TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 775.

LEO M. FRANK, APPELLANT,

vs.

C. WHEELER MANGUM, SHERIFF OF FULTON COUNTY, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED JANUARY 18, 1915.

(24,519)

(24,519)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 775.

LEO M. FRANK, APPELLANT,

vs.

C. WHEELER MANGUM, SHERIFF OF FULTON COUNTY, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 21, 1915.

a In the District Court of the United States for the Northern District of Georgia.

LEO M. FRANK
against
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

To the Honorable the District Court of the United States in and for the Northern District of Georgia:

The petition of Leo M. Frank respectfully shows:

First. I am and ever since my birth have been a citizen of the United States. I am now and for some years past have been a resident of Fulton County, in the State of Georgia, I am unjustly and unlawfully deprived of my liberty, and unlawfully imprisoned, confined and detained in the jail of said County, by C. Wheeler Mangum, the Sheriff of said County and Ex-Officio jailer.

Second. My aforesaid imprisonment, confinement and detention are wholly without the authority of and contrary to the law, and in violation of my rights as a citizen of the United States as guaranteed by the Constitution of the United States, and particularly by Section 1 of the Fourteenth Amendment to said Constitution, which provides that no State shall deprive any person of life, liberty or property without due process of law, or deny to him the equal protection of the laws, the protection of which I expressly invoke.

Third. The sole claim of authority by virtue of which the said C. Wheeler Mangum, Sheriff and ex-officio jailer as aforesaid, so restrains and detains me is, that on May 24, 1913, I was indicted by the Grand Jury of Fulton County, State of Georgia, on the charge of having murdered Mary Phagan; that thereafter, in
b the Superior Court of Fulton County aforesaid, Hon. L. S. Roan, a Judge of said Court, presiding, I was arrainged and tried on said indictment, and on August 25, 1913, the jury empaneled to try the said indictment returned a verdict of guilty against me, upon which verdict the judgment of the Court was thereafter rendered, and I was, on August 26, 1913, sentenced to death. A copy of said judgment and of the subsequent order extending the time for the execution thereof is hereto annexed, marked Exhibit A. I was thereupon remanded to the custody of said C. Wheeler Mangum, Sheriff and ex-officio jailer aforesaid, which said custody has continued until the present time.

Fourth. At the time of the rendition of said verdict, the entry of said judgment and the pronouncement of the sentence of death, the said Superior Court of Fulton County, in which I was tried, had lost jurisdiction over me, and over the trial of the said indictment; and all proceedings upon said trial, including the reception of the verdict, the rendition of judgment and the pronouncement of sentence of death, and my com-mitment to the jail of Fulton County aforesaid and into the custody of the said C. Wheeler Mangum,

Sheriff and ex-officio jailer of said County, were without due process of law and in all respects null, void and of no effect, and my imprisonment, confinement and detention as aforesaid, were in all respects illegal and in violation of my aforesaid constitutional rights.

Fifth. The facts which occasioned such loss of jurisdiction, and by reason of which I was deprived of due process of law and the equal protection of the laws, are as follows:

My trial in the Superior Court of Fulton County, State of Georgia, before Hon. L. S. Roan and a jury, began on July 28, 1913, in the Court House at Atlanta, Georgia, and continued until August 25, 1913. The court room in which the trial took place was on the ground floor of the Court House. The windows of the court room were open during the progress of the trial, and looked out on Pryor Street, a public street of Atlanta. An open alley ran from Pryor Street along the side of the Court House, and there
c were windows looking into this alley from the court room. The noises from the street were thus conveyed to the court room, and the proceedings in the court room could be heard in the street and alley. Considerable public excitement prevailed during the trial, and it was apparent to the Court that public sentiment seemed to be greatly against me. The court room was constantly crowded, and considerable crowds gathered in the street and alley, and the noises which emanated from them could be heard in the court room. These crowds were boisterous. Several times during the trial, the crowd in the court room and outside of the Court House applauded, in a manner audible both to the Court and jury, whenever the State scored a point. The crowds outside cheered, shouted and hurrahed, while the crowd within the court room evidenced its feelings by applause and other demonstrations. Practically all of the seats in the court room were occupied, both within and without the bar. The aisles at each end of the court room were packed with spectators. The jury, in going to and from the court room, in the morning, at noon and in the evening, were dependent upon the passageways made for them by the officers of the court. The bar of the court room itself was so crowded as to leave but a small space for occupancy by the counsel. The jury box, which was occupied by the jury, was enclosed by the crowd sitting and standing in such close proximity to it that the whispers of the crowd could be heard during a part of the trial.

On Saturday, August 23, 1913, during the argument of Solicitor General Dorsey to the jury, Reuben R. Arnold, Esq., one of my counsel, made an objection to such argument, and the crowd laughed at him. While Mr. Arnold, my counsel, made a motion for a mistrial, and was engaged in taking evidence in support thereof before the Court, the crowd applauded a witness who testified that he did not believe that the jury heard the applause of the crowd on the previous day, as at that time the jury was in the jury room about twenty feet distant.

On Saturday, August 23, 1913, while the Court was con-
d sidering whether or not the trial should proceed on that evening and to what hour the trial should be extended, the ex-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 775.

LEO M. FRANK, APPELLANT,

vs.

C. WHEELER MANGUM, SHERIFF OF FULTON COUNTY, GEORGIA, APPELLEE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Leo M. Frank, appellant, and respectfully shows that on the first day of January, 1915, an appeal was duly allowed to this court, in the above-entitled cause, from an order of the United States District Court for the Northern District of Georgia, which dismissed the appellant's petition for the issuance of a writ of *habeas corpus*, he being, as alleged, unlawfully detained by the appellee under a judgment of the Superior Court of Fulton County, Georgia, which convicted him of the crime of murder and sentenced him to be executed; the appellant's contention being that the said judgment was void in that the Superior Court of Fulton County, Georgia, had lost jurisdiction over him at the time of the rendition of the verdict of the jury which convicted him of the said crime of murder.

On January 19, 1915, this honorable court granted an order staying proceedings on the said judgment pending this appeal, and the appellant is now actually incarcerated in the jail of Fulton County, and is there deprived of his liberty.

Subsequent to the allowance of this appeal, counsel for the appellant conferred with Warren Grice, Attorney General of the State of Georgia, who represents the appellee, for the purpose of speeding the argument of said appeal, subject to the approval of this court, on the ground that the interests of the appellant and of the public demand its speedy hearing and a determination thereof.

This cause was duly docketed by the clerk of this court on January 18, 1915, and the Attorney General of the State of Georgia has consented that a motion to advance this cause may be made, and has waived the service of notice of motion upon him, but states that on account of the pressure of his engagements in other courts, he is unwilling to have the hearing of this cause set earlier than during the week beginning February 22, 1915. The appellant is willing to have this cause set for hearing on any day and is desirous that the earliest practicable day be fixed for the hearing of said appeal.

Wherefore, the appellant prays that this cause be advanced and set for argument on such day as this honorable court may deem proper.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,
FULTON BRYLAWSKI,
Attorneys for Appellant.

citement in and without the court room was so apparent as
apprehension in the mind of the Court as to whether the trial
be safely continued on that day, and before deciding upon
adjournment, the presiding Judge, Hon. L. S. Roan, while upon th
bench, and in the presence of the jury, conferred with the Chief
of Police of Atlanta and the Colonel of the Fifth Georgia Regiment,
stationed in Atlanta, who were well known to the jury. The public
press of Atlanta, apprehending danger if the trial continued on
that day, united in a request to the Court, that the proceedings
should not continue on Saturday evening. The trial was thereupon
continued until the morning of Monday, August 25, 1913.

It was evident on that morning, that the public excitement had
not subsided, and that it was as intense, as it had been on the Satur-
day previous. Excited crowds were present as before, both within
and outside of the court room. When the Solicitor General en-
tered the court room, he was greeted by applause by the large crowd
present, who stamped their feet and clapped their hands, the jury
being then in its room, about twenty feet distant.

During the entire trial I was in the custody of C. Wheeler Man-
gum, the Sheriff of Fulton County and ex-officio jailer, and was
actually incarcerated in said jail, except on such occasions when
I was brought into the court room by the Sheriff or one of his
deputies. I was unable to be present at the trial, except when per-
mitted by the Court and conducted there by the said Sheriff or
his deputies.

On the morning of Monday, August 25, 1913, shortly before
Hon. L. S. Roan, Presiding Judge, began his charge to the jury,
he privately conversed with Messrs. L. Z. Rosser and Reuben R.
Arnold, two of my counsel, in the jury room of the Court House,
and referred to the probable danger of violence that I would
e incur if I were present when the verdict was rendered and
the verdict should be one of acquittal or of disagreement.
After he had thus expressed himself, he requested my counsel to
agree that I need not be present at the time when the verdict was
rendered and the jury polled. In the same conversation the Judge
expressed his opinion to counsel, that even they might be in danger
of violence should they be present at the reception of the verdict.
Under these circumstances they agreed with the Judge, that neither
I nor they should be present at the rendition of the verdict.

I knew nothing of this conversation, nor of any agreement made
by my said counsel with the Judge, until after the rendition of
the verdict and sentence of death had been pronounced.

Pursuant to this conversation, I was not brought into court at
the time of the rendition of the verdict, and I was not present
when the verdict was received and the jury was discharged, nor was
any of my counsel present when the verdict was received and the
jury discharged.

I did not give to my counsel nor to any one else, authority to
waive my right to be present at the reception of the verdict, or to
agree that I should not be present at that time, nor were they in
any way authorized or empowered to waive my right so to be present;

I authorize my counsel, or any of them, to be absent from court room at the reception of the verdict, or to agree that they or any of them might be absent at that time. My counsel were induced to make the aforesaid agreement as to my absence and their absence at the reception of the verdict, solely because of the statement made to them by the Presiding Judge, and their belief that if I were present at the time of the reception of the verdict and it should be one of acquittal or of disagreement, it might subject me and them to serious bodily harm, and even to the loss of life.

Besides Messrs. Rosser and Arnold, I had as counsel Morris Brandon, Esq. and Herbert J. Haas, Esq. Neither of them was present when the verdict was received and the jury discharged.

f Neither the conversation with Judge Roan, nor the purport thereof, was communicated to Messrs. Brandon and Haas, nor did they have any knowledge thereof, until after sentence of death had been pronounced against me.

After the jury had been finally charged by the Court and the case had been submitted to it, when Mr. Dorsey, the Solicitor General, left the court room, a large crowd on the outside of the Court House and in the streets, greeted him with loud and boisterous applause, clapping their hands and yelling "Hurrah for Dorsey," placed him upon their shoulders, and carried him across the street into a building where his office was located. The crowd did not wholly disperse during the interval between the submission of the case to the jury and the return of the jury to the court room with its verdict, but during the entire period a large crowd was gathered in the immediate vicinity of the Court House. When it was announced that the jury had agreed upon a verdict, a signal was given from within the court room to the crowd on the outside to that effect, and the crowd outside raised a mighty shout of approval, and cheered while the polling of the jury proceeded. Before more than one juror had been polled, the applause was so loud and the noise was so great, that the further polling of the jury had to be stopped, so that order might be restored, and the noise and cheering from without was such, that it was difficult for the Presiding Judge to hear the responses of the jurors as they were being polled, although he was only ten feet distant from the jury.

All of this occurred during my involuntary absence from the court room, I being at the time in the custody of the Sheriff of Fulton County and incarcerated in the jail of said County, my absence from the court room, and that of my counsel, having been requested by the Court because of the fear of the Court that violence might be done to me and my counsel had I or my said counsel been in court at the time of the rendition of the verdict.

Sixth. Thereafter, on August 26, 1913, I was sentenced

g to death by said Superior Court of Fulton County, Georgia, and remanded to the custody of C. Wheeler Mangum, Sheriff and ex-officio jailer as aforesaid, said Court being at that time without jurisdiction over me or over the cause in which said verdict was rendered, because of my involuntary absence from the court at the time of the rendition of the verdict and of the polling and

discharge of the jury, said trial having thereby become a n
and the proceedings of Hon. L. S. Roan, Presiding Judge, in
ceiving said verdict and polling the jury and discharging it, bei
coram non judice and devoid of due process of law.

Seventh. On August 26, 1913, my counsel filed a motion for a new trial. This was denied on October 31, 1913, Hon. L. S. Roan, the presiding Judge, in denying the motion saying, that the jury had found me guilty; that he had thought about the case more than any other that he had ever tried; that he was not certain of my guilt; that with all the thought he had put on the case, he was not fully convinced that I was innocent or guilty, but that he did not have to be convinced; that there was no room to doubt that the jury was, and that he felt it his duty to order that the motion for a new trial be overruled. On account of the great length of the motion for new trial, a copy is not attached, but a copy thereof is exhibited herewith to the Court.

Eighth. The cause was then taken on writ of error to the Supreme Court of Georgia, where, on February 17, 1914, a judgment was rendered affirming the judgment of conviction of the Superior Court of Fulton County, and denying my motion for a new trial. The opinion of the Supreme Court of Georgia is reported in Volume 141 Georgia, page 243 and the same is hereby referred to.

Ninth. On April 16, 1914, I filed my motion in the Superior Court of Fulton County, Georgia, to set aside the verdict rendered against me, on the grounds set forth in paragraphs Four, Fifth and Sixth of this petition, to wit, that I was involuntarily
h absent from court when the verdict against me was received and the jury discharged, in violation of my aforesaid constitutional rights; that I was deprived of a fair and impartial trial, of due process of law, and of the equal protection of the laws; that I did not waive the right to be present at the reception of the verdict, and did not authorize the waiver of such right on my behalf by my counsel, or any other person, nor consent that I should not be present at the rendition of the verdict, or that my counsel should be absent at that time; that any agreement made by my said counsel in my absence, and without my knowledge or consent that I should not be present at the rendition of the verdict, was of no legal force or effect, and that by reason of the premises the verdict rendered against me was a nullity.

Tenth. The State of Georgia, by the Solicitor General, demurred to this petition, and on June 6, 1914, it was dismissed on said demurrer, and judgment was rendered against me thereon.

Eleventh. The judgment was then taken by writ of error to the Supreme Court of Georgia, where, on November 14, 1914, a judgment was rendered by said Court which affirmed the judgment of the Superior Court of Fulton County sustaining the State's demurrer to my petition and dismissing my motion to set aside said verdict. The grounds of the judgment of the Supreme Court of Georgia were, in substance, (1) that a person accused of crime has the right to be present at the time of the rendition of the verdict

him, but such right is an incident of the trial; (2) that absence at the time of the rendition of the verdict is a mere irregularity that can be waived by him; (3) that under the laws of Georgia a motion for a new trial is an available remedy by which to attack a verdict rendered in the absence of one accused of crime, and (4) that after the making of a motion for a new trial and the affirmance of judgment denying the same by the Supreme Court, a motion made thereafter to set aside the verdict on the ground that the accused had been absent from the court room when the verdict was rendered, is too late. The opinion of the Supreme Court of Georgia is of great length and is, therefore, not hereto attached, but a copy thereof is herewith exhibited to the Court.

Twelfth. Under previous decisions of the Supreme Court of Georgia, and under the practice which had prevailed throughout the State prior to the aforesaid decision rendered in my case on November 14, 1914, as aforesaid, the proper procedure to attack as a nullity a verdict rendered in the absence of a prisoner, had been held to be a motion to set aside the verdict. A motion for a new trial was treated as not being the proper remedy.

Thirteenth. Such former decisions of the Supreme Court of Georgia were unanimous decisions, and under the laws of the State of Georgia had the force of a statute until reversed by a full bench, after argument, on a request for review granted by the Court.

Fourteenth. No previous decision of the Supreme Court of Georgia, nor the Court of Appeals of said State, said courts being its only appellate courts and its highest courts, had ever declared that a motion to set aside as a nullity a verdict rendered in a prisoner's absence, was not an available remedy to attack such verdict. The decision of the Supreme Court of Georgia in my case, which determined that a motion for a new trial was an available remedy in such a case and denied my right to move to set aside the verdict on the aforesaid grounds, was the first decision of its kind ever rendered by said Court or by the Court of Appeals of Georgia.

Fifteenth. The said decision had the effect of depriving me of a substantial right given to me by the law in force at the time to which my alleged guilt related, and at the time of the reception of the verdict against me and of the presentation and decision of the motion for a new trial, and took from me a right which at all of said times was vital to the protection of my life and liberty, and constituted the passing of an ex post facto law, in violation of the prohibition contained in Article 1, Section 10, of the Constitution of the United States, and was illegal and void.

Sixteenth. The said judgment of the Supreme Court of Georgia, rendered on November 14, 1914, likewise deprived me of due process of law, and of the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States, because the Court thereby, in effect, declared that, in order to avail myself of my aforesaid constitutional rights, to wit, the assertion of my right to due process of law and to the equal pro-

tection of the laws, I would be compelled to subject myself to a second jeopardy, thus depriving me of my aforesaid constitutional rights, except on the illegal condition of the surrender by me of the right secured to all persons charged with criminal offenses in the State of Georgia, by paragraph 8, Section 1*f*, Article I, of the Constitution of said State, that no person shall be put in jeopardy of life or liberty more than once for the same offense; save on his or her own motion for a new trial after conviction or in case of mistrial.

Seventeenth. On November 18, 1914, I applied to the Supreme Court of Georgia for a writ of error to the Supreme Court of the United States, for a review of the aforesaid judgment denying my motion to set aside the verdict rendered against me, and said application was, on November 18, 1914, denied.

Eighteenth. On November 21, 1914, I made an application to Mr. Justice Lamar, the Justice of the Supreme Court of the United States assigned to the Fifth Circuit, which includes the State of Georgia, for a writ of error to review said judgment. This application was denied on November 23, 1914. A similar application was made to Mr. Justice Holmes of the Supreme Court of the
k United States, who denied the same on November 25, 1914, and an application having thereafter been made to Mr. Chief Justice White of said Court, the same was referred to the full bench of the Court, which, on December 7, 1914, denied the same, without opinion.

Nineteenth. The denial by Mr. Justice Lamar and Mr. Justice Holmes of said application for a writ of error, proceeded on the ground that, inasmuch as the decision of the Supreme Court of Georgia, that under the laws of that State, where a motion for a new trial has been made and denied, a defendant cannot make a motion to set aside the verdict on a ground known to him when his motion for new trial was made, that he was not present when it was returned, involves a matter of State practice, the case was not presented in such form as permitted it to be reviewed on writ of error by the Supreme Court of the United States. The memoranda by Mr. Justice Lamar and Mr. Justice Holmes denying the application for writ of error are hereto attached marked Exhibit B.

Twentieth. Having thus exhausted all of my remedies in the courts of the State of Georgia, and by applications for writ of error to the Supreme Court of the United States, to review the judgment denying my motion to set aside the verdict rendered against me as aforesaid, and having been afforded, as above appears, no adequate and efficient means for asserting and obtaining my rights under the Constitution of the United States, I now ask this Honorable Court to discharge me from custody, because of the nullity of said verdict and of the judgment rendered thereon and my commitment thereunder, for the reasons hereinbefore set forth, and in substantiation thereof, and of my contention that the Superior Court of Fulton County, State of Georgia, wherein I was convicted of the crime of murder, lost jurisdiction over me, as hereinbefore set forth, I aver:

(1) The reception, in my absence, of the verdict convicting me of the crime of murder, tended to deprive me of my life and liberty without due process of law, within the meaning of the Four-
l teenth Amendment to the Constitution of the United States, the protection of which I expressly invoke.

(2) I had the right to be present at every stage of my trial, including the reception of the verdict, the polling of the jury and the discharge of the jury, this right being a fundamental right essential to due process of law.

(3) My involuntary absence at the time of the reception of the verdict and the polling of the jury, deprived me of the opportunity to be heard which constitutes an essential prerequisite to due process of law.

(4) This opportunity to be heard, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

(5) My right to be present during the entire trial, including the time of the rendition of the verdict, was one which neither I nor my counsel could waive or abjure.

(6) My counsel having had no express or implied authority from me to waive my presence at the time of the rendition of the verdict, and it being in any event beyond my constitutional power to give them such authority, their consent to the reception of the verdict in my absence was a nullity.

(7) Since neither I nor my counsel could expressly waive my right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by me or acquiescence on my part in any action taken by my counsel.

(8) My involuntary absence at the reception of the verdict, constituting as it did an infraction of due process of law, incapable of being waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the failure to raise the jurisdictional question on my motion for a new trial, did not deprive me of my constitutional right to attack as a nullity the verdict rendered against me and the judgment based thereon.

(9) My trial did not proceed in accordance with the orderly pro-
cesses of the law essential to a fair and impartial trial, be-
m cause dominated by a mob which was hostile to me, and whose conduct intimidated the Court and jury and unduly influenced them, and neutralized and overpowered their judicial functions, and for that reason also, I was deprived of due process of law and of the equal protection of the law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, the protection of which I expressly invoke.

Twenty-first. No previous application for a writ of habeas corpus has been made by me.

Wherefore, I pray that a writ of habeas corpus may issue, directed to C. Wheeler Mangum, Sheriff of Fulton County, Georgia, ex-officio jailer, and to each and all of his deputies, requiring him and them to bring and have me before this Court, at a time to be by this Court

determined, together with the true cause of my detention, to the end that due inquiry may be had in the premises, and that I may be relieved from my said unlawful imprisonment and detention. And thus I will ever pray.

Dated, at Atlanta, Georgia, December 17th, 1914.

(Signed) LEO M. FRANK,
Petitioner.

(Signed) " TYE, PEEPLES AND JORDAN,
HENRY A. ALEXANDER,
Attorneys for Petitioner.

n

EXHIBIT A.

No. 9410.

THE STATE
vs.
LEO M. FRANK.

Indictment for Murder, Fulton Superior Court. May Term, August 25th, 1913; Verdict of Guilty, July Term, 1913.

Whereupon, it is considered, ordered and adjudged by the Court that the defendant, Leo M. Frank, be taken from the bar of this court to the common jail of the County of Fulton, and that he be safely there kept until his final execution in the manner fixed by law.

It is further ordered and adjudged by the Court that on the 10th day of October, 1913, the defendant, Leo M. Frank, shall be executed by the Sheriff of Fulton County in private, witnessed only by the executing officer, a sufficient guard, the relatives of such defendant and such clergymen and friends as he may desire; such execution to take place in the common jail of Fulton County, and that said defendant, on that day, between the hours of 10 o'clock A. M., and 2 o'clock P. M., be by the Sheriff of Fulton County hanged by the neck until he shall be dead, and may God have mercy on his soul.

In Open Court, this 26th day of August, 1913.

L. S. ROAN,
J. S. C. Mt. Ct. Presiding.

HUGH M. DORSEY,
Sol. Gen'l.

Superior Court Fulton County, Ga.

No. 9410.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Murder.

Upon inquiry into the facts and circumstances of this case, it appearing that the defendant, Leo M. Frank, was on the 25th day of August, 1913, convicted of murder, and thereafter on the 26th day of August, 1913, was duly sentenced by an order of this Court to the punishment of death.

And it further appearing that said sentence has not been executed, having been superseded and stayed by a motion for a new trial and an appeal thereon to the Supreme Court of Georgia, which said Court affirmed the verdict and judgment of this Court, and an appropriate order having been passed on the 3rd dav of March, 1914, making said judgment of affirmance by the Supreme Court the judgment of this Court.

And it appearing that the sentence heretofore imposed on said Leo M. Frank, still stands in full force and effect, and that no legal reason exists against the execution of said sentence.

It is here and now ordered and adjudged that the Sheriff of Fulton County, be, and he is, hereby commanded to do execution of such sentence aforesaid on the 17th day of April, 1914, in the manner and form designated in said sentence, and prescribed by law.

Let the petition and writ of habeas corpus and this order be entered on the minutes of this Court, this 7th dav of March, 1914.

BEN. H. HILL,
Judge Superior Court Fulton County, Ga.

Georgia, Fulton County, November Term, 1914.

THE STATE
vs.
LEO M. FRANK.

Indictment for Murder.

Verdict of Guilty.

Whereupon, it is considered, ordered and adjudged by the Court, that the Defendant, Leo M. Frank, be taken from the bar of this Court to the common jail of Fulton County, and be thereby safely kept until his final execution in the manner fixed by law.

It is further ordered and adjudged: that on the 22nd day of January, 1915, the defendant, Leo M. Frank, shall be executed by the

Sheriff of Fulton County, in private, witnessed only by the executing officer, a sufficient guard, the relatives of the said defendant, and such clergymen and friends as he may desire; such execution to take place in the common jail of Fulton County, and that said defendant, on that day, between the hours of 10 A. M. and 4 P. M., be by the Sheriff of Fulton County hanged by the neck until he shall be dead.

And may God have mercy on his soul*d*.

In Open Court, this 9th day of December, 1914.

BENJ. H. HILL,
Judge S. C. A. C.

q UNITED STATES OF AMERICA,
Northern District of Georgia, County of Fulton, ss:

Leo M. Frank, being duly sworn, deposes and says, that he is the Petitioner named in the foregoing petition subscribed by him, that he has read the same and knows the contents thereof, and that the statements made therein by him are true, as he verily believes.

(Signed) LEO M. FRANK.

Subscribed and sworn to before me this 17th day of December, 1914.

[SEAL.] (Signed) MONTEFIORE SELIG,
Notary Public, Fulton County, Georgia.

r UNITED STATES OF AMERICA,
Northern District of Georgia, ss:

To C. Wheeler Mangum, Sheriff of Fulton County, Georgia, Greeting:

We command you, that the body of Leo M. Frank, in your custody detained. as it is said. together with the time and cause of his imprisonment and detention, you safely have before the District Court of the United States in and for the Northern District of Georgia, at the court room of said Court. at a Stated Term thereof, to be held on the — day of December. 1914, at — o'clock in the morning of that day, or as soon thereafter as counsel can be heard, to do and receive what shall then and there be considered concerning the said Leo M. Frank: and have you then and there this writ.

Witness, Honorable William T. Newman, Judge of the District Court of the United States for the Northern District of Georgia, this — day of December, Nineteen hundred and fourteen.

Attest:

———,
Clerk of the District Court of the United States for the Northern District of Georgia.

The foregoing writ is hereby allowed.
Dated, Atlanta, Ga., December —, 1914.

———,
United States District Judge.

EXHIBIT "B."

Opinion of Mr. Justice Lamar.

LEO M. FRANK
v.
THE STATE OF GEORGIA.

Motion to Set Aside Verdict.

The Record discloses that on August 25, 1913, Frank was found guilty of murder by a jury in the Superior Court of Fulton County, Georgia, he, with the consent of his counsel, being absent from the court room when the verdict was rendered. At the same term he made a motion for a new trial in which the fact of his absence was mentioned, though it was not made a ground of the motion. A new trial was refused and the case taken to the Supreme Court of Georgia, where the judgment was affirmed.

Thereafter, on April 16, 1914, and at a subsequent term of the Superior Court, Frank made a "motion to set aside the verdict." The order denying the same was affirmed by the State Supreme Court and thereupon this application for a writ of error was made.

In its opinion in this case the Supreme Court of Georgia, among other things, held:

1. That under the due process clause of the Fourteenth Amendment to the Constitution of the United States. Frank was entitled to be present in court at every stage of the trial, including the time when the jury returned their verdict.
2. That under the laws of Georgia and the practice of its courts a motion for a new trial is a proper method by which to attack a verdict rendered in the prisoner's absence.
3. That when that method of procedure is adopted, the defendant must set out in the motion for a new trial all known grounds of objection to the verdict, including the fact that he was absent when it was rendered.
4. That having elected to make a motion for a new trial and the judgment denying the same having been affirmed by the Supreme Court, the defendant could not thereafter make a motion to set aside the verdict on the ground that he had been absent from the court room when the verdict was rendered.

The laws of the several States fix the method in which, and the time at which, to attack verdicts because of anything occurring during the progress of the trial, including disorderly conduct of the crowd in and out of the court room and the fact that the defendant was not present when the verdict was rendered. It is for the States to determine whether a verdict rendered in the absence of the defendant can be attacked by a motion to set aside the verdict, or by a motion for a new trial, or both. The laws of the States also determine whether the denial of one of these motions will prevent the defendant

from subsequently making the other. The decision of the Supreme Court of Georgia in this case holds that, under the laws of that State where a motion for a new trial was made and denied, the defendant could not thereafter make a motion to set aside the verdict on the ground that he was not present when it was returned by the jury. That ruling involves a matter of State practice and presents no Federal question. The writ of error is therefore denied.

JOSEPH R. LAMAR,
Associate Justice Supreme Court of the United States.

s. EXHIBIT "B."

t *Opinion of Mr. Justice Holmes.*

FRANK
vs.
STATE OF GEORGIA.
Application for a Writ of Error.

I understand that I am to assume that the allegations of fact in the motion to set aside are true. On those facts I very seriously doubt if the petitioner has had due process of law—not on the ground of his absence when the verdict was rendered so much as because of the trial taking place in the presence of a hostile demonstration and seemingly dangerous crowd, thought by the presiding Judge to be ready for violence unless a verdict of guilty was rendered. I should not feel prepared to deny a writ of error if I did not consider that I was bound by the decision of the Supreme Court of Georgia that the motion to set aside came too late, and even if I thought that the suggestion of waiver was not enough to meet the Constitutional question and the right to bring the case here. I understand from the headnote and the opinion that the case was finished when the previous motion for a new trial was denied by the Supreme Court and, as cases must be ended at some time, that apart from any question of waiver, the second motion came too late. I think I am bound by this decision even if it reverses a long line of cases and the Counsel for the petitioner were misled to his detriment, which I do not intimate to be my view of the case. I have the impression that there is a case in which the ground that I rely on as showing want of due process of law was rejected by the Court with my dissent, but I have not interrupted discussion with Counsel to try to find it, if it exists.

O. W. HOLMES,
Justice Supreme Court of the United States.

u Endorsed on the cover is the following: "In the District Court of the United States for the Northern District of Georgia. No. 1156. Motion. Leo M. Frank against C. Wheeler Mangum, Sheriff of Fulton County, Georgia. Application for Writ of Habeas Corpus. Filed in Clerk's Office, Dec. 17th, 1914. (Signed) O. C. Fuller, Clerk. Tye, Peeples & Jordan, Henry A. Alexander, Attorneys for Leo M. Frank."

Opinion of the Court.

In the District Court of the United States for the Northern District of Georgia.

LEO M. FRANK
vs.
C. WHEELER MANGUM, Sheriff Fulton Co.

It is well settled, and indeed the Act of Congress with reference to the issuance of writs of habeas corpus by this Court provides that the Court shall issue the writ "unless it appears from the petition that the party is not entitled thereto". So that, unless it appears from this application and from the exhibits attached thereto, and the records referred to therein that relief could be granted if the writ issued, the writ should be denied.

I do not think this petition, or application, and the exhibits and records referred to, make a case wherein this Court can properly allow the issuance of the writ. All of the papers presented show clearly that this defendant was tried in the Superior Court of the State and motion for a new trial was made and overruled, and the case was taken to the Supreme Court of the State, and the judgment of the lower court was affirmed. It further shows that afterwards a motion was made to set aside the verdict and that that motion was denied and it was then taken to the Supreme Court of the State and affirmed for the reasons stated in the opinion by the Supreme Court. It further shows that an application for a writ of error to the Supreme Court of the United States was made to Mr. Justice Lamar, and to Mr. Justice Holmes of the Supreme Court of the United States.

In a memorandum opinion filed by Mr. Justice Lamar in denying the application for writ of error, he said this, among other things:

"The laws of the several States fix a method in which, and a time at which, to attack verdicts because of anything occurring during the progress of the trial, including disorderly conduct of the crowd in and out of the court room and the fact that the defendant was not present when the verdict was rendered. It is for the State
w to determine whether a verdict rendered in the absence of the defendant can be attacked by a motion to set aside the verdict, or by a motion for a new trial, or both. The laws of the State also determine whether the denial of one of these motions will prevent the defendant from subsequently making the other. The decision of the Supreme Court of Georgia in this case holds that, under the laws of that State where a motion for a new trial was made and denied, the defendant could not thereafter make a motion to set aside the verdict on the ground that he was not present when it was returned by the jury. That rule involves a matter of State practice and presents no Federal question. The writ of error is therefore denied."

Mr. Justice Holmes, speaking in his memorandum denying the application for the writ of error to the Supreme Court of the United States, from the last decision of the Supreme Court of Georgia, said:

"I understand from the headnote and the opinion that the case was finished when the previous motion for a new trial was denied by the Supreme Court and, as cases must be ended at some time, that apart from any question of waiver, the second motion came too late. I think I am bound by this decision even if it reverses a long line of cases and the Counsel for the petitioner were misled to his detriment, which I do not intimate to be my view of the case."

Subsequently the matter was presented to Chief Justice White, who referred the matter, apparently, to the entire Court, and the motion for the writ of error was denied by the entire Court.

How this Court could be justified in issuing this writ when this record is disclosed to it, I am unable to see. If this writ should issue, notwithstanding all that has occurred, and this applicant should be brought into court, the only thing the Court here could do would be to hear evidence and determine whether this applicant had been denied the equal protection of the laws and due process of law, and consequently should be discharged. It seems to me that this would be the exercise by this Court of supervisory power over the action of the State courts in a manner not warranted by the Constitution or the Laws of United States. Also the Court would be considering the matter as proper for hearing and decision here in the face of the decisions of two Justices of the Supreme Court—indeed of the entire Court—to the effect, as stated, that no Federal question remained for consideration or now exists in the case.

I am not aware of any precedent for such action in a case like this on the part of this Court, and none has been referred to by counsel for the applicant who have so ably presented and argued this case.

No question whatever is made about the jurisdiction of the Court trying the case originally and subsequently reviewing it on writ of error.

Believing from the petition itself, therefore, that the applicant is not entitled to the writ of habeas corpus or to the relief prayed, the application for the same is denied.

This 21st day of December, 1914.

(Signed) WM. T. NEWMAN,
U. S. Judge.

Endorsed on the cover is the following: "United States District Court Northern District of Georgia. No. —. Leo M. Frank vs. C. Wheeler Mangum, Sheriff, Fulton Co. Opinion of the Court. Filed in Clerk's Office 21st day of Dec. 1914. (Sgd.) O. C. Fuller, Clerk, By J. D. Steward, Deputy."

In the District Court of the United States for the Northern District of Georgia, October Term, 1914.

LEO M. FRANK, Appellant,
against
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia, Appellee.

Petition for Writ of Habeas Corpus.

The petition of Leo M. Frank for a writ of habeas corpus to be directed to C. Wheeler Mangum, Sheriff and ex-officio jailer of Fulton County, Georgia, having been presented to the Court with the exhibits attached thereto, and there being also exhibited to the Court and considered by it a copy of the motion for new trial referred to therein, and a copy of the opinion of the Supreme Court of the State of Georgia referred to in Paragraph Eleven thereof, both of which exhibits have been identified by the Court and ordered filed, and the Court having fully considered the said petition and said exhibits and said copy of the motion for a new trial and of said opinion of the Supreme Court of Georgia, the Court finds that the facts alleged and shown are insufficient, under the law applicable thereto, to authorize the issuance of the writ; and the Court being of the opinion, from the allegations and facts stated in the petition and the exhibits and in said copy of the motion for new trial and of the opinion of the Supreme Court of Georgia, under the law applicable thereto, that if the writ be granted and a hearing given, the petitioner could not be discharged from custody, and no relief granted thereunder, and that petitioner is not entitled thereto;

It is ordered and adjudged by the Court that said petition for a writ of habeas corpus be, and the same is hereby, refused;

z to which ruling and refusal petitioner by his counsel excepts.

This 21st day of December, 1914.

(Signed) WM. T. NEWMAN,
Judge United States District Court
for the Northern District of Georgia.

Endorsed on the cover is the following: "In the District Court of the United States for the Northern District of Georgia. Leo M. Frank, Appellant, against C. Wheeler Mangum, Sheriff of Fulton County, Georgia, Appellee. Order Denying Petition for Writ of Habeas Corpus. Filed Open Court, December 21, 1914. (Signed) O. C. Fuller, Clerk, by J. D. Steward, Deputy Clerk."

aa In the District Court of the United States for the Northern District of Georgia, October Term, 1914.

LEO M. FRANK, Appellant,
against
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia, Appellee.

Petition for Writ of Habeas Corpus.

Assignments of Error on Petition for Writ of Habeas Corpus.

Now comes Leo M. Frank, the appellant in the above entitled cause, and avers and shows that, in the record and proceedings in the said cause, the District Court of the United States for the Northern District of Georgia erred to the grievous injury and wrong of the appellant in said cause and to the prejudice and against the rights of the appellant herein in the following particulars, to-wit:

First. The said District Court erred in denying the petition for writ of habeas corpus and in refusing to issue the same.

Second. The said District Court erred in denying the petition for writ of habeas corpus and in refusing to issue the same, on the ground that the Court was concluded and bound by the denial, in this case, of a writ of error from the Supreme Court of the United States to the Supreme Court of Georgia, by the Justices of the Supreme Court of the United States and by the said Court.

Third. The said District Court erred in refusing to hold that the verdict, the judgment and all subsequent proceedings in the trial of the indictment for murder against the appellant were, for the reasons alleged in the petition, coram non judice and void, and in refusing to issue the writ of habeas corpus as prayed.

bb Fourth. The said District Court erred in refusing to hold that the appellant, having exhausted his remedies in the State courts and by application for a writ of error from the Supreme Court of the United States, and having been unable to secure a ruling on the constitutional rights, privileges and immunities claimed by him, was entitled to the writ of habeas corpus as prayed.

Fifth. The said District Court erred in refusing to hold that the reception, in appellant's absence, of the verdict convicting him of the crime of murder, tended to deprive him of his life and liberty without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Sixth. The said District Court erred in refusing to hold that appellant had the right to be present at every stage of his trial, including the reception of the verdict, the polling of the jury and the discharge of the jury, this right being a fundamental right essential to due process of law.

Seventh. The said District Court erred in refusing to hold that appellant's involuntary absence at the time of the reception of the verdict and the polling of the jury, deprived him of the opportunity

to be heard which constitutes an essential prerequisite to due process of law.

Eighth. The said District Court erred in refusing to hold that this oportunity to be heard, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

Ninth. The said District Court erred in refusing to hold that appellant's right to be present during the entire trial, including the time of the rendition of the verdict, was one which neither appellant nor his counsel could waive or abjure.

Tenth. The said District Court erred in refusing to hold that appellant's counsel having had no express or implied authority
cc from appellant to waive his presence at the time of the rendition of the verdict, and it being in any event beyond his constitutional power to give them such authority, their consent to the reception of the verdict in his absence was a nullity.

Eleventh. The said District Court erred in refusing to hold that since neither appellant nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by appellant or acquiescence on his part in any action taken by his counsel.

Twelfth. The said District Court erred in refusing to hold that appellant's involuntary absence at the reception of the verdict, constituting as it did an infraction of due process of law, incapable of being waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the failure to raise the jurisdictional question on his motion for a new trial, did not deprive him of his constitutional right to attack as a nullity the verdict rendered against him and the judgment based thereon.

Thirteenth. The said District Court erred in refusing to hold that, because of the facts set out in the petition, appellant's trial did not proceed in accordance with the orderly processes of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to appellant, and whose conduct intimidated the Court and jury and unduly influenced them, and neutralized and overpowered their judicial functions, and for that reason also, appellant was deprived of due process of law and of the equal protection of the law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Fourteenth. The said District Court erred in holding that the appellant had been afforded due process of law under the Fourteenth Amendment to the Constitution of the United States.

dd Fifteenth: The said District Court erred in holding that the appellant had been accorded the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Sixteenth. The said District Court erred in holding that the reception, in appellant's absence, of the verdict, convicting him of the crime of murder, did not tend to deprive him of his life and liberty

without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Seventeenth. The said District Court erred in holding that appellant did not have the right to be present at every stage of his trial, including the reception of the verdict, the polling of the jury and the discharge of the jury, this right being a fundamental right essential to due process of law.

Eighteenth. The said District Court erred in holding that appellant's involuntary absence at the time of the reception of the verdict and the polling of the jury, did not deprive him of the opportunity to be heard which constitutes an essential prerequisite to due process of law.

Nineteenth. The said District Court erred in holding that this opportunity to be heard, did not include the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

Twentieth. The said District Court erred in holding that appellant's right to be present during the entire trial, including the time of the rendition of the verdict, was one which either appellant or his counsel could waive or abjure.

Twenty-first. The said District Court erred in holding that the consent of appellant's counsel to the reception of the verdict in his absence was not a nullity, because appellant's counsel had no express or implied authority to waive his presence at the time of the reception of the verdict, and it being in any event beyond appellant's constitutional power to give them such authority.

Twenty-second. The said District Court erred in holding that appellant's right to be present at the rendition of the verdict could be waived by implication or in consequence of appellant's pretended ratification or acquiescence on his part in the action taken by his counsel, because neither appellant nor his counsel could expressly or impliedly waive such right.

Twenty-third. The said District Court erred in holding that the failure to raise the jurisdictional question on appellant's motion for new trial deprived him of his constitutional right to attack as a nullity the verdict rendered against him and the judgment based thereon, because appellant's involuntary absence at the reception of the verdict, constituting as it did an infraction of due process of law, was incapable of being waived directly or indirectly, expressly or impliedly, before or after the rendition of the verdict.

Twenty-fourth. The said District Court erred in holding that, despite the facts set up in the petition, appellant's trial proceeded in accordance with the orderly processes of law essential to a fair and impartial trial, and that appellant was not deprived of due process of law and of the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States, even though appellant's trial was dominated by a mob which was hostile to him, and whose conduct intimidated the Court and jury and unduly influenced them, and neutralized and overpowered their judicial functions.

Twenty-fifth. The said District Court erred in refusing to hold

that the Superior Court of Fulton County, Georgia had lost jurisdiction over appellant at and by reason of the reception of the verdict in his absence, and that the subsequent sentence imposed upon appellant and his subsequent detention thereunder was wholly
ff without authority of law and beyond the jurisdiction of the court.

And because of other errors appearing upon the face of the record.

Wherefore, for these and other manifest errors, said Leo M. Frank, appellant, prays that the judgment of the District Court of the United States for the Northern District of Georgia be reversed and set aside and held for naught and that the writ of habeas corpus prayed for be directed to issue.

(Signed) TYE, PEEPLES & JORDAN,
H. A. ALEXANDER,
Attorneys at Law, for Appellant.

Endorsed on the cover is the following: "In the District Court of the United States for the Northern District of Georgia. Leo M. Frank, Appellant, against C. Wheeler Mangum, Sheriff of Fulton County, Georgia. Assignments of error on appeal. Filed in Open Court December 21, 1914. (Sgd.) O. C. Fuller, Clerk, By J. D. Steward, Deputy Clerk.

gg In the District Court of the United States for the Northern District of Georgia, October Term, 1914.

LEO M. FRANK, Appellant,
against
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia, Appellee.

Petition for Writ of Habeas Corpus.

The above named appellant, Leo M. Frank, conceiving himself aggrieved by the judgment made and entered on the 21st day of December, 1914, by the United States District Court for the Northern District of Georgia, in the above entitled cause, does hereby appeal from said judgment to the Supreme Court of the United States, for the reasons specified in the assignments of error, which is filed herewith, appellant alleging that there exists probable cause for said appeal, and prays that this appeal may be allowed and that duly authenticated transcript of the record, proceedings and papers herein may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper.

(Signed) TYE, PEOPLES & JORDAN,
H. A. ALEXANDER,
Attorneys for the Appellant.

Endorsed on the cover is the following: "In the District Court of the United States for the Northern District of Georgia. Leo M.

Frank, Appellant, against C. Wheeler Mangum, Sheriff of Fulton County, Georgia, Appellee. Petition for allowance of appeal. Filed in Open Court Dec. 21, 1914.

(Signed) O. C. FULLER, *Clerk,*
By J. D. STEWARD, *Deputy Clerk.*

gg In the District Court of the United States for the Northern District of Georgia, October Term, 1914.

Ex Parte LEO M. FRANK.

Petition for Writ of Habeas Corpus.

The above styled petition having been presented to the Court and by order and judgment heretofore made, the prayer of the same for the issuance of the writ of habeas corpus having been denied, and the petitioner having filed his petition for the allowance of an appeal to the Supreme Court of the United States, together with an assignment of errors upon the said order and judgment;

The Court declines to grant the appeal prayed, accompanied by the certificate hereinafter referred to, upon the ground that having refused to grant even the issuance of the writ of habeas corpus because the Court was of the opinion that under the facts stated in the petition for the writ and the exhibits attached thereto and referred to therein and made a part of the same, and under the law applicable thereto, if the writ were granted and the hearing given the petitioner could not be discharged from custody, and no relief could be granted thereunder, and that the petitioner was not entitled to the writ, the Court could not, consistently therewith, make the certificate required by the Act of Congress of March 10, 1908, as necessary to the allowance of an appeal, to-wit: that there is probable cause for such allowance of appeal.

This 21st day of December, 1914.

(Signed) WM. T. NEWMAN,
U. S. Dist. Judge.

Endorsed on the cover is the following: "No. 1156. United States District Court, Northern District of Georgia, Northern Division. Leo M. Frank, versus C. Wheeler Mangum, Sheriff Fulton County, Georgia. Order filed in Clerk's Office 21 day of December, 1914. (Signed) O. C. Fuller, Clerk, By J. D. Steward, Deputy Clerk.

ii Copy of opinion Supreme Court of Georgia exhibited to and considered by me in Ex parte Leo M. Frank, petition for writ of habeas corpus. Let same be filed.

(Signed) WM. T. NEWMAN,
Judge U. S. Dist. Court,
Nor. Dist. of Ga.

Filed in Open Court December 21, 1914. (Signed) O. C. Fuller, Clerk, by J. D. Stewart, Deputy Clerk.

Opinion of the Supreme Court of the State of Georgia.

3, Criminal, October Term, 1914.

FRANK
v.
THE STATE.

By the COURT:

1. Due process of law implies the administration of laws which apply equally to all persons according to established rules, and which are "not violative of the fundamental priciples of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing."

(*a*) Consequently, where one indicted for murder has had full opportunity under the constitution and laws of the State to defend his case in the courts of the State having jurisdiction thereof, in person, by attorney, or both, according to established constitutional rules of procedure, he has been afforded due process of law under the State and Federal Constitutions, which provide that no person shall be deprived of life, liberty, or property without due process of law.

(*b*) And where such opportunity has been, under constitutional laws of the State, afforded without discrimination, he has been accorded the equal protection of the laws.

2. If on the trial of one indicted for murder a verdict of guilty is received in the absence of the prisoner, and without his consent, while he is incarcerated in jail, a motion for new trial is an available remedy in such case, if made in time.

(*a*) But where a motion for a new trial is made by the defendant, with knowledge of the fact that the verdict was rendered in his absence, and such motion does not contain that fact as a ground for new trial, though it is recited therein, it is too late after the motion for new trial has been denied and the judgment has been affirmed by this court, to make a motion to set aside the verdict on that ground.

3. It is the right of a defendant on trial for crime in this State to be present at every stage of his trial, and to be tried according to established procedure. But he may waive formal trial and verdict and plead guilty, and this includes the power to waive mere incidents of trial, such as his presence at the reception of the verdict.

(*a*) Accordingly, where on the trial of one accused of murder the counsel for the accused, at the suggestion of the trial judge, waived the presence of the defendant at the reception of the verdict, without his knowledge or consent, and where the verdict was received and the jury polled by the court when the defendant was not present, but was confined in jail, and the defendant's counsel were also absent; and where it appears that when the defendant was sentenced to suffer death he was present in court in person and by attorneys, and later, within the time allowed by law, made a motion for a new trial, which recited, among other things, his absence at the reception of the verdict and that his presence had been waived

by his counsel, and his motion for new trial was refused by the trial court and its judgment affirmed by the Supreme Court, the defendant will be considered as having acquiesced in the waiver made by his counsel of his presence at the reception of the verdict, and he can not at a subsequent date set up such absence as a ground to set aside the verdict in a motion made for that purpose.

4. In so far as the motion to set aside the verdict relies on allegations of disorder within and without the court room, and popular excitement as affecting the trial, such matters peculiarly furnish grounds to be included in a motion for a new trial, under the practice in this State. In fact, contentions as to matters of that character were included in the original motion for a new trial, and on examination as to the facts were ruled against the movant, and the judgment was affirmed by this court.

kk

Leo M. Frank filed his motion in writing, which was afterwards amended, to set aside the verdict of guilty of murder rendered against him in the Superior Court of Fulton County. To this motion the State of Georgia interposed its demurrer, both general and special. On the hearing of the demurrer, and at the conclusion thereof, judgment was rendered by the court on June 6th, 1914, sustaining the demurrer upon each and every ground and dismissing the motion. To this judgment Leo M. Frank excepts and assigns the same as error.

From the motion it appears that the verdict of guilty of murder was received by the court on August 25, 1913, and it was sought to be set aside for the following reasons: At the time the verdict was received, and the jury trying the cause was discharged, the defendant was in the custody of the law and incarcerated in the common jail of the county. He was not present when the verdict was received and the jury discharged, as he had the right in law to be, and as the law required he should be. He did not waive the right to be present, nor did he authorize any one to waive it for him, nor consent that he should not be present. He did not know that the verdict had been rendered and the jury discharged until after the reception of the verdict and the discharge of the jury, and did not know of any waiver of his presence made by his counsel until after the sentence of death had been pronounced upon him. On the day the verdict was rendered, and shortly before the judge who presided at the trial of the cause began his charge to the jury, the judge in the jury room of the court house wherein the trial was proceeding privately conversed with two of the counsel of the defendant, and in the conversation referred to the probable danger of violence that the defendant would be in if he were present when the verdict was rendered if the verdict should be one of acquittal; and after the judge had thus expressed himself, he requested the counsel thus spoken to to agree that the defendant need not be present at the time the verdict was rendered and the jury was polled. In these circumstances the counsel did agree with the judge that the defendant should not be present at the rendition of the verdict. In the same conversation the judge expressed the opinion also to the counsel that even counsel of the defendant might be in danger if

ll

they should be present at the reception of the verdict. In these circumstances defendant's counsel; Rosser and Arnold, did agree with the judge that the defendant should not be present at the rendition of the verdict. The defendant was not present at the conversation and knew nothing about any agreement made, as above stated, until after the verdict was received and the jury was discharged and until after sentence of death was pronounced upon him. Pursuant to the conversation above stated, neither of defendant's counsel *were* present when the verdict was received and the jury discharged; nor was the defendant present when the verdict was rendered and the jury discharge-. Defendant says he did not give counsel, nor anyone else. any authority to waive or renounce the right of the defendant to be present at the reception of the verdict or to agree that the defendant should not be present thereat; that the relation of client and attorney did not give them such authority, though counsel acted in the most perfect good faith and in the interest of the personal safety of the defendant. Defendant did not agree that his counsel, or either them, might be absent when the verdict was rendered.

Defendant says upon and because of each of the grounds above stated, the verdict was of no legal effect and was void, and in violation of art. 1, sec. 1, par. 3 of the constitution of the State of Georgia, which provides that "no person shall be deprived of life, liberty or property, except by due process of law." That the reception of the verdict in the "involuntary absence of the defendant" was in violation of and contrary to the provisions of art. 6, sec. 18, par. 1 of the constitution of the State of Georgia, which provides that "the right of trial by jury, except where it is otherwise provided in the constitution, shall remain inviolate. That the reception of the verdict in the absence of the defendant was contrary to and in violation of the provisions of the Fourteenth Amendment to the constitution of the United States, to wit: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." That the reception of the verdict in the absence of the defendant was in violation of art. 1, sec. 1, par. 5 of the constitution of the State of Georgia, to wit: "Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel." Because the trial judge (Hon. L. S. Roan), upon considering "the motion for a new trial made by this defendant, after the reception of said verdict, as above stated, rendered his judgment denying said motion and in rendering said judgment stated that the jury had found the defendant guilty; that he, the said judge, had thought about the cause more than any other he had ever tried; that he was not certain of the defendant's guilt; that with all the thought he had put on this case, he was not thoroughly convinced that Frank was guilty or innocent, but that he did not have to be convinced; that the jury was convinced; that there was no room to doubt that; that he felt it his duty to order that the motion for a new trial be overruled." That the judge in denying to the defendant a new trial in the case, did not, as shown

by his statement, give to the defendant the judicial determination of the motion to which the defendant was entitled by law; that the judge being constituted by law as one of the triors did not afford to the defendant the protection which the law guarantees, nor the due process of law. It was alleged that the defendant was denied

nn the due proces of law and the equal protection of the laws because the court room wherein his trial was had had a number of windows on the Pryor Street side, looking out on the public street of Atlanta, and furnishing easy access to any noises that might occur upon the street; that there is an open alley way running from Pryor Street on the side of the court house, and there are windows looking out from the court room into this alley, and that crowds collected therein, and any noises in this alley could be heard in the court room; that these crowds were boisterous, and that on the last day of the trial after the case had been submitted to the jury, a large and boisterous crowd of several hundred people were standing in the street in front of the court house, and as the solicitor general came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into a building wherein his office was located; that this crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict; that several times during the trial the crowd in the court room, and outside of the court room, which was audible both to the court and the jury, would applaud when the State scored a point; a large crowd of people standing on the outside cheering, shouting and hurrahing, and the crowd in the court room signifying their feelings by applause and other demonstrations, and on the trial, and in the presence of the jury, the trial judge in open court conferred with the chief of police of the city of Atlanta and the colonel of the Fifth Georgia Regiment stationed in Atlanta, which had the natural effect of intimidating the jury; and so influencing them as to make impossible a fair and impartial consideration of defendant's case; indeed, such determinations finally actuated the court in making the request of defendant's counsel, Messrs. Rosser and Arnold, to have the defendant and the counsel themselves to be absent at the time the verdict was received in open court, because the judge apprehended

oo violence to the defendant and his counsel; and the apprehension of such violence naturally saturated the minds of the jury so as to deprive the defendant of a fair and impartial consideration of his case, which the constitution of the United States, in the Fourteenth Amendment hereinbefore referred to, entitled him to. On Saturday, August 23rd, 1913, previous to the rendition of the verdict on August 25th, the entire public press of Atlanta appealed to the trial court to adjourn court from Saturday to Monday, owing to the great public excitement, and the court adjourned from Saturday twelve o'clock M. to Monday morning because it felt it unwise to continue the case that day, owing to the great public excitement, and on Monday morning the public excitement had not subsided, and was as intense as it was on Saturday previous. When it was announced that the jury had reached a verdict, the trial

judge went to the court room and found it crowded with spectators and fearing violence in the court room, the trial judge cleared it of spectators, and the jury was brought in for the purpose of delivering their verdict. When the verdict of guilty was announced, a signal was given to the crowd on the outside to that effect. The large crowd of people standing on the outside cheered and shouted as the jury was beginning to be polled, and before more than one juror had been polled the noise was so loud and the confusion so great that the further polling of the jury had to be stopped so as to restore order, and so great was the noise and the confusion and cheering and confusion from without, that it was difficult for the court to hear the responses of the jurors as they were being polled, though the court was only ten feet distant from the jury. All of this occurred during the involuntary absence of the defendant, he being at the time confined in jail as above set forth. Wherefore, etc.

The State of Georgia, responding to the motion to set aside the verdict, said by way of demurrer that the motion should be dismissed for the following reasons: (1) Because a motion to set aside a verdict or judgment of the court should be under the law *pp* predicated upon some defect appearing on the face of the pleadings or record, and the motion filed is not one predicated upon any defect appearing on the face of the pleadings or the record. (2) Because it affirmatively appears from the motion that the defendant, Leo M. Frank, made a motion for a new trial, which was denied by the court, and as a matter of law if the verdict was rendered at a time when the defendant was not present in court, such irregularity should have been included among the grounds of the motion for a new trial, and as a matter of law is conclusively presumed to have been incorporated and embodied in the motion for a new trial, which motion was heard and denied as shown by the petition. (3) Because the motion shows a course of conduct on the part of the defendant which amounts to an estoppel. And that the motion and the record of the decision of the case of Leo. M. Frank against the State, rendered by the Supreme Court of Georgia, affirmatively shows a course of conduct that amounts to and constitutes an estoppel. (4) Because the motion affirmatively discloses that counsel for the defendant agreed with the court that the defendant should not be present at the rendition of the verdict; that this agreement on the part of counsel was and is binding on the defendant, Leo M. Frank, and effectively constitutes a waiver. (5) Because the motion, in conjunction with the decision of the Supreme Court of Georgia in the case of Leo M. Frank against the State of Georgia, affirmatively shows that Frank, after a knowledge of this waiver on the part of his counsel, acquiesced in the same and took steps affirmatively indicating a waiver of such conduct on the part of his counsel. (6) Because the motion affirmatively shows that the jury returning the verdict were polled, and the presence of the defendant is necessary for himself mainly in order to exercise his right to poll the jury. (7) Because the motion and the decision of the Supreme Court of Georgia in the case above named affirma-

tively discloses that the verdict of guilty was received in open
qq court and a poll of the jury demanded on behalf of the defendant, and that the poll of the jury was in conformity with every requirement of law.

HILL, *J.* (after stating the foregoing facts):

1. Did the absence of the defendant, under the foregoing statement of facts, at the time that the verdict finding him guilty of murder was received by the court and the jury trying him was discharged, render the verdict void and of no legal effect? It is insisted by the defendant that the reception of the verdict in his involuntary absence, while he was confined in jail was in violation of the due process clauses of the State and Federal constitutions, and that it denied him the equal protection of the laws. "Due process of law, as the meaning of the words has been developed in American decisions, implies the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. The phrase is and has long been exactly equivalent to and convertible with the older expression 'the law of the land.' The basis of due process, orderly proceedings, and an opportunity to defend, must be inherent in every body of law or custom as soon as it advances beyond the state of uncontrolled vengeance." McGehee on Due Process of Law, 1, citing Chicago, etc., R. Co. v. Chicago, 166 U. S. 226 (17 Sup. Ct. 581, 41 L. ed. 979). On page 35, this same author says: "Before the passage of the Fourteenth Amendment the security of the citizens of the several States for due process of law in proceedings by the State lay in its institutions alone. Even if due process was denied, the Federal government had no right to interfere. The fourteenth Amendment changed this condition of affairs. It made it a matter of national concern that the State should not deny due process of law to its
citizens and to others. It gave to the United States the right
rr to supervise the performance of this duty, and transferred from the State to the Federal Supreme Court the ultimate decision on the question of the presence of due process in all proceedings affecting life, liberty and property. But under the amendment the authority of the Federal court is merely to determine whether the state by some official action has provided due process or has failed in that duty; and if a denial of due process appears, it can only pronounce the proceedings void. The power of the Federal government ordinarily ends with that act. Thus the primary duty of providing for the protection of life, liberty and property by due process of law rests still with the States, and the fourteenth Amendment operates merely as a guaranty additional to the state constitutions against encroachments on the part of the state upon fundamental rights, which their governments were created to secure. It did not radically change the whole theory of the relations of the state and federal governments to each other and of both governments to the people." [See United States v. Cruickshank, 92 U. S. 542, (23 L. ed. 588): In re Kemmler, 136 U. S. 436-438 (10 Sup. Ct. 930, 34

L. ed. 519.] "The Federal Supreme Court has again and again declared that when the highest court of a state has acted within its jurisdiction and in accordance with its construction of the state constitution and laws, very exceptional circumstances will be necessary in order that the Federal Supreme Court may feel justified in saying that there has been a failure of due process of law. 'We might ourselves have pursued a different course, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference. For especially in cases involving procedure, is it true that 'due process of law means law in its regular course of administration through courts of justice.'" McGehee, Due Process of Law, 167 citing Allen vs. Georgia, 166 U. S. 138 (17 Sup. Ct. 525, 41 L. ed. 949), which case is cited with approval in Wilson v. North Carolina, 169 U. S. 586, 595 *ss* (18 Sup. Ct. 435, 42 L. ed. 865). In Rawlins v. Georgia, 201 U. S. 638 (26 Sup. Ct. 560, 50 L. ed. 899, 5 Ann. Cas. 783), it was contended that because many lawyers, preachers, doctors, engineers, firemen, and dentists were excluded from jury service in Georgia by the jury commissioners failing and refusing to put any of the names of the classes excluded in the jury box, that the defendant had rights under the Fourteenth Amendment. In delivering the opinion of the court in that case, Mr. Justice Holmes said: "At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the state constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would revise the decision of the state court that the local provisions had been compiled with. This is a mistake. If the state constitution and laws as construed by the state court are consistent with the Fourteenth Amendment, we can go no further. The only question for us is whether a state could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms."

In the recent case of Garland v. State of Washington, 232 U. S. 642 (34 Sup. Ct. 456), it was held that, "A conviction upon a second and amended information, after a prior conviction under the original information had been set aside and a new trial grnted, was not wanting in the due process of law guaranteed by U. S. Const., 14th Amend., because no arraignment or plea was had upon the second information, where, without raising that specific objection before trial, the accused had made certain objections to such information, and was put to a trial thereon before a jury in all respects as though he had entered a formal plea of not guilty." In delivering the opinion of the court (which was unanimous), Mr. Justice Day said in part: "Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the *tt* accusation and an adequate opportunity to defend himself in the prosecution. Rogers *v.* Peck, 199 U. S. 425, 435 (50 L. ed. 256, 26 Sup. Ct. Rep. 87), and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that

the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage. All requirements of due process of law in criminal trials in a state, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court. * * * Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the prosecution of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain case [162 U. S. 625, 16 Sup. Ct. 952, 40 L. ed. 1097], when he said (p. 649): 'Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which, under the circumstances, would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.'" See Trono v. United States, 199 U. S. 521 (26 Sup. Ct. 121, 50 L. ed. 292, 4 Ann. Cas. 773). Authorities might be multiplied to the effect that if the state laws as construed by the state courts are not inconsistent with the provisions of the Fourteenth Amendment, that there is no denial of due process of law within the meaning of that provision of the Federal Constitution.

Art. 1, sec. 1, par. 4 of the constitution of the State of Georgia (Civil Code, §6360) declares that "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both." By section 6079 of the Civil Code of 1910 it is provided that "The several superior courts of this State shall have power to correct errors and grant new trials in any cause or collateral issue depending in any of the said courts, in such manner and under such rules and regulations as they may establish according to law and the usages and customs of courts." And see sections 6080, et seq., as to the procedure in such cases. Provision is made that cases tried in the superior courts may be reviewed by the Supreme Court, which has appellate jurisdiction to hear and determine all cases civil and criminal that may come

before it, and to grant judgments of affirmance or reversal, etc. Civil Code, §6103. And how stands the case with reference to our state constitution and laws as affording the defendant due process of law? Art. 1, sec. 1, par. 3 of the constitution of Georgia (Civil Code, 1910, §5700) provides that "No person shall be deprived of life, liberty or property, except by due process of law." This provision of the State constitution is in substantial accord with the Fourteenth Amendment to the constitution of the United States, which
vv declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Civil Code, §6700. Thus it will be seen that provision has been made in the "law of the land" by which all who are charged with crime can make their defenses, and in case of conviction in the trial court, they can make a motion for a new trial in that court on account of any alleged errors which may have been committed in the trial court. If the motion is denied by the trial court, the accused can take the case to the Supreme Court by writ of error, or by direct bill of exceptions, and have the case reviewed. We think it can not be said, therefore, in view of the ample provisions made by the constitution and laws of Georgia for any one accused of crime to exercise his right of defense in our courts, that he is denied "due process of law" or the equal protection of the laws. See Frank v. State, 141 Ga. 243 (80 S. E. 1016.)

2. In this State a defendant charged with crime and tried by a jury is given the right, by motion for a new trial, to have reviewed a verdict and judgment rendered against him, and have it set aside for an illegality, of irregularity amounting to harmful error, in the trial, including such grounds as the reception of a verdict in his absence. But where such motion is made, it should include all proper grounds which were at the time known to the defendant or his counsel, or which by reasonable diligence could have been discovered. Leathers v. Leathers, 138 Ga. 740 (76 S. E. 44). A motion in arrest of judgment is also available to the defendant in a proper case, but a motion in arrest of judgment must be made during the term of court at which the judgment was obtained, and must be predicated upon some defect which appears upon the face of the record or pleadings. Civil Code, 1910, §5958. But this court has decided a number of times that objections to the reception of a verdict in the
ww absence of the defendant, and to recharging the jury in the absence of the prisoner, and similar alleged errors, can be made in a motion for a new trial. In Wade v. State, 12 Ga. 25, the defendant, a verdict for assault with intent to rape being rendered against him, made a motion for a new trial, one of the grounds being that the court read testimony taken down by the court to the jury in the absence of the prisoner and without consent of the prisoner's counsel. It was held in that case that, "The court has no more authority under the law to read over testimony to the jury, affecting the life or liberty of the defendant, in his absence,

than it had to examine the witness in relation thereto in his absence." A new trial was accordingly granted. The court merely treated the ground of the motion for a new trial as an irregularity, and not as a nullity. In Martin v. State, 51 Ga. 567, the defendant was indicted for simple larceny, and the court charged the jury the second time in the absence of the defendant and his counsel. This court did not treat the verdict of guilty as a nullity, but said: "As this important privilege was lost to the defendant in this case, and at a critical stage of the trial, through a mistake of the State's counsel, at least it is positively so stated by defendant's counsel, and doubtless the court was misled by it, we think there should be a new trial." Bonner v. State, 67 Ga. 510, was an indictment for murder, and there was a conviction for voluntary manslaughter. A motion for a new trial was made, which was overruled and the defendant excepted. A new trial was granted by this court, it being held that, "In a criminal case the prisoner has the right to be present in person throughout the trial. Therefore, for the judge to recharge the jury while the prisoner was absent and in confinement, although his counsel may have been present and kept silent was error." In Wilson v. State, 87 Ga. 583 (13 S. E. 566), there was indictment and trial for murder, and a motion for new trial. The trial court recharged the jury in the absence of the defendant. This court held this to be cause for a new trial. And to the same
xx effect, see Tiller v. State, 96 Ga. 430 (23 S. E. 825); Hopson v. State 116 Ga. 90 (42 S. E. 412).

It will thus be seen that this court has held that a motion for a new trial is an available remedy in a case where during progress of the trial of one charged with a felony some step is taken by the court during the enforced absence of the defendant without his consent, and in such case the verdict rendered against the defendant will not be treated as a nullity, but it will be set aside and a new trial granted. It will also be seen that where a motion for a new trial is made, that the defendant must in his motion for a new trial set out all that is known to him at the time, or by reasonable diligence could have been known by him as grounds for a new trial.

Did the defendant in the instant case know at the time he made his motion for a new trial that he was absent without his consent, when the verdict of guilty was rendered against him? He must of necessity have known it, and likewise his counsel. In one ground of his motion for a new trial (which was reviewed and passed on by this court in the case of Frank v. State, supra), it was alleged: "Defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel." When one convicted of crime makes a motion for a new trial, it is his duty to include everything in it which was appropriate to such a motion and which was known to him at the time. As we have seen, the defendant could have made the question under consideration in the motion for a new trial. In Daniels v. Towers, 79 Ga. 785 (7 S. E. 120), a judgment of conviction for felony had been affirmed by the Supreme Court on writ of error brought by the defendant, and this court held that the legality of his conviction could not be

brought into question by writ of habeas corpus sued out by him, save for the want of jurisdiction appearing on the face of the record as brought from the court below to the Supreme Court.

yy In delivering the opinion of the court, Judge Bleckley said (p. 789): "We rest the case upon the general rule that, after a judge of the superior court has presided in any case in the superior court of any county, and the judgment rendered at the trial has been affirmed by this court, it is to be taken for all purposes that it was a legal trial and judgment, and can not be questioned for anything but the want of jurisdiction appearing upon the face of the proceedings as ruled upon here. If there is more record below, and the plaintiff in error after conviction does not bring it up, it is his own misfortune. He had an opportunity to bring it up. He must abide the judgment upon the record which he brings here; and if the judgment is legal according to that record, he must take the consequences. It will not do to allow him to bring up his case in sections, whether there is a trial of it by a court divided in sections or not; he must bring up his whole case as he expects to stand upon it for all time; and if he does not do it, neither he nor his friends can repair the error afterwards."

In support of his contention, the plaintiff cites the case of Hopt v. People of Utah, 110 U. S. 574 (4 Sup. Ct. 202, 28 L. ed. 262). Hopt was tried on an indictment for murder, found guilty and sentenced to suffer death. The judgment was affirmed by the Supreme Court of the Territory of Utah. Upon writ of error to the Supreme Court of the United States the judgment was reversed and the case remanded, with instructions to order a new trial. A statute of Utah provided that, "If the indictment is for a felony the defendant must be personally present at the trial, but if for a misdemeanor, the trial may be had in the absence of the defendant." The triors of the competency of the jurors, appointed by the court, conducted their examination of the jurors in a different room, and tried the grounds of challenge out of the presence as well of the court as of the defendant and his counsel. The Supreme Court of the United

zz States, in construing the statute of Utah, said that under their construction the trial, by triors, appointed by the court, of challenges of proposed jurors in felony cases must be had as well in the presence of the court as of the accused; and that such presence cannot be dispensed with. But it will be observed that the decision was placed upon a construction of the statute of Utah which required the personal presence of the accused at every stage of the trial. It was said by Mr. Justice Harlan, who delivered the opinion, that "all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a felony, must be 'personally present at the trial.'" The absence of the defendant, however, was treated as an irregularity, as shown by the judgment remanding the case and ordering that a new trial be had. Ball v. United States, 140 U. S. 118 (11 Sup. Ct. 761, 35 L. ed. 377), was also relied upon. In that case it did not affirmatively appear from the record that the defendant was present when sentence was pronounced upon him. It was said that "At common law it

was essential in a trial for a capital offense, that the prisoner should be present, and that it should appear of record that he was asked before sentence whether he had anything to say why it should not be pronounced." The defendant was convicted of murder, and filed a motion for new trial, and to arrest the judgment, both on the same date, but whether along with the other motion is not clear. The case was remanded with direction to quash the indictment because it failed to show the time and place of death, p. 133. In delivering the opinion of the court, Chief Justice Fuller said (p. 132): "We do not think that the fact of the presence of the prisoner can by fair intendment be collected from the record, no mention being made to that effect in the order, it not appearing therefrom that the sentence was read or orally delivered to them, and the usual questions not having been propounded." The Chief Justice further
aaa said: We are clear that the indictment is fatally defective, and that a capital conviction, even if otherwise regular, could not be sustained thereon." While it seems to be the practice in the federal courts in capital felonies, that the record should show that the defendant was present and was asked whether he had anything to say why sentence should not be pronounced, it has never been the practice in this State "to enter on the record the fact that the prisoner and his counsel were present when the verdict was rendered, and when the sentence was pronounced, and from arraignment to sentence, or that the prisoner was asked, before sentence whether there was any reason why sentence should not be pronounced upon him. The silence of the record as to such facts is, therefore, no cause for arresting the judgment or setting it aside." Rawlins v. Mitchell, 127 Ga. 24 (55 S. E. 958). See also Nolan v. State, 53 Ga. 137 (3).

Counsel for the defendant rely on the cases of Nolan v. State, 53 Ga. 137, and Nolan v. State, 55 Ga. 521 (21 Am. R. 284). In the former case the defendant was indicted for the offense of murder, and the jury found him guilty of voluntary manslaughter. When the jury were out and before the verdict was returned, counsel for the accused consented that if the jury agreed on a verdict that night they could return a sealed verdict to the clerk of the court and disperse. They did not agree that night, but did on the following day, and their verdict was received in the absence of the prisoner and his counsel. The defendant made a motion in arrest of judgment on the ground that the consent extended only in case of agreement that night and not to the next day. It was held that "consent of counsel that should the jury agree that night, they might return a sealed verdict to the clerk and disperse, can not be construed to extend to a verdict found on the next day." "It was the legal right of the defendant to be present when the verdict was rendered, and had a motion to set aside such verdict been made on the
bbb ground of his absence, it should have been granted." By the motion in arrest of judgment the defendant sought to arrest the judgment as a nullity. But the court said that no motion under section 4629 of the Code then in force could be sustained for any matter not affecting the real merits of the offense charged in the indictment. The judgment of the court below overruling the motion

in arrest of judgment was therefore affirmed. The court also said, "That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on account of his absence, the motion should have been granted by the court." This last statement, from an examination of the record, is obiter. But what was probably meant by a motion to set aside was in the sense of being a motion for a new trial, as such motions have been likened to motions in arrest and to set aside. See Prescott v. Bennett. 50 Ga. 266-272, where Judge Trippe said: "It is true that a motion entitled a motion to set aside, is sometimes made for matters extrinsic the pleadings or record. In such cases, they are practically more to be likened unto motions for new trials, and substantially are the same in form and effect." This is probably what Judge Warner meant by the obiter expression quoted above from the Nolan case; for, from the cases cited in which opinions were delivered prior to that utterance, it will be seen that a motion for a new trial was an available remedy in such cases, and it will be noted, too, that Judge Warner presided and delivered the opinion of the court in the Prescott case, in which Judge Trippe used the language quoted above in his concurring opinion. In the Nolan case decided in 55th Georgia, 521, Nolan was placed on trial for the offense of murder. Evidence was submitted to the jury, argument had and a charge delivered by the court. Subsequently, while the defendant was confined in jail, in the absence of his counsel, and without his consent, the jury returned a verdict finding him guilty of voluntary manccc slaughter, and were discharged. The defendant, at a subsequent term, moved to set aside the verdict rendered against him on the ground that it was rendered and published in his absence and without his right of being present having been waived. The trial court ordered accordingly. Subsequently, the defendant was arraigned again upon the same indictment, and he pleaded specially in bar facts as constituting his having been placed once in jeopardy, and claimed his discharge. This court held, that "A verdict so received, having been, on his motion, set aside as illegal, when afterwards arraigned for trial on the same indictment for the offense before another jury, the prisoner may plead specially his former jeopardy in bar of a second trial, and if supported by the record and the extrinsic facts, the plea should be sustained, and, thereupon, the prisoner should be discharged. It will be observed that the defendant in the Nolan case treated the verdict as a nullity and made a motion to set it aside as such, which was done, instead of making a motion for a new trial and setting up his defense as an irregularity and seeking a new trial because of some error committed at the trial. In the latter case, he would waive the fact that the verdict was a nullity, but insist that it was merely irregular or erroneous, requiring a new trial. Judge Bleckley, delivering the opinion in the last Nolan case, said: "One trial, and only one, for each crime, is a fundamental principle in criminal procedure, and must be the general rule practically administered in all countries. For the public authority, whether king or commonwealth, to try the same person over and

over again for the same offense, would be rank tyranny. * * * Though some exceptions to the general rule are to be admitted, as when a new trial is had on the prisoner's motion, or when judgment on a void indictment has been arrested, the transcendent importance of the rule itself requires that the exceptions should be few and strictly guarded."

ddd In the instant case, the defendant made a motion for a new trial, which was overruled by the court (paragraphs 6 and 7 of defendant's motion; also Frank v. State, supra), thus treating the verdict not as a nullity, but as an irregularity. In Smith v. State, 59 Ga. 513 (27 Am. R. 393), it was held that although the prisoner be in custody he may consent that the verdict shall be received in his absence, and that a verdict thus received was valid, notwithstanding he was at the time confined in jail. The facts in this case were somewhat similar to the Nolan case as to the agreement. The court said: "He ought to have been brought from the jail, so as to be present at the reception. But we think it was merely an irregularity and that no matter of substance was involved. Having surrendered his right to poll the jury, no other of any value to him remained, for the exercise of which his presence was important. Had he been in court, the result must have been the same as it was. Nothing took place in his absence, but the mechanical act of receiving the verdict, as the consent had provided it should be received. If he had been present, the act would have been no less mechanical. In Nolan's case (53 Ga. 137, 55 ib. 521), the event contemplated did not happen." We conclude from these authorities that the question here raised could have been adjudicated under a motion for a new trial and that a failure to include this ground in such motion, would preclude the defendant, after denial of the motion, and the affirmance of the judgment by this court, from seeking to set aside the verdict as a nullity.

3. The motion to set aside the verdict complains of the reception of the verdict in the involuntary absence of the defendant while he was incarcerated in jail, and in the absence of his counsel. Paragraph 2 of the motion avers that he did not waive that right, nor did he authorize anyone to waive it for him, nor did he consent that he should not be present; that he did not know that the verdict had been rendered and the jury discharged until after the reception of

eee the verdict and the discharge of the jury, and that he did not know of any waiver of his presence made by his counsel until after sentence of death had been pronounced upon him. Paragraph 3 of the motion alleges that on the day the verdict was rendered, and shortly before the judge who presided on the trial of the case began his charge to the jury the judge privately conversed with two of the counsel for the defendant, and in the conversation referred to the probable danger of violence to the defendant and his counsel, if he or they were present when the verdict was rendered and it should be one of acquittal, and after the judge had thus expressed himself, he requested counsel to agree that the defendant should not be present at the time the verdict was rendered and the jury polled; that under circumstances counsel did agree

with the judge that the defendant should not be present at the rendition of the verdict, and he was not present at the rendition of the verdict, nor were his counsel present. It is contended that it is the constitutional right of the defendant to be present at every stage of the trial, and that he can not waive that right, nor can his counsel waive it for him, and that his absence at the reception of the verdict vitiates the whole trial.

It is the undoubted right of a defendant who is indicted for a criminal offense in this State to be present at every stage of his trial. But he may waive his presence at the reception of the verdict rendered in his case. In Cawthorn v. State, 119 Ga. 395 (46 S. E. 897), a waiver was made by the defendant's counsel in his presence as to his personal presence at the reception of the verdict. This court held in that case: "8. Even if an attorney, by virtue of the relation of attorney and client existing between himself and one charged with a felony, has no implied right to waive the right of his client to be present at the reception of the verdict, if the attorney makes an express waiver to this effect in the presence of the client, who does not at the time repudiate the action of his counsel, a verdict afterwards received in the absence of the accused and in *fff* consequence of the waiver will not be held to be invalid at the instance of the accused, seeking, after the reception of the verdict, to repudiate the action of his counsel in making the waiver." "9. Before a verdict received in the absence of the accused will be held to be invalid, it is incumbent upon the accused to show that he was in custody of the law at the time the waiver was made, that he made no waiver of his right to be present, and that he did not authorize his counsel to make such waiver for him, and, if an unauthorized waiver has been made by counsel, that he has not ratified the same or allowed the court to act upon the waiver of counsel after he has notice that the same has been made." Judge Cobb, who delivered the opinion of the court in the Cawthon case, after citing a number of authorities, pro and con, said (p. 413): "These decisions seem to draw no distinction between a waiver made by counsel in the presence of his client and one made in his absence. While counsel may have no implied authority, growing out of the relation of attorney and client, to make a waiver of this character for his client in his absence, we can see no good reason why the accused would not be bound by an express waiver made in his presence. Such a waiver is to all intents and purposes the waiver of the client. It would be trifling with the court to allow it to act upon a waiver thus made, and then impeach its action on the ground that counsel had been guilty of an unauthorized act. And while we recognize fully that there are limitations upon the authority of counsel, the client, even though he be charged with a capital felony, should not be allowed to impeach the authority of his counsel, when he acts in his presence, unless he promptly repudiates the unauthorized act before the court bases action upon it. Speaking for myself, I am inclined to the opinion that the right to make the waiver resides in the counsel, whether the accused be present or not at the time of the waiver, his authority arising from the mere rela-

tion of attorney and client. The reasoning of the courts that
ggg hold to the contrary is not, in my opinion, satisfactory or by any means conclusive. Counsel is generally much better able to take care of the rights of the accused than he is himself, and the accused is better protected from improvident waivers by his case being left to the control of his counsel than if he were to take charge of the same in his own behalf." As said by this court, in effect, in the case of Lampkin v. State, 87 Ga. 517 (13 S. E. 523), it is not sound practice for counsel to make a waiver of their client's presence at the reception of the verdict, take the chances of acquittal for their client, and then after verdict of guilty, the defendant should be allowed to repudiate the action of counsel, and employ other counsel to set aside the verdict because of the absence of the defendant at the time it was rendered. Who was better prepared to protect the interests of the defendant, trained and expert counsel, or the defendant himself? True, he had the right to conduct the trial in person, if he so desired; but the defendant had committed his case to able and experienced counsel, who in the exercise of their relation as attorney to the client waived his right to be present, and having made the waiver, and defendant by his conduct having acquiesced in it, he should be bound by it.

In the instant case, the defendant in his motion to set aside the verdict as a nullity says that he did not know of the waiver of his presence made by his counsel. After the verdict of guilty was rendered against him in the trial court, the defendant made a motion for a new trial on various grounds, and the motion being overruled, a writ of error was sued out to this court and the judgment of the lower court affirmed. See Frank v. State, supra. The 75th ground of that motion contains the following recital, among others, "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel." We pause here long enough to say that this court will take judicial notice of its own records, and will of its own motion, or at the suggestion
hhh of counsel, inspect the records of this court in a former appeal of the same case. Strickland v. Western & Atlantic R. Co., 119 Ga. 70 (45 S. E. 721); Dimmick v. Tompkins, 194 U. S. 540, 548 (24 Sup. Ct. 780, 48 L. ed. 1110) and authorities there cited; Mississinewa Min. Co. v. Andrews, 28 Ind. App. 496 (63 N. E. 231); Culver v. Fidelity & Dep. Co., 149 Mich. 630 (113 N. W. 9); Studebaker v. Faylor, 52 Ind. App. 171 (98 N. E. 318); Mayhew v. State (Tex. Crim.), 155 S. W. 191 (5); South Fla. Lumber &c. Co. v. Read, 65 Fla. 61 (61 So. 125); Bohanan v. Darden, 7 Ala. App. 220 (60 So. 955); Alabama &c. R. Co. v. Bates, 155 Ala. 347 (46 So. 776 (2); McNish v. State, 47 Fla. 69 (36 So. 176); Westfall v. Wait, 165 Ind. 353 (73 N. E. 1089, 6 Ann. Cases, 788); 1 Chamberlyne's Modern Law of Evidence, § 683, p. 850.

The motion under review recites that "the said Judge, Hon. L. S. Roan, upon considering the motion for new trial made by this defendant, after the reception of said verdict, as above stated, rendered his judgment denying said motion and in rendering said judgment stated that the jury had found the defendant guilty, etc."

When, therefore, the defendant by motion for a new trial invoked from the court a ruling upon alleged errors that had been committed upon the trial (reciting on the face of the motion a knowledge of his absence when the verdict was returned, and the waiver of his presence), he will not now be heard to say that the verdict was a nullity on account of his not being present at its rendition, after the motion for a new trial has been denied and the judgment denying it affirmed by this court. Frank v. State, supra. And moreover an extraordinary motion for a new trial was made and has likewise been refused and the judgment overruling it affirmed by this court. Frank v. State, 142 Ga. — (83 S. E. —.) He had the right to invoke a ruling on that question in the motion for a new trial, and failing to do so, he can not now be heard to say that

iii he will treat the verdict as a nullity and move to have it set aside as such. It would be a reproach upon the court's administration of the law to allow a defendant to make a motion for a new trial, with a knowledge of his absence when the verdict against him was rendered, and have the grounds of the motion adjudicated by the court, and then move to set the verdict aside as void. The defendant necessarily knew when sentenced by the court, for he was then present, that the verdict had been rendered against him. His counsel must have known it, for they filed his motion for a new trial. He and they are presumed to know the law. His motion for a new trial recited that his presence at the reception of the verdict had been waived by his counsel. Under these circumstances, it must be held that the defendant acquiesced in the waiver by his counsel of his presence at the reception of the verdict. It would be trifling with the court to allow one who had been convicted of a crime, and who had made a motion for a new trial on over a hundred grounds, including the statement that his counsel had waived his presence at the reception of the verdict, and have the motion heard by both the superior and supreme courts, and after a denial by both courts of the motion to now come in and by way of a motion to set aside the verdict include matters which were or ought to have been included in the motion for a new trial. While a defendant indicted for crime in this State has the legal right to be personally present at every stage of his trial, as before stated, there are certain matters which he may waive, and which many prisoners do waive at their trial. They may waive copy of indictment, formal arraignment, and list of witnesses before the grand jury, all of which are important rights. They may waive a preliminary hearing before a committal court; a jury of twelve to try them; or any legal objection to jurors who have qualified on their voir dire; they may even waive trial entirely, plead guilty of murder and be sentenced to hang. Sarah v. State, 28 Ga. 576 (2), 581; Wiggins v. Tyson, 112 Ga. 745, 750 (38 S. E. 86).

jjj These are rights personal to the defendant, and it would be absurd to say that when his counsel had waived his presence at the reception of the verdict, and this waiver had been brought to his attention in ample time for him to move for a new trial on that ground, which he fails to do until after he makes a motion for

a new trial, with knowledge of the fact of absence when the verdict was rendered, and then after the motion had been finally adjudicated against him, he could then move to set aside the verdict as a nullity. We may add that the allegations of the petition show that at the rendition of the verdict the jury was polled by the court, under an agreement had with the defendant's counsel when the waiver was made. In this State after a verdict of guilty of murder and the overruling of a motion for a new trial, a writ of error will lie to this court, assigning error on the overruling of the motion. In some jurisdictions the practice is different. But on examination of the cases in other jurisdictions in which a complaint of the reception of a verdict in the absence of the accused was made and sustained, it will be found that very commonly this was treated as a ground for remanding the case for another trial. We know of no provision in the constitution of the United States, or of this State, nor of any statute, which gives to an accused person a right to disregard the rules of procedure in a State, which afford him due process of law, and demand that he shall move in his own way and be granted absolute freedom because of an irregularity (if there is one) in receiving the verdict. If an accused person could make some of his points of attack on the verdict, and reserve other points known to him, which he could then have made, to be used as grounds for further attacks on the verdict, there would be practically no end to a criminal case.

4. Comparing the grounds of the motion to set aside the verdict in this case on the ground of disorder in the court room during the progress of the trial; of cheering and applause outside of the court room; and of the oral remarks of the trial judge before signing the order denying a new trial, with the grounds of the motion for a new trial made in the former record in this case (see Strickland v. W. & A. R. Co. 119 Ga. 70) when it was here under review upon the denial of that motion (Frank v. State, 141 Ga. 243), it will be seen that the questions there made as to these matters were substantially the same as those sought to be raised by the present motion, and the questions there raised were adjudicated by this court in that case adversely to the contentions of the defendant. This Court, therefore, will not again consider those same questions when sought to be raised by the motion to set aside the verdict now under review.

kkk

Judgment affirmed. All the Justices concur except Fish, C. J., absent on account of sickness.

lll Copy motion for new trial in Leo M. Frank vs. State of Georgia exhibited to and considered by me in Ex parte Leo M. Frank, Petition for Writ of Habeas Corpus.

Let same be filed.

(Signed) WM. T. NEWMAN,
Judge U. S. Dist. Court, Northern Dist. of Ga.

In the Supreme Court of Georgia, October Term, 1913.

No. 18.

LEO M. FRANK, Plaintiff in Error,
vs.
STATE OF GEORGIA, Defendant in Error.

In Error from Fulton Superior Court.

Conviction of Murder.

Motion for New Trial.—Amended Motion for New Trial.—Charge of the Court.

Attorneys: Rosser & Brandon, Reuben R. Arnold, Herbert J. Haas, Leonard Haas, for Plaintiff in Error.

Filed in Open Court December 21, 1914.
(Signed) O. C. FULLER, *Clerk,*
By J. D. STEWARD, *Deputy Clerk.*

mmm

Index.

Part I.

Part II.

nnn

000

Part III.