LAMAR GRANTS APPEAL TO FRANK

Full Supreme Court Will Pass on His Rights Under "Due Process of Law."

LONG BATTLE IF HE WINS

Georgia Federal Court Would Hear Writ and Supreme Bench Give Final Judgment.

FRANK CALM IN VICTORY

Turning in "Long Lane" of Defeat, He Says — Lamar's Opinion Epochal, in Marshall's View.

Special to The New York Times.

WASHINGTON, Dec. 28. — Justice Lamar of the Supreme Court of the United States today granted to Leo M. Frank, under sentence of death in Atlanta, an appeal for a writ of habeas corpus to the Supreme Court. The immediate effect of this victory, won by Louis Marshall of New York, as counsel for Frank, will be to stay Frank's execution, which had been set for Jan. 22. Under ordinary circumstances two or maybe three years would elapse before the Supreme Court would reach the Frank case, but, if the State of Georgia follows the customary course in cases of this sort, it will ask for an advancement, which would almost certainly be granted. This probably would reduce delay to only a few months.

In granting the appeal from the decision of the United States District Court for the Northern District of Georgia, which court had denied an appeal, Justice Lamar makes no reference to Frank's innocence or guilt. He granted the appeal, as his opinion makes clear, simply because several Federal points involved in the case and properly raised never had been passed upon by the full Supreme Court of the United States. Lacking the high court's opinion on those points, he said he felt constrained by the act of 1908 to grant the appeal as "it cannot be said that there is such a want of probable cause as to warrant the refusal of an appeal."

In announcing his decision Justice Lamar said that the unsettled points of Federal law in question were whether the Federal Constitution required an accused to be present when a verdict was returned against him in a State court; the effect of the accused not raising the point of his absence on a motion for a new trial, and the effect of the Supreme Court's own action in refusing to grant a writ of error in a case where an alleged jurisdictional question was presented in a motion filed at a time not authorized by the practice of the State where the trial took place.

Justice Lamar's Decision.

Justice Lamar's opinion follows:

In re Leo Frank—Habeas corpus.

Leo Frank's recent application for a writ of error was denied by me on the ground that no Federal question was involved in the ruling of the Supreme Court of Georgia that his motion to set aside the verdict finding him guilty of murder had been filed too late. This petition presents a wholly different question, since it is an application for the allowance of an appeal from the judgment of a Federal court on a record which presents a purely Federal question, irrespective of regulations governing State practice.

Frank's petition for the writ of habeas corpus, addressed to the Judge of the United States District Court for the Northern District of Georgia, alleges that on his trial for murder in the Superior Court of Fulton County, Georgia, public feeling against him was so great that the presiding judge advised his counsel not to have him present in the court room when the verdict was returned; that his involuntary absence, under such circumstances, when the verdict was received deprived him of a hearing to which he was entitled under the Constitution and rendered his conviction void.

He avers that his motion for a new trial was overruled and he then moved to set aside the verdict as being void for want of jurisdiction; that in passing on that motion the State Supreme court held that while he had the constitutional right to be present when the verdict against him was returned into court, yet such verdict could not be attacked by a motion to set aside after the expiration of the trial term and after his motion for a new trial had been finally refused. He alleges that his attempt to have that judgment reviewed in the Supreme Court of the United States failed because, though a Federal question was raised in the record, the decision of the Supreme Court of Georgia was based on a matter of State practice.

He thereafter filed this petition for a writ of habeas corpus, in which he claims that the right to be present at the rendition of the verdict was jurisdictional and that on habeas corpus he is entitled to a hearing on the question as to whether he had waived or could waive his constitutional right to be present when the verdict of guilty was returned into court.

The District Judge heard no evidence as to the truth of the allegations, but refused the writ on the ground that the facts therein stated did not entitle Frank to the benefit of that remedy. He declined to give the certificate of probable cause, and this application for that certificate and for the allowance of an appeal was then made to me as the Justice assigned to the Fifth Circuit.

Under the act of 1908 the application for the certificate is not to be determined by any views which may be held as to the effect of the final judgment of the State Supreme Court refusing a new trial, but by considering whether the nature of the constitutional right asserted and the absence of any decision expressly foreclosing the right to an appeal leave the matter so far unsettled as to constitute probable cause justifying the allowance of the appeal.

The Supreme Court of the United States has never determined whether, on a trial for murder in a State court, the due process clause of the Federal Constitution guarantees the defendant a right to be present when the verdict is rendered.

Neither has it decided the effect of a final judgment refusing a new trial in a case where the defendant did not make the fact of his absence when the verdict was returned a ground of the motion nor claim that the rendition of the verdict in his absence was the denial of a right guaranteed by the Federal Constitution.

Nor has it passed upon the effect of its own refusal to grant a writ of error in a case where an alleged jurisdictional question was presented in a motion filed at a time not authorized

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by the practice of the State where the trial took place.

Such questions are all involved in the present case, and, since they have never been settled by any authoritative ruling by the full court, it cannot be said that there is such a want of probable cause as to warrant the refusal of an appeal. That being true, the Act of Congress requires that the certificate should be given and the appeal allowed. J. R. LAMAR,
Associate Justice Supreme Court of the United States.
Dec. 28, 1914.

Will Go Before Full Bench.

The entire Supreme Court will pass upon the appeal. Should the court decide that Frank is entitled to ask for the writ, thus reversing Judge Newman of the lower court, the case will be remanded to the district court for the taking of evidence in support of the petition. Whatever the decision in that court, an appeal will lie to the Supreme Court. Should it be eventually held that Frank must be released from custody, it is said a mooted question may arise as to the power of the State of Georgia to indict and try him a second time, although the weight of opinion seems to be that the question of retrial is not involved in the present habeas corpus proceedings.

This was the second time Frank's case had rested in Justice Lamar's hands. After the Georgia Supreme Court declined to set aside the verdict of conviction Justice Lamar was asked to issue a writ of error for the Supreme Court to review the case. He declined on the ground that no Federal question was present, inasmuch as questions of procedure were for the States to decide. Justice Holmes and eventually the other members of the court, upon being petitioned, took the same ground.

Application was then made in the Georgia Federal Court for Frank's release on a writ of habeas corpus. Judge Newman held the condemned was not entitled to the writ and refused to grant an appeal to the Supreme Court from his decision because he was unwilling to issue a certificate of "probable cause," as required by a Federal statute of 1908 in such appeals. Justice Lamar then was asked to grant the appeal and issue the certificate.

SAYS DECISION AFFECTS ALL.

Marshall Sees in It Determination of Constitutional Liberties.

Louis Marshall, who presented the appeal from the decision of the Federal District Court of Georgia before Justice Lamar on Dec. 24, was elated over the favorable turn in Frank's case, when a NEW YORK TIMES reporter saw him last night at his home, 47 East Seventy-second Street. Mr. Marshall entered the Frank case just prior to the taking of the last step in the Georgia courts. He went into the case without pay and for no other reason, as publicly expressed by him, than to do his duty to his profession by seeking to prevent a miscarriage of justice. He came convinced of Frank's innocence after analyzing the record of the case.

THE TIMES reporter presented a copy of Justice Lamar's opinion, which Mr. Marshall read. Previously he had received excerpts from the opinion from Frank's attorneys in Atlanta.

"If the Supreme Court, after a hearing, should grant the writ of habeas corpus, what, in your opinion, would be the relief to be realized by Frank?" he was asked.

"I will not discuss that," he said. "Not a word as to what the United States Supreme Court will do. I do not know, of course, and I will not express any view.

"This is a great opinion—this opinion of Justice Lamar—great not only for Frank but for every other citizen of the United States. This opinion means as much for the personal liberty of the man in the street as for Frank. The question I was concerned with was whether this was to be a country of law, whether there was to be protection for every citizen under the United States constitution, whether trials were to be governed by law or by violence. Now the door of the Supreme Court of the United States has been opened to admit a presentation and discussion of these fundamental principles, upon which depend the lives and liberties of the American people. That is why Justice Lamar's decision is important."

"When will you be ready to argue the case before the Supreme Court?" he was asked.

"I will be ready at any time the court sets."

Mr. Marshall said that he would present to the court practically all that was contained in the brief submitted to the Supreme Court when the motion for a writ of error was before that court early this month. The text of this brief was printed in full in THE TIMES of Dec. 2 last. The greater part of the brief was devoted to the alleged denial to Frank of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Taking the brief as a basis, the principal points which Mr. Marshall will make in his argument will be:

That the reception in Frank's absence of the verdict convicting him of murder tended to deprive him of life and liberty without due process of law, within the meaning of the Federal Constitution.

That the right of Frank, who was incarcerated pending his trial, to be present at every stage of it, is a fundamental right, essential to due process of law.

That the right of Frank to be present during the entire trial, including the time of the rendition of the verdict, is one which neither he or his counsel could waive or abjure.

That Frank's failure to raise the jurisdictional question on his motion for a new trial did not deprive him of his constitutional right to attack the judgment of the court.

These points, of course, will bring before the court the record of the spirit of mob violence which existed in and around the Court House during the trial of Frank. Mr. Marshall undoubtedly will relate the circumstances which induced the trial Judge to advise that Frank be not brought into the courtroom to hear the verdict, because of the danger of violence. He will explain that mob violence was so threatening that Frank's attorneys even were advised by the presiding Judge to absent themselves from the courtroom. He will also explain that Frank knew nothing of any agreement to keep him out of the courtroom until after sentence of death had been pronounced.

It is expected that great weight will be attached in the argument to the admission by Judge Roan, the trial Judge, that he had doubt as to Frank's guilt. Judge Roan made this admission when Frank's attorneys made their original motion for a new trial. Referring to this admission in his brief to the United States Supreme Court, Mr. Marshall wrote:

"It was a judicial admission that the administration of justice had broken down: that its proceedings were controlled by a mob; that fear of its action hovered like an evil spell over the court and jury. For all practical purposes the mob paralyzed the judicial function, and the duly constituted authority, at the most critical moment of the trial, surrendered its judicial powers and permitted itself to be coerced by the ominous threats of prejudice and the terrors of violence into denying one of the substantial and elementary rights of the man whose steadfast insistence on his innocence had inflamed the hostile passions of lawlessness."