HIS PLEA DENIED, FRANK MAY MOVE FOR A REHEARING

Solicitor General Dorsey and Attorney General Grice Hold Long Conference Over Noted Case.

CONFIDENT OF WINNING, ASSERTS THE PRISONER

If Case Goes to Governor It Is Probable That Judge Harris Will Act Instead of Slaton.

For more than two hours Monday Solicitor Hugh M. Dorsey and Attorney General Warren Grice conferred in the former's office in the court house to determine the prosecution's move to combat a prospective effort of the Leo M. Frank counsel to apply for a new hearing before the supreme court in Washington following the court's refusal to interfere.

Although attorneys for the condemned man would not commit themselves upon the possibilities of a new stand in Frank's behalf, it was rumored Monday afternoon that they would plead for a rehearing in the same tribunal which Monday morning turned down their plea for his freedom.

When questioned at the close of their conference, neither Mr. Dorsey nor Mr. Grice would talk. They merely stated that they could take no action until thirty days hence, at which time official notification would be due from the Washington court. In event a plea for rehearing is made, the notification will be withheld, and it will be weeks before the Fulton courts are notified of the United States court's action.

Plans for Pardon Plea.

In event Frank's counsel do not ask a rehearing, their entire efforts will be concentrated upon the prison commission and governor for either Frank's pardon or a commutation of his sentence. In this case, no time will be lost in presenting the petition for commutation to the prison board. Work will be begun on this petition the moment Frank's attorneys decide upon their next step.

Frank received news of his latest defeat with characteristic calm. He refused, however, to make any comment, saying merely: "I am disappointed," and that he would continue fighting. He was visited throughout the day by friends and relatives.

Solicitor Dorsey said, when informed of the decision: "It was nothing more than could be expected." The same sentiment was expressed by Attorney General Grice.

Both Grice and Dorsey will fight vigorously the effort before the prison commission. In case this step is made instead of a new fight before the supreme court, the matter of Frank's fate will, in all probability, reach the hands of the governor in June. As Governor-elect N. C. Harris will go into office late in June, the chances are that he will finally pass on this case.

Governor Slaton, when asked regarding the Frank case, said: "I have had no official notification of the Frank case. I shall not recognize it until I am officially informed of it."

Frank Still Confident.

"I am confident I will never hang. Truth and justice will eventually prevail. So conscious of the right of my cause and innocent as I am, I have never faltered in spirit. I still have mind and hopes on the future, and eventually I will be a free and exonerated man."

This was the statement of Leo Frank to a reporter for The Constitution who visited him in his cell in the Tower last night. Standing in the shadow of the gallows, his last fight lost in the courts, Frank is perfecting his physical and mental self for the future, when he expects to be a liberated man, cleared of the stigma of murder.

"I have never once lost faith," he continued. "True," it is no picnic enduring confinement and denial of freedom, but I have borne up under it as philosophically as I was capable. I have always felt assured of eventual exoneration.

"It is a long road that has no turning. The road has gone as long as it possibly can. There is obliged to be a turning, and my innocence will be recognized."

Frank's health is phenomenal. Instead of growing ill and losing weight, he has gained at least ten or fifteen pounds since his confinement two years ago. He maintains a system of daily exercise, reads exhaustively and receives visitors at appointed hours.

Friends say that his spirit is dauntless, and that, despite the many defeats he has met in the courts, has never wavered in his confidence that he would finally be restored to freedom.

Frank Loses Another Step.

Washington, April 19.—Leo M. Frank, under death sentence for the murder of Mary Phagan, an Atlanta factory girl, lost another step in his fight for life in the supreme court of the United States today.

In a decision, to which Justices Holmes and Hughes dissented, the court dismissed Frank's appeal from the federal court of Georgia which refused to release him on a writ of habeas corpus.

Frank contended that alleged "mob violence" at his trial and the fact that he was absent from the courtroom when the jury returned its verdict had removed him from the jurisdiction of the courts of Georgia.

The majority opinion of the supreme court rejected all those contentions and declared Frank had enjoyed all his legal rights in the Georgia courts.

Seemingly, no other avenue of escape from the death penalty is open to

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Frank through the courts. The state pardon officials might relieve him.

Justice Pitney Delivered Opinion.

Justice Pitney delivered the opinion, declaring that, "In all the proceedings in the courts of Georgia the fullest right and opportunity to be heard according to the established modes of procedure" had been accorded Frank.

"In the opinion of this court," continued the justice, "he is not shown to have been deprived of any right guaranteed to him by the fourteenth amendment or any other provision of the constitution or laws of the United States; on the contrary, he has been convicted and is now held in custody under due process of law within the meaning of the constitution."

It is believed by legal authorities here that only the state pardon officials of Georgia now can save Frank from paying the death penalty for his conviction of the murder of Mary Phagan, the Atlanta factory girl.

Justice Holmes delivered a dissenting opinion, in which Justice Hughes concurred.

Decision Based on Appeal.

The court's decision was based on an appeal from the action of the United States district court for northern Georgia in refusing to release Frank on a writ of habeas corpus.

His petition for habeas corpus rested on allegations of disorder during his trial in Atlanta, amounting to a mob domination and his involuntary absence when the verdict was returned.

Justice Pitney, in his decision, held that the obligation rested on the supreme court to look through the form and "into the very heart and substance of the matter," not only in the averment in Frank's petition, but in the trial proceedings in the state courts themselves.

"The petition contains a narrative of disorder, hostile manifestations, and uproar," said Justice Pitney, "which if it stood alone and were to be taken as true, may be conceded to have been inconsistent with a fair trial and an impartial verdict. But to consider this as standing alone is to take a wholly superficial view; for the narrative is coupled with other statements from which it clearly appears that the same allegations of disorder were submitted first to the trial court, and afterwards to the supreme court of Georgia, as a ground for avoiding the consequences of the trial, and these allegations were considered by those courts successively at times and places and under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination or the like; the facts were examined by those courts upon evidence submitted on both sides, and both courts found Frank's allegations to be groundless, except with respect to a few matters of irregularity not harmful to the defendant.

State Court Not in Error.

"This court holds that such a determination of the facts cannot in this collateral inquiry be treated as a nullity, but must be taken as setting forth the truth of the matter until some reasonable ground is shown for an inference that the supreme court of Georgia either was wanting in jurisdiction or committed error in the exercise of its jurisdiction; and the mere assertion by the prisoner that the facts of the matter are other than the state courts, upon full investigation, determined them to be will not be treated as raising an issue respecting the correctness of that determination; especially not where the very evidence upon which the determination was rested is withheld by him who attacks the finding.

"Respecting the fact that Frank was not present in the courtroom when the verdict was rendered (his presence having been waived by his counsel, but without his knowledge or consent), the Georgia court held that because Frank, shortly after the verdict, was made fully aware of the facts, and he then made a motion for a new trial upon over 100 grounds, not including this as one, and had that motion been heard by both the trial court and the supreme court, he could not, after this motion had been finally adjudicated against him, move to set aside the verdict as a nullity because of his absence when the verdict was rendered. This court holds that there is nothing in the fourteenth amendment to prevent a state from adopting and enforcing so reasonable a regulation of procedure.

Frank Not Deprived of Rights.

"It is settled by repeated decisions of this court that the due process of law clause of the fourteenth amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interfered with. Indictment by grand jury is not essential to due process. Trial by jury is not essential to it, either in civil or in criminal cases. This court in previous decisons has sustained the right of a state to permit one charged with a capital offense to waive a trial by jury and be tried by the court; and in another case has sanctioned a state law permitting the defendant in a capital case to be absent during a part of the trial."

"This court holds that the practice established in the criminal courts of Georgia that a defendant may waive his right to be present when the jury renders its verdict, and that such waiver may be given after as well as before the trial, and is to be inferred from the making of a motion for new trial upon other grounds when the facts respecting the rendition of the verdict are within the prisoner's knowledge, is a regulation of criminal procedure that it is within the authority of the state to adopt. Since the state may, without infringing the fourteenth amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the such incidents of the trial. The presence of the prisoner at the rendition of the verdict is not so essential a part of the hearing that a rule of practice permitting the accused to waive it, and holding him bound by the waiver, amounts to a deprivation of due process of law.

"The contention that the decision of the supreme court of Georgia that Frank had waived the point respecting his absence when the verdict was rendered amounted in effect to an ex post facto law because inconsistent with previous decisions of the same court, is overruled by this court because, assuming the inconsistency, the prohibition contained in the constitution of the United States, 'no state shall pass a bill of attainder, ex post facto law, or law impairing the obligation of contracts,' as its terms indicate, is directed against legislative action only and does not reach erroneous or inconsistent decisions by the courts."

Dissenting Opinion.

Justice Holmes based his dissent largely on the ground that the finding of a state supreme court about the existence of "mob violence" at a trial is not binding on the United States supreme court. He said he saw no reason for adopting a sterner rule in criminal appeals than in civil appeals, and where questions of law and fact are intermingled in civil cases, as here, the supreme court may "review a state court's finding of fact.

"The single question in our mind," said Justice Holmes, "is whether a petition alleging that the trial took place in the midst of a mob savagely and manifestly intent on a single result, is shown on its face unwarranted, by the specifications, which may be presumed to set forth the strongest indications of the fact at the petitioner's command.

"This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere. And when we find the judgment of the expert on the spot, of the judge whose business it was to preserve not only form but substance, to have been that if one juryman yielded to one reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob.

"Of course, we are speaking only of the case made by the petition, and whether it ought to be heard. Upon allegations of this gravity, in our opinion, it ought to be heard, whatever the decision of the state court may have been, and it did not need to set forth contradictory evidence or matter of rebuttal, or to explain why the motions for a new trial and to set aside the verdict were overruled by the state court.

Would Impair Authority.

"There is no reason to fear an impairment of the authority of the state to punish the guilty. We do not think it impracticable in any part of this country to have trials free from outside control. But to maintain this immunity it may be necessary that the supremacy of the law and of the federal constitution should be vindicated in a case like this.

"It may be on a hearing a different complexion would be given to the judge's alleged request and expression of fear. But supposing the alleged facts to be true, we are of the opinion if they were before the supreme court it sanctioned a situation upon which the courts of the United States should act; and if for any reason they were not before the supreme court, it is our duty to act upon them now and to declare lynch-law, as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death."

Charges of Hostility Rejected.

Justice Pitney's formal opinion of more than 10,000 words concluded with the following summary:

"His allegations of hostile public sentiment and disorder in and about the courtroom, improperly influencing the trial court and the jury against him, have been rejected because found untrue in point of fact upon evidence presumably justifying that finding, and which he has not produced in the present proceeding; his contention that his lawful rights were infringed because he was not permitted to be present when the jury rendered its verdict, has been set aside, because it was waived by his failure to raise the objection in due season when fully cognizant of the fact.

"In all of these proceedings the state, through its courts, has retained jurisdiction over him, and accorded to him the fullest right and opportunity to be heard, according to the established modes of procedure and now holds him in custody to pay the penalty of the crime of which he has been adjudged guilty.

"In our opinion, he is not shown to have been deprived of any right guaranteed to him by the fourteenth amendment, or any other provision of the constitution or laws of the United States; on the contrary, he has been convicted, and is now held in custody, under 'due process of law' within the meaning of the constitution.

"The judgment of the district court, refusing the application for a writ of habeas corpus, is affirmed."