FRANK v. MANGUM, SHERIFF OF FULTON COUNTY, GEORGIA.

No. 775.

SUPREME COURT OF THE UNITED STATES

237 U.S. 309; 35 S. Ct. 582; 59 L. Ed. 969; 1915 U.S. LEXIS 1338

Argued February 25, 26, 1915.
April 12, 1915, Decided

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

LEO M. FRANK, the present appellant, being a prisoner in the custody of the Sheriff in the jail of Fulton County, Georgia, presented to the District Court of the United States for the Northern District of Georgia his petition for a writ of habeas corpus under Rev. Stat., ß 753, upon the ground that he was in custody in violation of the Constitution of the United States, especially that clause of the Fourteenth Amendment which declares that no State shall deprive any person of life, liberty, or property without due process of law. The District Court, upon consideration of the petition and accompanying exhibits, deeming that upon his own showing petitioner was not entitled to the relief sought, refused to award the writ. Whether this refusal was erroneous is the matter to be determined upon the present appeal.

From the petition and exhibits it appears that in May, 1913, Frank was indicted by the grand jury of Fulton County for the murder of one Mary Phagan; he was arraigned before the Superior Court of that county, and, on August 25, 1913, after a trial lasting four weeks, in which he had the assistance of several attorneys, the jury returned a verdict of guilty. On the following day, the court rendered judgment sentencing him to death and remanding him, meanwhile, to the custody of the sheriff and jailer, the present appellee. On the same day, the prisoner's counsel filed a written motion for a new trial, which was amended about two months thereafter so as to include 103 different grounds particularly specified. Among these were several raising the contention that defendant did not have a fair and impartial trial, because of alleged disorder in and about the court-room including manifestations of public sentiment hostile to the defendant sufficient to influence the jury. In support of one of these, and to show the state of sentiment as manifested, the motion stated: "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the court, because of the fear of violence that might be done the defendant were he in court when the verdict was rendered." But the absence of defendant at the reception of the verdict, although thus mentioned, was not specified or relied upon as a ground for a new trial. Numerous affidavits were submitted by defendant in support of the motion, including 18 that related to the allegations of disorder; and rebutting affidavits were submitted by the State. The trial court, having heard argument, denied the motion on October 31. The cause was then taken on writ of error to the Supreme Court of Georgia, where the review included not only alleged errors in admission and exclusion of evidence, and instructions to the jury, but also a consideration of the allegations of disorder in and about the court-room and the supporting and rebutting proofs. On February 17, 1914, the judgment of conviction was affirmed. (141 Georgia, 243.)

Concerning the question of disorder, the findings and conclusions of the court were, in substance (141 Georgia, 280): That the trial court, from the evidence submitted, was warranted in finding that only two of the alleged incidents occurred within the hearing or knowledge of the jury. 1. Laughter by spectators while the defense was examining one of its witnesses; there being nothing to indicate what provoked it, other than a witty answer by the witness or some other innocuous matter. The trial court requested the sheriff to maintain order, and admonished those present that if there was further disorder nobody would be permitted in the court-room on the following day. The Supreme Court held that, in the absence of anything showing a detrimental effect, there was in this occurrence no sufficient ground for a new trial. 2. Spectators applauded the result of a colloquy between the solicitor general and counsel for the accused. The latter complained of this conduct, and requested action by the court. The Supreme Court said: "The [trial] court directed the sheriff to find out who was making the noise, and, presumably from what otherwise appears in the record, the action by the court was deemed satisfactory at the time, and the orderly progress of the case was resumed without any further action being requested. The general rule is that the conduct of a spectator during the trial of a case will not be ground for a reversal of the judgment, unless a ruling upon such conduct is invoked from the judge at the time it occurs. [Citing

cases]. . . The applause by the spectators, under the circumstances as described in the record, is but an irregularity not calculated to be substantially harmful to the defendant; and even if the irregularity should be regarded as of more moment than we give it, we think the action of the court, as a manifestation of the judicial disapproval, was a sufficient cure for any possible harmful effect of the irregularity, and deemed so sufficient by the counsel who, at the time, made no request for further action by the court."

As to disorder during the polling of the jury, the court said (141 Georgia, p. 281): "Just before the jury was ushered into the court's presence for the purpose of rendering their verdict, the court had the room cleared of spectators. The verdict of the jury was received and published in the usual manner. A request was made to poll the jury, and just after the polling had begun loud cheering from the crowd in the streets adjacent to the court-house was heard. This cheering continued during the polling of the jury. The plaintiff in error insists that the cheering on the outside of the court-room, which was loud, and which was heard by the jury, could not have been interpreted otherwise than as expressive of gratification at the verdict which had been rendered, and of which the crowd on the outside had in some way been informed, and was so coercive in character as to affect the fairness of the poll of the jury which was taken. . . . [p. 282]. In order that the occurrence complained of shall have the effect of absolutely nullifying the poll of the jury taken before they dispersed, it must appear that its operation upon the minds of the jury, or some of them, was of such a controlling character that they were prevented, or likely to have been prevented, from giving a truthful answer to the questions of the court. We think that the affidavits of jurors submitted in regard to this occurrence were sufficient to show that there was no likelihood that there was any such result. Under such circumstances we do not think that the occurrence complained of amounts to more than an irregularity, which was not prejudicial to the accused. There is a wide difference between an irregularity produced by the juror himself, or by a party, and the injection into a trial of an occurrence produced by some one having no connection therewith."

After this decision by the Supreme Court, an extraordinary motion for a new trial was made under Georgia Code 1910, ßß 6089, 6092, upon the ground of newly discovered evidence; and this having been refused, the case was again brought before the Supreme Court, and the action of the trial court affirmed on October 14, 1914 (142 Georgia, 617; S.C., 83 S.E. Rep. 233).

On April 16, 1914, more than six months after his conviction, Frank for the first time raised the contention that his absence from the court-room when the verdict was rendered was involuntary, and that this vitiated the result. On that day, he filed in the Superior Court of Fulton County a motion to set aside the verdict as a nullity [1] on this ground (among others); stating that he did not waive the right to be present nor authorize anybody to waive it for him; that on the day the verdict was rendered, and shortly before the presiding judge began his charge to the jury, the judge privately conversed with two of the prisoner's counsel, referred to the probable danger of violence to the prisoner if he were present when the verdict was rendered, in case it should be one of acquittal, or if the jury should disagree, and requested counsel to agree that the prisoner need not be present when the verdict was rendered and the jury polled; that in the same conversation the judge expressed the view that even counsel might be in danger of violence should they be present at the reception of the verdict, and under these circumstances they agreed that neither they nor the prisoner should be present, but the prisoner knew nothing of the conversation or agreement until after the verdict and sentence; and that the reception of the verdict during the involuntary absence of defendant and his counsel was a violation of that provision of the consititution of the State of Georgia guaranteeing the right of trial by jury, and was also contrary to the "due process of law" clause of the Fourteenth Amendment. The motion was also based upon allegations of disorder in the court-room and in the adjacent street, substantially the same as those previously submitted in the first motion for a new trial. To this motion to set aside the verdict the State interposed a demurrer, which, upon hearing, was sustained by the Superior Court; and upon exception taken and error assigned by Frank, this judgment came under review before the Supreme Court, and, on November 14, 1914, was affirmed (83 S.E. Rep. 645; 142 Ga. 741).

> 1 The constitution of Georgia provides (Act. 1, ß 1, Par. 8; Code 1911, ß 6364): "No person shall be put in jeopardy of life, or liberty, more than once for the same offence, save on his or her motion for a new trial after conviction, or in case of mistrial." In some cases a distinction has been taken between a motion for a new trial, and a motion to set aside the verdict as a nullity. It seems that if a motion of the latter kind is granted upon grounds such as were here urged, defendant, if again put upon trial, can plead former jeopardy. Nolan v. State, 55 Georgia, 521; Baywell v. State, 129 Georgia, 170.

The grounds of the decision were, briefly: That by the law of Georgia it is the right of a defendant on trial upon a criminal indictment to be present at every stage of the trial, but he may waive his presence at the reception of the verdict (citing Cawthon v. State, 119 Georgia, 395, 412); that a defendant has the right by motion for a new trial to review an adverse verdict and judgment for illegality or irregularity amounting to harmful error in the trial, but where such a motion is made it must include all proper grounds which are at the time known to the defendant or his counsel, or by rea-

sonable diligence could have been discovered (citing Leathers v. Leathers, 138 Georgia, 740); that objections to the reception of a verdict during the enforced absence of defendant without his consent, or to the taking by the trial court of other steps in his absence and without his consent, can be made in a motion for a new trial (citing Wade v. State, 12 Georgia, 25; Martin v. State, 51 Georgia, 567; Bonner v. State, 67 Georgia, 510; Wilson v. State, 87 Georgia, 583; Tiller v. State, 96 Georgia, 430; and Hopson v. State, 116 Georgia, 90), and in such case the verdict rendered against the defendant will not be treated as a nullity, but will be set aside and a new trial granted; and since Frank and his counsel, when the motion for a new trial was made, were fully aware of the facts respecting his absence when the verdict of guilty was rendered against him, the failure to include this ground in that motion precluded him, after denial of the motion and affirmance of the judgment by the Supreme Court, from seeking upon that ground to set aside the verdict as a nullity. Respecting the allegations of disorder, the court held that the questions raised were substantially the same that were presented when the case was under review upon the denial of the first motion for a new trial (141 Georgia, 243), at which time they were adjudicated adversely to the contentions of defendant, and the court therefore declined to reconsider them. The result was an affirmance of the judgment of the trial court denying the motion to set aside the verdict.

Shortly after this decision, Frank unsuccessfully applied to the Supreme Court of Georgia for the allowance of a writ of error to review its judgment in this court. Thereafter he applied to several of the justices of this court, and finally to the court itself, for the allowance of such a writ.These applications were severally denied. (See 235 U.S. 649.)

Thereupon his application for a writ of habeas corpus was made to the District Court, with the result already mentioned. The petition purports to set forth the criminal proceedings pursuant to which appellant is detained in custody, including the indictment, the trial and conviction, the motions, and the appeals above set forth. It contains a statement in narrative form of the alleged course of the trial, including allegations of disorder and manifestations of hostile sentiment in and about the court-room, and states that Frank was absent at the time the verdict was rendered without his consent, pursuant to a suggestion from the trial judge to his counsel to the effect that there was probably danger of violence to Frank and to his counsel if he and they were present and there should be a verdict of acquittal or a disagreement of the jury; and that under these circumstances they consented (but without Frank's authority) that neither he nor they should be present at the rendition of the verdict. From the averments of the petition it appears that the same allegations were made the basis of the first motion for a new trial, and also for the motion of April 16, 1914, to set aside the verdict. Accompanying the petition, as an exhibit, was a copy of Frank's first motion for a new trial and the supporting affidavits. The rebutting affidavits were not included, nor were they in any way submitted to the District Court; therefore, of course, they have not been brought before this court upon the present appeal. The petition refers to the opinion of the Georgia Supreme Court affirming the conviction and the denial of the motion for a new trial (141 Georgia, 243); it also refers to the opinion upon the affirmance of the motion to set aside the verdict as a nullity (83 S.E. Rep. 645), and a copy of this was submitted to the District Court as an exhibit. From these opinions, and from the order of the Superior Court denying the motion for new trial, which is included among the exhibits, it appears that the rebutting affidavits were considered and relied upon by both of the state courts as the basis of their findings upon the questions of fact.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant prisoner, whose conviction for murder had been affirmed by the Supreme Court of Georgia, sought review of a decision of the United States District Court for the Northern District of Georgia denying his petition for a writ of habeas corpus.

OVERVIEW: Appellant prisoner, who was convicted of murder, challenged the district court's denial of his petition for a writ of habeas corpus, claiming that disorder and mob domination in the courtroom during his trial as well as his absence from the courtroom at the time the jury's verdict was rendered denied him a fair trial in violation of his due process rights under U.S. Const. amend. XIV. The court affirmed the denial, ruling that the Supreme Court of Georgia had decided in appellant's direct appeal of his conviction that his claim of disorder was unfounded, and that appellant's mere allegations that disorder occurred was not sufficient to raise an issue respecting the correctness of that determination. The court further ruled that, with respect to appellant's claim that the jury's verdict was rendered in his absence, the Supreme Court of Georgia had determined that appellant waived this point by failing to raise it in his motion for a new trial, and that a rule of practice permitting the accused to waive his right to be present when the verdict was rendered and to be bound by his waiver did not amount to a deprivation of due process of law.

OUTCOME: The court affirmed the district court's denial of appellant prisoner's petition for a writ of habeas corpus, ruling that his due process rights under the Fourteenth Amendment had not been violated.

CORE TERMS: prisoner, process of law, new trial, disorder, habeas corpus, nullity, custody, domination, hostile, waive, habeas corpus, deprivation, court-room, tribunal, process of law, ex post facto law, common law, competent jurisdiction, present case, loss of jurisdiction, fair trial, sentiment, detention, deprived, resort, interfered, guaranteed, indictment, reception, violence'

LexisNexis(R) Headnotes

Criminal Law & Procedure > Habeas Corpus > Custody Requirement > Custody Determinations > Satisfaction of Custody
Criminal Law & Procedure > Habeas Corpus > Custody Requirement > In-Custody Requirement
Criminal Law & Procedure > Habeas Corpus > Procedure > Filing of Petition > Jurisdiction
[HN1] In order to entitle an applicant for a writ of habeas corpus to the relief sought, it must appear that he is held in custody in violation of the Constitution of the United States. Moreover, if he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on habeas corpus. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > General Overview
[HN2] As to the "due process of law" that is required by U.S. Const. amend. XIV, a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the United States Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense.

Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > General Overview
[HN3] While U.S. Const. amend. XIV does not require that a state shall provide for an appellate review in criminal cases where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to U.S. Const. amend. XIV.

Administrative Law > Separation of Powers > Constitutional Controls > General Overview
Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > Due Process
Criminal Law & Procedure > Habeas Corpus > Exhaustion of Remedies > General Overview
[HN4] The question whether a state is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the United States Constitution, cannot ordinarily be determined, with fairness to the state, until the conclusion of the course of justice in its courts. Where it is made to appear to a court of the United States that an applicant for habeas corpus is in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the state not in itself repugnant to the United States Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the federal questions arising upon the record have been brought before this court upon writ of error.

Criminal Law & Procedure > Habeas Corpus > Exhaustion of Remedies > General Overview
Governments > Courts > Judicial Comity
[HN5] Where a criminal prosecution has proceeded through all the courts of the state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of federal rights sufficient to oust the state of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity. The rule arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the federal

governments. The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is a principle of right and of law, and of necessity.

Criminal Law & Procedure > Habeas Corpus > Custody Requirement > Custody Determinations > Satisfaction of Custody
Criminal Law & Procedure > Habeas Corpus > Procedure > Filing of Petition > Jurisdiction
Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > General Overview
[HN6] A prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process
Governments > State & Territorial Governments > General Overview
[HN7] To determine whether the state has deprived a criminal defendant of due process of law does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview
[HN8] The due process clause of U.S. Const. amend. XIV does not have the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Indictment by grand jury is not essential to due. Trial by jury is not essential to it, either in civil cases, or in criminal.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN9] Since a state may, without infringing U.S. Const. amend. XIV, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial. The presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice permitting the accused to waive it and holding him bound by the waiver amounts to a deprivation of due process of law.

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview
Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Bills of Attainder
Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > General Overview
[HN10] The constitutional prohibition: No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts.

LAWYERS' EDITION HEADNOTES:

Habeas corpus -- scope of review -- mere error -- substitute for writ of error. --

Headnote:

Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus, since this writ may not be employed as a substitute for a writ of error.

[For other cases, see Habeas Corpus, II. a, in Digest Sup. Ct. 1908.]

Constitutional law -- due process of law -- criminal prosecution. --

Headnote:

A criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, is due process of law in the sense of U. S. Const. 14th Amend., so long as it includes notice and a hearing or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure.

[For other cases, see Constitutional Law, IV. b, 9, in Digest Sup. Ct. 1908.]

Habeas corpus -- Federal interference with state administration of criminal law. --

Headnote:

Habeas corpus will lie in the Federal courts in behalf of a person held in custody under a conviction of crime in a state court only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings.

[For other cases, see Habeas Corpus, I. b, 2, in Digest Sup. Ct. 1908.]

Habeas corpus -- in Federal courts -- scope of inquiry -- appellate proceedings. --

Headnote:

The inquiry on an application to the Federal courts for a writ of habeas corpus in behalf of a person held in custody under a conviction of crime in a state court should not be confined to the proceedings and judgment in the state trial court, where an appeal is provided for by the state laws and the prisoner has had the benefit of it, but the proceedings in the state appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and are to be considered in determining any question of alleged deprivation of his life or liberty without due process of law, contrary to the 14th Amendment to the Federal Constitution.

[For other cases, see Habeas Corpus, IV., in Digest Sup. Ct. 1908.]

Habeas corpus -- in Federal courts -- review -- matters outside record. --

Headnote:

The courts of the United States, upon an application for a writ of habeas corpus under U. S. Rev. Stat. 754-761, Comp. Stat. 1913, 1282-1289, in behalf of a person held in custody under the final judgment of a state court of criminal jurisdiction, may look beyond forms, and inquire into the very truth and substance of the causes of his detention, although this may necessitate an inquiry into the judicial facts outside of the record of his conviction.

[For other cases, see Habeas Corpus, IV., in Digest Sup. Ct. 1908.]

Habeas corpus -- Federal interference with state administration of criminal law. --

Headnote:

Habeas corpus will not issue out of the Federal courts in behalf of a person in custody under a conviction of crime in a state court who asserts in his petition for the writ the existence at the trial of disorder, hostile manifestations, and uproar, amounting to mob domination of court and jury, and hence a denial of the due process of law guaranteed by U. S. Const., 14th Amend., where such assertions are but repetitions of allegations which the accused had a right to submit and did submit first to the trial court on motion for new trial, and afterwards in the highest state court as a ground for avoiding the consequences of the trial, and where both courts, having considered such allegations successively at times and places under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination or the like, and having examined the facts, not only upon the affidavits and exhibits submitted in behalf of the prisoner, which are embodied in his petition for habeas corpus, but also upon rebutting affidavits submitted in behalf of the state, which, for reasons not explained, he has not included in such petition, found the allegations to be groundless except in a few particulars, as to which the courts ruled that they were irregularities not harmful to defendant, and therefore insufficient in law to avoid the verdict.

[For other cases, see Habeas Corpus, I. b, 2, in Digest Sup. Ct. 1908.]

Constitutional law -- due process of law -- mob domination -- new trial. --

Headnote:

The allowance by the state of a new trial under better auspices, when the first attempt at a fair trial of a criminal cause is rendered abortive by mob domination, satisfies the due process of law clause of U. S. Const. 14th Amend., and the state need not, under such circumstances, abandon jurisdiction over the accused, and refrain from further inquiry into the question of his guilt.

[For other cases, see Constitutional Law, IV. b, 9, in Digest Sup. Ct. 1908.]

Constitutional law -- due process of law -- waiver of right to be present at trial. --

Headnote:

There is no denial of the due process of law guaranteed by U. S. Const. 14th Amend., in the practice established in the criminal courts of Georgia that the accused may waive his right to be present when the jury renders its verdict, and that such waiver may be given after, as well as before, the event, and is to be inferred from the making of a motion for new trial upon other grounds alone, when the facts respecting the reception of the verdict are within the prisoner's knowledge at the time of making such motion.

[For other cases, see Constitutional Law, IV. b. 9. in Digest Sup. Ct. 1908.]

Constitutional law -- ex post facto laws -- change of decision. --

Headnote:

Erroneous or inconsistent decisions by the courts are not reached by the prohibition of U. S. Const. art. 1, 10, against ex post facto laws, but such provision is directed against legislative action only.

[For other cases, see Constitutional Law, IV. f, 1, in Digest Sup. Ct. 1908.]

SYLLABUS

Petitioner was formally indicted for murder, placed on trial before a court of competent jurisdiction with a jury lawfully constituted, had a public trial deliberately conducted and with counsel for defense, was found guilty and sentenced pursuant to law of the State; subsequently he twice moved the trial court to grant new trial, and once to set verdict aside as a nullity, and was heard three times on appeal by the court of last resort, and in all instances the trial court was affirmed. Petitioner alleged that a hostile public sentiment improperly influenced the trial court and jury against him and in the court-room took the form of mob domination; that his lawful rights were interfered with because he was not permitted to be present when the verdict was rendered.The state courts however held, on evidence presumably justifying such a finding but not produced in the habeas corpus proceeding, that the allegations as to mob violence and influence were not sustained and that the objection as to absence on rendering the verdict had been waived by failure to raise it in due season when fully informed as to the facts.Petitioner then applied to the District Court of the United States for release on habeas corpus on the ground that the conditions alleged to have existed in the court-room amounted to mob domination and deprived the court of jurisdiction to receive a verdict and pronounce sentence against him, that his involuntary absence from the court-room was a deprivation of an essential part of the right of trial by jury, and amounted to a denial of due process of law and that the decision of the state court overruling his objections to his enforced absence from court on rendition of verdict was so far inconsistent with previous decisions of the same court as to be equivalent in effect to an ex post facto law. His petition was denied and an appeal allowed by a justice of this court. Held by this court that:

The question of deprivation of liberty without due process of law involves not the jurisdiction of any particular court, but the power and authority of the State itself, and where there is no claim that the offense is based on an unconstitutional statute, the question of whether the petitioner in habeas corpus has been deprived of his liberty in violation of constitutional rights cannot be determined, with fairness to the State, until the conclusion of the course of justice in its own courts, and the United States courts must consider not merely the proceedings of the trial court, but also those in the appellate court of the State.

Due process of law guaranteed by the Fourteenth Amendment has regard to substance of right and not to matters of form and procedure; and in determining whether one convicted of crime has been denied due process, the entire course of proceedings, and not merely a single step, must be considered.

Although petitioner's allegation that mob domination existed in the trial court might, standing alone and if taken as true, show a condition inconsistent with due process of law, if the record in the habeas corpus proceedings in the Federal court also shows that the same allegations had been considered by the state court and upon evidence there taken but not disclosed in the Federal court, had been found to be groundless, that finding cannot be regarded as a nullity but must be taken as setting forth the truth until reasonable ground is shown for a contrary conclusion.

The due process of law clause of the Fourteenth Amendment does not preclude a State from adopting and enforcing a rule of procedure that an objection to absence of the prisoner from the court-room on rendition of verdict by the jury cannot be taken on motion to set aside the verdict as a nullity after a motion for new trial had been made on other grounds, not including this one, and denied. Such a regulation of practice is not unreasonable.

The due process of law clause of the Fourteenth Amendment does not impose upon the State any particular form or mode of procedure so long as essential rights of notice and hearing or opportunity to be heard before a competent tribunal are not interfered with; and it is within the power of the State to establish a rule of practice that a defendant may waive his right to be present on rendition of verdict.

The right of the State to abolish jury trial altogether without violation of the Fourteenth Amendment includes the right to limit the effect to be given to an error respecting an incident of such trial -- such as the presence of defendant when the jury renders its verdict.

The prohibition in the Federal Constitution against a State passing an ex post facto law is directed against legislative action only, and does not reach erroneous or inconsistent decisions of the courts of the State.

The petitioner in this case was not denied due process of law in the conduct of his trial by the courts of first instance or appellate, nor was the decision of the appellate court, by reason of inconsistency with prior decisions, equivalent to an ex post facto law.

COUNSEL: Mr. Louis Marshall, with whom Mr. Henry C. Peeples and Mr. Henry A. Alexander were on the brief, for appellant:

The reception by the Superior Court of Fulton County of the verdict by which the appellant was condemned to death, in his absence and without his consent or authority, and in the absence of his counsel, was such a violation of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, as to bring about a loss of jurisdiction of the court and the nullification of the verdict and judgment. Hovey v. Elliott, 167 U.S. 409; Windsor v. McVeigh, 93 U.S. 247; B. & Q. R.R. Co. v. Chicago, 166 U.S. 226; Scott v. McNeal, 154 U.S. 34; Standard Oil Co. v. Missouri, 224 U.S. 270, 280-282; Ex parte Riggins, 134 Fed. Rep. 404; Central of Georgia Ry. v. Wright, 207 U.S. 127; Londoner v. Denver, 210 U.S. 385; Denver v. State Investment Co., 45 Coloardo, 244; S.C., 112 Pac. Rep. 789; Ong Chang Wing v. United States, 218 U.S. 280, distinguishing Hurtado v. California, 110 U.S. 516; Allen v. Georgia, 166 U.S. 138; Brown v. New Jersey, 175 U.S. 172; Maxwell v. Dow, 176 U.S. 581; Simon v. Craft, 182 U.S. 427; West v. Louisiana, 194 U.S. 258; Howard v. Kentucky, 200 U.S. 164; Twining v. New Jersey, 211 U.S. 78; Hammond Packing Co. v. Arkansas, 212 U.S. 322; Jordan v. Massachusetts, 225 U.S. 167; Garland v. Washington, 232 U.S. 642.

The right of the accused to be present at every stage of his trial, including the reception of the verdict, is essential to the right to be heard. Nolan v. State, 55 Georgia, 522; Prine v. Commonwealth, 18 Pa. St. 103; Lewis v. United States, 146 U.S. 372; Rex v. Ladsingham, Sir T. Raym. 193; Dunn v. Commonwealth, 6 Pa. St. 384; Temple v. Commonwealth, 14 Bush (Ky.), 769; Rhodes v. State, 128 Indiana, 198; 2 Moore on Facts, ßß 991-995; Cooley's Const. Lim., 2d ed., ß 452; McGehee on Due Process, pp. 164, 165, 168; 1 Bishop's New Cr. Proc., 1913, ßß 265-274; Nolan v. State, 53 Georgia, 137; Bonner v. State, 67 Georgia, 510; Barton v. State, 67 Georgia, 653; Bagwell v. State, 129 Georgia, 170; Cawthon v. State, 119 Georgia, 395; Lyons v. State, 7 Ga. App. 50; Hopt v. Utah, 110 U.S. 574; Ball v. United States, 140 U.S. 118; Schwab v. Berggren, 143 U.S. 442, 448; Dowdell v. United States, 221 U.S. 321; Diaz v. United States, 223 U.S. 442, 455, and the decisions of the courts of twenty-eight States.

Not only was the appellant deprived of due process of law, because he was by the action of the court, kept out of the court-room when the verdict was rendered, but the entire proceedings became coram non judice, because of mob domination, to which the presiding judge succumbed and which in effect wrought a dissolution of the court. People v. Wolf, 183 N.Y. 472; 5 Cyc. U.S.S.C. Rep. 618, and cases cited; Massey v. State, 31 Tex. Cr. Rep. 371; State v. Welden, 91 S. Car. 29; Sanders v. State, 85 Indiana, 319; People v. Fleming, 136 Pac. Rep. 291; Myers v. State, 97 Georgia, 76; Collier v. State, 115 Georgia, 803; Ex parte Riggins, 134 Fed. Rep. 404; Ellerbee v. State, 75 Mississippi, 522; Blend v. People, 41 N.Y. 604; People v. Shaw, 3 Hun, 272, aff'd 63 N.Y. 36; Hinman v. People, 13 Hun, 266; Hayes v. Georgia, 58 Georgia, 35; O'Brien v. People, 17 Colorado, 561; McClure v. State, 77 Indiana, 287; Pennoyer v. Neff, 95 U.S. 714; United States v. Shipp, 203 U.S. 563.

The right of the prisoner to be present during the entire trial, including the time of the rendition of the verdict, the polling of the jury, and its discharge, is one which neither he nor his counsel could waive or abjure. Barton v. State, 67 Georgia, 653; Robson v. State, 83 Georgia, 171; Cawthon v. State, 119 Georgia, 395; Lyons v. State, 7 Ga. App. 50; Hopt v. Utah, 110 U.S. 579; Schwab v. Berggren, 143 U.S. 449; Lewis v. United States, 146 U.S. 373; Thompson v. Utah, 170 U.S. 343; Kepner v. United States, 195 U.S. 100, 135; Cancemi v. People, 18 N.Y. 128; Ball v. United States, 140 U.S. 118; Dickinson v. United States, 159 Fed. Rep. 801; Diaz v. United States, 223 U.S. 456.

It would seem to follow logically from the propositions thus far discussed that if neither Frank 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 him or acquiescence on his part in any action taken by his counsel. Thompson v. Utah, 170 U.S. 343.

If, therefore, Frank's absence at the reception of the verdict constituted and infraction of due process of law, which could not be waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the fact that he did not raise the jurisdictional question on his motion for a new trial, did not deprive him of his constitutional right to attack the judgment as a nullity.

Even if the decision of the Supreme Court of Georgia were to be interpreted as deciding that a motion for a new trial is the only method by which the constitutional question with which we are now concerned can be raised, then, we contend, that such a decision as applicable to the present case would be in conflict with the Constitution of the United States, because it would be an Ex post facto law. Nolan v. State, 53 Georgia, 137; Lyons v. State, 7 Ga. App. 50; Rawlins v. Mitchell, 127 Georgia, 24; Hopt v. Utah, 110 U.S. 579; Laws of Georgia, Acts of 1858, p. 74, Georgia Code, 1882, ß 217; Georgia Code, 1910, ß 6207; Muhlker v. N.Y. & H.R. Co., 197 U.S. 544.

It follows from the propositions thus far discussed that appellant's application for a writ of habeas corpus is squarely based on the contention that, when the verdict against him was received and judgment was rendered against him the court had lost such jurisdiction as it previously possessed, and the verdict and judgment under which he was detained were absolute nullities, thus making habeas corpus the proper remedy to test the validity of his detention thereunder. Rev. Stat., ßß 751-756; Matter of Hans Nielsen, 131 U.S. 176; Ex parte Bain, 121 U.S. 1; In re Bonner, 151 U.S. 242, 256; Felts v. Murphy, 201 U.S. 123; Valentina v. Mercer, 201 U.S. 131; Rogers v. Peck, 199 U.S. 425; Ex parte Bridges, 2 Woods, 428; S.C., 4 Fed. Cas. 105, 106; McClaughry v. Deming, 186 U.S. 49; Oakley v. Aspinwall, 3 N.Y. 547; Kaizo v. Henry, 211 U.S. 146; Harlan v. McGourin, 218 U.S. 442; Stevens v. McClaughry, 207 Fed. Rep. 18; Matter of Spencer, 228 U.S. 652; Rogers v. Alabama, 192 U.S. 226, 230.

The appellant had, before applying for a writ of habeas corpus, exhausted all of his remedies in the state courts, and had ineffectually applied for a writ of error to review their determination. This remedy invoking the Federal Constitution for the protection of his life is, therefore, his last resort, and he conforms in every respect to the practice which this court has pointed out as controlling in like cases. Ex parte Royall, 117 U.S. 241; Ex parte Charles W. Fonda, 117 U.S. 516; Wood v. Brush, 140 U.S. 278; Cook v. Hart, 146 U.S. 183; Ex parte Frederich, 149 U.S. 70; New York v. Eno, 155 U.S. 89, 95; Pepke v. Cronan, 155 U.S. 100; In re Chapman, 156 U.S. 211; Whitten v. Tomlinson, 160 U.S. 231; Baker v. Grice, 169 U.S. 284; Tinsley v. Anderson, 171 U.S. 101; Fitts v. McGhee, 172 U.S. 516; Markuson v. Boucher, 175 U.S. 184; Minnesota v. Brundage, 180 U.S. 499; Urquhart v. Brown, 205 U.S. 179; Glasgow v. Moyer, 225 U.S. 420; Ex parte Spencer, 228 U.S. 652; Stevens v. McClaughry, 207 Fed. Rep. 18; Nolan v. State, 53 Georgia, 136; Nolan v. State, 55 Georgia, 521; Georgia Laws, 1906, p. 24, Georgia Code, 1910; ß 6506; Lyons v. State, 7 Ga. App. 50; Georgia Code, 1873, ß 3719; Georgia Code, 1910, ß 6089; Lampkin v. State, 87 Georgia, 517.

Judge Newman entirely misconceived the decisions which led to the denial of a writ of error to review the judgment of the Supreme Court of Georgia, and misapplied them. Waters-Pierce Oil Co. v. Texas, 212 U.S. 112; Allen v. Arguimbau, 198 U.S. 149; Garr, Scott & Co. v. Shannon, 223 U.S. 458.

In the present case, the Superior Court of Georgia had jurisdiction over the appellant after his indictment and down to the later stages of his trial. The verdict and all subsequent proceedings, being nullities, he is entitled to his discharge from the void judgment and to be relieved from the void sentence of death. He does not, however, contend that he cannot he held for further trial under the indictment. Ex parte Badgley, 7 Cowen, 472; Medley, Petitioner, 134 U.S. 160, 174; In re Bonner, 151 U.S. 256-259, 261, 262; Ex parte Scott, 70 Mississippi, 247; People ex rel. Devoe v. Kelly, 97 N.Y. 212; Michaelson v. Beemer, 72 Nebraska, 761.

Mr. Warren Grice and Mr. Hugh M. Dorsey, for appellee:

Appellant is asking this court to grant him a writ of habeas corpus which will virtually overturn his conviction in the state court without submitting to the United States courts important portions of the record on which the judgment is based, and on which he is being held.

The decision of the Supreme Court of Georgia holding that Frank had not adopted the correct procedure in invoking in the state court the effect of his absence when the verdict was received was not the passage of an ex post facto law but followed prior decisions.

Every question presented by the application for habeas corpus having already been presented by him to the state court and its decision invoked and its judgment rendered adverse to him, the principle of res judicata applies and for that reason alone the questions cannot be reopened here.

Where oral evidence is required to show want of jurisdiction, habeas corpus will not discharge the prisoner.

The writ of habeas corpus cannot be made use of to perform the functions of a writ of error.

Irregularities, no matter how gross, will not be sufficient to obtain a release on habeas corpus.

The due process clause in the Fourteenth Amendment does not overturn well settled principles and established usages prevailing in States, nor deprive the States of the power to establish other systems of law and procedure, or alter the same at their will.

The Fourteenth Amendment does not require the presence of a defendant in court at the reception of a verdict as such presence does not go to the jurisdiction of the court.

Waivers such as were made in this case by the prisoner's counsel are binding on the prisoner.

Petitioner Frank cannot repudiate the acts of his counsel.

The Supreme Court of the United States will not grant the relief asked by Frank in this application in view of what has heretofore taken place in the Supreme Court of Georgia and by the Supreme Court of the United States in denying him a writ of error.

The Supreme Court of the United States will not permit Frank to do by indirection that which it already has held Frank could not do directly.

The Supreme Court of Georgia had jurisdiction to determine whether Frank's counsel could waive his presence, and even if this court should think that ruling error, habeas corpus cannot correct it.

The action of the court in permitting Frank's counsel to waive his presence, if erroneous, was a mere irregularity in the matter of procedure, and certainly habeas corpus cannot avail to discharge the prisoner.

Numerous authorities support these propositions.

OPINION BY: PITNEY

OPINION

[*324] [586] [***979]** MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

The points raised by the appellant may be reduced to the following:

(1) It is contended that the disorder in and about the court-room during the trial and up to and at the reception of the verdict amounted to mob domination, that not only **[*325]** the jury but the presiding judge succumbed to it, and that this in effect wrought a dissolution of the court, so that the proceedings were coram non judice.

(2) That Frank's right to be present during the entire trial until and at the return of the verdict was an essential part of the right of trial by jury, which could not be waived either by himself or his counsel.

(3) That his presence was so essential to a proper hearing that the reception of the verdict in his absence, and in the absence of his counsel, without his consent or authority, was a departure from the due process of law guaranteed by the Fourteenth Amendment, sufficient to bring about a loss of jurisdiction of the trial court and to render the verdict and judgment absolute nullities.

(4) That the failure of Frank and his counsel, upon the first motion for a new trial, to allege as a ground of that motion the known fact of Frank's absence at the reception of the verdict, or to raise any jurisdictional question based upon it, did not deprive him of the right to afterwards attack the judgment as a nullity, as he did in the motion to set aside the verdict.

(5) And that the ground upon which the Supreme Court of Georgia rested its decision affirming the denial of the latter motion (83 S.E. Rep. 645), -- viz., that the objection based upon Frank's absence when the verdict was rendered was available on the motion for new trial and under proper practice ought to have been then taken, and because not then taken could not be relied upon as a ground for setting aside the verdict as a nullity, -- was itself in conflict with the Constitution of the United States because equivalent in effect to an ex post facto law, since, as is said, it departs from the practice settled by previous decisions of the same court.

In dealing with these contentions, we should have in mind the nature and extent of the duty that is imposed upon a Federal court on application for the writ of habeas **[*326]** corpus under ß 753, Rev. Stat. Under the terms of that section, [HN1] in order to entitle the present appellant to the relief sought, it must appear that he is held in custody in violation of the Constitution of the United States. Rogers v. Peck, 199 U.S. 425, 434. Moreover, if he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on habeas corpus. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. Ex parte Parks, 93 U.S. 18, 21; Ex parte Siebold, 100 U.S. 371, 375; Ex parte Royall, 177 U.S. 241, 250; In re Frederich, Pet'r, 149 U.S. 70, 75; Baker v. Grice, 169 U.S. 284, 290; Tinsley v. Anderson, 171 U.S. 101, 105; Markuson v. Boucher, 175 U.S. 184.

[HN2] As to the "due process of law" that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a **[***980]** law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense. Walker v. Sauvinet, 92 U.S. 90, 93; Hurtado v. California, 110 U.S. 516, 535; Andrews v. Swartz, 156 U.S. 272, 276; **[**587]** Bergemann v. Backer, 157 U.S. 655, 659; Rogers v. Peck, 199 U.S. 425, 434; Drury v. Lewis, 200 U.S. 1, 7; Felts v. Murphy, 201 U.S. 123, 129; Howard v. Kentucky, 200 U.S. 164.

It is, therefore, conceded by counsel for appellant that **[*327]** in the present case we may not review irregularities or erroneous rulings upon the trial, however serious, and that the writ of habeas corpus will lie only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced

it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings. And since no question is made respecting the original jurisdiction of the trial court, the contention is and must be that by the conditions that surrounded the trial, and the absence of defendant when the verdict was rendered, the court was deprived of jurisdiction to receive the verdict and pronounce the sentence.

But it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the State of Georgia (as will appear from decisions elsewhere cited), provide for an appeal in criminal cases to the Supreme Court of that State upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. And [HN3] while the Fourteenth Amendment does not require that a State shall provide for an appellate review in criminal cases (McKane v. Durston, 153 U.S. 684, 687; Andrews v. Swartz, 156 U.S. 272, 275; Rogers v. Peck, 199 U.S. 425, 435; Reetz v. Michigan, 188 U.S. 505, 508), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment.

In fact, such questions as are here presented under the due process clause of the Fourteenth Amendment, though sometimes discussed as if involving merely the jurisdiction of some court or other tribunal, in a larger and more accurate **[*328]** sense involve the power and authority of the State itself. The prohibition is addressed to the State; if it be violated, it makes no difference in a court of the United States by what agency of the State this is done; so, if a violation be threatened by one agency of the State but prevented by another agency of higher authority, there is no violation by the State. It is for the State to determine what courts or other tribunals shall be established for the trial of offenses against its criminal laws, and to define their several jurisdictions and authority as between themselves. And [HN4] the question whether a State is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the Federal Constitution, cannot ordinarily be determined, with fairness to the State, until the conclusion of the course of justice in its courts. Virginia v. Rives, 100 U.S. 313, 318; Civil Rights Cases, 109 U.S. 3, 11; McKane v. Durston, 153 U.S. 684, 687; Dreyer v. Illinois, 187 U.S. 71, 83-84; Reetz v. Michigan, 188 U.S. 505, 507; Carfer v. Caldwell, 200 U.S. 293, 297; Waters-Pierce Oil Co. v. Texas (No. 1), 212 U.S. 86, 107; In re Frederich, Petitioner, 149 U.S. 70, 75; Whitten v. Tomlinson, 160 U.S. 231, 242; Baker v. Grice, 169 U.S. 284, 291; Minnesota v. Brundage, 180 U.S. 499, 503, Urquhart v. Brown, 205 U.S. 179, 182.

It is, indeed, settled by repeated decisions of this court that where it is made to appear to a court of the United States that an applicant for habeas corpus is in the custody of a state officer in the ordinary course of a criminal prosecution, under a **[***981]** law of the State not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error. Ex parte Royall, 177 U.S. 241, 251; In re Frederich, **[*329]** Petitioner, 149 U.S. 70, 77; Whitten v. Tomlinson, 160 U.S. 231, 242; Baker v. Grice, 169 U.S. 284, 291; **[**588]** Tinsley v. Anderson, 171 U.S. 101, 105; Markuson v. Boucher, 175 U.S. 184; Urquhart v. Brown, 205 U.S. 179. And see Henry v. Henkel, 235 U.S. 219, 228. Such cases as In re Loney, 134 U.S. 372, 376; and In re Neagle, 135 U.S. 1; are recognized as exceptional.

It follows as a logical consequence that [HN5] where, as here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in Ex parte Royall, 117 U.S. 241, 252 -- applying in a habeas corpus case what was said in Covell v. Heyman, 111 U.S. 176, 182, a case of conflict of jurisdiction: -- "The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity." And see In re Tyler, Petitioner, 149 U.S. 164, 186.

It is objected by counsel for appellee that the alleged loss of jurisdiction cannot be shown by evidence outside of the record; that where a prisoner is held under a judgment **[*330]** of conviction passed by a court having jurisdiction of the subject-matter, and the indictment against him states the case and is based upon a valid existing law, habeas corpus is not an available remedy, save for want of jurisdiction appearing upon the face of the record of the court wherein he was

convicted. The rule at the common law, and under the act 31 Car. II, c. 2, and other acts of Parliament prior to that of July 1, 1816 (56 Geo. III, c. 100, ß 3), seems to have been that a showing in the return to a writ of habeas corpus that the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction, closed the inquiry. So it was held, under the judiciary act of 1789 (ch. 20, ß 14, 1 Stat. 73, 81), in Ex parte Watkins, 3 Pet. 193, 202.And the rule seems to have been the same under the act of March 2, 1833 (ch. 57, ß 7, 4 Stat. 632, 634), and that of Aug. 29, 1842 (ch. 257, 5 Stat. 539). But when Congress, in the act of February 5, 1867 (ch. 28, 14 Stat. 385), extended the writ of habeas corpus to all cases of persons restrained of their liberty in violation of the Constitution or a law or treaty of the United States, procedural regulations were included, now found in Rev. Stat., ßß 754-761. These require that the application for the writ shall be made by complaint in writing signed by the applicant and verified by his oath, setting forth the facts concerning his detention, in whose custody he is detained, and by virtue of what claim or authority, if known; require that the return shall certify the true cause of the detention; and provide that the prisoner may under oath deny any of the facts set forth in the return or allege other material facts, and that the court shall proceed in a summary way to determine the facts by hearing testimony and arguments, and thereupon dispose of the party as law and justice require. The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the **[*331]** act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require."

There being no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus in order to **[***982]** safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited [HN6] a prisoner in custody pursuant to the final judgment of a state court of ciriminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state **[**589]** court to proceed to judgment against him. Cuddy, Petitioner, 131 U.S. 280, 283, 286; In re Mayfield, 141 U.S. 107, 116; Whitten v. Tomlinson, 160 U.S. 231, 242; In re Watts and Sachs, 190 U.S. 1, 35.

In the light, then, of these established rules and principles: that the due process of law guaranteed by the Fourteenth Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States upon an application for a writ of habeas corpus to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not; that an investigation into the case of a prisoner held in custody by a State on conviction of a criminal offense must take into consideration the entire course of proceedings in the courts of the State, and **[*332]** not merely a single step in those proceedings; and that it is incumbent upon the prisoner to set forth in his application a sworn statement of the facts concerning his detention and by virtue of what claim or authority he is detained; we proceed to consider the questions presented.

1. And first, the question of the disorder and hostile sentiment that are said to have influenced the trial court and jury to an extent amounting to mob domination.

The District Court having considered the case upon the face of the petition, we must do the same, treating it as if demurred to by the sheriff. There is no doubt of the jurisdiction to issue the writ of habeas corpus. The question is as to the propriety of issuing it in the present case. Under ß 755, Rev. Stat., it was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it. And see ex parte Watkins, 3 Pet. 193, 201; Ex parte Milligan, 4 Wall. 2, 110; Ex parte Terry, 128 U.S. 289, 301.

Now the obligation resting upon us, as upon the District Court, to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petitioner attacks. We must regard not any single clause or paragraph, but the entire petition, and the exhibits that are made a part of it. Thus, the petition contains a narrative of disorder, hostile manifestations, and uproar, which, if it stood alone, and were to be taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict. But to consider this as standing alone is to take a wholly superficial view. The narrative has no proper place in a petition addressed to a court of the United States except as it may tend to throw light upon the question whether the State of Georgia, having regard to the entire course of the roceedings, in the appellate as well as in the trial court, is depriving appellant of his liberty and intending to deprive him of his **[*333]** life without due process of law. Dealing with the narrative, then, in its essence, and in its relation to the context, it clearly appears to be only a reiteration of allegation that appellant had a right to submit, and did submit, first to the trial court, and afterwards to the Supreme Court of the State, as a ground for avoiding the consequences of the trial; that the allegations were considered by those courts, suc-

cessively, at times and places and under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination, or the like; and that the facts were examined by those courts not only upon the affidavits and exhibits submitted in behalf of the prisoner which are embodied in his present petition as a part of his sworn account of the causes of his detention, but also upon rebutting affidavits submitted in behalf of the State and which, for reasons not explained, he has not included in the petition. As appears from the prefatory statement, the allegations of disorder were found by both of the state courts to be groundless except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to defendant and therefore insufficient in law to avoid the verdict. 141 Georgia, 243, 280. And it was because the defendant was concluded by that finding that the Supreme Court upon the subsequent motion to set aside the verdict **[***983]** declined to again consider those allegations. 83 S.E. Rep. 645, 655.

Whatever question is raised about the jurisdiction of the trial court, no doubt is suggested but that the Supreme Court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. It is not easy to see why appellant is not, upon general principles, bound by its decision.It is a fundmental principle of jurisprudence, arising from the very nature of courts of justice **[*334]** and the objects for which they are **[**590]** established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. Southern Pacific Railroad v. United States, 168 U.S. 1, 48. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application in habeas corpus cases, with respect to decisions by such courts of the facts pertaining to the jurisdiction ever the prisoner, see Ex parte Terry, 128 U.S. 289, 305, 310; Ex parte Columbia George, 144 Fed. Rep. 985, 986.

However, it is not necessary, for the purposes of the present case, to invoke the doctrine of res adjudicata, and, in view of the impropriety of limiting in the least degree the authority of the courts of the United States in investigating an alleged violation by a State of the due process of law guaranteed by the Fourteenth Amendment, we put out of view for the present the suggestion that even the questions of fact bearing upon the jurisdiction of the trial court could be conclusively determined against the prisoner by the decision of the state court of last resort.

But this does not mean that that decision may be ignored or disregarded. To do this, as we have already pointed out, would be not merely to disregard comity, but to ignore the essential question before us, which is not the guilt or innocence of the prisoner, or the truth of any particular fact asserted by him, but whether the State, taking into view the entire course of its procedure, has deprived him of due process of law. [HN7] This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to **[*335]** be heard according to the usual course of law in such cases.

We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.

But the State may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prisoner's right to a fair trial. Myers v. State, 97 Georgia 76 (5), 99; Collier v. State, 115 Georgia, 803.

Such an appeal was accorded to the prisoner in the present case [Frank v. State, 141 Georgia, 243 (16), 280], in a manner and under circumstances already stated, and the Supreme Court, upon a full review, decided appellant's allegations of fact, so far as matters now material are concerned, to be unfounded.Owing to considerations already adverted to (arising not out of comity merely, but out of the very right of the matter to be decided, in view of the relations existing between the States and the Federal Government), we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial **[*336]** through disorder and manifestations of hostile sentiment cannot in this collateral inquiry be treated as a nullity, but must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it

either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be deemed sufficient to raise an issue respecting the correctness of that determination; especially not, where the very evidence **[***984]** upon which the determination was rested is withheld by him who attacks the finding.

It is argued that if in fact there was disorder such as to cause a loss of jurisdiction in the trial court,jurisdiction could not be restored by any decision of the Supreme Court.This, we think, embodies more than one error of reasoning.It regards a part only of the judicial proceedings, instead of considering the entire process of law. It also begs the question of the existence of such disorder as to cause a loss of jurisdiction in the trial court; which should not be assumed, in the face of the decision of **[**591]** the reviewing court, without showing some adequate ground for disregarding that decision. And these errors grow out of the initial error of treating appellant's narrative of disorder as the whole matter, instead of reading it in connection with the context. The rule of law that in ordinary cases requires a prisoner to exhaust his remedies within the State before coming to the courts of the United States for redress would lose the greater part of its salutary force if the prisoner's mere allegations were to stand the same in law after as before the state courts had passed judgment upon them.

We are very far from intimating that manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury, are matters to be lightly treated. **[*337]** The decisions of the Georgia courts in this and other cases show that such disorder is repressed, where practicable, by the direct intervention of the trial court and the officers under its command; and that other means familiar to the common-law practice, such as postponing the trial, changing the venue, and granting a new trial, are liberally resorted to in order to protect persons accused of crime in the right to a fair trial by an impartial jury. The argument for appellant amounts to saying that this is not enough; that by force of the "due process of law" provision of the Fourteenth Amendment, when the first attempt at a fair trial is rendered abortive through outside interference, the State, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused and refrain from further inquiry into the question of his guilt.

To establish this doctrine would, in a very practical sense, impair the power of the States to repress and punish crime; for it would render their courts powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle but is in conflict with the practice that prevails in all of the States, so far as we are aware. The cases cited do not sustain the contention that disorder or other lawless conduct calculated to overawe the jury or the trial judge can be treated as a dissolution of the court or as rendering the proceedings coram non judice, in any such sense as to bar further proceedings. In Myers v. State, 97 Georgia, 73, (5), 99; Collier v. State, 115 Georgia, 803; Sanders v. State, 85 Indiana, 318; S.C., 44 Am. Rep. 29; Massey v. State, 31 Tex. Cr. Rep. 371, 381; S.C., 20 S.W. Rep. 758; and State v. Weldon, 91 S. Car. 29, 38; S.C., 39 L.R.A., N.S., 667, 669; -- in all of which it was held that the prisoner's right to a fair trial had been interfered with by disorder or mob violence -- it was not held that jurisdiction over the prisoner had been lost; on the contrary, in each instance a new trial was **[*338]** awarded as the appropriate remedy. So, in the cases where the trial judge abdicated his proper functions or absented himself during the trial (Hayes v. State, 58 Georgia, 36 (12), 49; Blend v. People, 41 N.Y. 604; Shaw v. People, 3 Hum, 272; aff'd 63 N.Y. 36; Hinman v. People, 13 Hun, 266; McClure v. State, 77 Indiana, 287; O'Brien v. People, 17 Colorado, 561; Ellerbe v. State, 75 Mississippi, 522; S.C., 41 L.R.A. 569) the reviewing of the State in each instance simply set aside the verdict and awarded a new trial.

The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law.

2. We come, next, to consider the effect to be given to the fact, admitted for present purposes, that Frank was not present in the court-room when the verdict was rendered, his presence having been waived by his counsel, but without his knowledge or consent.No question is made but that at the common law and under the Georgia decisions it is the right of the prisoner to be present throughout the entire trial, from the commencement of the selection of the jury until the verdict is rendered and jury discharged. Wade v. State, 12 Georgia, 25, 29; Martin v. State, 51 Georgia, 567; Nolan v. State, 53 Georgia, 137; S.C., 55 Georgia, 521; Smith v. State, 59 Georgia, 513; Bonner v. State, 67 Georgia, 510; Barton v. State, 67 Georgia, 653; Cawthon v. State, 119 Georgia, 395, 412; Bagwell v. State, 129 Georgia, 170; Lyons v. State, 7 Ga. App. 50. But the effect of these decisions **[***985]** is that the prisoner may personally waive the right to be present when the verdict is rendered, and perhaps may waive it by authorized act of his counsel; and that where, without his consent, the verdict is received in his absence, he may **[*339]** treat this as an error, and by timely motion demand a new trial, or (it seems) he may elect to treat the verdict as a nullity by moving in due season to set it aside as such. But we are unable to find that the courts of Georgia have in any case held that, by receiving a verdict in the ab-

sence of the prisoner and without his consent, the jurisdiction of the trial court was terminated. In the Nolan **[**592]** Case, supra, the verdict was set aside as void on the ground of the absence of the prisoner; but this was not held to deprive the trial court of its jurisdiction. On the contrary, the jurisdiction was treated as remaining, and that court proceeded to exercise it by arraigning the prisoner a second time upon the same indictment, when he pleaded specially, claiming his discharge because of former jeopardy; the trial court overruled this plea, the defendant excepted, and the jury found the defendant guilty; and, upon review, the Supreme Court reversed this judgment, not for the want of jurisdiction in the trial court, but for error committed in the exercise of jurisdiction. To the same effect is Bagwell v. State, supra.

In most of the other States, where error is committed by receiving a verdict of guilty during the involuntary absence of the accused, it is treated as merely requiring a new trial.In a few cases, the appellate court has ordered the defendant to be discharged, upon the ground that he had been once in jeopardy and a new trial would be futile.

However, the Georgia Supreme Court in the present case (83 S.E. Rep. 645) held, as pointed out in the prefatory statement, that because Frank, shortly after the verdict, was made fully aware of the facts, and he then made a motion for a new trial upon over 100 grounds, without including this as one, and had the motion heard by both the trial court and the Supreme Court, he could not, after this motion had been finally adjudicated against him, move to set aside the verdict as a nullity because of his absence when the verdict was dendered. There is **[*340]** nothing in the Fourteenth Amendment to prevent a State from adopting and enforcing so reasonable a regulation of procedure. Dreyer v. Illinois, 187 U.S. 71, 77-80.

It is insisted that the enforced absence of Frank at that time was not only a deprivation of trial by jury, but was equally a deprivation of due process of law within the meaning of the Amendment, in that it took from him at a critical stage of the proceeding the right or opportunity to be heard. But repeated decisions of this court have put it beyond the range of further debate that [HN8] the "due process" clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Indictment by grand jury is not essential to due process (Hurtado v. California, 110 U.S. 516, 532, 538; Lem Woon v. Oregon, 229 U.S. 586, 589, and cases cited). Trial by jury is not essential to it, either in civil cases (Walker v. Sauvinet, 92 U.S. 90), or in criminal (Hallinger v. Davis, 146 U.S. 314, 324; Maxwell v. Dow, 176 U.S. 581, 594, 602, 604).

It is argued that a State may not, while providing for trial by jury, permit the accused to waive the right to be heard in the mode characteristic of such trial, including the presence of the prisoner up to and at the time of the rendition of the verdict. But the cases cited do not support this contention. In Hopt v. Utah, 110 U.S. 574, 578 (principally relied upon), the court had under review a conviction in a territorial court after a trial subject to the local code of criminal procedure, which declared: If "the indictment is for a felony, the defendant must be personally present at the trial." The judgment was reversed because of the action of the trial court in permitting certain challenges to jurors, based upon the ground of bias, to be tried out of the presence of the court, the defendant, and his counsel. The ground of the decision of **[*341]** this court was the violation of the plain mandate of the local statute; and the power of the accused or his counsel to dispense with the requirement as to his personal presence was denied on the ground that his life could not be lawfully taken except in the mode prescribed by law. No other question was involved. See Diaz v. United States, 223 U.S. 442, 455, 458.

The distinction between what the common law requires with respect to trial by jury in criminal cases, and what the States may enact without contravening the "due process" clause of the Fourteenth Amendment, is very clearly evidenced by Hallinger v. Davis, 146 U.S. 314, **[***986]** and Lewis v. United States, 146 U.S. 370, which were under consideration by the court at the same time, both opinions being written by Mr. Justice Shiras. In the Lewis Case, which was a conviction of murder in a circuit Court of the United States, the trial practice being regulated by the common law, it was held to be a leading principle, pervading the entire law of criminal procedure, that after indictment nothing should be done in the absence of the prisoner; that the making of challenges is an essential part of the trial, and it was **[**593]** one of the substantial rights of the prisoner to be brought face to face with the jurors at the time the challenges were made; and that in the absence of a statute, this right as it existed at common law must not be abridged. But in the Hallinger Case, where a State by legislative enactment had permitted one charged with a capital offense to waive a trial by jury and elect to be tried by the court, it was held that this method of procedure did not conflict with the Fourteenth Amendment. So in Howard v. Kentucky, 200 U.S. 164, 175 -- a case closely in point upon the question now presented -- this court, finding that by the law of the State an occasional absence of the accused from the trial, from which no injury resulted to his substantial rights, was not deemed material error, held that the application of this rule of law did not **[*342]** amount to a denial of due process within the meaning of the Fourteenth Amendment.

In fact, this court has sustained the States in establishing a great variety of departures from the common law procedure respecting jury trials. Thus, in Brown v. New Jersey, 175 U.S. 172, 176; a statute providing for trial of murder cases by struck jury was sustained, notwithstanding it did not provide for twenty peremptory challenges. Simon v. Craft, 182 U.S. 427, 435, while not a criminal case, involved the property of a person alleged to be of unsound mind, and it was held that an Alabama statute, under which the sheriff determined that Mrs. Simon's health and safety would be endangered by her presence at the trial of the question of her sanity, so that while served with notice she was detained in custody and not allowed to be present at the hearing of the inquisition, did not deprive her of property without due process of law. In Felts v. Murphy, 201 U.S. 123, 129, where the prisoner was convicted of the crime of murder and sentenced to imprisonment for life, although he did not hear a word of the evidence given upon the trial because of his almost total deafness, his inability to hear being such that it required a person to speak through an ear-trumpet close to his ear in order that such person should be heard by him, and the trial court having failed to see to it that the testimony in the case was repeated to him through his ear-trumpet, this court said that this was "at most an error, which did not take away from the court its jurisdiction over the subject-matter and over the person of the accused." In Twining v. New Jersey, 211 U.S. 78, 101, 111, it was held that the exemption of a prisoner from compulsory self-incrimination in the state courts was not included in the guaranty of due process of law contained in the Fourteenth Amendment. In Jordan v. Massachusetts, 225 U.S. 167, 177, where one of the jurors was subject to reasonable doubt as to his **[*343]** sanity, and the state court, pursuant to the local law of criminal procedure, determined upon a mere preponderance of the evidence that he was sane, the conviction was affirmed. In Garland v. Washington, 232 U.S. 642, 645, it was held that the want of a formal arraignment, treated by the State as depriving the accused of no substantial right and as having been waived and thereby lost, did not amount to depriving defendant of his liberty without due process of law.

Our conclusion upon this branch of the case is, that the practice established in the criminal courts of Georgia: that a defendant may waive his right to be present when the jury renders its verdict, and that such waiver may be given after as well as before the event, and is to be inferred from the making of a motion for new trial upon other grounds alone, when the facts respecting the reception of the verdict are within the prisoner's knowledge at the time of making that motion; is a regulation of criminal procedure that it is within the authority of the State to adopt. In adopting it, the State declares in effect, as it reasonably may declare, that the right of the accused to be present at the reception of the verdict is but an incident of the right of trial by jury; and [HN9] since the State may, without infringing the Fourteenth Amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial. The presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice permitting the accused to waive it and holding him bound by the **[***987]** waiver amounts to a deprivation of "due process of law."

3. The insistence that the decision of the Supreme Court of Georgia in affirming the denial of the motion to set aside the verdict (83 S.E. Rep. 645) on the ground that Frank's failure to raise the objection upon the motion for a new trial amounted to a waiver of it, was inconsistent with the previous practice as established in Nolan v. **[*344]** State, 53 Georgia, 137; S.C., 55 Georgia, 521; and therefore amounted in effect to an ex post facto law in contravention of ß 10 of Article I of the Federal Constitution, needs but a **[**594]** word. Assuming the inconsistency, it is sufficient to say that [HN10] the constitutional prohibition: "No State shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts. Calder v. Bull, 3 Dall. 386, 389; Fletcher v. Peck, 6 Cr. 87, 138; Kring v. Missouri, 107 U.S. 221, 227; Thompson v. Utah, 170 U.S. 343, 351; Cross Lake Club v. Louisiana, 224 U.S. 632, 638; Ross v. Oregon, 227 U.S. 150, 161.

4. To conclude: Taking appellant's petition as a whole, and not regarding any particular portion of it to the exclusion of the rest -- dealing with its true and substantial meaning and not merely with its superficial import -- it shows that Frank, having been formally accused of a grave crime, was placed on trial before a court of competent jurisdiction, with a jury lawfully constituted; he had a public trial, deliberately conducted, with the benefit of counsel for his defense; he was found guilty and sentenced pursuant to the laws of the State; twice he has moved the trial court to grant a new trial, and once to set aside the verdict as a nullity; three times he has been heard upon appeal before the court of last resort of that State, and in every instance the adverse action of the trial court has been affirmed; his allegations of hostile public sentiment and disorder in and about the court-room, improperly influencing the trial court and the jury against him, have been rejected because found untrue in point of fact upon evidence presumably justifying that finding, and which he has not produced in the present proceeding; his contention that his lawful rights were infringed because he was not permitted to be present when the jury **[*345]** rendered its verdict, has been set aside because it was waived by his failure to raise the objection in due season when fully cognizant of the facts. In all of these proceedings the State, through its courts, has retained jurisdiction over him, has accorded to him the fullest right and opportunity to be heard according to

the established modes of procedure, and now holds him in custody to pay the penalty of the crime of which he has been adjudged guilty. In our opinion, he is not shown to have been deprived of any right guaranteed to him by the Fourteenth Amendment or any other provision of the Constitution or laws of the United States; on the contrary, he has been convicted, and is now held in custody, under "due process of law" within the meaning of the Constitution.

The final order of the District Court, refusing the application for a writ of habeas corpus, is

Affirmed.

DISSENT BY: HOLMES

DISSENT

MR. JUSTICE HOLMES with whom concurred MR. JUSTICE HUGHES, dissenting.

Mr. Justice Hughes and I are of opinion that the judgment should be reversed. The only question before us is whether the petition shows on its face that the writ of habeas corpus should be denied, or whether the District Court should have proceeded to try the facts. The allegations that appear to us material are these. The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed wit spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment stationed in that city, both of whom were known to the jury. On the same day, the evidence seemingly having been closed, the public press, apprehending **[*346]** danger, united in a request to the Court that the proceedings should not continue on that evening. Thereupon the Court adjourned until Monday morning. On that morning when the Solicitor General entered the court he was greeted with applause, stamping of feet and claping of hands, and the judge before beginning his charge had a private conversation with the petitioner's counsel in which he expressed the opinion that there would be 'probable danger of violence' if there should be an acquittal or a disagreement, and that it would be safer for not only the petitioner but his counsel to be absent from Court when the verdict was brought in. At the judge's request they agreed that the petitioner and they should be absent, and they kept their work. When the verdict was rendered, and before more than one of the jurymen had been polled **[***988]** there was such a roar of applause that the polling could not go on until order restored. The noise outside was such that it was difficult for the judge to hear the answers of the jurors although he was only ten feet from them. With these specifications of fact, the petitioner alleges that the trial was dominated by a hostile mob and was nothing but an empty form.

We lay on one side the question whether the petitioner could or did waive his right to be present at the polling of the jury. That question was apparent in the form of the trial and was raised by the application for a writ of error; and although after the **[**595]** application to the full Court we thought that the writ ought to be granted, we never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States. But habeas corpus cuts through all forms and goes to the very tissus of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.

[*347] The argument for the appellee in substance is that the trial was in a court of competent jurisdiction, that it retains jurisdiction although, in fact, it may be dominated by a mob, and that the rulings of the state court as to the fact of such domination cannot be reviewed. But the argument seems to us inconclusive. Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or more irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case. The loss of jurisdiction is not general but particular, and proceeds from the control of a hostile influence.

When such a case is presented, it cannot be said, in our view, that the state court decision makes the matter res judicata. The State acts when by its agency it finds the prisoner guilty and condemns him.We have held in a civil case that it is no defence to the assertion of the Federal right in the Federal court that the State has corrective procedure of its own -- that still less does such procedure draw to itself the final determination of the Federal question. Simon v. Southern Ry., 236 U.S. 115, 122, 123. We see no reason for a less liberal rule in a matter of life and death. When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the

other, the Federal court must examine the facts. Kansas Southern Ry. v. C.H. Albers Commission Co., 223 U.S. 573, 591. Nor. & West. Ry. v. Conley, **[*348]** March 8, 1915, 236 U.S. 605. Otherwise, the right will be a barren one. It is significant that the argument for the State does not go so far as to say that in no case would it be permissible on application for habeas corpus to override the findings of fact by the state courts. It would indeed be a most serious thing if this Court were so to hold, for we could not but regard it as a removal of what is perhaps the most important guaranty of the Federal Constitution. If, however, the argument stops short of this, the whole structure built upon the state procedure and decisions falls to the ground.

To put an extreme case and show what we mean, if the trial and the later hearing before the Supreme Court had taken place in the presence of an armed force known to be ready to shoot if the result was not the one desired, we do not suppose that this Court would allow itself to be silenced by the suggestion thst the record showed no flaw. To go one step further, suppose that the trial had taken place under such intimidation and that the Supreme Court of the State on writ of error had discovered no error in the record, we still imagine that this court would find a sufficient one outside of the record, and that it would not be disturbed in its conclusion by anything that the Supreme Court of the State might have said. We therefore lay the suggestion that the Supreme Court of the State had disposed of the present question by its judgment on one side along with the question of the appellant's right to be present. If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above. And notwithstanding the principle of comity and convenience (for in our opinion it is nothing more, United States v. Sing Tuck, 194 U.S. 161, 168), that calls for a resort to the local appellate tribunal before coming to the courts of the United States for a writ of habeas corpus, when, as here, that resort **[***989]** has been had in vain, the power to secure fundamental rights **[*349]** that had existed at every stage becomes a duty and must be put forth.

The single question in our minds is whether a petition alleging that the trial took place in the midst of a mobsavagely and manifestly intent on a single result, is shown on its face unwarranted, by the specifications, which may be presumed to set forth the strongest indications of the fact at the petitioner's command. This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that in spite of **[**596]** forms they are extremely likely to be impregnated by the environing atmosphere. And when we find the judgment of the expert on the spot, of the judge whose business it was to preserve not only form but substance, to have been that if one juryman yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob. Of course we are speaking only of the case made by the petition, and whether it ought to be heard.Upon allegations of this gravity in our opinion it ought to be heard, whatever the decision of the state court may have been, and it did not need to set forth contradictory evidence, or matter of rebuttal, or to explain why the motions for a new trial and to set aside the verdict were overruled by the state court. There is no reason to fear an impairment of the authority of the State to punish the guilty. We do not think it impracticable in any part of this country to have trials free from outside control. But to maintain this immunity it may be necessary that the supremacy of the law and of the Federal Constitution should be vindicated in a case like this. It may be that on a hearing a different complexion would be given to the judge's alleged request and expression of fear. But supposing the alleged facts to be true, we are **[*350]** of opinion that if they were before the Supreme Court it sanctioned a situation upon which the Courts of the United States should act, and if for any reason they were not before the Supreme Court, it is our duty to act upon them now and to declare lynch law as little valid when practiced by a regularly drawn jury as then administered by one elected by a mob intent on death.

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VERA L. BEAVERS, personal representative for The Estate of Charles A. Abernathy, deceased, DOUGLAS AKINS, CLEBURN E. ADERHOLT, CLARICE W. ANDERSON, spouse and personal representative for the Estate of Henry L. Anderson, deceased, DONALD F. ARMSTRONG, ERNEST W. AUSTIN, JERRY WAYNE BARFIELD, ROBERT H. BARKER, RUTH L. ALLEN, daughter and personal representative for Jerry Allen Barronton, deceased, SHIRLEY DARLENE BARROW, personal representative for the Estate of Carl A. Barrow, deceased, ETHAL BATES, spouse and personal representative for the Estate of John H. Bates, Jr., deceased, DEBRA BAYLIS, spouse and personal representative for the Estate of John Baylis, deceased, ROBERT L. BECKWITH, JOHN W. BLACKERBY, personal representative for the Estate of Ernest Leon Blackerby, deceased, PATRICK BORDEN, personal representative for the Estate of David C. Borden, deceased, SIDNEY R. BOUTWELL, SR., spouse and personal representative for the Estate of Bonnie Boutwell, deceased, JAMES E. BOWLING, IRENE BROWN, spouse and personal representative for the Estate of James Edward Brown, deceased, EVELYN BROWN, personal representative for the Estate of Richard Allen Brown, deceased, JAMES P. BURNETT, JAMES J. BYRD, GAYLE BYROM, spouse and personal representative for the Estate of Jerry L. Byrom, deceased, CAROLYN SUE CHAPMAN, personal representative for the Estate of Allen M. Chapman, deceased, CATHY SHERK, personal representative for the Estate of Lester Knox Coleman, deceased, JAMES CATON, GEORGIE L. CORSBIE, LEON H. COSBY, VERNON C. CREASY, JAMES E. DANLEY, LOUISE S. DAVIS, personal representative for the Estate of Bobby R. Davis, deceased, MARSHALL DEASE, LLOYD H. DEVAUGHN, REBECCA ANN ELLIOTT, spouse and personal representative for the Estate of James Weldon Elliott, deceased, CHARLES E. EMMONS, JOANN EVANS, personal representative for the Estate of Robert Evans, deceased, LUCILLE W. EVERS, WILLIAM FARSHEE, MATTIE L. FEAGIN, personal representative for the Estate of Ray Feagin, deceased, FLORA MAE FEAGINS, personal representative for the Estate of Roosevelt Feagins, deceased, MARVIN D. GHRIGSBY, A. C. GOSS, DEBRA J. GRIFFIN, personal representative for the Estate of William R. Griffin, deceased, PHILLIP HALLMARK, personal representative for the Estate of Chester Hallmark, deceased, MARLYN HARRIS, spouse and personal representative for the Estate of Frank Harris, deceased, MELBA MALLORY, personal representative for the Estate of Rena Houston, deceased, PATRICIA HOWELL, spouse and personal representative for the Estate of Ray Nance Howell, Jr., deceased, FAYTHE HUGHES, spouse and personal representative for the Estate of Thomas D. Hughes, deceased, VERDIE MAY JAMES, spouse and personal representative for the Estate of Clarence O. James, deceased, EVETTE JIMMERSON, daughter and personal representative for the Estate of Lee R. Jimmerson, deceased, JOYCE ANN JOHNSON, spouse and personal representative for the Estate of Ansel Lee Johnson, deceased, DAVID H. JOHNSON, BILLY F. JONES, CASEY T. JONES, THELMA JANE KRUEGER, spouse and personal representative for the Estate of Robert S. Krueger, deceased, DAVID LANE, BOBBY LAW, personal representative for the Estate of Chester Law, deceased, GLENNES B. LEMLEY, JAMES LEWIS MALONE, WANDA MANGUM, spouse and personal representative for the Estate of Barney Mayo Mangum, deceased, BOBBY JOE MCDOWELL, BILL MOORE, WILLIAM C. MORGAN, MARY MORRISON, spouse and personal representative for the Estate of James D. Morrison, ELLIS MORICLE, CAROLYN SUE MOTE, spouse and personal representative for the Estate of Morris R. Mote, JOE NORMAN, TONY CURTIS HUNTER, personal representative for the Estate of Percy L. Norwood, deceased, JAMES OGLE, SAN-

DRA OWENS, daughter and personal representative for the Estate of Raymond Owens, deceased, JAMES ROBERT PALMER, EDDIE PITTS, NELDA D. LECROY, daughter and personal representative for the Estate of Harold Poland, deceased, GERALDINE RATLIFF, spouse and personal representative for the Estate of Max Ratliff, deceased, HERMAN REA, LEOPOLDO RENDON, ARNOLD L. RICHEY, NORMA ROBINSON, spouse and personal representative for the Estate of Edward H. Robinson, deceased, AZALEAN ROGERS, spouse and personal representative for the Estate of Thomas L. Rogers, deceased, DENNIS RYE, EULA SCORVER, spouse and personal representative for the Estate of Henry Scorver, deceased, BILLY O. SEAL, BEVERLY SHELBY, daughter and personal representative for the Estate of Eula D. Shelby, deceased, JOE R. SMITH, PEGGY WALKER, daughter and personal representative for the Estate of James R. Steelman, deceased, CHARLES D. STEVENS, MARVIN STRINGER, MAMIE M. STONE, spouse and personal representative for the Estate of Fred Stone, deceased, WOODROW WILSON THOMAS, FAY D. THRASHER, DONNA SWEET, spouse and personal representative for the Estate of Phillip Austin Sweet, deceased, CHARLETTE TURNER, spouse and personal representative for the Estate of James E. Turner, deceased, JACK W. TYRBYFILL, SUSIE WEBB, spouse and personal representative for the Estate of Gean Charles Webb, deceased, ELVA WILLMMARTH, spouse and personal representative for the Estate of Oliver Howard Willmarth, deceased, LYNN W. WILSON, BARBARA COLLINS, Executrix for the Estate of Larry B. Wolfe, MICHEAL E. WOOD, ALAN WOODS, Plaintiffs-Appellants, versus A. O. SMITH ELECTRICAL PRODUCTS COMPANY, a division of A.O. Smith Corporation, A. O. SMITH CORPORATION, A. W. CHESTERTON COMPANY, ALBANY INTERNATIONAL, AMERICAN OPTICAL CORPORATION, CROWN CORK & SEAL COMPANY, INC. CROWN HOLDINGS, INC., KELLY-MOORE PAINT COMPANY, BORG WARNER CORP. by and through its successor in interest, BORGWARNER MORSE TEC Inc., EXTECO, INC. f/k/a THERMO ELECTRIC CO., INC., MARLEY-WYLAIN CO. d/b/a WEIL-MCLAIN CO., INC., HONEYWELL INC., JOHN CRANE INC. et.al., Defendants-Appellees.

Nos. 06-15401 & 07-11401 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

265 Fed. Appx. 772; 2008 U.S. App. LEXIS 3419

February 13, 2008, Decided
February 13, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [1]**
Appeals from the United States District Court for the Northern District of Alabama. D. C. Docket No. 06-00899-CV-UWC-2-S.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, nearly 100 individuals, appealed from the United States District Court for the Northern District of Alabama, challenging the dismissal of their complaint for lack of subject matter jurisdiction, as well as the court's denial of their Fed. R. Civ. P. 60(b) motion. The complaint sought damages for personal injury and wrongful death resulting from exposure to asbestos. The complaint diversity jurisdiction, 28 U.S.C.S. ß 1332.

OVERVIEW: Plaintiffs' complaint alleged only the residence of plaintiffs, not their states of citizenship. Because plaintiffs had the burden to affirmatively allege facts demonstrating the existence of jurisdiction and failed to allege the citizenship of the individual plaintiffs, the district court lacked subject matter jurisdiction on the face of the complaint. Plaintiffs' claims arose out of their separate exposures to asbestos at different locations over different time periods, so plaintiffs were required to allege that each individual plaintiff's claims met the amount in controversy requirement. Because they failed to do so, the district court also lacked subject matter jurisdiction on this basis. As to the Rule 60(b) motion, even apart from plaintiffs' asserted drafting mistakes, the district court lacked jurisdiction over the case. Further, plaintiffs drafted the complaint and were responsible for alleging the proper jurisdictional facts. The instant court would not characterize the district court's correct application of settled law by sua sponte dismissing the complaint as an unfair surprise. Plaintiffs also did not show that an extreme and unexpected hardship would result.

OUTCOME: The instant court affirmed the dismissal and the denial of the motion for relief from judgment.

CORE TERMS: diversity, subject matter jurisdiction, diversity jurisdiction, amount in controversy, citizenship, sua sponte, jurisdictional, manifestly, drafting, unjust, result of mistake, citations omitted, dispensable, impression, nondiverse, surprised, unfairly, abused, cure, exposure to asbestos, de novo, unfair surprise, subject-matter, affirmatively, demonstrating, consolidated, unexpected, severance, mistaken, inquire

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] A court of appeals reviews de novo a district court's conclusion that it lacked subject matter jurisdiction.

Civil Procedure > Appeals > Records on Appeal
[HN2] A court of appeals may affirm a district court's judgment on any ground that finds support in the record.

Civil Procedure > Jurisdiction > Jurisdictional Sources > Constitutional Sources
Civil Procedure > Jurisdiction > Jurisdictional Sources > Statutory Sources
[HN3] Federal courts have limited subject matter jurisdiction, or in other words, they have the power to decide only certain types of cases. While Article III of the United States Constitution sets the outer boundaries of that power, it also vests Congress with the discretion to determine whether, and to what extent, that power may be exercised by lower federal courts. Consequently, lower federal courts are empowered to hear only cases for which there has been a congressional grant of jurisdiction, and once a court determines that there has been no grant that covers a particular case, the court's sole remaining act is to dismiss the case for lack of jurisdiction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Waiver & Preservation
[HN4] A federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3).

Civil Procedure > Jurisdiction > Diversity Jurisdiction > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN5] A party asserting diversity jurisdiction has the burden to affirmatively allege facts demonstrating the existence of jurisdiction.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Amount in Controversy > General Overview
Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview

[HN6] Diversity jurisdiction exists where a suit is between citizens of different states and the amount in controversy exceeds the statutorily prescribed amount, in this case $ 75,000.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Amount in Controversy > General Overview
Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview
[HN7] Diversity jurisdiction requires complete diversity--every plaintiff must be diverse from every defendant. Citizenship, not residence, is the key fact that must be alleged in the complaint to establish diversity for a natural person. Moreover, where multiple plaintiffs allege claims in the same complaint, the complaint must allege that the claims of each individual plaintiff meet the amount in controversy requirement.

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview
[HN8] Fed. R. Civ. P. 60(b) allows for relief from a final judgment, order, or proceeding for several reasons, including mistake, inadvertence, surprise, or excusable neglect; or any other reason justifying relief from the operation of the judgment. Rule 60(b)(1), (6).

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN9] In order to obtain relief under Fed. R. Civ. P. 60(b), a party must prove some justification for relief. He cannot prevail simply because the district court properly could have vacated its order. Instead, an appellant must demonstrate a justification so compelling that the court was required to vacate its order.

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview
Civil Procedure > Judgments > Relief From Judgment > Extraordinary Circumstances
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN10] Relief under Fed. R. Civ. P. 60(b)(6) is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances. The party seeking relief has the burden of showing that absent such relief, an extreme and unexpected hardship will result.

COUNSEL: For Vera L. Beavers, Appellant: G. Patterson Keahey, Jr., Law Office G. Patterson Kehey, P.C., BIRMINGHAM, AL.

For Douglas Akins, Cleburn E. Aderholt, Appellant: John David Saxon, John D. Saxon, P.C., BIRMINGHAM, AL.

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For A. O. Smith Corporation, Appellee: Laura DeVaughn Goodson, Forman Perry Watkins Krutz & Tardy LLP, JACKSON, MS.

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For Albany International, Appellee: Keith James Pflaum, Porterfield, Harper, Mills & Motlow, P.A., BIRMINGHAM, AL.

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For Rockwell Automation, Inc., Successor by merger to, Flowserve-Rockwell Manufacturing, Appellee: Kacey Leigh Keeton, Brunini, Grantham, Grower and Hewes, PLLC, JACKSON, MS.

For Asten Johnson, Inc., Industrial **[**2]** Holdings Corporation f/k/a Carborundum, Ingersoll-Rand Company, Appellee: Donald C. Partridge, Forman, Perry, Watkins, Krutz & Tardy, JACKSON, MS.

For Harnischfeger Corporation, Appellee: William Perry Webb, Porterfield, Harper & Mills, P.A., BIRMINGHAM, AL.

For Crown Cork & Seal Company, Inc., Crown Holdings, Inc., Appellee: Walter Thompson Gilmer, Jr., McDOWELL, KNIGHT, ROEDDER & SLEDGE, LLC., MOBILE, AL.

For Goulds Pumps Inc., Appellee: Frank Grey Redditt, Jr., Vickers, Riis, Murray & Curran, L.L.C., MOBILE, AL.

For Kelly-Moore Paint Company, Appellee: William T. Mills, II, PORTERFIELD HARPER & MILLS, P.A., BIRMINGHAM, AL.

For Borg Warner Corp, Exteco, Inc., Marley-Wylain Co, Appellee: Chadwick L. Shook, Aultman, Tyner & Ruffin, LTD., HATTIESBURG, MS.

For Honeywell Inc, Appellee: Robert R. Baugh, Sirote & Permutt, P. C., Birmingham, AL.

For Beazer East, FMC Corp., Georgia Pacific Corp, United States Steel Corp., Appellee: Allan R. Wheeler, Burr & Forman, BIRMINGHAM, AL.

For American Standard, Inc, Bell & Gossett, ITT Corp, Hobart Brothers Co., The Lincoln Electric Co, Appellee: Timothy W. Knight, Kee & Selby, LLP, BIRMINGHAM, AL.

For Owens-Illinois, Inc, Appellee: George Matthew Keenan, **[**3]** Starnes & Atchison, LLP, BIRMINGHAM, AL.

For Garlock Sealing Technologies LLC, Buffalo Pumps, Inc., Square D Company, Standard Equipment Company, Inc., Appellee: Edward B. McDonough, Jr., Attorney at Law, MOBILE, AL.

For Brandon Drying Farbics, Inc, Appellee: Matthew Whittle Robinett, Norman, Wood, Kendrick & Turner, BIRMINGHAM, AL.

For Crane Co., Appellee: Frank Grey Redditt, Jr., Vickers, Riis, Murray & Curran, L.L.C., MOBILE, AL; Lucy Westover Jordan, Kee & Selby, LLP, BIRMINGHAM, AL; Jenelle R. Evans, Balch & Bingham, LLP, BIRMINGHAM, AL; S. Allen Baker, Jr., Balch & Bingham, BIRMINGHAM, AL; Charles Paul Cavender, Burr & Forman, BIRMINGHAM, AL; Anthony C. Harlow, Starnes & Atchison, LLP, BIRMINGHAM, AL; Elizabeth B. Padgett, Hawkins & Parnell LLP, ATLANTA, GA; Stephen Christopher Collier, Hawkins & Parnell, LLP, ATLANTA, GA.

JUDGES: Before TJOFLAT, BLACK and CARNES, Circuit Judges.

OPINION

[*775] PER CURIAM:

In this case, which is not a class action, the plaintiffs, nearly 100 individuals, appeal the district court's dismissal of their complaint for lack of subject matter jurisdiction, as well as the court's denial of their subsequent Rule 60(b) motion for relief from judgment. The complaint, which sought **[**4]** damages for personal injury and wrongful death resulting from exposure to asbestos, alleged that the court had diversity jurisdiction under 28 U.S.C. ß 1332. However, the district court determined that it lacked subject matter jurisdiction because there was not complete diversity among the parties--specifically, the complaint contained plaintiffs and defendants that were both alleged to be from California and Georgia. Accordingly, on August 31, 2006, the court dismissed the complaint "[f]or want of diversity jurisdiction."

On October 2, 2006, the plaintiffs filed a notice of appeal, challenging the district court's dismissal of their complaint. On that same day, the plaintiffs filed a Rule 60(b) motion for relief from judgment, arguing that the court's impression that there was not complete diversity was the result of mistake under Rule 60(b)(1), they were unfairly surprised by the district court's order under Rule 60(b)(1), and the order was manifestly unjust under Rule 60(b)(6). The plaintiffs also moved to sever each plaintiff's claim and to amend their complaint. On October 25, 2006, the district **[*776]** court struck the plaintiffs' Rule 60(b) motion for relief from judgment because it **[**5]** believed that the pending appeal stripped it of jurisdiction over the motion.

On the next day, the plaintiffs filed a motion for reconsideration, arguing that the district court did have jurisdiction to entertain its earlier Rule 60(b) motion, and that the court should therefore grant them relief from its October 25, 2006, order and consider the merits of their Rule 60(b) motion. The district court held a hearing on the plaintiffs' motion on January 9, 2007, and the next day, January 10, denied their Rule 60(b) motion because it "raised no meritorious arguments entitling relief under Rule 60(b)." The court also re-emphasized that on the face of the complaint the court lacked diversity jurisdiction. Finally, the court stated that the plaintiffs could either file a new action or move to reopen the current case with an attached proposed amended complaint that satisfied the court's jurisdictional requirements.

On January 19, 2007, the plaintiffs filed a motion to reopen the case and to file their proposed amended complaint, which was attached to the motion. The district court denied that motion on February 28, 2007, for want of jurisdiction because the case was still pending on appeal in **[**6]** this Court. On March 12, 2007, the plaintiffs filed with the district court a motion for an extension of time to appeal the court's January 10, 2007, order denying their Rule 60(b) motion, arguing that they had good cause for their failure to file, because they had believed that the court's order was an invitation to move to re-open the case and was therefore not a final, appealable order. The district court granted the plaintiffs' motion, and the plaintiffs appealed the district court's order denying their Rule 60(b) motion.

The plaintiffs' appeals of the district court's order dismissing their complaint and the court's order denying them Rule 60(b) relief were consolidated. In this consolidated appeal, the plaintiffs first contend that the district court erred by dismissing their complaint for lack of diversity jurisdiction because, according to the plaintiffs, the proper method to cure problems with diversity is to dismiss a dispensable nondiverse party or to allow severance of the claims. [1] The plaintiffs further contend that the district court erred by denying their Rule 60(b) motion for relief from judgment because: (1) the lack of diversity jurisdiction on the face of the complaint **[**7]** was the result of mistake; (2) the court unfairly surprised them by sua sponte dismissing their complaint for lack of jurisdiction; and (3) the court's dismissal of their complaint was manifestly unjust.

1 The plaintiffs also contend that the district court erred by sua sponte dismissing their complaint because the district court's order of dismissal mentioned some of the arguments raised by the defendants in their various motions to dismiss without first allowing the plaintiffs a chance to respond. However, because the district court ultimately dismissed the complaint for lack of jurisdiction, and our review of subject matter jurisdiction is *de novo, see Dale v. Moore,* 121 F.3d 624, 626 (11th Cir. 1997), we need not address this argument.

I.

The plaintiffs contend that the district court erred by dismissing their complaint for lack of subject matter jurisdiction because, although they admit that their complaint on its face gave the mistaken impression that complete diversity did not exist, they argue that the proper method to cure problems with diversity is to dismiss a dispensable nondiverse party or to allow severance of the plaintiffs' claims. **[*777]** The defendants respond that the district **[**8]** court properly dismissed the plaintiffs' complaint because, in addition to the problems with complete diversity found by the district court and admitted by the plaintiffs, the plaintiffs alleged only the residency, not the citizenship, of the nearly 100 plaintiffs. Moreover, according to the defendants, the plaintiffs also failed to allege that each plaintiff's claims met the amount in controversy requirement.

[HN1] We review *de novo* the district court's conclusion that it lacked subject matter jurisdiction. *Dale v. Moore,* 121 F.3d 624, 626 (11th Cir. 1997); *see also Williams v. Best Buy Co.,* 269 F.3d 1316, 1318 (11th Cir. 2001) ("Subject matter jurisdiction is a question of law subject to de novo review."). [HN2] "[W]e may affirm the district court's judgment 'on any ground that finds support in the record.'" *Gaston v. Bellingrath Gardens & Home, Inc.,* 167 F.3d 1361, 1363 n.1 (11th Cir. 1999) (quoting *Jaffke v. Dunham,* 352 U.S. 280, 281, 77 S. Ct. 307, 308, 1 L. Ed. 2d 314 (1957)).

In *Morrison v. Allstate Indemnity Co.,* 228 F.3d 1255 (11th Cir. 2000), a case premised on diversity jurisdiction, we said:

> [HN3] Federal courts have limited subject matter jurisdiction, or in other words, they have the power to decide only **[**9]** certain types of cases. While Article III of the Constitution sets the outer boundaries of that power, it also vests Congress with the discretion to determine whether, and to what extent, that power may be exercised by lower federal courts. Consequently, lower federal courts are empowered to hear only cases for which there has been a congressional grant of jurisdiction, and once a court determines that there has been no grant that covers a particular case, the court's sole remaining act is to dismiss the case for lack of jurisdiction.

Id. at 1260-61 (citations omitted). [HN4] "A federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises." *Johansen v. Combustion Eng'g, Inc.,* 170 F.3d 1320, 1328 n.4 (11th Cir. 1999). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3); *see also Morrison,* 228 F.3d at 1261.

The plaintiffs allege in their complaint that jurisdiction in the district court over their state-law tort claims is proper based on diversity of citizenship, pursuant to 28 U.S.C. ß 1332. The plaintiffs, **[**10]** as [HN5] the party asserting diversity jurisdiction, have the burden to "affirmatively allege facts demonstrating the existence of jurisdiction." *Taylor v. Appleton,* 30 F.3d 1365, 1367 (11th Cir. 1994).

[HN6] "Diversity jurisdiction exists where the suit is between citizens of different states and the amount in controversy exceeds the statutorily prescribed amount, in this case $ 75,000." *Williams,* 269 F.3d at 1319 (citing 28 U.S.C. ß 1332(a)). [HN7] Diversity jurisdiction "requires complete diversity--every plaintiff must be diverse from every defendant." *Palmer v. Hosp. Auth.,* 22 F.3d 1559,1564 (11th Cir. 1994). "Citizenship, not residence, is the key fact that must be alleged in the complaint to establish diversity for a natural person." *Taylor,* 30 F.3d at 1367. Moreover, where multiple plaintiffs allege claims in the same complaint, the complaint must allege that the claims of each individual plaintiff meet the amount in controversy requirement. *See Smith v. GTE Corp.,* 236 F.3d 1292, 1300 n.6 (11th Cir. 2001) ("Generally, when plaintiffs join in one lawsuit, the value of their claims may not be added together, or 'aggregated,' to satisfy the amount in controversy requirement for diversity jurisdiction."); **[**11]** *see also Troy Bank* **[*778]** *v. G.A. Whitehead & Co.,* 222 U.S. 39, 40-41, 32 S. Ct. 9, 9, 56 L. Ed. 81 (1911) ("When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount . . . .").

The plaintiffs' complaint alleges only the residence of the nearly 100 plaintiffs, not their states of citizenship. Because the plaintiffs have the burden to "affirmatively allege facts demonstrating the existence of jurisdiction," *Taylor,* 30 F.3d at 1367, and failed to allege the citizenship of the individual plaintiffs, the district court lacked subject matter jurisdiction on the face of the complaint. *See id.* Moreover, the plaintiffs' complaint does not allege that the claims of each individual plaintiff exceeded the $ 75,000 threshold, but instead states generally that "[t]he matter in controversy exceeds, exclusive of interest and costs, the sum of $ 75.000.00." The plaintiffs' claims arise out of their separate exposures to asbestos at different locations over different time periods, and therefore the plaintiffs were required to allege that each individual plaintiff's claims met the **[**12]** amount in controversy requirement. *See Smith,* 236 F.3d at 1300 n.6; *see also Troy Bank,* 222 U.S. at 40-41, 32 S. Ct. at 9. Because they failed to do so, the district court also lacked subject matter jurisdiction on this basis.

Neither of these defects in the plaintiffs' complaint could be remedied by the plaintiffs' suggested approach of dismissing nondiverse dispensable parties, and therefore "the court's sole remaining act [was] to dismiss the case for lack of jurisdiction." *Morrison,* 228 F.3d at 1261. Even though the district court did not address the amount in controversy requirement or the fact that the plaintiffs alleged residence instead of citizenship, we nonetheless affirm the district court's dismissal of the plaintiffs' complaint for lack of subject matter jurisdiction on these grounds. *See Gaston,* 167 F.3d at 1363 n.1.

II.

The plaintiffs also contend that the district court erred by denying their Rule 60(b) motion for relief from judgment because: (1) the lack of diversity jurisdiction on the face of the complaint was the result of mistake; (2) the court unfairly surprised the plaintiffs by sua sponte dismissing their complaint for lack of jurisdiction; and (2) the court's **[**13]** dismissal of their complaint was manifestly unjust. We review the district court's denial of the plaintiffs' Rule 60(b) motion only for abuse of discretion. *Am. Bankers Ins. Co. of Fla. v. Nw. Nat'l Ins. Co.,* 198 F.3d 1332, 1338 (11th Cir. 1999).

Federal Rule of Civil Procedure 60(b) [HN8] allows for relief from a final judgment, order, or proceeding for several reasons, including "mistake, inadvertence, surprise, or excusable neglect;" or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(1), (6). [HN9] In order to obtain relief under Rule 60(b), a party "'must prove some justification for relief.' He 'cannot prevail simply because the district court properly could have vacated its order. Instead, appellant must demonstrate a justification so compelling that the court was required to vacate its order.'" *Cavaliere v. Allstate Ins. Co.,* 996 F.2d 1111, 1115 (11th Cir. 1993) (citations omitted).

The plaintiffs first argue that the district court abused its discretion by denying them relief under Rule 60(b)(1) because, according to them, their complaint was mistakenly drafted to give the impression that complete diversity did not exist even though it really **[**14]** did. In other words, the plaintiffs argue that Rule 60(b) should **[*779]** provide them relief

because of their own error in drafting the document. However, even if a party's own mistake in drafting its complaint were a basis for relief under Rule 60(b)(1), which we seriously doubt, the district court did not abuse its discretion in denying relief on this ground because, as we mentioned above, this "mistaken drafting" was not the only problem with jurisdiction in this case. Even apart from the plaintiffs' asserted drafting mistakes, the court lacked jurisdiction over the case.

The plaintiffs next argue that the district court abused its discretion by denying them relief under Rule 60(b)(1) because the district court's sua sponte dismissal of their complaint was an unfair surprise. This argument is meritless. As we mentioned above, federal courts are courts of limited jurisdiction and have the duty to inquire into whether they have subject-matter jurisdiction. *See Johansen,* 170 F.3d at 1328 n.4; *Baggett v. First Nat'l Bank of Gainesville,* 117 F.3d 1342, 1352 (11th Cir. 1997) ("The Court sua sponte may raise a jurisdiction defect at any time."). And when a court discovers that it lacks jurisdiction, **[**15]** "the court must dismiss the action." Fed. R. Civ. P. 12(h)(3); *see also Morrison,* 228 F.3d at 1261. The plaintiffs drafted the complaint and were responsible for alleging the proper jurisdictional facts. We will not characterize the district court's correct application of settled law as an unfair surprise.

Finally, the plaintiffs argue that the district court abused its discretion by denying them relief under Rule 60(b)(6) because the district court's sua sponte dismissal of their complaint worked a manifest injustice against them. Specifically, they argue that the district court's dismissal of their complaint without prejudice was in effect a "death penalty sanction" because some plaintiffs may be time-barred from refiling their claims. According to the plaintiffs, it was manifestly unjust for the court to resort to this heavy sanction without notice, hearing, or an opportunity to amend to cure any jurisdictional defects.

[HN10] "[R]elief under [Rule 60(b)(6)] is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances. The party seeking relief has the burden of showing that absent such relief, an 'extreme' and 'unexpected' hardship will result." **[**16]** *Griffin v. Swim-Tech Corp.* 722 F.2d 677, 680 (11th Cir. 1984) (citations omitted). The plaintiffs have failed to meet this heavy burden. It is not--or should not be, given our precedent in the area of subject matter jurisdiction--"unexpected" that a district court will dismiss a plaintiff's complaint for lack of jurisdiction when the only possible jurisdictional basis is diversity, and the complaint on its face fails to allege not only the citizenship of each plaintiff, *see Taylor,* 30 F.3d at 1367, but also that the amount in controversy requirement is met for each plaintiff's claims, *see Smith,* 236 F.3d at 1300 n.6; *see also Troy Bank,* 222 U.S. at 40-41, 32 S. Ct. at 9. The district court properly denied the plaintiffs' Rule 60(b) motion for relief.

AFFIRMED.

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DRAKE OIL TECHNOLOGY PARTNERS; FRANK E. ACIERNO, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. DRAKE OIL TECHNOLOGY PARTNERS; FRANK E. ACIERNO, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. VANGUARD OIL TECHNOLOGY PARTNERS; DRAKE OIL TECHNOLOGY PARTNERS; DILLON OIL TECHNOLOGY PARTNERS; DERRINGER OIL TECHNOLOGY PARTNERS 1981; DERRINGER OIL TECHNOLOGY PARTNERS 1982; CROWN OIL TECHNOLOGY PARTNERS; CARLTON OIL TECHNOLOGY PARTNERS, LTD.; CHARLES R. MANGUM; MARILYN M. MANGUM; JAMES FORD HARVEY; MARTHA B. HARVEY; STEVE STROUBE; ELAINE STROUBE, Petitioners - Appellants. v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. ROBERT F. JACOBSEN; MARILYN B. JACOBSEN; BRUCE A. FORSBERG; LINDA FORSBERG; TROY A. ATHON; DILLON OIL TECHNOLOGY PARTNERS, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. ROBERT F. JACOBSEN; MARILYN B. JACOBSEN; BRUCE A. FORSBERG; LINDA FORSBERG; TROY A. ATHON; DILLON OIL TECHNOLOGY PARTNERS, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. TONY W. DIAL and CANDACE P. DIAL, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. SCOTT K. MONROE; BARBARA F. MONROE, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. VULCAN OIL TECHNOLOGY PARTNERS; VANGUARD OIL TECHNOLOGY PARTNERS; DRAKE OIL TECHNOLOGY PARTNERS; DILLON OIL TECHNOLOGY PARTNERS; DERRINGER OIL TECHNOLOGY PARTNERS 1981; DERRINGER OIL TECHNOLOGY PARTNERS 1982; CROWNE OIL TECHNOLOGY PARTNERS; CARLTON OIL TECHNOLOGY PARTNERS, LTD; AMERICAN ENERGY RESOURCES, INC.; SCOTT K. MONROE; BARBARA F. MONROE; RAYMOND P. MEYER; GRETCHEN A. MEYER; WILLIAM D. GINN; ARLENE D. GINN, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. VANGUARD OIL TECHNOLOGY PARTNERS; DILLON OIL TECHNOLOGY PARTNERS; CARLTON OIL TECHNOLOGY PARTNERS, LTD; SCOTT K. MONROE; BARBARA F. MONROE; RAYMOND P. MEYER; GRETCHEN A. MEYER; WILLIAM D. GINN; ARLENE D. GINN, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. JOHN C. MEGNA; BEVERLY J. MEGNA, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. CARL BOSSOLA; ROSEMARIE BOSSOLA, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. CARL BOSSOLA; ROSEMARIE BOSSOLA, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. MICHAEL L. MINTZ; LAURIE M. MINTZ, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. CARL S. BOSSOLA; ROSEMARIE BOSSOLA, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. JACK SCHOELLERMAN; KATHERINE SCHOELLERMAN, DILLION OIL TECHNOLOGY PARTNERS; LARRY V. GRIDLEY; DAILA S. GRIDLEY; THOMAS L. SALIBA; BETTY R. SALIBA; SAMUEL W. PETERSON; B. L. PETERSON; GARY G. MORIKONE; DOROTHY MORIKONE; CROWNE OIL TECHNOLOGY PARTNERS; DONALD H. FRITTS; DRAKE OIL TECHNOLOGY PARTNERS, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee. ESTATE

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UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

211 F.3d 1277; 2000 U.S. App. LEXIS 15138

April 14, 2000, Filed

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

SUBSEQUENT HISTORY: Reported in full at Drake Oil Tech. Partners v. Commissioner, 2000 U.S. App. LEXIS 6851 (10th Cir. Colo., 2000)
Writ of certiorari denied Drake Oil Tech. Partners v. Commissioner, 531 U.S. 875, 121 S. Ct. 180, 148 L. Ed. 2d 124, 2000 U.S. LEXIS 5891 (2000)

PRIOR HISTORY: (Appeal from U.S. Tax Court). (T.C. No. 21530-87). (T.C. No. 16768-88). (T.C. No. 31310-86). (T.C. No. 4646-89). (T.C. No. 26785-86). (T.C. No. 20263-83). (T.C. No. 36390-87). (T.C. No. 2709-86). (T.C. No. 37411-85). (T.C. Nos. 12235-86, 32931-86, 4142-87, 12476-87, 18986-87, 24227-87, 24013-88, 7300-89, 8272-89, & 18502-89). (T.C. No. 24725-89). (T.C. No. 5830-88). (T.C. No. 23863-87). (T.C. No. 40805-86). (T.C. No. 3037-87). (T.C. No. 3852-88). (T.C. No. 32684-88). (T.C. No. 41934-86). (T.C. No. 22214-86). (T.C. No. 14545-88). (T.C. No. 39965-86). (T.C. No. 28327-87). (T.C. No. 5757-89). (T.C. No. 32418-86). (T.C. No. 14326-88). (T.C. No. 19427-89).

Reported in Full-Text Format at: 2000 U.S. App. LEXIS 6851; 2000-1 U.S. Tax Cas. (CCH) P50,378.
Vulcan Oil Tech. Partners v. Commissioner, 110 T.C. 153, 1998 U.S. Tax Ct. LEXIS 14 (1998)
Estate of Campion v. Commissioner, 110 T.C. 165, 1998 U.S. Tax Ct. LEXIS 15 (1998)

OPINION

AFFIRMED.

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UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2000 U.S. App. LEXIS 6851; 2000-1 U.S. Tax Cas. (CCH) P50,378

April 14, 2000, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 2000 U.S. App. LEXIS 15138. Certiorari Denied October 2, 2000, Reported at: 2000 U.S. LEXIS 5891.

PRIOR HISTORY: (Appeal from U.S. Tax Court). (T.C. No. 21530-87). (T.C. No. 16768-88). (T.C. No. 31310-86). (T.C. No. 4646-89). (T.C. No. 26785-86). (T.C. No. 20263-83). (T.C. No. 36390-87). (T.C. No. 2709-86). (T.C. No. 37411-85). (T.C. Nos. 12235-86, 32931-86, 4142-87, 12476-87, 18986-87, 24227-87, 24013-88, 7300-89, 8272-89, & 18502-89). (T.C. No. 24725-89). (T.C. No. 5830-88). (T.C. No. 23863-87). (T.C. No. 40805-86). (T.C. No. 3037-87). (T.C. No. 3852-88). (T.C. No. 32684-88). (T.C. No. 41934-86). (T.C. No. 22214-86). (T.C. No. 14545-88). (T.C. No. 39965-86). (T.C. No. 28327-87). (T.C. No. 5757-89). (T.C. No. 32418-86). (T.C. No. 14326-88). (T.C. No. 19427-89).

DISPOSITION: AFFIRMED.

CORE TERMS: oral argument, favorable, entities, notices, abated, panel decision

COUNSEL: For DRAKE OIL TECHNOLOGY PARTNERS, Petitioner - Appellant: Declan J. O'Donnell, Denver, CO.

For COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee: Stuart L. Brown, Chief Counsel, Internal Revenue Service, Washington, DC. Kenneth W. Rosenberg, United States Department of Justice, Washington, DC. Loretta C. Argrett, Asst., Attorney Gen., **[*2]** United States Department of Justice, Washington, DC.

JUDGES: Before BRORBY, and LUCERO, Circuit Judges and WEST, Senior District Judge **.

** The Honorable Lee R. West, Senior Judge, U.S. District Court for the Western District of Oklahoma, sitting by designation.

OPINION

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the materials on file, this panel has determined unanimously that oral argument is not necessary. *See* Fed. R. App. P. 34(a)(2)(B); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted on the current record.

In these appeals, petitioners challenge two orders of the tax court issued on March 5, 1998. *See Estate of Campion v. Comm'r*, 110 T.C. 165 (1998); **[*3]** *Vulcan Oil Tech. Partners v. Comm'r*, 110 T.C. 153 (1998). In those orders, the court held the Commissioner did not breach any statutory or regulatory duties when it failed to offer these appellants more favorable treatment following a failed tax-shelter scheme. Specifically, the court held the Internal Revenue Service did not breach its duty of disclosure under the Tax Equity and Responsibility Act of 1982 and that it did not commit fraud in failing to offer more favorable settlements to these petitioners than to other taxpaying entities. These appeals followed.

Because of the numbers of individuals and partnerships involved in this scheme, multiple entities filed notices of appeal from the tax court's orders. In total, this court received, either through transfer or originally, 45 appeals seeking review of the 1998 orders. In late 1998, this court ordered briefing in 8 lead cases, which were then heard at oral argument in September, 1999. The remainder were abated. [1] On November 2, 1999, this court issued an Order & Judgment affirming the tax court in all respects. *See Tucek v. Comm'r*, 1999 U.S. App. LEXIS 29189, Nos. 98-9016, 98-9017, 98-9018, 98-9019, 98-9020, 98-9022, 98-9023, and **[*4]** 98-9024, (10th Cir. Nov. 2, 1999).

1 Two notices of appeals were filed after this court issued its disposition in the lead cases. Those two appeals, numbers 99-9029 and 99-9039, both styled *Dodson v. Comm'r*, were not abated.

On January 3, 2000, this court directed petitioners in these appeals to show cause why the remaining cases were not controlled by the panel decision in *Tucek*. In a response filed on January 24, appellants admitted that "the substance of the issues is identical in all of the cases in this group." *See Petitioners' Response*, dated January 24, 2000, at 2. In a pleading filed on February 17, 2000, the government opined that the issues raised in all of the appeals are identical and that summary affirmance is appropriate.

Upon careful review of the responses, as well as these files, we agree that the issues presented in these matters are identical to those raised and addressed in this panel's Order & Judgment in *Tucek.* Consequently, we AFFIRM the judgments of the tax court for **[*5]** substantially the same reasons as are set forth in that panel decision. The mandates shall issue forthwith.

Entered for the Court

Per Curiam

5 of 9 DOCUMENTS

Frank BYRD, by his guardian ad litem, Christobel Byrd, Arthur W. Stanley, Jr., by his guardian ad litem, Theodosia K. Stanley, Bobby Blackman, et al., Plaintiffs v. Bennie A. GARY, Principal of Mayo High School, G. C. Mangum, Area No. 1 Superintendent, et al., Defendants

Civ. A. No. 7199

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, FLORENCE DIVISION

184 F. Supp. 388; 1960 U.S. Dist. LEXIS 2853

May 18, 1960

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff students filed a motion for a preliminary injunction against defendants, a principal and a superintendent, in an action for an alleged violation of the students' rights to due process and equal protection under the Fourteenth Amendment.

OVERVIEW: The students were sent home from school by a principal for attempting to organize a boycott. The principal sent the students home with a note for their parents stating that a conference could be arranged with the superintendent. None of the students availed themselves of the opportunity to confer with the superintendent, and instead instituted a lawsuit for an injunction against the principal and the superintendent to secure the students' reinstatement in the school. The court held that an injunction would not issue in favor of the students because a federal court would not enjoin the activities of the principal and superintendent discharging in good faith their supposed duties, except in a case reasonably free from doubt. Furthermore, the court held that it would not grant injunctive relief until the students exhausted their administrative remedies.

OUTCOME: The court denied the motion for a preliminary injunction filed by the students.

CORE TERMS: civil rights, pupil, state officials, enjoin, discretionary, reluctance, immunity, expel, notice, threatening, injunction, delicate, declare, preliminary injunction, expulsion, expelling, acts done, school trustees, school official, state officers, best interest, administrative procedure, official duties', good faith, discharging, exhausted, delegate, supposed, fulfill, attend

LexisNexis(R) Headnotes

Education Law > Departments of Education > State Departments of Education > Authority
Education Law > Students > Discipline Methods > Suspensions
Estate, Gift & Trust Law > Trusts > Trustees > Duties & Powers > General Overview
[HN1] S.C. Code Ann. ß 21-230 gives school trustees the power to suspend or dismiss pupils when the best interest of the schools makes it necessary. The general powers granted school trustees by S.C. Code Ann. ß 21-230, clearly permits the trustees to delegate to the principal and superintendent such authority.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Civil Procedure > Justiciability > Exhaustion of Remedies > Administrative Remedies
Education Law > Departments of Education > State Departments of Education > Authority

[HN2] An administrative remedy is provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend. The courts of the United States will not grant injunctive relief until administrative remedies have been exhausted.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
Governments > State & Territorial Governments > Claims By & Against
Governments > State & Territorial Governments > Employees & Officials
[HN3] A federal court should not enjoin activities of state officers discharging in good faith their supposed official duties except in a case reasonably free from doubt.

Civil Procedure > Remedies > Injunctions > Elements > General Overview
Governments > State & Territorial Governments > Employees & Officials
[HN4] In a situation regarding an interference by the process of an injunction with the activities of state officers discharging in good faith their supposed official duties, an injunction ought not to issue unless in a case reasonably free from doubt.

Governments > Federal Government > U.S. Congress
Governments > Legislation > Expirations, Repeals & Suspensions
[HN5] Repeal is the responsibility of Congress, not the courts.

Civil Rights Law > Immunity From Liability > Local Officials > Customs & Policies
Governments > State & Territorial Governments > Claims By & Against
[HN6] Without the presence of a particular discriminatory intent, government officials acting within the scope of their authority have no liability. Courts will not inquire subjectively into their state of mind where government officials are exercising a discretionary function.

COUNSEL: [1]** Elliott D. Turnage, Darlington, S.C., for plaintiffs.

P. H. McEachin, of McEachin, Townsend & Zeigler, Florence, S.C., and D. Carl Cook, Hartsville, S.C., for defendants.

OPINION BY: WILLIAMS

OPINION

[*388] Plaintiffs brought this action for an alleged violation of the rights of the plaintiffs, Frank Byrd, Arthur W. Stanley, Jr., and Bobby Blackman, to attend Mayo High School in the City of Darlington and for other relief, all of which is summarized in the prayer of the complaint as follows:

'1. 'That the Court do declare that section 230(3), title 21 of The South Carolina 1952 Code of laws is unconstitutional, as being in conflict with the due process clause of section 1, of article XIV, of the constitution of the United States of America; and the Court do enjoin the defendants and each of them, from threatening or continuing to expel any pupil of Mayo High School, Darlington, S.C., pursuant to the provisions of same.

2. 'That the Court do declare that under the facts and circumstances of this case, the threatened or actual dismissal or expulsion of any of the plaintiff pupils by said defendants, or either of them constitutes a deprivation of said pupils and plaintiffs **[**2]** of civil rights in violation of said section 1, of article **[*389]** XIV, of said constitution and that the Court do enjoin the defendants and each of them from continuing to do so.

3. 'That the Court do declare that the threatened or actual dismissal or expulsion of any of the plaintiff pupils by said defendants, Bennie A. Gary or G. C. Mangum pursuant to powers purported to have been delegated to them by said Boards above mentioned, constitutes a deprivation of civil rights of said pupils and plaintiffs, in violation of said section 1, of article XIV, of said amendment to said Constitution of the United States of America, and that the Court do enjoin the defendants and each of them from continuing to do so.

4. 'For such other relief general or specific, which to the Court shall seem fitting by reason of premises.'

Following the service of the summons and complaint plaintiffs gave notice of a motion for a preliminary injunction to enjoin

'the defendants, Bennie A. Gary, G. C. Mangum, the Darlington County Board of School Trustees and the defendant individual members thereof, their agents, servants, employees and attorneys, from expelling or threatening or continuing to threaten **[**3]** to expel the plaintiff pupils from attendance in Mayo High School, Darlington, S.C., in the manner or for the causes set forth in the Complaint, and from expelling or threatening to expel any other pupils from said school for said causes or in said manner.'

The grounds of the motion are set out therein and may be generally stated to contend that defendants are depriving plaintiffs of civil rights guaranteed them by the due process and equal protection of the law, Article 1, Section XIV of the amendments to the Constitution of the United States or

'are acting pursuant to rules, regulations and practices which plaintiffs contend violate the laws of the State of South Carolina and said section of the Constitution of the United States of America.'

The motion was called for hearing before me in open Court at Florence, S.C., on May 11, 1960. Defendants made timely motion to dismiss the application for a temporary injunction upon grounds set out in the record. The motion to dismiss was taken under advisement and the Court proceeded to take the testimony offered by plaintiffs and defendants.

It appears from the testimony that plaintiffs, Frank Byrd, Arthur W. Stanley, Jr. and Bobby Blackman, **[**4]** students at Mayo High School, in Darlington, S.C., were sent home by the defendant, Bennie A. Gary, for attempting to organize a boycott by the student body of Cobles' Milk, a product served by the school in its cafeteria, after having been previously warned in a meeting of the whole student body, that such practices would not be permitted in the school.

Each of these boys was given a note to take to his parent stating that a conference could be arranged with the Area Superintendent, the defendant, G. C. Mangum. The parents of two of the boys requested a conference with the Superintendent but failed to appear at the appointed time and place, although due notice was given to each parent requesting the conference. The third boy's parent requested no conference. A fourth boy, who was sent home at about the same time for the same offense with a similar note to his parent, acting through his parent requested a conference with the Area Superintendent. The conference was held by the Superintendent with the boy and his mother resulting in the boy being reinstated in the school.

All three of the boys admitted on cross-examination that they had not availed themselves of the opportunity **[**5]** to confer with the Area Superintendent with the parent or parents of each boy present. Instead they, through their parents, instituted **[*390]** this case to secure reinstatement in the school.

From the testimony of the principal and Area Superintendent the Trustees of the school by proper rule gave the principal authority to temporarily send a student home when in his discretion the best interest of the school required such action. The procedure provided being that the principal would have a note sent by the child to the parent giving notice that the parent and child could arrange a conference with the Superintendent in reference to the disciplinary action. Should the conference be requested a time and place would be fixed by the Area Superintendent and due notice thereof given to the parent.

Upon holding the conference the Superintendent can reinstate the child if he considered it proper or continue the temporary suspension and report the case with his recommendations to the Board of Trustees, which Board would make disposition of the case by a written order, a copy of which to be delivered to the parent by mail or otherwise.

The parent or person in loco parentis has the right **[**6]** of appeal from any action of the Board of Trustees to the County Board of Education, and from there to the Circuit Court where the matter will be heard de novo by the Circuit Judge. This administrative procedure is afforded under S.C.1952 Code, Sections 21-230(2), 21-247, 21-247.2, 21-247.3, 21-247.4 and 21-247.5.

Under the provisions of [HN1] Sec. 21-230, S.C.1952 Code, the Trustees have the power to '(3) suspend or dismiss pupils when the best interest of the schools makes it necessary.' The general powers granted school trustees by Sec. 21-230, clearly permits the trustees to delegate to the principal and Superintendent such authority as was used in this case.

'The Trustees have an unquestioned right to expel a student for just cause. The trustees also have the power to delegate the right of expulsion to its officers or the officers of the University.

'Plaintiff's motion seeks to have the Court amend its order of February 29 to provide that the plaintiff be readmitted to the University for the September 1956 term. The Court is of the opinion that it should not interfere with the administrative acts of the Trustees or the officers of the University except upon appropriate proceedings, **[**7]** and after a clear showing that such acts contravene the constitutional rights of the plaintiff as defined by the Supreme Court. I am, there-

fore, of the opinion that in the present posture of this case that plaintiff's motion to amend the order of February 29, 1956, should be overruled. This ruling, however, is without prejudice to plaintiff as to any future proceedings that may appropriately challenge the acts of the Trustees in permanently expelling her from the University.' Lucy, et al., v. Adams, et al., U.S. District Court, Northern District, Ala., Aug. 29, 1956, Civ. No. 652.

The plaintiffs have not exhausted the administrative procedure provided under the State law for the disposition of local controversies arising under the school law. In fact they have failed to take the first step, i.e. arrange a conference with the Area Superintendent in accordance with instructions given each parent by the principal.

[HN2] 'An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative **[**8]** remedies have been exhausted.' Covington v. Edwards, 4 Cir., 264 F.2d 780, 781.

There is grave doubt that this Court has jurisdiction of this cause. The evidence adduced at the hearing shows conclusively that the issues only present a local controversy where a school official acting under the color of his office is **[*391]** conscientiously endeavoring to fulfill his duty to the State.

'Thus, as I view the delicate balance which exists between State and Federal jurisprudence, only a case of manifest oppression will justify a Federal Court in enjoining state officials acting colore officii in their conscientious endeavor to fulfill their duty to the State. [HN3] A Federal Court should not enjoin 'activities of state officers discharging in good faith their supposed official duties' except "in a case reasonably free from doubt". These are the written words of a great jurist -- Mr. Justice Cardozo, who said: 'The case thus far has been considered from the viewpoint of the substantive law, the basic rights and duties contested by the litigants. There is another path of approach that brings us to the same goal, an approach along the line of the law of equitable remedies. Caution and **[**9]** reluctance there must be in any case where there is the threat of opposition, in respect of local controversies, between state and federal courts. Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that [HN4] an injunction ought not to issue 'unless in a case reasonably free from doubt.' * * * A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. * * * There must be reluctance even greater when the rights are strictly local; jurisdiction having no other basis than the accidents of residence. * * *". Chapman v. Trustees of Delaware State College, D.C., 101 F.Supp. 441, 443.

Furthermore there is no showing by the plaintiffs that they have been deprived of any of their constitutional or civil rights. The defendant school officials **[**10]** with no intent to discriminate, took such action as in their discretion the situation required. Such discretionary action is not subject to attack under the Civil Rights Act, 42 U.S.C.A. ß 1981 et seq.

'Since these Civil Rights actions lie in the federal courts and defendants are usually state officials, there are involved 'delicate state-federal relationships,' Francis v. Lyman, 1 Cir., 1954, 16 F.2d 583, 588.

'In Stefanelli v. Minard, 1951, 342 U.S. 117, at pages 121-125, 72 S.Ct. 118, at page 122, 96 L.Ed. 138, Justice Frankfurter after pointing out the 'far-flung and undefined range' of questions of procedural due process under the Civil Rights Acts (342 U.S. at page 123, 72 S.Ct. at page 122) concludes with the enigmatic statement, 'To suggest these difficulties is to recognize their solution'. (342 U.S. at page 124, 72 S.Ct. at page 122).

'To protect this 'delicate state federal relationship' some limits must be placed on the otherwise limitless sweep of the Civil Rights Act.

'A broad holding that all state officials enjoyed immunity would be an improper approach. If courts held that all state officials had immunity from liability under Civil Rights actions for all acts **[**11]** done or committed within the ostensible scope of their authority, this would practically constitute a judicial repeal of the Civil Rights Act. [HN5] Repeal is the responsibility of Congress, not the courts.

'Immunity for Discretionary Acts

'The approach of granting immunity to government officials for discretionary acts done within the **[*392]** scope of their authority, seems a proper one. [HN6] Without the presence of a particular discriminatory intent they have no li-

ability in any event. This approach says we will not inquire, subjectively -- into their state of mind -- where they are exercising a discretionary function.' Hoffman v. Halden, 9 Cir., 268 F.2d 280, 299.

Upon a review of all the testimony, I find in my discretion that the plaintiffs are not entitled to a preliminary injunction. It is therefore

Ordered that the plaintiffs' motion for a preliminary injunction be and the same is hereby denied.

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The CITY OF FLAGSTAFF, a body politic, the Personnel Board of the City of Flagstaff, Don E. Vorhies, Fire Chief of the Flagstaff Fire Department, Charles K. McClain, City Manager of the City of Flagstaff, Frank Dickenson, a member of the Personnel Board, Opal Able, a member of the Personnel Board, Petitioners, v. The SUPERIOR COURT of the State of Arizona IN AND FOR the COUNTY OF COCONINO, the Honorable Richard K. Mangum, Judge of the Superior Court in and for the County of Coconino; and the Real Party in Interest Dennis BLEEKER, Respondents

No. 13222

Supreme Court of Arizona

116 Ariz. 382; 569 P.2d 812; 1977 Ariz. LEXIS 204

September 7, 1977

PRIOR HISTORY: [*1]** SPECIAL ACTION

PRAYER FOR RELIEF GRANTED

DISPOSITION: Relief granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner, the City of Flagstaff and other political bodies, sought review of a decision of the Superior Court of Coconino County (Arizona), which held that respondent fireman was wrongfully removed from his job as a fireman for the City, and that he be reinstated with pay and reasonable attorney's fees.

OVERVIEW: The question on appeal was whether the fireman was entitled, as a matter of due process, to a hearing before being terminated from his employment. The court found that firemen of the City, who could have been dismissed from their positions for cause only, had a property or liberty interest in continuing employment. The court concluded that as long as a meaningful post-termination hearing was held, and the fireman had a chance to recover back salary if his termination was found to be unlawful, he could have been discharged without hearing because the interest of the City in the continued operation of its fire department outweighed the fireman's interest. The court held that the trial court erred in believing a pre-termination hearing was mandated.

OUTCOME: The court reversed the trial court's judgment and remanded.

CORE TERMS: personnel, post-termination, liberty interest, pre-termination, termination, terminated, fireman, suspension, suspended, prompt, fired, fire department, advisory board, pretermination, outweighed, fellow

LexisNexis(R) Headnotes

Governments > State & Territorial Governments > Employees & Officials

[HN1] The Supreme Court of the United States has set forth a two-step process concerning cases involving a deprivation of governmental benefit. First, it must be ascertained whether the petitioner's interest in continued public employment is a constitutionally protected property or liberty interest. Second, if it is determined that the interest is a protected

one, the petitioner's interest must be balanced against the government's interest in summary removal of an unsatisfactory employee.

Governments > State & Territorial Governments > Employees & Officials
[HN2] As a result of the Supreme Court of the United States' holding that a two-step process must be considered in cases involving a deprivation of governmental benefit, the United States Circuit Courts of Appeal have been split on the issue. The Eighth Circuit has held that a regular employee, subject to dismissal only for cause, is entitled, at a minimum, to a pre-suspension or pre-discharge hearing even though the rules and regulations also entitle him to a post-termination evidentiary hearing before a personnel advisory board. In the view of the Eighth Circuit's decision, the pre-termination hearing is not a final hearing but only a hearing to determine if there is cause to dismiss, with the employee still entitled to a full post-termination hearing. The United States Ninth Circuit Court of Appeals has, however, held to the contrary.

Governments > State & Territorial Governments > Employees & Officials
[HN3] As long as a meaningful post-termination hearing is held and the employee has a chance to recover back salary if his termination is found to be unlawful, a person may be discharged without hearing when the interest of the employer indicates this is necessary.

COUNSEL: Mangum, Wall, Stoops & Warden by Robert W. Warden and Douglas J. Wall, Flagstaff, for petitioners.

Fred Belman, Tucson, for respondent Bleeker.

Beer, Kalyna & Simon by Olgerd W. Kalyna, Phoenix, brief amicus curiae for Maricopa County.

John H. Grace, Coconino County Atty., Flagstaff, brief amicus curiae for Coconino County.

Stephen D. Neely, Pima County Atty. by John C. Gabroy, Deputy County Atty., Tucson, brief amicus curiae for Pima County.

JUDGES: In Banc. Cameron, Chief Justice. Struckmeyer, V. C. J., and Hays, Holohan and Gordon, JJ., concur.

OPINION BY: CAMERON

OPINION

[*382] [812]** We accepted this petition for special action to review a decision of the Superior Court of Coconino County which held that the respondent, Dennis Bleeker, was wrongfully removed from his job as a fireman for the City of Flagstaff and that he be reinstated with pay and $ 3,500 in reasonable attorney's fees.

We must consider only one question on appeal and that is whether the respondent fireman was entitled, as a matter of due process, to a hearing before being terminated from his employment.

The facts necessary **[***2]** for a determination of this matter on appeal are as follows. Dennis Bleeker was employed by the City of Flagstaff as a fireman. Bleeker was well beyond the probationary period having **[*383] [**813]** been employed as a fireman for approximately five and one-half years. When he was hired, the personnel rules provided that a non-probationary employee of the City of Flagstaff could be fired by the City Manager for cause only. The rules also provided for a post-termination hearing before the Personnel Board if requested by the employee. On 10 March 1975, the City of Flagstaff, by executive order, created an Internal Affairs Board for fire department matters. This was in addition to the City Personnel Board, and the order creating the Internal Affairs Board provided that any employee who disagreed with the Internal Affairs Board's finding could appeal to the City Personnel Board.

In August of 1975, an incident occurred in the city fire station in which Bleeker allegedly threatened to kill a fellow fireman. On 5 September 1975, pursuant to a request from his fire chief, Bleeker stated in writing his version of the incident. On 9 September 1975, Bleeker was called before the **[***3]** City Manager who informed Bleeker in writing and orally that he was being fired for cause; that he had used abusive language and threatened physical force against a fellow fire fighter and had been insubordinate.

Bleeker filed an appeal with the Personnel Board and a hearing was held on 25 September which, on 3 October 1975, upheld the actions of the City Manager. The Internal Affairs Board considered aspects of the matter on 22 October

1975 and upheld the actions of the Personnel Board and City Manager. Bleeker filed an action in the Coconino County Superior Court, and the court, on 22 March 1977, found that Bleeker had been improperly terminated. The court found:

> "1. The City Manager's charter-created power to fire employees is restricted to a 'for cause' power since the council adopted the Personnel System Rules in 1971.
>
> "2. These rules are lawful and fall within the scope of the 'merit system regulations' which the charter in Art. III, Section 3(c) specifically authorizes.
>
> "3. The imposition of a 'for cause' standard created a liberty interest in petitioner.
>
> "4. Except in case of a bona fide emergency, such a liberty interest may not be taken away from **[***4]** a city employee without a pretermination hearing.
>
> "5. The lack of a pretermination hearing in this case denied due process to the petitioner.
>
> "6. Petitioner is entitled to reinstatement with full pay.
>
> "7. Petitioner is entitled to attorney's fees under A.R.S. Section 12-341.01."

We accepted jurisdiction of the petition for special action because of the state-wide importance of the matter in relation to other personnel rules and regulations in effect in the various cities throughout the State.

[HN1] The Supreme Court of the United States in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), set forth a two-step process concerning cases involving a deprivation of governmental benefit. First, it must be ascertained whether the petitioner's interest in continued public employment is a constitutionally protected property or liberty interest. Second, if it is determined that the interest is a protected one, the petitioner's interest must be balanced against the government's interest in summary removal of an unsatisfactory employee.

In the instant case, it appears that firemen of the City of Flagstaff who can be dismissed from their positions "for **[***5]** cause" only, have a property or liberty interest in continuing employment. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Jacobs v. Kunes*, 541 F.2d 222 (9th Cir. 1976). We must therefore consider whether, under the facts of the instant case, the petitioner could be terminated without a pre-termination hearing provided, of course, that a meaningful and prompt post-termination hearing is available to the terminated or suspended employee.

[HN2] As a result of *Goldberg v. Kelly*, supra, the United States Circuit Courts of Appeal have split on this issue. The Eighth Circuit, relied upon by petitioner and the trial **[*384]** **[**814]** court, has held that a regular employee, subject to dismissal only for cause, is entitled, at a minimum, to a pre-suspension or pre-discharge hearing even though the rules and regulations also entitle him to a post-termination evidentiary hearing before a personnel advisory board. *Kennedy v. Robb*, 547 F.2d 408 (8th Cir. 1976). In the view of the court in *Kennedy*, supra, the pre-termination hearing is not a final hearing but only a hearing to determine if there is cause to dismiss, with the employee still entitled to **[***6]** a full post-termination hearing:

> "The need at this stage of proposed, dismissal is to minimize the employee's risk of wrongful termination, not a decision on the merits. That will come later, before the Advisory Board, with the full panoply of adversary confrontation. It is squarely at this point that plaintiff makes a formidable assertion, namely that he has a right to have his say before he is fired, particularly since in this situation the 'issues of credibility and veracity * * * play a significant role' (footnote omitted) in the decision reached.
>
> "We thus balance the chance of error, mistake, or bias, resulting in the disastrous termination of employment, against the expense, the delay, and the administrative burden of trial with counsel, testimonial presentations, and the right of cross-examination." *Kennedy v. Robb*, supra, 547 F.2d at 414-415.

The United States Ninth Circuit Court of Appeals has, however, held to the contrary. In *Peacock v. Board of Regents*, 510 F.2d 1324 (9th Cir. 1975), cert. denied, 422 U.S. 1049, 95 S.Ct. 2668, 45 L.Ed.2d 701, the court held that the potential threat to the administration of the University of Arizona Medical School **[***7]** by the suspended head of the Department of Surgery outweighed the requirements of a hearing prior to suspension provided that a prompt post-suspension hearing was available. This case can, admittedly, be distinguished from the present case in that the employee doctor was suspended with pay rather than terminated without pay, but we believe the principles are applicable to a case of termination as well as suspension. The court did say, however:

> "We emphasize that under different circumstances, involving a more serious intrusion on a protected property interest, such as the professorship, or on a 'liberty' interest, or an employment relationship in which loyalty and cooperation are less imperative, a pre-deprivation hearing may be required." 510 F.2d at 1330.

We believe that *Jacobs v. Kunes*, supra, holds that [HN3] as long as a meaningful post-termination hearing is held and the employee has a chance to recover back salary if his termination is found to be unlawful, a person may be discharged without hearing when the interest of the employer indicates this is necessary.

In balancing the interest of the City of Flagstaff (and the public) in maintaining a loyal and efficient **[***8]** fire department with the interest of the petitioner to a pre-termination hearing, we believe the need of the petitioner to a pre-termination hearing is outweighed by the interest of the City of Flagstaff in the continued efficient operation of its fire department, provided, of course, that a prompt and meaningful post-termination hearing is available upon request. *Jacobs, Peacock*, supra. The need to prevent dissention or uproar in the department should allow a suspension or termination without hearing.

Because the matter was determined by the trial court in the belief that a pre-termination hearing was mandated, judgment is reversed and the matter remanded for further proceedings consistent with this opinion.

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DR. FRANK I. MANGUM, JR. v. THOMAS WEIGEL, ET AL.

No. 11433

Court of Appeal of Louisiana, Fourth Circuit

393 So. 2d 871; 1981 La. App. LEXIS 3456

January 13, 1981

SUBSEQUENT HISTORY: [1]** Rehearing Denied February 20, 1981.

PRIOR HISTORY: APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, No. 223-890, DIV. "A", HONORABLE LOUIS G. DeSONIER, JR., JUDGE.

AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff appealed the decision of the Twenty-Fourth Judicial District Court, Parish of Jefferson (Louisiana) that granted summary judgment to defendant insurer and dismissed plaintiff's action against defendant insurer for recovery under either the uninsured motorist provisions or the medical payment provisions, or both, of plaintiff's automobile insurance policy.

OVERVIEW: After an automobile accident, defendant driver exited his vehicle and punched plaintiff in the face. Defendant driver was either uninsured or underinsured. Plaintiff sued defendants for personal injuries. Specifically, plaintiff sued defendant insurer, plaintiff's insurer, for recovery under either plaintiff's automobile insurance policy uninsured motorist provisions or the medical payment provisions, or both. Defendant insurer was granted summary judgment, and plaintiff's action against defendant insurer was dismissed. The appellate court stated that plaintiff's uninsured motorist coverage and medical payment coverage required plaintiff's bodily injuries to be "caused by accident." Furthermore, under the uninsured motorist coverage, the injuries were to result from "the ownership, maintenance, or use" of the uninsured vehicle. The appellate court held that rather than being "caused by accident," plaintiff's injuries were caused by a battery committed by defendant driver. Furthermore, since defendant driver left his vehicle to commit the battery, the injuries did not result from the use of defendant driver's vehicle. Therefore, summary judgment for defendant insurer was affirmed.

OUTCOME: Summary judgment for defendant insurer and dismissal of plaintiff's action for recovery under plaintiff's automobile insurance policy were affirmed because plaintiff's bodily injuries did not result from the use of defendant driver's vehicle, as required by plaintiff's uninsured motorist coverage, and plaintiff's injuries were not caused by accident, as required by both the uninsured motorist coverage and the medical payment coverage.

CORE TERMS: uninsured, battery, uninsured motorist, insurer, coverage, throwing, window, bodily injury, insured, driver, van, uninsured vehicle, motorist, fireworks, robbers, entitled to recover, ownership

LexisNexis(R) Headnotes

Evidence > Inferences & Presumptions > General Overview
Insurance Law > Motor Vehicle Insurance > Vehicle Use > General Overview
[HN1] The following six tests are used to determine whether or not an injury arose out of the "use" of an automobile: (1) the dangerous situation causing injury must have its source in the use of the automobile; (2) the chain of events re-

sulting in the accident must originate in the use of the automobile and must be unbroken by the intervention of any event which has no direct or substantial relation to the use of the vehicle; (3) the accident must be a natural and reasonable incident or consequence of the use of the vehicle for the purposes contemplated by the policy although not necessarily foreseen or expected; (4) the accident must be one which can be "immediately identified" with the use of the automobile as contemplated by the parties to a policy; (5) the accident must be of a type reasonably associated with the use of the automobile as contemplated by contracting parties, and (6) the accident must be one which would not have happened "but for" the use of the automobile.

COUNSEL: Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Claude D. Vasser, Metairie, for plaintiff-appellant.

Lobman & Carnahan, Burt K. Carnahan, Metairie, for defendants-appellees.

JUDGES: Before SAMUEL, BARRY and SARTAIN, JJ.

OPINION BY: SAMUEL

OPINION

[*872] This is an appeal from a summary judgment dismissing plaintiff's suit against his own insurer under the uninsured motorist and/or medical payment provisions of his automobile policy.

The facts are not in dispute. [1] Plaintiff was in a very minor collision involving his van and another vehicle in the French Quarter of New Orleans during a St. Patrick's Day parade. The other driver, shouting obscenities at plaintiff, got out of his own vehicle, came to plaintiff's van, and repeatedly punched plaintiff in the face through the open window. He then opened the door and attempted to pull plaintiff out of the van, while continuing to punch and strike plaintiff in the face, causing severe injuries. The other driver was either **[**2]** uninsured or under insured. He and plaintiff's insurer are defendants in this suit for personal injuries.

1. The judgment is based solely upon plaintiff's petition and defendant's insurance policy.

The issue presented is whether plaintiff is entitled to recover from his own insurer under either or both provisions, medical payment and uninsured motorist, of his policy with the defendant insurer.

That portion of the uninsured motorist provision pertinent here is:

"COVERAGE U Uninsured Motorists (damages for Bodily Injury). To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, ... caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile, ..." (Emphasis ours).

The pertinent provision of the medical payment portion of the policy reads as follows:

"COVERAGE C Medical Payments. To pay all reasonable expenses incurred within one **[**3]** year from the date of accident for necessary medical, ... services, ...

Division 1. To or for the named insured ... who sustains bodily injury, ... caused by accident, ..." (Emphasis ours).

Thus, under the medical payment provision the bodily injury must be "caused by **[*873]** accident", and under the uninsured motorist provision such injury must be "caused by accident" and must arise "out of the ownership, maintenance or use" of the uninsured vehicle.

Relative to "use of the uninsured vehicle," the most often cited Louisiana case is Speziale v. Kohnke, La.App., 194 So.2d 485. In Speziale plaintiff's injury was caused by throwing fireworks from one automobile into another motor vehicle. The court held that throwing fireworks did not constitute a "use" of the vehicle. [2]

2. See also Miller v. Keating, La.App., 339 So.2d 40, modified in other respects, La., 349 So.2d 265, where plaintiff contended a battery committed by defendant constituted "use" of a vehicle; Ramsey v. Continental Insurance Company, La.App., 286 So.2d 371 (plaintiff injured by gun discharged in vehicle).

[4]** In Speziale, the court said at page 486:

"... it is obvious that this case does not involve an "arising out of the use of an automobile' as reasonably contemplated by that cause. That the circumstances here are not within the clause is accentuated by the fact that the act of throwing a firecracker was a voluntary, deliberate act on the part of the automobile passenger. This factor, along with the entire set of circumstances, removes the connexity of the incident with the use of an automobile to the realm of insignificance."

In Baudin v. Traders & General Insurance Company, La.App., 201 So.2d 379, at pages 384 and 385, the court listed these six tests which have been used to determine whether or not an injury arose out of the "use" of an automobile:

"It is not our purpose here to establish a required list of tests of causation for holding that the accident is one "arising out of' the use of the automobile. Each case must be decided under its own particular facts. However, we note that [HN1] the following tests have been used in the cited cases: (1) The dangerous situation causing injury must have its source in the use of the automobile; (2) The chain of events resulting in the accident **[**5]** must originate in the use of the automobile and be unbroken by the intervention of any event which has no direct or substantial relation to the use of the vehicle; (3) The accident must be a natural and reasonable incident or consequence of the use of the vehicle for the purposes contemplated by the policy, although not necessarily foreseen or expected; (4) The accident must be one which can be "immediately identified' with the use of the automobile as contemplated by the parties to the policy; (5) The accident must be of a type reasonably associated with the use of the automobile as contemplated by the contracting parties; (6) The accident must be one which would not have happened "but for' the use of the automobile."

None of these tests are satisfied in the instant case.

Relative to "caused by accident", plaintiff relies on the case of Redden v. Doe, La.App., 357 So.2d 632. In Redden the plaintiff vehicle was forced off the highway and into a bayou by two cars driven by a group of "would-be robbers'. Plaintiff was injured when she was pulled through a car window by one of her assailants. The court held those injuries were accidental. Drawing a distinction between injuries **[**6]** caused by the "accident", i. e., injuries sustained by plaintiff while emerging from the window, and those which might have been caused by a battery committed by one of the robbers, the court held plaintiff's injuries were within the terms of her uninsured motorist coverage. Thus, Redden is distinguishable.

We are of the opinion that plaintiff's injuries were the result of a battery, an intentional tort, committed by the defendant driver, and thus not caused by accident within the terms of the policy. Nor was there an accident which arose out of the use of the defendant vehicle, which defendant left in order to commit the battery.

For the reasons assigned, the judgment appealed from is affirmed.

AFFIRMED.

8 of 9 DOCUMENTS

ARNOLD RAY MANGUM v. EQUISTAR CHEMICAL, L.P., VELVA NURSE, FRANK HASTINGS, MAC TREJO, MARK GETTY AND PAM PATTERSON

03-1118

SUPREME COURT OF TEXAS

2004 Tex. LEXIS 67

February 6, 2004, Order Pronounced

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Matagorda County; 13th district (13-02-00325-CV, __S.W.3D __, 09-11-03). Mangum v. Equistar Chem. Co., 2003 Tex. App. LEXIS 7921 (Tex. App. Corpus Christi, Sept. 11, 2003)

OPINION

Petition for review **[*2]** *denied.*

9 of 9 DOCUMENTS

ARNOLD RAY MANGUM, Appellant, v. EQUISTAR CHEMICAL COMPANY, VELVA NURSE, FRANK HASTINGS, AND MAC TREJO, ET AL. Appellees.

NUMBER 13-02-325-CV

COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS CHRISTI

2003 Tex. App. LEXIS 7921

September 11, 2003, Delivered
September 11, 2003, Filed

SUBSEQUENT HISTORY: [*1]
Petition for review denied by Mangum v. Equistar Chem., L.P., 2004 Tex. LEXIS 67 (Tex., Feb. 6, 2004)

PRIOR HISTORY: On appeal from the 130th District Court of Matagorda County, Texas.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: After he was terminated, plaintiff employee brought suit against defendants, the employer-company and others who worked for the company, alleging breach of contract, civil conspiracy, wrongful discharge, tortious interference, and defamation. The 130th District Court of Matagorda County, Texas, entered a summary judgment against the employee. The employee appealed.

OVERVIEW: On review, the employee contended, inter alia, that the trial court erred by not setting a later hearing date and time for his motion for summary judgment, resulting in inadequate notice. The appellate court found there was adequate time for the employee to file a written objection prior to the hearing date; thus, as the employee failed to comply with Tex. R. Civ. P. 166a(c)'s mandate that all issues had to be presented in writing, the employee waived his right to raise such issue on appeal. The employee also failed to file an affidavit or a motion for continuance based on the need for discovery; by failing to do so, he waived any error regarding inadequate time to complete discovery. As the employer's manual in question did not contain express contractual language modifying the employee's employment at-will status, summary judgment as to the breach of contract claim was proper. The employee's brief was inadequate and did not support his claim that summary judgment as to the conspiracy claims was improper. Similarly, the employee waived error on the defamation issue as he provided no meaningful argument and cited no authority to support his contentions.

OUTCOME: The judgment was affirmed.

CORE TERMS: summary judgment, summary judgment, notice, at-will, civil conspiracy, discovery, waived, issue of material fact, non-movant's, overrule, genuine, manual, matter of law, employment contract, standard of review, essential elements, hearing date, right to terminate, question of fact, termination, continuance, defamation, untimely, defamation claim, failed to provide, failure to object, late notice, conspiracy, accomplish, opposing

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
[HN1] The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Evidence favorable to the non-movant will be taken as true in deciding whether there is a disputed material fact issue precluding summary judgment. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview
[HN2] The appellate court reviews the trial court's granting or denial of summary judgment de novo. A traditional summary judgment is proper when the summary judgment proof establishes as a matter of law that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's cause of action, or when the defendant has conclusively established all elements of its affirmative defense.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Appeals > Standards of Review > General Overview
[HN3] A no-evidence summary judgment asserts there is no evidence of one or more essential elements of claims upon which the opposing party would have the burden of proof at trial. Tex. R. Civ. P. 166a(i). A no-evidence summary judgment is essentially a pretrial directed verdict to which the appellate courts apply a legal sufficiency standard of review. A no-evidence motion for summary judgment is properly granted only if the non-movant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to the challenged element of the claims. Tex. R. Civ. P. 166a(i).

Civil Procedure > Counsel > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Time Limitations
[HN4] Tex. R. Civ. P. 166a(c) states that except on leave of court, with notice to opposing counsel, the motion for summary judgment and all supporting affidavits shall be filed and served at least 21 days before the time specified for hearing. It lies within the sound discretion of the trial court whether to accept or consider late filings under this rule.

Civil Procedure > Summary Judgment > Notices
Civil Procedure > Summary Judgment > Time Limitations
[HN5] The non-movant's failure to object to late notice of a motion for summary judgment waives error.

Civil Procedure > Summary Judgment > Hearings > General Overview
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Notices
[HN6] It is only when a party is not given notice of the summary judgment hearing, or a party is deprived of its right to seek leave to file additional affidavits or other written response that it may preserve error in a post-trial motion.

Civil Procedure > Summary Judgment > Hearings > General Overview
Civil Procedure > Summary Judgment > Opposition > Motions for Additional Discovery
Civil Procedure > Pretrial Matters > Continuances
[HN7] When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance. Tex. R. Civ. P. 166a(g).

Contracts Law > Types of Contracts > Express Contracts
Labor & Employment Law > Employment Relationships > At-Will Employment > Duration of Employment
Labor & Employment Law > Employment Relationships > Employment Contracts > General Overview
[HN8] Under the employment-at-will doctrine, absent a specific agreement to the contrary, the relationship between an employer and employee is "at-will," meaning that either party may terminate the employment relationship at any time for any reason or no reason at all. A discharged employee who asserts that the parties have contractually agreed to limit

the employer's right to terminate the employee at will has the burden of proving an express agreement or written representation to that effect. In order to rebut the presumption of employment at-will, an employment contract must directly limit in a "meaningful and special way" the employer's right to terminate the employee without cause. That is, an employer's statements concerning termination rights in employment literature may modify the at-will relationship if the statements specifically and expressly curtail the employer's right to terminate the employee.

Labor & Employment Law > Employment Relationships > At-Will Employment > General Overview
[HN9] In an employment at-will situation, an employee policy handbook or manual, does not, of itself, constitute a binding contract for the benefits and policies stated unless the manual uses language clearly indicating an intent to do so.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
Torts > Procedure > Multiple Defendants > Concerted Action > Civil Conspiracy > Elements
[HN10] A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. The essential elements of a civil conspiracy action are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result.

Civil Procedure > Appeals > Briefs
Torts > Procedure > Multiple Defendants > Concerted Action > Civil Conspiracy > Elements
[HN11] In considering the appellant's brief, an appellate court is not required to make an independent, unguided search of the record for evidence supporting a party's position or to determine the validity of an issue.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Torts > Intentional Torts > Defamation > Procedure
[HN12] The appellate court's only duty on reviewing a summary judgment in a defamation case is to determine if a material question of fact exists.

Civil Procedure > Appeals > Briefs
Torts > Intentional Torts > Defamation > Procedure
[HN13] Tex. R. App. P. 38.1(h) requires that the brief contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. Points of error must be supported by argument and authorities, and if not so supported, the points are waived.

COUNSEL: For Appellant: Herbert Hawkins, Jr. Attorney At Law, Bay City, TX.

For Appellee: Ethel J. Johnson, Attoney at Law, Houston, TX. Stephen E. Hart, Attorney at Law, Houston, TX.

JUDGES: Before Chief Justice Valdez and Justices Rodriguez and Castillo. Opinion by Chief Justice Valdez.

OPINION BY: Rogelio Valdez

OPINION

MEMORANDUM OPINION

Opinion by Chief Justice Valdez

This is an appeal of a summary judgment rendered against the appellant in a case involving allegations of breach of contract, civil conspiracy, wrongful discharge, tortious interference, and defamation. Appellant, Arnold Ray Mangum, brought suit against appellees, Equistar Chemical Company, Velva Nurse, Frank Hastings, Mac Trejo, Mark Gaddy, and Pam Patterson after being terminated from Equistar. Appellant alleged that Equistar breached its employment contract with the appellant and failed to provide written notice of reasons for his termination. Appellant also alleged that Nurse, Hastings, Trejo, Gaddy, and Patterson engaged in civil conspiracy, which resulted in his termination, and interfered with the employment contract between appellant and Equistar. Additionally, appellant alleged that appellees knowingly made **[*2]** false statements about him that caused him harm.

In defense, Equistar alleged that it terminated appellant based on accusations of sexual harassment by Nurse, appellant's co-worker. The trial court entered a summary judgment against appellant, and this appeal ensued. We affirm the judgment of the trial court.

Standard of Review

The standard of review for a motion for summary judgment is well established by the supreme court of Texas. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49, 28 Tex. Sup. Ct. J. 384 (Tex. 1985). [HN1] The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.* Evidence favorable to the non-movant will be taken as true in deciding whether there is a disputed material fact issue precluding summary judgment. *Id.* Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.*

[HN2] We review the trial court's granting or denial of summary judgment *de novo*. *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699, 37 Tex. Sup. Ct. J. 722 (Tex. 1994); *Tex. Commerce Bank-Rio Grande Valley, N.A. v. Correa*, 28 S.W.3d 723, 726 **[*3]** (Tex. App.-Corpus Christi 2000, pet. denied). A traditional summary judgment is proper when the summary judgment proof establishes as a matter of law that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's cause of action, or when the defendant has conclusively established all elements of its affirmative defense. *McCord v. Dodds*, 69 S.W.3d 230, 231 (Tex. App.-Corpus Christi 2001, pet. denied).

[HN3] A no evidence summary judgment asserts there is no evidence of one or more essential elements of claims upon which the opposing party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i). A no evidence summary judgment is essentially a pretrial directed verdict to which the appellate courts apply a legal sufficiency standard of review. *AMS Constr. Co. v. Warm Springs Rehab. Found.*, 94 S.W.3d 152, 159 (Tex. App.-Corpus Christi, no pet.). A no evidence motion for summary judgment is properly granted only if the non-movant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to the challenged element of the claims. *Id.; see* TEX. R. CIV. **[*4]** P. 166a(i).

Although appellees filed both traditional summary judgment and no evidence summary judgment motions, the trial court's order does not distinguish between the two, and grants the traditional motion for summary judgment as to all claims asserted by appellant against appellees. Moreover, appellant's brief does not challenge the trial court's failure to address the no evidence motion for summary judgment in its order, so this Court will review appellant's points of error under the standard of review applicable to traditional summary judgments.

Inadequate Notice

On March 1, 2002, appellees submitted separate motions for summary judgment and no evidence summary judgment on grounds that appellant's claims failed as a matter of law. The motions were served on appellant on March 1, 2002, and the hearing date for the motions was set on March 12, 2002. This date was not set in compliance with Texas Rule of Civil Procedure 166a(f). TEX. R. CIV. P. 166a(f). Despite the inadequate notice, appellant filed separate responses to the motions for summary judgment and no evidence summary judgment on March 11, 2002. The trial court signed an order granting appellees' motion **[*5]** for summary judgment on March 15, 2002.

Appellant asserts that the court erred in failing to set a later hearing date and time for the appellees' motion for summary judgment, resulting in inadequate notice. [HN4] Texas Rule of Civil Procedure 166a(c) states that except on leave of court, with notice to opposing counsel, the motion for summary judgment and all supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. TEX. R. CIV. P. 166a(c). It lies within the sound discretion of the trial court whether to accept or consider late filings under this rule. *Mowbray v. Avery*, 76 S.W.3d 663, 688 (Tex. App.-Corpus Christi 2002, pet. filed). Appellant's failure to file a motion for continuance waives his complaint that he did not receive adequate notice of the appellees' motion for summary judgment. *Id.*; *Gonzalez v. Nielson*, 770 S.W.2d 99, 101 (Tex. App.-Corpus Christi 1989, writ denied).

There is nothing in the record that shows appellees had leave of court to file and serve the motion less than twenty-one days before the hearing was scheduled. The appellant's brief states that he objected in open court **[*6]** to the untimely filing of the motion by appellees, and that the trial judge told appellees' counsel that the filing of the motion was improper. Appellant's statements are not reflected in the record, however, and we are unable to consider any statements in appellant's brief which are completely outside the record and unsupported by any evidence. *Perry v. S.N.*, 973 S.W.2d 301, 303, 41 Tex. Sup. Ct. J. 1162 (Tex. 1998); *Baker v. Charles,* 746 S.W.2d 854, 855 (Tex. App.-Corpus Christi

1988, no writ); *Estate of Arrington v. Fields,* 578 S.W.2d 173, 183 (Tex. Civ. App.-Tyler 1979, writ ref'd n.r.e.); *Schlang v. Schlang*, 415 S.W.2d 28, 29 (Tex. Civ. App.-Houston [1st Dist.] 1967, writ ref'd n.r.e.).

[HN5] The non-movant's failure to object to late notice of a motion for summary judgment waives error. *Rios v. Tex. Bank*, 948 S.W.2d 30, 33 (Tex . App.-Houston [14th Dist.] 1997, no writ); *Wyatt v. Furr's Supermarkets, Inc.*, 908 S.W.2d 266, 270 (Tex. App.-El Paso 1995, writ denied); *Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 582 (Tex App.-Austin 1995, no writ); *Veal v. Veterans Life Ins. Co.*, 767 S.W.2d 892, 895 (Tex. App.-Texarkana 1989, no pet.); **[*7]** *Davis v. Davis*, 734 S.W.2d 707, 712 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.). Appellant filed a response to the motion for summary judgment, yet he failed to raise the issue of untimely notice. Even if the trial court erred in hearing the motion for summary judgment, appellant's failure to object to late notice waived the error that he had less than twenty-one days' notice of the hearing. *Davis*, 734 S.W.2d at 712; *Wyatt*, 908 S.W.2d at 270.

Appellant did raise the issue of untimely notice in his motion for new trial; however, he failed to preserve the issue for appellate review. [HN6] It is only when a party is not given notice of the summary judgment hearing, or a party is deprived of its right to seek leave to file additional affidavits or other written response that it may preserve error in a post trial motion. *May v. Nacadoches Mem'l Hosp.*, 61 S.W.3d 623, 626 (Tex. App.-Corpus Christi 2001, no pet.). There was adequate time for appellant to file a written objection prior to the hearing date set for the motion for summary judgment. Thus, since appellant failed to comply **[*8]** with rule 166(c)'s mandate that all issues be presented in writing, he has waived his right to raise such issue on appeal. *May*, 61 S.W.3d at 627; *Rios*, 948 S.W.2d at 33. Accordingly, appellant's first issue is overruled.

Inadequate Time to Complete Discovery

In his second point of error, appellant asserts that the trial court failed to give him adequate time to complete discovery and respond to the appellees' motion for summary judgment.

[HN7] When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance. TEX. R. CIV. P. 166a(g); *Tenneco, Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647, 39 Tex. Sup. Ct. J. 907 (Tex. 1996); *Keszler v. Mem'l Med. Ctr. of E. Tex.*, 105 S.W.3d 122, 130 (Tex. App.-Corpus Christi 2003, no pet.); *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 902 (Tex. App. Dallas 2001, pet. denied); Appellant never filed an affidavit or a motion for continuance based on the need for further discovery, and by failing to do so he has waived **[*9]** error. *Scott v. Commercial Servs. of Perry, Inc.*, No. 12-01-00233-CV, 121 S.W.3d 26, 2003 Tex. App. LEXIS 5883, at *12 (Tyler July 9, 2003, no pet. h.). We overrule appellant's second issue.

Breach of Contract

In his third point of error appellant contends that the trial court erred in granting appellees' motion for summary judgment because a contract existed between appellant and Equistar. At-will employment is a longstanding doctrine in Texas. *Tex. Dept. of Health v. Rocha*, 102 S.W.3d 348, 354 (Tex. App.-Corpus Christi 2003, no pet.). [HN8] Under the employment-at-will doctrine, absent a specific agreement to the contrary, the relationship between an employer and employee is "at-will," meaning that either party may terminate the employment relationship at any time for any reason or no reason at all. *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502, 41 Tex. Sup. Ct. J. 537 (Tex. 1998). A discharged employee who asserts that the parties have contractually agreed to limit the employer's right to terminate the employee at will has the burden of proving an express agreement or written representation to that effect. *Ronnie Loper Chevrolet-Geo v. Hagey*, 999 S.W.2d 81, 83 **[*10]** (Tex. App.-Houston [14th Dist.] 1999, no pet.). This Court has held that in order to rebut the presumption of employment at-will, an employment contract must directly limit in a "meaningful and special way" the employer's right to terminate the employee without cause. *Matagorda County Hosp. Dist. v. Burwell*, 94 S.W.3d 75, 88-89 (Tex. App.-Corpus Christi 2002, no pet.); *Rios v. Tex. Commerce Bancshares*, 930 S.W.2d 809, 815 (Tex. App.-Corpus Christi 1996, writ denied). That is, an employer's statements concerning termination rights in employment literature may modify the at-will relationship if the statements specifically and expressly curtail the employer's right to terminate the employee. *Matagorda*, 94 S.W.3d at 89.

Appellant contends that Equistar modified his employment at-will status based on representations made in its Standards of Business Ethics and Conduct Manual. [HN9] In an employment at-will situation, an employee policy handbook or manual, does not, of itself, constitute a binding contract for the benefits and policies stated unless the manual uses language clearly indicating an intent to do so. *Werden v. Nueces County Hosp. Dist*., 28 S.W.3d 649, 651 **[*11]** (Tex. App.-Corpus Christi 2000, no pet.); *Gamble v. Gregg County*, 932 S.W.2d 253, 255 (Tex. App.-Texarkana 1996, no

writ). Equistar's Standards of Business Ethics and Conduct Manual does not contain express contractual language that modifies appellant's employment at-will status. Rather, it refers to policies, procedures, and guidelines. We conclude that the summary judgment evidence indicates that appellant was an employee at-will. Accordingly, we overrule appellant's third point of error.

Appellant asserts in his fourth point of error that the trial court erred in granting summary judgment because whether Equistar breached its contract with the appellant was a question for the jury. We have already held that appellant was an employee at-will, therefore appellant's fourth point of error is overruled.

Civil Conspiracy

In his fifth point of error appellant asserts that the trial court erred in granting the appellees' motion for summary judgment on the appellant's conspiracy claims because whether or not appellees engaged in a civil conspiracy was a question of fact for the jury.

[HN10] A civil conspiracy is a combination by two or more persons to accomplish an **[*12]** unlawful purpose or to accomplish a lawful purpose by unlawful means. *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614, 39 Tex. Sup. Ct. J. 848 (Tex. 1996). The essential elements of a civil conspiracy action are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934, 26 Tex. Sup. Ct. J. 438 (Tex. 1983); *Michael v. Dyke*, 41 S.W.3d 746, 753 (Tex. App.-Corpus Christi 2001, no pet.). In his brief appellant claims that he has met each of the elements of civil conspiracy. However, appellant fails to provide appropriate citations to authority and to the record that support this claim in accordance with Texas Rule of Appellate Procedure 38.1(h). *See* TEX. R. APP. P. 38.1(h). [HN11] An appellate court is not required to make an independent, unguided search of the record for evidence supporting a party's position or to determine the validity of an issue. *In re K.S.*, 76 S.W.3d 36, 44 (Tex. App.-Amarillo 2002, no pet.).

We overrule appellant's fifth point of error.

Defamation

[*13] In his sixth and seventh points of error, appellant asserts that the trial court erred in granting the appellees' motion for summary judgment on his slander claim because whether or not appellees slandered him was a question of fact for the jury.

Appellant claims that appellees defamed him by continuously repeating allegations of misconduct to both employees and non-employees of Equistar. [HN12] The appellate court's only duty on reviewing a summary judgment in a defamation case is to determine if a material question of fact exists. *Alaniz v. Hoyt*, 105 S.W.3d 330, 345 (Tex. App.-Corpus Christi 2003, no pet.). Appellant's answer to the motion for summary judgment fails to cite any authority or provide any analysis of his defamation claim other than stating that appellees and their agents published false and misleading statements about him "to the world." Appellant failed to provide any affidavits, witnesses or other evidence to support his defamation claim. Additionally, in his brief appellant fails to direct the court to any evidence in the record that a genuine issue of material fact exists as to this claim. Appellant has waived error on this issue based on inadequate **[*14]** briefing. [HN13] Texas Rule of Appellate Procedure 38.1(h) requires that the brief contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(h). Appellant provides no meaningful argument and cites no authority to support his contentions under this issue. Points of error must be supported by argument and authorities, and if not so supported, the points are waived. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 934, 26 Tex. Sup. Ct. J. 239 (Tex. 1983). Accordingly, appellant's sixth and seventh points of error are overruled.

General Assertion of Error

Appellant generally asserts in his eighth point of error that the trial court erred in granting the appellees' motion for summary judgment on all grounds asserted by appellees. *See Malooly Bros. v. Napier*, 461 S.W.2d 119, 121, 14 Tex. Sup. Ct. J. 140 (Tex. 1970). Because this issue sets forth no additional arguments other than those addressed above, we need not separately address it. We overrule appellant's eighth issue.

For the foregoing reasons, we affirm **[*15]** the trial court's judgment.

Rogelio Valdez,

Chief Justice