremely difficult to parse through all the documents and evidence in the case.<sup>267</sup>

Without independent consultation with any of the jurors, it would be unfair to speculate further about the exact significance of the jury verdict other than to take it at face value.

Carolyn MacAllaster had an additional view of why the jury found the way it did:

*I think that we had a jury that heard evidence for three months. It was a long trial, they heard a lot of evidence. They decided that there was police department complicity. Not as much as we wanted but they felt that the police should have at least done more to protect these demonstrators. I would say that (is) what the verdict means. I think that it was a courageous verdict back at the time actually. I suspect that there was at least one juror if not more that didn't want to give the plaintiffs anything. They probably did comprise. It was a quick verdict. It was less than a day after three months of trial. There were probably some factors like wanting to get home. They were sequestered the last, I think they were sequestered over a week. They hadn't seen family, they weren't sequestered for the whole trial. So, that could have been a factor.*<sup>268</sup>

### **After the verdict:**

After the trial, each side filed fairly routine motions to set aside unfavorable portions of the verdict and/or for a new trial.<sup>269</sup> Each of the parties asked Judge Merhige to overturn parts of the jury's decision that were unfavorable to them. The motions asked the judge to grant a new trial if their motions are denied.

Each motion alleged that erroneous rulings during the trial damaged their case, and each claimed that the jury's verdict was not supported by evidence in the more than 10 weeks of trial testimony.

In their motion, the plaintiffs listed 12 decisions by Merhige that they alleged were improper and harmed their case. Several of these rulings dealt with jury instructions the plaintiffs believed were improper. Others dealt with evidence the judge either allowed into evidence or kept out. The plaintiffs also charged that the judge erred in not granting their motion to move the trial outside North Carolina. In addition, they were critical of the judge for making "highly prejudicial comments" in front of the jury about the conspiracy case, and "on numerous occasions" belittling their efforts to prove the conspiracy.

In addition, the plaintiffs previously had filed a second lawsuit against four federal or city agents that was also pending post-trial.<sup>270</sup>

Judge Merhige ordered the plaintiffs to pay the "costs of action" of the City of Greensboro and 35 other defendants whose cases had been sent to the jury but who were not found liable.<sup>271</sup>

### **Settlement:**

Soon after the verdict, the plaintiffs took a decidedly conciliatory tone in their public statements. They clearly offered the olive branch to the City to consider settling the case.<sup>272</sup> For example, in one press account, plaintiffs' counsel was quoted as saying, "Our clients want to put the case to rest even if the compensation or the number of liable defendants is not what it should be."<sup>273</sup>

In November 1985, a settlement was announced in the case.<sup>274</sup> The city of Greensboro agreed to pay the full \$351,500 that Martha Nathan had been awarded for the wrongful death of her husband. One of the most unusual aspects of the settlement is that the city, in essence, was settling on behalf of both itself and the Klansmen and Nazis who were also found liable for the Nathan murder. This, however, was not an acknowledged part of the written agreement. The settlement agreement states very clearly that the city is not accepting responsibility for the wrongdoing. It further contains no apology for its actions or that of its agents. The settlement states that it should not be construed by the plaintiffs as conferring any liability on the city for any aspect of the events of Nov. 3, 1979.<sup>275</sup>

The settlement agreement itself acknowledged, in part, why the parties chose to conclude the case. It stated that both sides agree that a settlement was warranted "because of the time and expense necessary for the further prosecution and defense of post-trial motions and appeals and in light of the entire verdict."<sup>276</sup> Further, the City of Greensboro noted that its insurance carrier was willing to settle this case in order to bring it to conclusion.<sup>277</sup> The police chief at the time emphasized that neither party would want to be tied up in litigation for another two years and that it was in the best interests of the community as a whole to conclude the litigation "once and for all."<sup>278</sup>

But it is important to emphasize that the agreement made no concessions as to the fundamental legal and factual issues in the case. In numerous ways, the agreement emphasized that each side believed, in good faith, that they had viable arguments to set aside the verdict or win on appeal.<sup>279</sup> Nonetheless, a central part of the agreement was the waiving of all future legal actions against each other. The plaintiffs released all the city defendants, the City of Greensboro, the GPD, and all former or present employees of the city or GPD, from any past or future liability for any type of suit, alleging any type of action or inaction, arising from the Nov. 3, 1979, incident.<sup>280</sup> The waiver provisions were intended to be broad prohibitions against future legal action. The agreement expressly stated that both sides would not pursue their pending motions, nor would they pursue any appeals. The plaintiffs also agreed not to pursue their pending lawsuit against Capt. Talbott.<sup>281</sup> In addition, they would not seek to recover attorneys' fees or costs from the opposing party.<sup>282</sup> Finally, both parties, of course, had to acknowledge their capacity to freely enter such an agreement. In particular, the plaintiffs had to acknowledge that

their injuries might take an uncertain course, but no matter what, they would not seek compensation from the city in the future.<sup>283</sup>

In the press, each side conceded little. City officials were quoted as calling the agreement a “settlement of disputed claims.”<sup>284</sup> City officials re-emphasized their perplexity at the jurors’ decision to find the two police officers liable. They stated, “We continue to support and stand by all of the police officers involved in this matter.”<sup>285</sup> The plaintiffs called the agreement an “affirmation that government officials were involved in the killing and wounding of the demonstrators.”<sup>286</sup>

As far as is publicly known, the city took no further actions in addition to the settlement. It did not discipline Lt. Spoon or Det. Cooper, even though both had been held liable at trial for a wrongful death.<sup>287</sup> No transparent process indicated that the city undertook any further action to reprimand other officials or to re-evaluate policies and practices in light of the tragedy. This may have happened later, but at the time of the agreement, the city aggressively defended its right to self-scrutinize and rejected plaintiffs’ calls for the convening of a citizen review board.<sup>288</sup>

The other plaintiffs received no awards from the Klan and Nazi defendants held liable for their injuries, nor were they able to settle with them. While the plaintiffs’ attorneys discussed the possibility of trying to collect on the recovery amount, no serious attempt was made to pursue the Klan or Nazi defendants’ assets.<sup>289</sup> It should be noted, however, that collection often is an expensive process, and given the limited amount of recovery, it most assuredly would have cost that amount or more to obtain it.

After the agreement, in addition to ordering that all motions on behalf of the plaintiffs and the city defendants Spoon and Cooper be withdrawn, Judge Merhige signed formal orders denying the motions for new trial and judgment notwithstanding the verdict of David Matthews, Jack Fowler and Edward Dawson.<sup>290</sup> He further ordered that all the counterclaims that had been filed by any defendants be dismissed.<sup>291</sup>

Lewis Pitts recalled his reactions to the verdicts and awards:

*We felt that it was very significant that a Southern jury found liable, jointly, police officers and the Ku Klux Klan in these acts of violence. I don't know that that had been done. And we wanted to, if you will, celebrate that progress. We were disappointed and broken-hearted that it wasn't a more comprehensive across-the-board finding and provision of compensation for the huge tragedy that occurred.*<sup>292</sup>

## CIVIL LAWSUIT FINDINGS

The failure of the first two trials to find any wrongdoing left many in the community, especially the survivors of the violence, feeling that justice had not been served. Civil court is fundamentally different from criminal court in that it offers citizens the opportunity to take the initiative to bring a case rather than depend on state or federal prosecutors, and (among other things) offers an alternative venue to seek justice where they feel the criminal system has failed. Plaintiffs have the power in a civil suit to compel defendants to release information and have more leeway to expose more information than is allowed in criminal court, and in this way the discovery process for the civil suit was a great value to the community (and future generations) by providing much more information.

However, even given this flexibility, the complexity of the number of defendants, the complex legal grounds for liability, and the ability of defendants to withhold or misrepresent evidence still provide ample grounds to obscure the real “truth.”

Further, the dismissals of defendants from the suit were made on the basis of procedural requirements and are silent on whether these individuals actually had any role or responsibility in the violence.

We believe that Judge Merihge recognized the importance of this trial to the community's sense of justice and for that reason made extra efforts to provide the plaintiffs with leeway to explore their claims and to ensure a more representative jury selection process, including prohibiting attorneys from striking jurors peremptorily on the basis of their race.

However, even these efforts did not address the overall anti-communist sentiment of the jury. Post-verdict interviews with two of the jurors suggest that many jurors simply did not want any money to go to the CWP and this inevitably had an effect on their verdicts and damage awards. Further, plaintiffs' polls of the general public found 37 percent of those asked would not award the plaintiffs any damages even if the defendants were found to be liable, so the jury was likely representative of the community in that sense.

In addition, as the GTRC now well knows, the case was extraordinarily complex and voluminous, making it difficult for the layperson to grasp fully the issues at stake. Further, the trial dragged on for months, taking jurors away from their own lives and concerns. As a result, it is not surprising that the jury came to a rapid, pragmatic compromise verdict that was reflective of prevailing community feelings.

It was not only the jury that wanted to put this case behind them. In some ways, the verdict can be seen as a huge victory because Greensboro police were found liable and it appears to be the first time in the South in which government agents were found jointly liable with Klan members. However, the verdict of only one wrongful death out of the five and the small damages also could be viewed as a defeat. As Floris Weston recalled,

*I remember being a little surprised that people thought that we had won a victory in the civil trial. To me it was a limited victory. They said that one person was wrongfully killed and the other four were not. I understand that the public statement had to be that we prevailed. But the fact of the matter is that the others were marginalized in the eyes of the court.<sup>293</sup>*

Yet even in the face of such private pain, the plaintiffs were the first to try to negotiate an agreement with the city so they could all move forward. Therefore, although the city's stated reason for settling was to put an end to the litigation, the city's decision to pay the judgment for both Klan/Nazis and police officers gives the appearance of support for the Klan and Nazi defendants. We find that this decision of joint payment, coupled with the city's denial of any responsibility for wrongdoing resolved the legal suit but not underlying questions, hurt and feelings of injustice in the community. The litigation may have been settled, but the moral issues were not.

The Commission finds that, while this case only resulted in limited justice for one of the victims, those killed and injured all enjoyed the same rights and should have been protected equally by the law – first against injury, then later in their efforts to seek justice and redress. We cannot undo this imbalance, but we do find that all of the injuries and deaths are morally condemnable and, in our view, were wrong even in the terms defined within the complex realm of the law.

The GTRC also finds that the City's payment of the settlement on behalf of not only the police officers found responsible but also on behalf of the Klansmen and Nazis, created an appearance (whether or not real in fact) of tolerance or indifference towards white supremacy. The settlement meant that the legal issues had been resolved but the moral ones had not.

### IMPACTS OF THE TRIALS

For those who survived the violence of Nov. 3, 1979, the criminal acquittals and the refusal to find that four of the five victims were even "wrongfully dead" in the civil case struck another series of terrible blows to the already traumatized and deeply suspicious families and friends of the dead. Floris Weston reflected,

*The verdict of the criminal and the civil trial marginalized Cesar as insignificant. He was unarmed, yet he was killed because the Klan had to defend themselves with guns. In the civil trial he was dead, but he was not wrongfully dead. He was marginalized by the criminal trial because we were not worthy of having our lives protected and marginalized again in the civil trial because his death was not wrongful ... I am here to honor Cesar. I think that justice failed him when no one was convicted of those murders and held responsible for his death.<sup>294</sup>*

Lawyers for the State prosecution, who were convinced before the trial of their strong case for convictions, were exhausted by the grueling trial, frustrated by the loss of the case, and outraged by implications from the survivors that they had not really tried to win.

Rick Greeson:

*There's not one of the three of us who doesn't believe those guys were guilty. That's what makes us so frustrated and emotional. We gave a year of our lives. He (Coman) and I both were sick afterwards, physically and emotionally exhausted.*

Jim Coman:

*I don't like to be in the position where it appears that I have any empathy with the KKK. I have spent most of my professional life dealing with them in an adversarial way. I am the one who got his car blown up by them during this. I never had any interest in going light on them ...*

*I grieve for Morningside Homes. I really do. We talked to residents there and even for me, as a white man, when those people told us with tears in their eyes that they were too afraid to testify, that affected me. Don't think for a minute that I don't feel like we let down some of the poorest of the poor in this community because we didn't convict those people. And I hold the CWP responsible for the fact that we weren't able to do that.*

The three trials that only minimally recognized that any wrongs had been committed reverberated in the community for some time.



## OVERALL JUDICIAL PROCESS FINDINGS

We find one of the most unsettling legacies of the shootings to be the disconnect between what seems to be a commonsense assessment of wrongdoing and the verdicts in the two criminal trials. When people see the shootings with their own eyes in the video footage, then the trials lead to verdicts finding that no crimes were committed, it undermines their confidence in the legal system.

Criminal trials have critical social importance of holding people accountable when wrongs are committed. The legal system is an imperfect but necessary tool in this regard. We also appreciate that, given this imperfection, it is necessary to err on the side of acquittals of the guilty rather than conviction of the innocent.

However, when the justice system fails to find people responsible when wrongs were committed, it sends a damaging signal that some crimes will not be punished, and some people will not be protected by the government. In addition, we believe that the system is not just randomly imperfect, it tends to be disproportionately imperfect against people of color and poor people.

### **Jury selection:**

The makeup of the jury is critical in the outcome of trials. Because we believe that race is a central factor in how people view these events and the actors in them, we likewise believe that the fact that jury pools in the first two trials were not racially balanced must have had an impact on the verdicts. The racial imbalance was caused by several factors:

1. Many citizens frequently refuse to serve;
2. Black jurors who appeared for summons and may have been otherwise willing to serve, were stricken for cause because they were afraid of retaliation from the Klan;
3. There are socioeconomic barriers that make jury service a hardship or diminish the representation of people of color and poor people in the source lists for jury pools (tax rolls, drivers license and voter registration);
4. Statutory shortcomings in the jury selection laws in 1980 allowed race alone to be used to strike potential jurors from the panel;
5. Using as qualification for service a positive view of the death penalty often also precludes people of color and more liberal-minded potential jurors, also making the resulting panel less racially representative.

But the composition and proclivities of a jury (normally of concern in the context of ensuring a fair trial to the accused) are more complex than race, especially in this case where the defendants were white and four of the five victims were white. Those who were more likely to be less threatened by communism were also excluded or did not want to serve. Anti-communism was widespread at that time, which was likely a significant factor in how jurors viewed the CWP's language and actions and, therefore, where they placed responsibility.

The jury trial is the very essence of democracy. Citizens are entrusted, rather than experts, and the consensus of the group reigns over the judgment of an individual. Therefore, it is vital that they are representative of the community, not only to protect the defendants but also to protect the community.

To some degree, however, it is impossible to sever the jury selection process entirely from its political and social context. Our adversarial system of justice inherently means that both prosecution and defense attorneys specifically seek, not an impartial jury, but jurors who are predisposed to their clients and strike those who are not. Making this decision to strike jurors who could serve impartially is therefore an inherently socio-political endeavor. The decisions of the jurors and to the degree that we have the

explanation of why they reached those decisions are reflective of a pervasive environment of anti-communism. Unpopular political or cultural stances on either side of a case will almost certainly figure into a jury's ultimate views of evidence and ultimate decision-making.

### **Acting as aggressors:**

We believe both the law as well as a moral standard tells us that the Klan and Nazis drove through the parade route using racist insults (and displaying the Confederate flag) to deliberately provoke a physical confrontation in a neighborhood that they knew to be a black neighborhood where there was a "Death to the Klan" demonstration forming.

Further, common sense also dictates that the CWP's "Death to the Klan" press conferences and fliers, which threatened to "physically beat" and "physically exterminate" the Klan and challenged them to "come out from under your rocks and face the wrath of the people" could be considered provocative to the Klan. In fact, Virgil Griffin attributed his decision to go to Greensboro to these statements. However, the law says that for language to be considered criminally provocative (and therefore unprotected "fighting words"), it must constitute a credible and imminent threat to cause injury to an individual and it must be likely to be successful.

However, overall, we find that the interpretation of who provoked whom depended not only on one's physical location but one's social and political perspective as well. Because the jurors ultimately found themselves unable to find common ground with the demonstrators' perspective, that the Klan posed a provocative danger in their presence and racist language, the jurors in the criminal cases, instead, found the defendants' self-defense argument to be reasonable. In turn, the CWP's absence from the proceeding meant that they did not help the jurors to understand their perspective and left them vulnerable to the claims, put forth at trial by the defendants, that the WVO were a violent extremist group who were looking for a fight.

Despite the findings of the jury, the GTRC believes that it is common sense that if you start a fight, you cannot use self-defense as an excuse. We believe that, although not legally proven in court, the defendants did not have a reasonable self defense claim because they went to the parade to provoke a fight and, in fact, fired the first gunshots, demonstrators' blows to the outside of cars notwithstanding. We further believe that shooting unarmed demonstrators, some in the back, and the use of excessive force further negate our commonsense understanding of the concept of self-defense.

## ■ Notes

<sup>1</sup> Rev. Cardes Brown, statement to the *Greensboro Truth and Reconciliation Commission*, Public Hearing, 27 August 2005.

<sup>2</sup> There are exceptions. Collective harm and responsibility can be investigated in some cases. For example, civil court provides a venue for multiple plaintiffs to bring suit against multiple defendants or institutions.

<sup>3</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 4 August 2005.

<sup>4</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 16 November 2005.

<sup>5</sup> N.C. Gen. Stat. § 9-2, et seq.

<sup>6</sup> *Batson v. Kentucky* 476 U.S. 79, (30 April 1986).

<sup>7</sup> Transcripts on jury selection have been destroyed, as is legally permitted for records after 25 years.

<sup>8</sup> Paul Bermanzohn, statement to the *Greensboro Truth and Reconciliation Commission*, Public Hearing, 15 July 2005.

<sup>9</sup> Marty Nathan, "Revisiting the mistakes of Nov. 3," Op-Ed, *Greensboro News & Record*, September 2005; Letter to the *Greensboro Truth and Reconciliation Commission* from Marty Nathan, Dale Sampson-Levin, Floris Cauce Weston, Signe Waller, (dated 1 September 2005).

<sup>10</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation*

Commission, 16 November 2005.

<sup>11</sup> Jim Wicker, “Man who fled Cuba in 1960 is 6<sup>th</sup> juror,” *Greensboro Record*, 10 July 1980, B-1

<sup>12</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 4 August 2005.

<sup>13</sup> *Ibid.*

<sup>14</sup> Robert Cahoon, interview with the *Greensboro Truth and Reconciliation Commission*, 8 August 2005.

<sup>15</sup> The defense had seven left. Greeson and Coman interviews with Wheaton, cited in Elizabeth Wheaton, *Codename GREENKIL: The 1979 Greensboro Killings* (Athens, GA: The University of Georgia Press, 1987), 212; Steve Berry, “Klan-Nazi testimony opens Monday,” *Greensboro Daily News*, 29 July 1980, B-1.

<sup>16</sup> Paul Bermanzohn, statement to the *Greensboro Truth and Reconciliation Commission*, Public Hearing, 15 July 2005.

<sup>17</sup> Michael Schlosser, interview with *Greensboro Truth and Reconciliation Commission*, 4 August, 2005.

<sup>18</sup> We note that she likely would not have been subpoenaed without meeting with prosecutors first because lawyers would never call this witness without knowing exactly what she would say.

<sup>19</sup> Letter to the *Greensboro Truth and Reconciliation Commission*, (dated 1 September 2005).

<sup>20</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 4 August 2005.

<sup>21</sup> Paul and Sally Bermanzohn, “Our response to the summary of (the first) interview with the state prosecution team,” memo to the *Greensboro Truth and Reconciliation Commission*, (30 October 2005).

<sup>22</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 16 November 2005.

<sup>23</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 4 August 2005.

<sup>24</sup> Earle Tockman, “DA contributed to acquittals in Klan/Nazi trial,” *Greensboro News & Record*, 16 October 2005.

<sup>25</sup> Earle Tockman, interview with the *Greensboro Truth and Reconciliation Commission*, 2 December 2005.

<sup>26</sup> *Ibid.*

<sup>27</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 4 August 2005.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Rand Manzella was the only person who had been charged with any crime. It is also not clear why Floris is the only widow specifically mentioned. (Letter dated 6 August 1980). On file at GTRC.

<sup>31</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 16 November 2005.

<sup>32</sup> “Lured by CWP. Defense: Clients Ambushed,” *Greensboro Daily News*, 5 August 1980; Wheaton, *Codename GREENKIL*, 213.

<sup>33</sup> Floris Weston, statement to the *Greensboro Truth and Reconciliation Commission*, Public Hearing, 26 August 2005.

<sup>34</sup> Marty Nathan, statement to the *Greensboro Truth and Reconciliation Commission*, Public Hearing, 15 May 2005.

<sup>35</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 16 November 2005.

<sup>36</sup> *Ibid.*

<sup>37</sup> Steve Berry, “CWP Called Key Factor in Acquittal,” *Greensboro Daily News*, 19 November 1980, A-1.

<sup>38</sup> Michael A. Schlosser, “CWP Members Sabotaged Klan/Nazi Trial,” *News & Record*, 30 September 2005.

<sup>39</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 16 November 2005.

<sup>40</sup> Lacy Russell, Federal Grand Jury Testimony, (date unknown), 11. Edward Butler Federal Grand Jury Testimony (5 May 1982), 30.

<sup>41</sup> GPD Det. Brady, interview with Signe Waller (18 January 1980), 1-2; GPD Det. Travis and State Prosecutor’s interview with Paul Bermanzohn (1 February 1980), 1-2.

<sup>42</sup> Prosecutors told the GTRC they attempted to contact Mike Nathan’s mother and Jim Waller’s parents to ask them to testify but were refused.

<sup>43</sup> Robert Cahoon, statement to the *Greensboro Truth and Reconciliation Commission*, Public Hearing Statement, 27 August, 2005

<sup>44</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 16 November 2005.

<sup>45</sup> Jerry Cooper, Testimony *State V. Fowler* (no date on transcript), 5-6.

<sup>46</sup> *Ibid*, 49

<sup>47</sup> *Ibid*, 10-11.

<sup>48</sup> "Answers of Defendant Thomas to Plaintiffs' Interrogatories," *Waller* (24 July 1984), 4. Thomas was head of the Criminal Intelligence Division, was present at this meeting.

<sup>49</sup> Talbott, IAD interview (20 November 1979), 4.

<sup>50</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 16 November 2005.

<sup>51</sup> *Ibid*.

<sup>52</sup> Steve Berry, "CWP Tactics May Slant Trial in Defendants' Favor" *Greensboro Daily News*, 8 August 1980, A-1. Jim Wicker, "Klan-Nazi trial: plenty of firsts and just begun", *Greensboro Daily News*, 20 September 1980, A-1; Steve Berry, "CWP Called Key Factor in Acquittal," *Greensboro Daily News*, 19 November 1980, A-1.

<sup>53</sup> Wheaton, *Codename GREENKIL*, 218-219.

<sup>54</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 16 November 2005.

<sup>55</sup> Michael Schlosser, Jim Coman and Rick Greeson, interview with the *Greensboro Truth and Reconciliation Commission*, 4 August 2005.

<sup>56</sup> Harry Hollien, *Acoustics of Crime* (New York: Springer, 1990), 310. Hollien also commented "It's impossible. There's so many sources of error...I don't think there's a person in the world who could do it, including me." The analysis is hopelessly complicated, he said, because of the stop signs, cars, windows, pavement that could potentially cause thousands of echoes. Hollien said he would "guess" from the intensity of the echoes that shots 3, 4 and 5 probably came from the area north of the intersection. *Greensboro Record* "Klansmen said statement was under pressure" 29, March, 1984, C-1.

<sup>57</sup> *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970), and cases cited." *State of North Carolina v. Bennie Lee Jackson*, 284 N.C. 383, 200 S.E.2d 596 (1973).

<sup>58</sup> 40 Am. Jur. 2d, Homicide, § 145, at 434."

<sup>59</sup> *State v. Henry Mosley*, 213 N.C. 304; 195 S.E. 830 (1938) citing *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832 (1903). *State v. William Ellerbe*, 223 N.C. 770, 28 S.E.2d 519 (1944), *State v. Kirby*, 273 N.C. 306 (1968), *State v. Spaulding*, 298 N.C. 149 (1979).

<sup>60</sup> Judge's Jury Instructions, 53-54.

<sup>61</sup> *Ibid*, 10.

<sup>62</sup> Wheaton, *Codename Greenkil*, 225-226.

<sup>63</sup> "Jurors Say Self-Defense Was Critical Factor in Klan-Nazi Trial," *AP wire service*, 18 November 1980.

<sup>64</sup> "Panel to Probe N.C. Communist Party Killings", *WUNC* Report by Rusty Jacobs (for NPR news), 27 June 2005. Mr. Lackey declined to give a statement to the GTRC for fear of retaliation.

<sup>65</sup> "Klan Trial Opened One Juror's Eyes" By Steve Berry. *Greensboro Daily News* 9 February 1981, B-1. Jordan said she quit her job because the trial went on for so long she was afraid she would be fired. Afterwards, she believes she had trouble finding work because people disagreed with the verdict. Nevertheless she believes the trial was overall positive experience because it forced her out of her "little world." The jurors also appear to have developed a close relationship to the defense attorneys, who were invited to a Christmas party held by all the jurors at the Bailiff's house. DA Schlosser said he was not invited to the party.

<sup>66</sup> Lucy Lewis, interview with the *Greensboro Truth and Reconciliation Commission*, 30 May 2005.

<sup>67</sup> Confidential interview with the *Greensboro Truth and Reconciliation Commission*, June 2005.

<sup>68</sup> Letter from GPD officer S.E. Bell to R.L. Warren, Criminal Intelligence Division (6 November 1979).

<sup>69</sup> Paul Spoon, Deposition, *Waller* (14 August 1984), 70.

<sup>70</sup> GPD arrest reports 3, November, 1979. On file at GTRC.

<sup>71</sup> FBI interview of James William Carthen, 56; Carthen GPD arrest report for disorderly conduct (3 November 1979). On file at GTRC.

<sup>72</sup> "US could intervene in Klan-Nazi case," *Greensboro Record*, 18 November 1980, A-1; *Winston-Salem Journal*, 30 May 1980.

<sup>73</sup> "Bond is cut for man facing rioting charge," *Greensboro Record*, 19 May 1980, B-3.

<sup>74</sup> "US could intervene in Klan-Nazi case," *Greensboro Record*, 18 November 1980, A-1

<sup>75</sup> In one incident in the summer of 1980, during the murder trial, Capt. Larry Gibson, who arrested Johnson for disorderly conduct and resisting arrest, claimed that Johnson was shouting obscenities (Johnson denies this). The trial transcript shows that Gibson testified he did not feel threatened by Johnson, although the CWP leader lunged at him with his right fist clenched during the arrest. (Testimony of Capt. L.S. Gibson in Guilford County Superior Court, 7 August 1980 before Judge D. Marsh McLelland. Case 80-CRS-16537, On file at GTRC).



See also “CWP chief wins two, loses one,” *Greensboro Daily News*, 8 August 1980, D1. Gibson said he was angered by the CWP’s harassment of a mentally disabled man who was known to often hang around the police department and that’s why he arrested Johnson and Marty Nathan (interview with the *Greensboro Truth and Reconciliation Commission*, 5 May 2006).

<sup>76</sup> “CWP Leader’s Latest Bond at \$100,000” *Greensboro Daily News*, 7 August, 1980

<sup>77</sup> *State of North Carolina v. Nelson Napoleon Johnson* (52 N.C. App. 592; 279 S.E.2d 77; 1981)

<sup>78</sup> Steve Berry, William March, “Higher Bond Sought for CWP Leader”, *Greensboro Record*, 2 August 1980; Steve Berry and Lindsey Gruson. “Bonds set for 13 held in slayings” *Greensboro Daily News*. 14 November 1979.

<sup>79</sup> N.C. Gen. Stat. § 15A-534.

<sup>80</sup> Michael Schlosser, conversation with GTRC staff, 9 May 2006.

<sup>81</sup> Lindsey Gruson, “CWP Chief Wins Two, Loses One,” *Greensboro Daily News* (8 August 1980), D-1.

<sup>82</sup> Steve Berry, “DA Defends Shootout Indictments”, *Greensboro Daily News*, (25 March 1980). See also “Motion to Dismiss” *State v. Morgan* (11 January 1980), filed by Robert. D Douglas III, attorney for Lawrence Gene Morgan.

<sup>83</sup> Copy in GTRC files. (no date).

<sup>84</sup> Steve Berry, William March, “Mayors Wife Cites Threats; off Jury”, *Greensboro Daily News*, 19 July 1980, A-1; Jim Wicker, “New Potential Jurors Refused” *Greensboro Record*, 24 July 1980, A-1; Steve Berry, “Klan Views Keep Blacks off Jury?” *Greensboro Daily News*, 29 July 1980, A-4.

<sup>85</sup> *AP wire service article*, 14 November 1979 (from *Charlotte News*).

<sup>86</sup> Criminal Action No. CR-83-53-G. US District Court, Middle District of North Carolina, Greensboro Division.

<sup>87</sup> Testimony before the Subcommittee on Criminal Justice of the Committee of the Judiciary, House of Representatives, 99<sup>th</sup> Congress, First session of Hearings on Racially Motivated Violence. (4 March, 3 June and 12 November 1981). Serial No. 135, 394.

<sup>88</sup> Wheaton, *Codename GREENKIL*, 156.

<sup>89</sup> The Greensboro Civil Rights Fund was a coalition effort built by the GJF and the Christic Institute to fund the civil suit. The Civil Rights Fund dissolved in 1985 and the GJF continued.

<sup>90</sup> Now deceased.

<sup>91</sup> Now deceased.

<sup>92</sup> Daisy Crawford affidavit for *Waller*. On file at GTRC.

<sup>93</sup> *Charlotte Observer*, 5 November 1979, A12; 6 November 1979, A18.

<sup>94</sup> FBI Memo from Beckwith to SAC (100012202 p). (23 October 1979). Pelczar, Federal Grand Jury, (31 March 1982), 11-13.

<sup>95</sup> Depositions from Alznauer (memo to SAC Charlotte, 16 November 1979, 2); Schatzman (29 August 1984, 64-65); Pelczar, “Klansman say he warned agents,” *Greensboro News & Record*, 8 May 1985.

<sup>96</sup> Bogaty did not report this conversation until after Nov 3: SA Leonard Bogaty Memo to the SAC Charlotte (44-3527), (20 November 1979), on file at GTRC; Declaration of Special Agent Leonard Bogaty, *Waller* (14 June 1984).

<sup>97</sup> Michaux, Testimony in *Waller* (no date given), 20-21.

<sup>98</sup> Brereton, Testimony *Waller* (2 May 1985), 34; “Answers by Special Agent Pelczar to Plaintiff’s Interrogatories,” *Waller* (12 June 1984), 4.

<sup>99</sup> Mordechai Levey affidavit. (18 April 1983),1; FBI Memo from Robert Goldberg to SAC Charlotte (14 Nov. 1979).

<sup>100</sup> Goldberg memorandum to SAC Charlotte (14 November 1979).

<sup>101</sup> (GPD) Herb Belvin and (FBI) Thomas Brereton, Statement of J.P. Smith (date of report 8 November 1979), 2; Belvin, Grand Jury Testimony (24 August 1982), 30. US Department of Justice prosecuting attorney in the federal criminal case made allegations that Virgil Griffin and David Matthews had threatened to kill Smith for cooperating with law enforcement investigations. Klan witnesses reportedly heard Mathews saying “They can’t do any more to me for killing six (people) than they can for killing five,” “Prosecutor: Klan pair plotted to kill witness,” *Greensboro Record*, 5 May 1983, A-1. Mark Sherer later testified in court that he participated in two or three conversations with other Klansmen a prosecution witness. “Sherer says Klan plotted assassination,” *Greensboro Record*, 2 February 1984, C-1.

<sup>102</sup> “Klansman, Nazi say agent urged guns for rally,” *Greensboro News & Record*, 7 May 1985.

<sup>103</sup> GPD Belvin and FBI Brereton, Statement of Roland Wayne Wood (4 November 1979).

<sup>104</sup> Brereton deposition (27 August 1984), 33.

<sup>105</sup> Greensboro Justice Fund, “The Need and Basis for the Appointment of a Special Prosecutor in the November 3<sup>rd</sup> Case,” (no date given).



<sup>106</sup> *Ibid.*, 3.

<sup>107</sup> Brereton, Deposition in *Waller* (27 August 1984), 14.

<sup>108</sup> Lewis Pitts, statement to the *Greensboro Truth and Reconciliation Commission* Public Hearing, 27 August 2005.

<sup>109</sup> *Ibid.*

<sup>110</sup> Pat Bryant, “Justice v. the Movement,” *Southern Exposure* vol. 14, no. 6 (1980).

<sup>111</sup> “Prosecutor Request Denied.” *Greensboro Record*, 5 October, 1982, B-2.

<sup>112</sup> *Greensboro Record*, 17 February 1983, A-1.

<sup>113</sup> “Shootout case probe is rejected by appeals court,” *Greensboro News and Record*, 5 June 1984, A-1.

<sup>114</sup> Title 18, U.S.C. § 371.

<sup>115</sup> Title 18, U.S.C. §245.

<sup>116</sup> Congressional Globe, 42nd Congress, 1st session, 820.

<sup>117</sup> Congressional Globe, 41st Congress, 2nd session, 3656

<sup>118</sup> *Ibid.* See also Eric Foner, *Reconstruction, America’s Unfinished Revolution, 1863-1877* for a good overview of the circumstances supporting the passage of the Ku Klux Klan Act, 454-459; See also Allen Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* (Louisiana: LSU Press, 1971, 1999), 385-391.

<sup>119</sup> Clarence Griffin, *History of Old Tyron and Rutherford Counties, North Carolina, 1730-1936*, 326-332.

<sup>120</sup> Frederick Douglass, *Life and Times of Frederick Douglass*, 62

<sup>121</sup> *Cartello v. U.S.*, 93 F.2d 412 (8th Cir. 1937); *U.S. v. O’Dell*, 462 F.2d 224 (6th Cir. 1972)

<sup>122</sup> *U.S. v. Price*, 383 U.S. 787 (1966); *U.S. v. Guest*, 383 U.S. 745 (1966)

<sup>123</sup> Other issues included deportation, involuntary servitude, contract rights, informer rights, witness rights and labor rights. See case notes, 18 U.S.C. §241, notes 11-25, contract rights-witnesses (2002)

<sup>124</sup> *U.S. v. Powell*, 212 U.S. 564 (1909); *Logan v. U.S.*, 144 U.S. 263 (1892)

<sup>125</sup> 114 Congressional Record, S533-534 (daily edition, 22 January 1968, statement of Senator Javits); See also *U.S. v. Griffin et al*, 585 F. Supp. 1439 (M.D. North Carolina, 1984) for a thorough review of § 245’s legislative intent history and its application to the Greensboro 245 claim.

<sup>126</sup> Arthur Kinoy, Supplementary Memorandum (prepared jointly with Attorneys Frank Deal and Doris Peterson of the Center for Constitutional rights, (no date), 4. On file at the GTRC.

<sup>127</sup> William van Alstyne, Prepared statement to U.S. House Committee on the Judiciary hearings on racially motivated violence. 97th Congress. Serial No. 135. (4 March 1981), 397. On file at GTRC. van Alstyne made the argument in his statement that the Federal labor laws were relevant privileges for the purposes of applying this section.

<sup>128</sup> *Luteran v. U.S.* 93 F.2d 395 (8th cir. 1937)

<sup>129</sup> Wheaton, *Codename Greenkil*, 232, 233.

<sup>130</sup> Jim Schlosser, “Court rules against open jury selection,” *Greensboro Record*, 16 January 1984, B-1. AP *AP wire service*, “Court rules jury selection must be open to public,” *Charlotte News*, 18 January 1984., A-1.

<sup>131</sup> Mab Segrest, a trial observer for North Carolinians Against Racist and Religious Violence, voiced her suspicions about the jury selection taking place behind closed doors with transcripts prohibitively expensive and time consuming to obtain. She said, “This jury is rigged.” *Memoir of a Race Traitor*, (Cambridge: South End Press, 1994).

<sup>132</sup> Hal Greeson, statement to the *Greensboro Truth and Reconciliation Commission*, Public Hearing Testimony, 27 August, 2005.

<sup>133</sup> There is reason to believe Sherer may have been threatened, since there were reports of Virgil Griffin threatening other witnesses who might have testified to information damaging to the Klan. See Larry King, “Prosecutor: Klan pair Plotted to Kill Witnesses” *Greensboro Daily News*, 5 May 1983, A-1; Associated Press, “Witnesses in Klan-Nazi Trial Say They Were Told to Lie,” *The Highpoint Enterprise*, 7 February 1984, A-10. In addition, Fred Taylor, who saw reported to the police that he saw a man carrying a machine gun alongside a line of cars parked on I-85 also told his attorney that he feared retaliation from the Klan. See GPD P.M. Shockley, Statement of Fred Don Taylor (3 November 1979).

<sup>134</sup> R. Toney Federal Grand Jury Testimony (13 April 1983), 89; Steve Berry, “Jury Hears Theory on Shootings,” *Greensboro Daily News*, 20 October 1980, B-20

<sup>135</sup> Plea Bargain, “Statement of Mark J. Sherer,” (10 March 1983), 1-2.

<sup>136</sup> *Ibid.*, 3.

<sup>137</sup> John Monk, “Witness switches sides in Klan-Nazi trial, harming prosecution” *Charlotte Observer* (2 Feb. 1984), B-1. “Klansman asks to back out of agreement” *Winston Salem Journal* (26 January 1983)

<sup>138</sup> Wheaton, 278.

<sup>139</sup> *Ibid.*, 278-279.

<sup>140</sup> “Jury foreman explains verdict” *Charlotte Observer*, 19 April 1984, B-4.

<sup>141</sup> “Race motive not proven, foreman says” *Winston Salem Journal*, 17 April 1984, 13.

<sup>142</sup> “Greensboro Killings: Justice has not been done” *Charlotte Observer*, 18 April 1984, A-10.

<sup>143</sup> This section of our report is quite lengthy, because of the complexity of the case and the wealth of records from the case available to the Commission from discovery, selected transcripts of testimony, depositions, exhibits, etc.

<sup>144</sup> Civil Case No.80-605-G. The reference “et al” means that there is a long list of names that follow, both of Plaintiffs and of Defendants. The title of the case, *Waller et al. v. Butkovich et al* is a shorthand form of reference used by the courts and we also refer to the case simply as “*Waller*.”

<sup>145</sup> The timing was as a result of the applicable legal requirement that an injured party has one year from the date of the injury to file a lawsuit.

<sup>146</sup> The complaint which sets out the plaintiffs, the defendants, the facts, the “claims,” or legal causes of action, and the remedy sought by the plaintiffs

<sup>147</sup> Paul Bernamzohn, Nelson Johnson, Thomas Clark, Frankie Powell, James Wrenn, Donald Pelles, Rand Manzella, Willena Cannon, Allen Blitz, Dori Blitz and Lacie Russell.

<sup>148</sup> James Waller, Sandra Smith, William Sampson, Michael Nathan and Cesar Cauce, by their respective Administratrixes and Administrator Signe Waller, Mark Smith, Dale Sampson, Martha Nathan and Floris Cauce, who were suing in their independent capacities as next of kin of the deceased.

<sup>149</sup> Virgil Griffin, David Wayne Matthews, Lawrence Gene Morgan, Harold Dean Flowers, Brent Fletcher, Coleman Blair Pridmore, Terry Wayne Hartsoe, Lisford Carl Nappier, Sr., Billy Joe Franklin, Jerry Paul Smith, Michael Eugene Clinton, Lee Joseph McLain, and Roy Clinton Toney.

<sup>150</sup> Roland Wayne Wood, Claude Matthew McBride, Jr., Rayford Milano Caudle, Jack Wilson Fowler, Jr., Harold Covington, Mark Shere, and Gorrell Pierce.

<sup>151</sup> William Swing, Chief of GPD, Capt. R.G. Bateman, Lt. W.D. Ozment, Capt. D.C. Williams, Capt. T.A. Hampton, Capt. L.S. Gibson, Lt. P.W. Spoon, Sgt. W.D. Comer, Off. J.T. Williams, Off. T.R. Johnson, Lt. S. Daughtry, Sgt. T.L. Burke, Off. J.G. Freeman, Off. G.M. Toomes, Off. E.D. Wells, Off. R.L. Smith, Off. J.F. Compton, Off. K. Henline, Off. S.C. Boyd, Off. R.D. Gerringer, Sgt. J.L. Hightower, Off. J.B. Clark, Off. S.A. Bryant, Off. T.F. Anderson, Off. J.P. Dixon, Off. A.A. League, Off. S.H. Smith, Off. W.L. Mackey, Det. J.H. Cooper, Det. H. Belvin, Off. J.T. Matthews, Off. J. M. Baucom, Atty. M.A. Cawn, and Capt. B.L. Thomas.

<sup>152</sup> Haywood Starling, the Director of the SBI, and Charles Ray, the supervisor of the Greensboro office of the SBI.

<sup>153</sup> E.S. Melvin, the Mayor of Greensboro, Thomas Z. Osborne, the City Manager of Greensboro, and Hewitt Lovelace, the Director of the Greensboro Department of Public Safety.

<sup>154</sup> Governor James Hunt, Burley Mitchell, the Director of the Dept. of Crime Control and Public Safety, and Michael Schlosser, the District Attorney of the 18<sup>th</sup> Judicial District.

<sup>155</sup> Director William Webster, Herbert Monahan and Robert Pence, directors of the NC FBI office, Cecil Moses, Asst. Spec. Agent in Charge, Andrew Pelczar, Supervisory Senior Resident Agent of the Greensboro office, and Thomas Breteton, FBI Special Agent.

<sup>156</sup> Director G.R. Dickerson, John Westra and Ed Conroy, Special Agents for NC and Cleveland.

<sup>157</sup> Robert Ensley and Gilbert Pompa, Director of the CRS.

<sup>158</sup> William F. Smith, Benjamin Civiletti, and Griffin Bell.

<sup>159</sup> *Complaint*.

<sup>160</sup> Jury Instructions, 28 (Preponderance of the Evidence).

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*, 86-87. Compensatory damages are sometimes thought as a form of “restorative justice,” as they are an “attempt to restore the plaintiff, that is, to make him or her whole or as he or she was immediately prior to his or her injury.” *Ibid.*, 87.

<sup>163</sup> In a 1961 case, the Supreme Court discussed three purposes behind this statute: 1) to “override certain kinds of state laws” 2) to “provide[] a remedy where state law was inadequate”; and 3) to “provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.” *Monroe v. Pape*, 365 U.S. 167, 173-174 (1961).

<sup>164</sup> Jury Instructions, 57-59.

<sup>165</sup> In general, federal courts have authority to hear claims based on federal law, while state courts have authority to hear claims based on state law. However, federal courts have discretion to hear claims that are

based on state law if the federal and state law claims “derive from a common nucleus of operative fact.” This principle – called “pendent jurisdiction” – allows federal courts to determine whether it is more judicially efficient to hear federal and state claims together in order to allow plaintiffs to litigate their case in one court instead of two when the claims are based on the same set of facts. In this case, since the state and federal claims arose from the same set of facts, the federal court judge exercised his discretion to have the claims tried together.

<sup>166</sup> *Ibid.*, 79-81. The wrongful acts listed in the jury instructions were the same wrongful acts which the jury needed to find for the federal law claims (planning, organizing, facilitating or participating in the attacks (or failing to take steps to prevent them), failing to provide police protection, failing to provide adequate training of police or informants, and/ or directly committing the acts or conspiring to commit the acts.

<sup>167</sup> Complaint, 36.

<sup>168</sup> Jury Instructions, 83-85 (Assault/Battery, Wrongful Death).

<sup>169</sup> The latter two state law claims were related to the arrest of some of the anti-Klan demonstrators on a November 1979. These criminal charges were later dropped.

<sup>170</sup> Restatement 2d of Torts § 653.

<sup>171</sup> Several other motions were pending at the time Judge Merhige decided the motions to dismiss. He ruled against the plaintiffs on a pending motion to amend to add plaintiff Claire Butler and to ‘specify further’ particular facts in the complaint. Judge Merhige denied these motions as untimely (beyond the statute of limitations) and prejudicial to the defendants. *Waller et. al. v. Butkovich*, 584 F. Supp. 909, at 920-921 (Mid. Dist. N.C. 17 April 1984).

He also denied several of the Klan/Nazi defendants request for discretionary appointment of counsel and ordered them to proceed *pro se* (representing themselves). *Waller* at 947-948. At a later date, Judge Merhige requested local counsel to appear as “Friends of the Court” on behalf of unrepresented Klan and Nazi defendants, Caudle, Matthews, McBride, Pridmore and Fowler, all of whom complied with the Court’s request for information to determine indigency.

Judge Merhige used this decision as an opportunity to admonish the plaintiffs and remind their attorneys of the Rule 11 sanctions for making unfounded claims available to him against them. He urged the plaintiffs to seek voluntary dismissal of any defendant for whom they could not prove liability as a matter of fact and law. He further noted his ability to assess attorneys’ fees against the plaintiffs at the conclusion of the proceedings if the court should determine that the suit was “frivolous, vexatious or brought for harassment purposes.” *Ibid.*, 947. Judge Merhige seems to be referring to the second amended complaint in this ruling. .

<sup>172</sup> The only exceptions are cases brought under a particular federal statute, the Federal Tort Claims Act, which was not the basis for this lawsuit

<sup>173</sup> *Ibid.*, 929.

<sup>174</sup> Therefore, the FBI, the CRS, the ATF and the JUSTICE DEPARTMENT listed above as defendants were dismissed. All federal government officials, acting in their official capacities, were dismissed. See notes 11-14.

<sup>175</sup> The state agencies, the SBI, the NC Dept. of Crime Control and Public Safety and the state of NC, and state officials, acting in their official capacities were dismissed. See notes 8, 10.

<sup>176</sup> *Monell v. Dep’t of Soc. Svcs.*, 436 U.S. 658, 690 (1978).

<sup>177</sup> *Ibid.* (citations omitted).

<sup>178</sup> 584 F. Supp., 925.

<sup>179</sup> FBI Agents Pelczar and Brereton raised similar arguments that were rejected by the court. FBI Agents Pence and Moses and ATF Agent Westra raised challenges to service under the applicable N.C. service of process requirements. The court, similarly, rejected these objections. *Ibid.*, 926.

<sup>180</sup> See *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

<sup>181</sup> N.C. Gen. Stat. § 1-75.4(1)(d).

<sup>182</sup> N.C. Gen. Stat. § 1-75.4(3).

<sup>183</sup> The judge termed this the “conspiracy theory of personal jurisdiction.” *Ibid.*, 927. He stated that an out-of-state co-conspirator, such as FBI Director Webster, ATF Director Dickerson and Pompa, who raised this defense to jurisdiction, can be found subject to suit in the forum state even if they never entered the forum state if “they had co-conspirators who performed substantial acts in furtherance of an unlawful conspiracy” in NC and “knew or “should have known” that those acts would be performed in NC. *Ibid.*, 928 (citing *Gemini Enterprises, Inc. v. WFMY Television Corp.* 470 F. Supp. 559, 564 (M.D.N.C. 1979). While denying Webster and Dickerson’s motion to dismiss on this basis, he invited them to file appropriate affidavits to demonstrate that they did not have the required advance knowledge of the conspiracy in NC. He stayed discovery as to these two defendants as well. *Ibid.* Webster later was dismissed from the lawsuit when the Court ruled that the plaintiffs had failed to

show any connection between Webster and the events in NC. Order, *Waller et. al. v. Butkovich et.al.* 13 June 1984.

<sup>184</sup> Prosecutors are considered to be part of the executive branch, because they bring lawsuits on behalf of the executive. Under the principle of separation of powers, other branches may not infringe on the power or authority of any another branch. As such, the judicial and legislative branches may not infringe on the authority of a prosecutor as an agent of the executive. Just as the executive is protected by the doctrine of sovereign immunity, prosecutors also enjoy immunity from civil liability for acts committed in their official capacity; this concept is prosecutorial immunity.

<sup>185</sup> *Ibid.*, 929.

<sup>186</sup> *Fed. R. Civ. P.* 8(a).

<sup>187</sup> *Ibid.*, 930-932.

<sup>188</sup> The Court notes that the cover-up conspiracy claims were found in Counts One, Two and Eight of the complaint. The court went further and criticized the complaint for being “no model of clarity” and castigated the lawyers for causing the Court “unnecessary effort” to separate out the claims. *Ibid.* 932-3, n. 3.

<sup>189</sup> The Court dismissed Klan defendants Brent Fletcher and Lee Joseph McLain on the basis that they had not been properly served. Judge Merhige evidently had given the plaintiffs an opportunity to explain the failure on April 27, 1984 but plaintiffs had failed to supply the explanation. Order, *Waller et. al. v. Butkovich et. al.*, 21 May 1984; see *Waller et. al. v. Butkovich*, 605 F. Supp. 1137, 1139 n.2. The plaintiffs agreed to a voluntary dismissal of Lt. W.D. Ozment of the GPD. Order of Dismissal of Claims, (31 January 1985). As noted above, Director of the FBI Webster was dismissed by the Court in a June 1984 order.

<sup>190</sup> 463 U.S. 825, 103 S.Ct. 3352, 3359 (1983).

<sup>191</sup> 584 F. Supp. at 937-939. Judge Merhige extensively supports his finding with citations. But he admonishes the plaintiffs that they will not succeed in demonstrating a conspiracy on the basis of their membership in the class of “advocates of equal rights for black people” unless they show that “they were identifiable in the defendants’ eyes as members” of this class. *Ibid.* 937.

<sup>192</sup> *Ibid.*, 937-8.

<sup>193</sup> *Ibid.*, 938-9 (citing *Griffin v. Breckenridge*, 403 U.S. 88 (1971)).

<sup>194</sup> *Ibid.*, 940. The Court summarized the basis for the complaint as the conspiracies under § 1983, under § 1985(3) and under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1946). That historically significant case stands for the notion that if legal rights have been violated and a statute provides a right to sue, then the federal courts must make a remedy available to the injured party. The Court stated, “Historically (money) damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.” *Bivens*, 95.

<sup>195</sup> *Ibid.*, 940-2. Judge Merhige cautioned the plaintiffs that they might have a problem meeting their burden of proof in relation to claims for damages for impeding their “legal redress” since they had been able to institute this action. He further stated that as to the false arrest charges, the fact that the charges were never pursued might “seriously undercut proof of damages.” *Ibid.*, 941.

<sup>196</sup> *Ibid.*, 942. The right to police protection in this context emanates from the picketers’ First Amendment rights, right to interstate travel, and right to equal protection. *Ibid.* (citations omitted).

<sup>197</sup> *Ibid.*, 942. The plaintiffs cannot allege that the federal defendants are liable for failure to properly screen, train and control their informants because they would have had to bring such a lawsuit under the Federal Tort Claims Act which they did not. *Ibid.*, 943.

<sup>198</sup> *Ibid.*, 943-944.

<sup>199</sup> The after-the-fact statements of officials of Greensboro could be used as evidence of their tacit authorization of the attacks or their deliberate indifference to it. *Ibid.*, 945.

<sup>200</sup> *Ibid.*, 946 (citing *N.C.G.S.* § 1-539-15).

<sup>201</sup> Flint Taylor, “Waller v. Butkovich: Lessons in Strategy and Tenacity for Civil Rights Litigation,” 1 *Police Misconduct and Civil Rights Law Report* 13, 145 (Jan/Feb 1986).

<sup>202</sup> Conversation with Carolyn McAllister, 16 March 2006.

<sup>203</sup> Taylor, *supra.*, 148.

<sup>204</sup> *Ibid.*

<sup>205</sup> See comments of attorney Flint Taylor, *Ibid.*, 148.

<sup>206</sup> Order and Memorandum, *Waller et. al. v. Butkovich et. al.*, 13 March 1985 (memorandum, 4-6). The Court denied Pelczar’s similarly argued claim since he could conceivably be proved to have a closer nexus with Dawson through Agent Bogaty, the agent with whom Dawson had contact, and because of his post-November 3 direct contact with Dawson. *Ibid.*, 6.



<sup>207</sup> The Court noted that plaintiffs agreed in their response papers that Pence was not involved in the pre-attack or attack phase of any conspiracy. *Ibid.*, 8 (citing Pls. Opposition to Def. Pelczar, Moses and Pence's Motion for Summary Judgment at 21). The Court engaged in a more extensive analysis of Moses' role and concluded that no reasonable inference from the facts could prove that Moses had any awareness of the Klan and Nazi plan to attack the rally nor that he engaged in any conspiracy. *Ibid.*, 8-9.

<sup>208</sup> *Ibid.*, 11-12.

<sup>209</sup> *Ibid.*, 12-14.

<sup>210</sup> *Ibid.*, 16. Order, *Waller et. al. v. Butkovich et. al.* (5 March 1985). Following what happened to all the federal agency defendants was very difficult, given the constraints of access to documents. This summary represents the best understanding of which federal defendants remained in the lawsuit.

<sup>211</sup> At that time, the Court noted that a total of five summary judgment motions had been filed. He noted that he orally denied in their entirety the three that are not discussed in this memo. These were the plaintiffs motion for summary judgment against defendant Dawson; the plaintiffs' motion for summary judgment against defendant Sherer and defendant BATF employees motion for summary judgment on all claims against them. Memorandum, *Waller et. al. v. Butkovich et. al.* (15 March 1985), 1, n. 2.

<sup>212</sup> *Ibid.*, 2.

<sup>213</sup> *Ibid.*, 3-7.

<sup>214</sup> *Ibid.*, 7-9.

<sup>215</sup> Judge Merhige justified his actions in regards to jury selection in a detailed, reported decision, 593 F. Supp. 942 (M.D.N.C. 1984). This decision is a rigorous defense of the constitutionality of the jury selection system in the Middle District.

<sup>216</sup> After conducting a random survey of potential jurors in the Middle District area, the plaintiffs concluded that they could not get a fair trial and moved to change the location of the trial. Judge Merhige denied this motion. Taylor, 149.

<sup>217</sup> It is impossible to make an objective assessment of the trial because there is not a complete set of trial transcripts. A complete transcript, which is extremely costly to prepare, was never created because of the decision to settle the case. See discussion, *infra*.

<sup>218</sup> "Klan trial plaintiffs believe they've proven case," *Greensboro News and Record*, C3 (19 May, 1985). The plaintiffs rested their case on 18 May 1985.

<sup>219</sup> This would be especially relevant to jury deliberations. See "Civil Rights Forces Win Part of 1979 Klan Case," *Washington Post*, (8 June 1985), A-6.

<sup>220</sup> Taylor, *supra*, 150.

<sup>221</sup> Conversation with Carolyn McAllister, (16 March, 2006).

<sup>222</sup> Taylor, *supra*, 151.

<sup>223</sup> [Fed.R.Civ.Pro.](#) 50(a).

<sup>224</sup> Judgment Order, *Waller et. al. v. Butkovich et.al.* (24 May 1985). The dismissed defendants were: GPD officers: T.R. Johnson, G.M. Toomes, E.D. Wells, R.L. Smith, J.F. Compton, G.K. Henline, S.C. Boyd, R.D. Gerringer, T.F. Anderson, J.P. Dixon, S.H. Smith, W.L. Mackey, H. Belvin, and J.M. Baucom. City Manager Thomas Osborne also was dismissed. The Court dismissed Court Two as to Westra, Count Eight as to Westra and Dawson, Count Twelve as to Dawson, Griffin, Covington and Pierce, and Count Thirteen as to Thomas, Swing and Lovelace. He dismissed Cannon's claim for relief on Count Thirteen. He also added Daughtry, Burke and Hightower to Count Thirteen. See also *Washington Post*, (22 March 1985), A-15.

<sup>225</sup> Judgment Order, 3-4.

<sup>226</sup> Conversation with Lewis Pitts, 23 March 2006.

<sup>227</sup> "Plaintiffs try to show conspiracy led to shootings," *Greensboro News and Record*, (8 June 1985), A-4.

<sup>228</sup> The jury instructions available in the UNC archive do not appear to be complete.

<sup>229</sup> "Nov. 3 jurors begin deliberations," *Greensboro News and Record*, (7 June 1985), C-8.

<sup>230</sup> See Jury Instruction, 4-5, 8-9 (Nature of Complaint). These defendants are referred to as "the defendants who are alleged by the plaintiffs to have physically assaulted them."

<sup>231</sup> Jury Instruction, 33 (Official Capacity).

<sup>232</sup> Jury Instructions, 34 (Conspiracy-Generally).

<sup>233</sup> *Ibid.*, 35-36. The previous two paragraphs of text are taken from only one jury instruction. This instruction is very repetitive.

<sup>234</sup> The parameters of the statute are laid out in still another instruction. Jury Instructions at 45 (§1983 Conspiracy – Statute Involved).

<sup>235</sup> Jury Instructions, at 47 (§1983 Conspiracy).



<sup>236</sup> *Ibid.*, 47-48.

<sup>237</sup> The instruction on denial of due process was particularly confusing. *Ibid.*, 49.

<sup>238</sup> This was another confusing instruction. *Ibid.*, 49a.

<sup>239</sup> This instruction emphasized that everyone has the right to speak and assemble even to express unpopular views, but the right does not protect lawless conduct or “fighting words,” which incite violence. *Ibid.*, 50-51.

<sup>240</sup> *Ibid.*, 51.

<sup>241</sup> *Ibid.*, 52 (Personal Involvement – Civil Rights Claims)

<sup>242</sup> *Ibid.*, 53-53a (Liability for Acts of Informants)

<sup>243</sup> *Ibid.*, 54-59 (42 U.S. C. §1985(3) Conspiracy and Plaintiffs’ Claim – 1985(3) Conspiracy).

<sup>244</sup> *Ibid.*, 67-69.

<sup>245</sup> The parameters of the statute are laid out in still another instruction. Jury Instructions at 45 (§1983 Conspiracy – Statute Involved).

<sup>246</sup> *Ibid.*, 71-72 (42 U.S.C. §1983 – Failure to Protect).

<sup>247</sup> *Ibid.*, 73-74 (42 U.S. C. §1983 – Failure to Screen or Supervise)

<sup>248</sup> *Ibid.* (unknown page number.) (Good Faith).

<sup>249</sup> These would include the planning, organizing, facilitating or participating and/or knowingly failing to take proper action to prevent the alleged attack, by intentionally, knowingly and/or recklessly failing to provide police protection, proper supervision and screening of police and/or informants. It also includes the conspiracy to commit an assault and battery in violation of N.C. law. *Ibid.*, 9-81 (Wrongful Death).

<sup>250</sup> *Ibid.*, 83-85 (Assault/Battery)

<sup>251</sup> *Ibid.*, 93-95 (False Arrest). There are additional jury instructions on probable cause to search and arrest and vehicle stops in the context of the events of November 3. *Ibid.*, 97-98a, presumably these instructions were related to the plaintiffs’ expert witness’s testimony that the defendant police had probable cause to stop the Klan and Nazi vehicles.

<sup>252</sup> *Ibid.*, 98a. This instruction also notes “this long prevailing standard seeks to safeguard citizens from rash and unreasonable interference with liberty and life.”

<sup>253</sup> *Ibid.*, 86-92 (Self-Defense Instruction).

<sup>254</sup> “Jurors tell judge they can’t agree,” *Greensboro News and Record*, (7 June 1985), C-1.

<sup>255</sup> *Ibid.* Judge Merhige contemplated a range of solutions to get the jury to reach a verdict from giving them some time off to conducting a “mini-trial” to recap the evidence. Judge Merhige was quoted as telling the attorneys, “I’m not leaving Winston-Salem in this terrible state of frustration...not yet at least.” *Ibid.*

<sup>256</sup> *Washington Post* (8 June 1985).

<sup>257</sup> Jury Instructions, (unknown page number). (Compensatory Damages)

<sup>258</sup> *Ibid.*, (unknown page number). (Punitive Damages).

<sup>259</sup> Judgment in a Civil Case (Jury Verdict forms), 8 June 1985.

<sup>260</sup> At the beginning of the trial, *Washington Post* indicated that the plaintiffs hoped that the trial would answer the following questions: (1). Did a federal undercover agent act as a provocateur?; (2) Did a police informer lead the attack on demonstrators?; (3) Did Greensboro police deliberately stay away from the confrontation, knowing that rival groups were armed and spoiling for a fight?; (4) Did local and federal law enforcement agencies cover up critical evidence in the case? *Washington Post*, 16 March 1985, A-4. None of these questions were answered by the jury verdict, although the verdict does not definitively indicate that they are all answered in the negative.

<sup>261</sup> “Judge orders elaborate security to protect Klan-Nazi trial jurors,” *Greensboro News and Record*, A12 (9 June 1985).

<sup>262</sup> Taylor, *supra*. n., 151-152. Taylor reports that the jurors who were against recovery did not want to give any award to Mark Smith, Sandy Smith’s widower, because they “disliked” him. Further, “they limited Dr. Paul Bermanzohn’s recovery to his actual out-of-pocket expenses, despite permanent paralysis, because he was still a member of the CWP and they feared that any additional money would go the Party.” *Ibid.*, 152.

<sup>263</sup> Lewis Pitts, interview with *Greensboro Truth & Reconciliation Commission*, Public Hearing, 27 August 2006.

<sup>264</sup> He evidently was “sworn in” as a member of the CWP on his death bed. *Washington Post*, A6 (8 June 1985). See also, “8 in Klan Trial to Pay Plaintiffs \$390,000,” *New York Times*, A35 (9 June 1985) (“The jury’s rationale is the subject of speculation among people who have followed the case. Some people noted that Martha Nathan was not at the rally where her husband was fatally wounded and that Michael Nathan was not a member of the CWP until he was on his deathbed, when his wife arranged for his membership.”); “Disquieting Verdict,” *Greensboro News and Record*, A12 (editorial) (11 June 1985).

<sup>265</sup> He evidently was “sworn in” as a member of the CWP on his death bed. *Washington Post*, (8 June 1985),

A-6. See also, "8 in Klan Trial to Pay Plaintiffs \$390,000," *New York Times*, (9 June 1985), A-35 ("The jury's rationale is the subject of speculation among people who have followed the case. Some people noted that Martha Nathan was not at the rally where her husband was fatally wounded and that Michael Nathan was not a member of the CWP until he was on his deathbed, when his wife arranged for his membership."); "Disquieting Verdict," *Greensboro News and Record*, (editorial) (11 June 1985), A-12.

<sup>266</sup> Conversation with Carolyn McAllister, 16 March 2006.

<sup>267</sup> *Ibid.* See also "After Six Years, A Historic Victory," *Carolina Peacemaker*, (15 June 1985), 1-2.

<sup>268</sup> Carolyn MacAllister, interview with (with Lewis Pitts and Gayle Korotkin Shepherd) the Greensboro Truth and Reconciliation Commission.

<sup>269</sup> "Parties ask overturn of verdict," *Greensboro News and Record*, (19 June 1985), B-1.

<sup>270</sup> "Agents dropped from lawsuit," *Greensboro News and Record*, (4 November 1985), B-1. This lawsuit had been filed in March. Three of the defendants were dropped because, according to an attorney for the plaintiffs, "the jury... had failed to find other federal agents liable for wrongdoing in the incident and because his clients have limited money with which to work." The remaining defendant was Capt. Robert Talbott of the GPD.

<sup>271</sup> Judgment in Civil Case, *Waller et. al. v. Butkovich, et. al.* (7 June 1985).

<sup>272</sup> "After Six Years, A Historic Victory," *Carolina Peacemaker*, 1-2: 'They (the city of Greensboro) have as much an interest as we do to close the case and heal the wounds,' Pitts said. 'We would be disappointed if the city looked for a way to avoid payment on the basis of technicalities.' See also *Greensboro Civil Rights Fund*, "Press Statement," 19 July 1985: "Our clients have stated they will abide the jury's verdict if the other parties do also. We renew our request to the City of Greensboro on behalf of the plaintiffs to join in a speedy resolution of this case." "Lawyers to pursue motion to overturn Klan-CWP lawsuit," *Greensboro News and Record*, 20 July 1985.

<sup>273</sup> "Civil Rights Lawyers Ask City to Pay Clients," *Carolina Peacemaker*, (27 July 1985).

<sup>274</sup> The information in this section of this report is taken from Agreement and Release, accompanying Order, *Waller et. al. v. Butkovich et. al.* (5 November 1985). As a result of the settlement agreement, Judge Merhige ordered that the plaintiffs and city defendants were relieved from the judgments in the case and were released from any further obligations to each other.

<sup>275</sup> *Ibid.*, 4-5.

<sup>276</sup> *Ibid.*, 4.

<sup>277</sup> *Ibid.* The Agreement was quick to note, however, that the insurance carrier "may have a legal right to deny coverage for the incident which occurred on November 3, 1979." This right was being waived by the Agreement. The city's insurance carrier had stated early on that it covered the costs of damages against employees who were "performing in the line of duty."

<sup>278</sup> Agreement of duty and Release, 3-4.

<sup>279</sup> *Ibid.*, 1-2. The city defendants released were Swing, Bateman, Oxment, Williams, Hampton, Gibson, Spoon, Thomas, Cawn, Comer, Williams, Johnson, Daughtry, Burke, Freeman, Toomes, Wells, Smith, Compton, Henline, Boyd, Geringer, Hightower, Clark, Bryant, Anderson, Dixon, League, Baucom, Simth Mackey, Cooper, Belvin, Matthews, Melvin, Osborne, Lovelace and Talbott. This list included Robert Talbott who was the subject of the separate legal action.

<sup>280</sup> A formal order was entered to this effect. Order, *Waller et. al. v. Butkovich et al.*, (6 November 1985).

<sup>281</sup> Agreement and Release, 5.

<sup>282</sup> *Ibid.* at 5-6.

<sup>283</sup> "Nov. 3 plaintiffs to get \$351,500 from Greensboro," *Greensboro News and Record*, (6 November 1985), A-1.

<sup>284</sup> *Ibid.*

<sup>285</sup> "Greensboro to pay plaintiffs \$351,500," *Greensboro News and Record*, (7 November 1985), A-1. The mayor at the time, John Forbis responded that the plaintiffs' statement was "malarkey." *Ibid.*

<sup>286</sup> *Ibid.* The Agreement functioned as a formal absolution of liability for the two police officers.

<sup>287</sup> *Ibid.* See also "City Agrees to Pay \$351,000," *Carolina Peacemaker* (9 November, 1985).

<sup>288</sup> Carolyn McAllister, interview with the *Greensboro Truth and Reconciliation Commission*, 16 March 2006.

<sup>289</sup> Order, *Waller et. al. v. Butkovich et. al.* (6 November 1985).

<sup>290</sup> *Ibid.*

<sup>291</sup> Lewis Pitts, statement to the *Greensboro Truth and Reconciliation Commission*, Public Hearing, 27 August 2005.

<sup>292</sup> Floris Weston, statement to the *Greensboro Truth and Reconciliation Commission*, Public Hearing, 26 August 2005.

<sup>293</sup> *Ibid.*