

In the Court of Appeals of the State of Mississippi

**Kevin R. Sowell**  
**Defendant/Appellant**

**FILED**

**MAY 25 2007**

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

**VS**

**State of Mississippi**  
**Plaintiff/Appellant**

**On appeal from the Circuit Court of Tate County  
before the Honorable Judge Andrew Baker.**

**The State of Mississippi Cause No.**  
**Brief of Appellant**

**Kevin R. Sowell**  
**Pro See Appellant**  
**Unit 26A E288**  
**Parchman MS. 38738**

Betty W. Sephton  
Supreme Court Clerk  
P.O. Box 249  
Jackson, MS. 39201

RE: Appeal Brief Of Kevin R. Sewell

Clerk

Enclose please find for filing my original of my appeal brief  
and file it in accordance with your normal office procedures.  
Thank you for your attention in this matter.

Sincerely

A handwritten signature in cursive script, appearing to read "Kevin R. Sowell", written in dark ink.

Kevin R. Sowell  
Pro See Appellant  
26A E 288  
Parchman MS. 38738

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# Certificate of Interested Persons

The undersigned Appellant certifies that the following listed person have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court of Appeals may evaluate possible disqualification or recusal.

1. Kevin R. Sowell 26A E 288 Parchman, MS. 38738
2. Hon. Susan Brewer, Asst. DA
3. Hon. Ronda Amos, Asst. DA

Respectfully submitted

  
Kevin R Sowell 17948

# Statement Of Issues

1. That the lower court illegally indicted defendant on 99-18-83 Habitual offender.
2. No Bifurcated hearing was held according with CCRP. 11.03 and 10.04.
3. The United States Fifth Amendment and the Mississippi Constitution.
4. That defendant was denied his constitutional rights to due process.
5. That defendant received ineffective assistance of counsel.
6. That defendant was sentence for a charge not yet an indicted case.
7. That defendant was illegally sentenced. The sentence did not meet the requirement of the statue under his charge 99-18-81.

# Statement of Case

1. During the July 2005 term of court, the Petitioner was Indicted for the charges of Possession of a Controlled Substance and Operation of a Motor Vehicle While Ability was impaired in Violation of **Sections 41-29-139 and 63-11-30 (1)** of the Mississippi Code Annotated (1972)
2. Petitioner Sowell retained the services of the Honorable James Franks to represent him in this matter.
3. That on January 31, 2006 the State of Mississippi, by means of and through Assistant District Attorney, Ms. Susan Brewer moved the court the Court during plea hearings to amend said indictment to charge Petitioner Sowell as a Habitual Offender under **Section 99-19-81** of the Mississippi Code Annotated (1972)
4. That on January 31, 2006 the Honorable Andrew C. Baker presiding for the Circuit Court of Tate County, Mississippi allowed the found beyond a reasonable doubt that the Petitioner was in fact a Habitual Offender pursuant to Rule 7.09 of the Uniform Rules of Circuit and County Court Practice, then charging Petitioner Sowell as a Habitual Offender.
5. That despite the Circuit Court granting the State's Motion allowing said indictment to be amended as such, the State of Mississippi failed to present said indictment to the Grand Jury of Tate County to be legally amended to include the charge and enhancement of punishment as a Habitual Offender pursuant to **Section 99-19-81** of the Mississippi Code Annotated.
6. That throughout the proceedings Petitioner Sowell continued to question his representation of the Honorable James Franks as to how the State of Mississippi could Indict and Prosecute him under Section 63-11-30 when in fact this was his first arrest said violation.
7. That Counsel for the Petitioner failed to file a demurrer in objective to the defective indictment. Said indictment charged the Petitioner with Possession of a Controlled Substance and Operating a Motor Vehicle While Ability to Operate a Motor was Impaired but failed to: (1) be presented to Grand Jury for legal Amendment as to the Habitual Offender Status (2) Indicted Petitioner for a charge which was not legally indictable, i.e. first offense Operation of a Motor Vehicle While Ability to Operate said Motor Vehicle was Impaired.

8. That the counsel for Petitioner Sowell, Mr. James Franks, never apprise him that the State of Mississippi had not legally obtained Habitual Offender Status by presenting the Indictment to the Grand Jury to Amend said Indictment pursuant to Section 99-19-81 of the Mississippi Code Annotated (1972).
9. That Petitioner Sowell's Attorney, Mr. James Franks, advised him to plead guilty without investigating: (1) The validity of said charges. (2) The validity of the indictment. (3) The reason why the State of Mississippi chose to seek amending the indictment by means of and Through the Circuit Court instead of presenting said accusations to the Grand Jury Of Tate County. (4) Why the Circuit Court allowed the Amended indictment.
10. That the Petitioner has been harmed as a direct result of his attorney's performance, which was deficient, and that such performance by his attorney prejudiced his defense so as to deprive the Petitioner of a fair Trial. That his attorney cooperated and colluded with the State of Mississippi in denying him the basic Constitutional right to due process.
11. That the Petitioner was illegally sentenced, and that the requirement of Section 99-18-81, does not meet the requirement of his sentence.
12. Why this Court Sentence Petitioner for a charge not yet indicted.

Kerin Sowell  
Signature of Petitioner

Subscribed and Sworn to before me this the 25<sup>th</sup> day of May  
2007

My Commission Expires



Karen Grant Cummins  
Signature of Notary



STATE OF MISSISSIPPI  
SEVENTEENTH CIRCUIT COURT DISTRICT

TATE COUNTY

JULY 2005 GRAND JURY SESSION

CR 2005-43-BT

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful citizens of Tate County thereof, duly elected, empaneled, sworn and charged to inquire in and for the County and State aforesaid, at the Grand Jury Session aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present:

COUNT 1

That KEVIN SOWELL, Late of the County and State aforesaid, on or about the **15th** day of **MAY**, in the year of our Lord **2005**, in the County and State aforesaid, and within the jurisdiction of this Court, did wilfully, unlawfully and feloniously, knowingly and intentionally possess a controlled substance, to-wit: Cocaine, one-tenth (0.1) gram but less than two (2) grams, in direct violation of Section 41-29-139, Mississippi Code 1972 Annotated, as amended, contrary to the form of the statute in such cases provided, and against the peace and dignity of the State of Mississippi.

COUNT 2

That KEVIN SOWELL, Late of the County and State aforesaid, on or about the **15th** day of **MAY**, in the year of our Lord **2005**, in the County and State aforesaid, and within the jurisdiction of this Court, did wilfully and unlawfully operate a vehicle within this State while under the influence of a substance which impaired KEVIN SOWELL's ability to operate a motor vehicle, in direct violation of Section 63-11-30(1), Mississippi Code 1972 Annotated, as amended, contrary to the form of the statute in such cases provided, and against the peace and dignity of the State of Mississippi.

A TRUE BILL

Susan M. Brewer  
District Attorney

Mark D. Edwards  
Foreman of Grand Jury

Filed 29 day of July, 2005; Eddie Hasky Clerk

Recorded 29 day of July, 2005.

Eddie Hasky Clerk, BY: Kendal Blunt D.C.

Race/Gender: White/Male  
DOB: 03/23/1961  
SSN: 425-27-6071

# **ARGUMENT**

## ASSIGNMENT OF ERROR ONE IMPROPER INDICTMENT

The Petitioner in this Cause was never formally indicted as a Habitual Offender and the Circuit Court erred in enhancing the Petitioner's sentence as a 99-19-81 Habitual Offender. **Mississippi Uniform Rules of Circuit and County Court Practice, Rule 7.09** states "All indictments may be amended as to form but not as to substance of the offense charged. Indictments may also be amended to charge the defendant as a Habitual Offender or to elevate the level of offense where the offense is one which is subject to enhanced punishment for subsequent offenses and the amendment is to assert prior offenses justifying such enhancement (e.g. driving under the influence, **Miss. Code Ann. Section 63-11-30**). Amendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised." In **Owens Vs. State of Mississippi, 2002-KA-013850-COA** the Court of Appeals found that "An amendment to the indictment to allege the offender's status as a Habitual Offender subject to enhanced punishment is not a substantive amendment requiring Grand Jury action but may be allowed by the Trial Court on proper Motion by the prosecution." The record reveals in the case at bar that **Rule 7.09** was not satisfied where as the Motion by the prosecution did not "Assert prior offenses justifying such enhancement." (**Transcript pg. 29, Lines 1-15**). In 2003, the Court of Appeals Reversed, Rendered and Remanded, in part, **Jerry Vince Vs. State of Mississippi 2001-KA-01376-COA** where as the Court found that "As for sentencing, the Appellate Court found that it was constrained to note plain error in the Habitual Offender charge." As is the Assignment of error in the case at bar in "**Vince**" the Court of Appeals found that "There is no written Motion in the record requesting such an amendment though there are statements in the record by the prosecuting attorney that 'The state has put him (**Vince**) on notice that it intends on proceeding as a Habitual.' None of the dialogue on the record sets out with any clarity the relevant facts necessary to identify the prior convictions relied upon by the prosecution until after the sentencing hearing had begun." The Court went on to further stipulate, "We cannot leave this aspect of the case, however, without further observing the long standing admonition of the Supreme Court warning against the 'Tendency to routinely allow the state to produce some documentation of prior offenses and for the Trial Court to perfunctorily find the defendant a Habitual Offender.' " In the instant cause the prejudice is of larger proportion as the petitioner didn't even enjoy the production of some documentation of prior offenses in substantiating the petitioner's status as a Habitual Offender. (**Transcript pg. 29, Lines 1-15**) The prosecution moved the Court to proceed with sentencing under 99-19-81 and asserted that the documents necessary to support said Motion were already contained in the Court file. There was never any verbal assertion as to what the proof of prior convictions or documentation the prosecution was referring to was or any acknowledgement in the record that the Trial Court saw the documentation. This is not sufficient to satisfy the assertion of prior

offense justifying enhancement. The Trial Court erred in not determining through clear and convincing proof that the petitioner in the instant cause was infact a 99-19-81 Habitual Offender. The petitioner has requested and purchased all documentation in the Court file pertaining to this Cause and has found no documentation to support the finding of 99-19-81 Habitual status by the Court other than the statements made by the prosecutor during sentencing contained in the record. The Court went on to state in "Vince" that " We have regularly upheld sentences under the Habitual criminal statues where the proof of prior convictions was made by certified copies of the judgments of convictions. This accords with the basic principle that the best evidence of a conviction is the judgment of conviction." Supporting this ruling the Court cited **McIlwain Vs. State 700 So.2d 586, 589** whereas it was stated "A prosecuting attorney, intent on proving prior convictions, would do well to heed this simple and straightforward advice from the Mississippi Supreme Court rather that needlessly testing the limits of the rules of evidence by attempting to make do with increasingly remote and less reliable methods of proof." Also the indictment was in error because it did not appear to include the Habitual crime nor did it include the necessary nature and description date and that the state was seeking a life sentence, as in **Bell Vs. State 355 So.2d 1106**. If an enhanced punishment was sought the indictment had to include **BOTH** the principle charge and a charge of previous conviction. In the case at bar the indictment did not mention anything about Habitual crime. In a footnote to **Usry V. State, 378 So.2d 635 Miss 1979** we find it written, "The wording of section 99-19-81 (Supp. 1978) leaves little doubt as to the intent of the legislature. It means precisely what it says. If a defendant is indicted and convicted of a primary crime, and in the same indictment is charged under this statute and found guilty, the trial court is mandated to impose upon such defendant the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation."

The petitioner now asserts through this assignment of error that there was not a proper foundation for the Trial Court to find the Petitioner as a Habitual Offender and no procedural substitution for Mississippi law was fulfilled, and therefore the only Constitutional answer was for the state to indict the Petitioner under Mississippi Code Ann. Section 99-19-81. However the state chose not to do so and for this disregard of Mississippi law this Court must find for the Petitioner's sentence to be deleted of its enhanced status.

## **ASSIGNMENT OF ERROR TWO**

### **DUE PROCESS**

The Petitioner in the case at bar would now examine and present the hearing conducted at the sentencing phase of the proceedings and show beyond any reasonable doubt that the hearing determining Habitual Criminal status itself was insufficient as and as a result was prejudicial to the Petitioner's right to Due Process. In doing so the Petitioner will look to a case in which the Supreme Court of Mississippi affirmed the decision of the Trial Court and make distinct and articulate claims. In **Keyes vs. State of Mississippi 07-58757** the Court laid the foundation for its opinion under criminal law and procedure by outlining "If the defendant is convicted or enters a plea of guilty on the principle charge, a hearing before the Court without a Jury will then be conducted on the previous convictions **Miss. Uniform Criminal Rules Circuit Court Practice, 6.04** (3)." "Where the defendant has been convicted after Jury trial the recidivism hearing will indeed be separate and subsequent. But where the defendant enters a plea of guilty, nothing in the rule mandates a separate hearing. The rule provides only that, after entry of the plea, a hearing will then be conducted." "The Constitution confers on the accused no right of a trial by Jury on the question whether he is a Habitual Offender. All that is required is that the accused be properly indicted as a Habitual Offender, that the prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecutions proof." In **Keyes**, the Supreme Court examined the record that was relied upon for justifying the enhancement of Keyes sentence and the following excerpt was the nucleus of their examination. "(Q) You also that on this charge, as well as the rest of the charges, that you charged as a Habitual and the indictment, the remaining indictments charged that you've been previously convicted of robbery in Cook County, Illinois, on August the 29<sup>th</sup>, 1979, in Cause No. 79-1762---60--- excuse me, 602 and the charge of plain robbery in the Circuit Court of Cook County, Illinois, on August the 5<sup>th</sup>, 1977, in Cause No. 75-2590 and that on each of those charges they arose out of separate incidents and they were separately---and that on each one of them you were sentenced to separate terms of one year or more in the penal institution. Do you understand that you're being charged as a Habitual on that one? (A) Yes. (Q) In Illinois? (A) Yes Sir. (Q) Again, have you gone over all of the facts of this case, of this charge with Mr. May? (A) Yes." The Petitioner would now present to this Honorable Court the excerpt taken from the Trial transcript in the instant cause (Transcript pgs. 28-30).

1 By Mrs. Brewer: Yes Sir. The state has agreed as part of these plea  
2 negotiations to reduce his charge from an 83 Habitual to an 81 Habitual

3The documents supporting the 81 Habitual status are already contained in  
4 the Court file and I would just simply move to adopt those documents as  
5 part of his hearing. The state recommends that he be sentenced to five  
6 years to serve as an 81 Habitual Offender, plus three years of Post-  
7 Release Supervision in this case. Additionally the state has agreed, he  
8 has another case that's not yet indicted and we have agreed to seek just  
9 additional Post-Release Supervision in that cause as well **By the Court:**  
10Mr Franks, is that your recollection of what constitutes the agreement in  
11this case? **By Mr. Franks:** Yes Sir, it does. There's also a \$1,000.00 fine  
12and \$125.00 in restitution and Court costs. I believe it was agreed that  
13the Post-Release Supervision period will be two years consecutive so  
14that the upshot of this would be on the two charges that he will get five  
15years to serve and then a total of five years PRS. **By The Court:** Has all  
16that been explained to you, Mr. Sowell? **By Defendant Sowell: Yes Sir.**  
17**By The Court:** So you understand it? **By Defendant Sewell: Yes Sir.** By  
18The Court: And you knew what that recommendation for punishment  
19would be prior to your admission of guilt to this charge? By Defendant  
20Yes Sir. **By The Court:** The court will then accept the recommendation,  
21and first of all, I will find that the State has proven beyond a reasonable  
22doubt that he is an **99-19-81 Habitual.**

The Rules of RCCCP for Rule 11.03, the Mississippi Constitution provides that the indictment must allege with particularity the nature or description of the offense constituting the previous conviction. The indictment didn't state this. If the defendant is convicted or enters a plea of guilty on the principal charge a hearing before the Court without a jury will then be conducted on the previous convictions. The case before this Honorable Court, there are no Record of any type of hearing to this affectd. The rules are clear, the indictment clearly does not list the particularity in Part 1 of Rule 11.03 RCCCP, constitution issued are and exception to the rule's and when Fundamental Rights are dated, Due Process does not exist

The state alleges in their statement of transcript pgs. 28-30 that they had agreed to reduce the Defendant charge from 99-18-83 to a 99-18-81 Habitual. The indictment did include that the State was seeking a life sentence, which must be included in the indictment in the case **State v Berryhill** (HN 14), a prosecutor has no power to alter the substance of an indictment either through amendment or variance of proof at trial without the concurrence of the Grand Jury. Also in **Stirone v United States** 361us 212; 805ct270 4 LED 2d252. 1960 vs. Lexis 1969, after indictment is reture it's charge may not be broadened through amendment except by the Grand Jury itself.

the concurrence of the Grand Jury. Also in **Stirone v United States 361vs.212; 805ct270 4 LED 2d252. 1960 vs. Lexis 1969**, after indictment is returned it's charge may not be broadened through amendment except by the Grand Jury itself.

The Defendant would ask this court to look at Line 789 of above transcript to where the statement was made by Mrs. Brewer D.A. Additionally the State has agreed he has another case that not yet indicted. And we have agreed to seek just additional Post Release Supervision in that case as well.

This is surely violation of Mississippi Constitution for he was sentenced for a charge that he was not indicted for yet. After this appeal was filed then the Lower Court sentenced him again on the same charge in trying to cover it's mistake.

For **Rule 207 RCCCP** states no Grand Jury juror, witness or Attorney General District Attorney, County Attorney other prosecuting clerk sheriff or other officer of the Court shall disclose to any unauthorized person that an indictment is being found or return into Court against a Defendant or disclose any action or proceeding in relation to the indictment before the finding of indictment or within six months there after or before the Defendant is arrested or gives bail or recognizance.

Now the petitioner would ask this Court to look at the sentence handed down by the Lower Court. The sentence was eight years, three suspended five years to serve as a **99-19-81** Habitual Offender, with three years Post Release Supervision. This sentence does not meet the requirements of **99-19-81**. To where Legislator leaves no doubt when imposing the Habitual. It must imply the maximum sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Now the petitioner would like this Court to look at **Ard vs. State 403 502D875**. This court delegated the part of the sentence of no parole or probation and sentenced him as a second offense in order to fit 99-18-81. Because it did not meet the requirement of 99-19-81. As so in the case now before you, for it is clear that errors were made by the state in Prosecution of the Defendant.

In **Keyes** the court stipulated "Where the defendant pleads not guilty and goes to trial, the reason for the separate hearing is to preclude jury knowledge of prior convictions, except as otherwise admissible. This reason does not obtain at sentencing, for the law strongly encourages, if it does not direct, the sentencing judge to become wholly familiar with the defendant's prior record before passing sentence." The Supreme Court of Mississippi said "The law strongly encourages, if it does not direct, the sentencing judge to become wholly familiar with the defendant's prior

status of **Keyes** based on the transcript recording, then this Honorable Court must strip the Petitioner's instant sentence of its enhanced status and that anything less would be a violation of the Petitioner's right to due Process and therefore a violation of monumental Constitutional proportions.



ASSIGNMENT OF ERROR THREE  
INEFFECTIVE ASSISTANCE OF COUNSEL

The Petitioner would now present his final assignment of error, his sixth amendment ineffective assistance of counsel claim. The Court has required that in order to substantiate a claim of ineffective assistance of counsel the Petitioner's claim must be subjected and fulfill the two prong test outlined in **Strickland Vs. Washington** ( 466 U.S. 668 104 S.Ct. 2052 ). In **Strickland** the court held that " The defendant show , first , that counsel's performance was deficient and , second , that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." As in **Strickland** the issue on presentation before this court is deficient performance during the sentencing phase of the Petitioner's proceedings and the prejudice that the Petitioner suffered as a result of that deficiency in the instant cause. The Petitioner is not challenging the validity of the guilty plea in this collateral attack but the error committed in sentencing the Petitioner as a Habitual Offender. As outlined in the Petitioner's first two assignment of error's , the court did err in sentencing the Petitioner as a 99 - 19 - 81 Habitual without proper foundation and defense counsel's failure to ensure that the Petitioner's right to a fair adversarial process in sentencing as well as at trial was deficiency and falls below an objective standard of reasonableness. The Petitioner is not educated as to Mississippi Law regarding that the defendants be indicted properly under Habitual Offender statues or any latter exceptions which may be adopted into procedural court rules and it is for this reason defendant's employ the services of defense counsel. In **Strickland Vs. Washington** the court's message resounds clearly when they asserted " In representing a criminal defendant , owes the client a duty of loyalty , a duty to avoid conflicts of interest , a duty advocate the defendant's cause , a duty to consult with the defendant on important decisions , a duty to keep the defendant informed of important developments in the course of the prosecution , and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." The Petitioner trusted his counsel to protect his right to a fair process and defense counsel failed to do so. The record reveals that the Petitioner was not indicted as a Habitual Offender nor did the prosecution offer sufficient proof to enhance the Petitioner's sentence. (Transcript pgs. 29 , Lines 1 - 15). It was defense counsel's duty to ensure that if the Petitioner was not indicted under the Habitual Offender statue that the court and prosecution meet the criteria laid out in the exceptions to **Mississippi Uniform Rules of Circuit County Court Practice , Rule 7.09**. The record reveals that the Honorable James Franks made no attempt to prevent the prosecution from moving the court to enhance the Petitioner's sentence as a 99 - 19 - 81 Habitual or to object when the court found the Petitioner to be an 81

Habitual when the prosecution failed to even offer proof of prior convictions by competent evidence. James Franks failed to fulfill his duties as defense counsel for the Petitioner and his failure to protect his clients fundamental constitutional rights was deficiency that falls below an objective standard of reasonableness.

The prejudice the Petitioner suffered is clear. Had the Honorable James Franks objected to the prosecution moving the court to enhance his sentence the record reveals that the prosecution did not have the proof of prior convictions to substantiate their motion. Had a proper recidivism hearing been demanded by James Franks the state could not have supported their motion and as a result the Petitioner would not be serving a mandatory prison sentence. It is for the aforementioned reasons the Petitioner moves this Honorable Court to strip the Petitioner's enhanced status.

*MR FRANK Did not inform the Defendant that the sentence  
was mandatory.*

## CONCLUSION

The Supreme Court of Mississippi held in **Smith Vs. State (477 So.2d 191 ; 1985)** that "Post - Conviction relief in Mississippi is not granted upon facts and issues which could or should have been litigated at trial and on appeal. Post Conviction proceedings are for the purpose of bringing to the trial court's attention facts not known at the time of judgment. Questions not alleged and raised at trial and / or on direct appeal are procedurally barred and may not be litigated collaterally in a Post - Conviction environment. However, errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal. Citizens may not be deprived of Constitutional rights without due process of law and that due process requires reasonable advance notice and a meaningful opportunity to be heard." This is precisely the subject matter of the instant petition. The prosecution erred in not indicting the Petitioner as a Habitual Offender, and the Trial Court compounded the injustice by allowing the prosecution to proceed without adequately fulfilling the prosecutorial duties by meeting the criteria outlined in **Mississippi Uniform Rules of Circuit County Court Practice** in lieu of a formal indictment. The Petitioner's defense counsel stood by and allowed these errors to occur without contest and in so doing colluded with the state in this miscarriage of justice. In closing the Petitioner would respectfully request this Honorable Court review the records and Court files and strip the Petitioner's enhanced status from his sentence with the vigilance the Mississippi Supreme Court displayed in **Wilson Vs. State (248 So.2d 802)** where they declared, "Disregard of the fundamental right in the guiltiest defendant, his conviction in violation of settled constitutional and legal safeguards, which are intended for the protection of all, is not something that affects the particular defendant in a given case alone but, in its disastrous and far reaching consequences, involves, in future trials, the innocent and the guilty alike, subverts justice, and disorganizes society. Guilt should be punished certainly and condignly, most assuredly, but guilt must be manifested in accordance with the law of the land, else some day the innocent, who are sometimes called to answer at the bar of their country, may come to find themselves involved in a common ruin and deprived of the legal trial necessary to the vindication of their innocence."