FRANK BRIEF FILED IN SUPREME COURT

Atlanta Prisoner's Lawyers Hold That He Was Convicted Without Due Process of Law.

ARGUMENTS THIS WEEK

Many Authorities Cited to Show That He Was Deprived of His Rights When the Jury Reported.

Special to The New York Times.

WASHINGTON, Feb. 20.—Louis Marshall of New York and Henry C. Peples and Henry A. Alexander of Atlanta, counsel for Leo M. Frank, now under sentence of death by a State court in Georgia for the murder of a factory girl in Atlanta in 1913, today filed a brief in the Supreme Court of the United States supporting their appeal from the judgment of the Federal District Court for the Northern District of Georgia denying to Frank a writ of habeas corpus. An appeal to the Supreme Court has been allowed by Justice Lamar of that court, and Feb. 23 has been set for a hearing. It is not expected, however, that arguments will be reached before the end of next week.

The brief does not go into the evidence upon which Frank was convicted, but in great detail—the brief covers 218 pages—argues that his trial was irregular, that it was conducted in the presence of a large and hostile mob that might have influenced the jury against the prisoner, and that in general Frank is now held unlawfully in the jail of Fulton County, Ga., in violation of his rights as a citizen, without the due process of law guaranteed by the Federal Constitution. The brief sets forth that both Frank and his counsel were absent from the courtroom at the court's request, without Frank's consent, when the verdict of guilty was returned upon which he was afterward sentenced to die.

The general outline of the disturbing incidents of the trial has already been laid before the Supreme Court in various efforts to have the proceedings reviewed on a writ of error. A somewhat different light, however, seems to be thrown upon subsequent efforts for relief in the courts of Georgia by today's brief.

On Aug. 26, 1913, counsel for the appellant filed a motion for a new trial. This was denied on Oct 21, following. On April 16, 1914, the appellant filed a motion in the Superior Court of Fulton County, which was later dismissed upon the demurrer or the State's Solicitor General. Later the Supreme Court of Georgia sustained the lower courts upon the ground that while a person accused of crime had a right to be present when the verdict was given, his absence was a mere irregularity and he could waive his right to be present, and that while a motion for a new trial was an available remedy, a motion to set aside the verdict made after a motion for a new trial came too late.

Today's brief lays much stress upon the difference between a motion for a new trial, and a motion to set aside the verdict. According to the brief, all previous decisions of the State's Supreme Court pertinent to the issue had held that a motion to set aside a verdict was the proper procedure, and a motion for a new trial improper. These unvarying decisions, says the brief, have the force of law in Georgia until reversed by a full bench after hearing. The point of this contention is that the Supreme Court in refusing to have the verdict set aside had in effect subjected the prisoner to the operation of an ex post facto law, which would be in itself unconstitutional.

The appellant insists that these various rulings have denied to him not only a formal but a substantial right, the lack of which prejudiced his case. He insists that his involuntary absence when the jury was being polled, during which the mob outside was loudly applauding the ballots cast against him, deprived him of the right to be heard, which he characterizes as "an essential prerequisite to due process of law." The right to be heard involved the right, also lost, of being brought face to face with the jury; that he had neither waived this right nor authorized his counsel or any other person to waive it for him, and that as the right was constitutional he could not have waived it if he had so desired.

In denying the petition for a writ of habeas corpus Judge Newman of the Federal District Court declared his court upon a favorable hearing would be limited to discharging the prisoner from custody. Presumably, therefore, a favorable issue of the hearing soon to be given by the Supreme Court of the United States would have the same result, setting Frank at liberty and closing all doors to subsequent proceedings against him. Such a proceeding, said Judge Newman, would amount to supervision of the action of State courts, in the face of the opinions of two Justices of the Supreme Court of the United States, Mr. Justice Lamar and Mr. Justice Hughes, by whom applications for writs of error were denied—that no Federal question was involved.

The brief attacks the opinion of the Federal District Court by nineteen assignments of error. It denies that the denial of a writ of error constituted a closure against a subsequent writ of habeas corpus, and it insists that the lower court erred in refusing to hold that the prisoner's Federal rights had been infringed in ways that entitled him to be protected by Federal courts. One of these points is that as the right of which Frank declares himself to have been deprived was constitutional, his failure to raise the jurisdictional question in a specified way could not constitute a waiver of the right which in itself could not be waived. Another point is that the lower court erred in sustaining the State courts in their view that under the circumstances a motion for a new trial, which would have subjected the prisoner to second jeopardy for the same offense, was Frank's only remedy.

On the subject of the prisoner's absence from the courtroom when the verdict is given, the brief cites the opinion of Chief Justice Gibson of Pennsylvania in Prime vs. Commonwealth, which was approvingly cited by Mr. Justice Shiras of the Supreme Court of the United States in Lewis vs. United States, as follows:

"It would be contrary to the dictates of humanity to let him (the accused) waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence."

"In Rex vs. Laddsingham," continues the brief, "it was quaintly said:

"'Tis intended that no privy verdict can be given in criminal cases which concern life, as felony, because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time.'"

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