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MAR 29 1918

March 28th, 1918.

Our #3385.

Walter Nelles,
Counsel, National Civil Liberties Bureau,
70 Fifth Avenue,
New York, N. Y.

Dear Sir:

Benjamin J. Salmon has handed us your letter of March 22nd in which you ask him to have us write you regarding his case.

You indicate in your letter some one has told you that we consider Salmon's case a strong one. In this regard would say that we do feel that we can present this matter in such a way that there would be strong probabilities of our success under ordinary conditions. We have not however held out any assurance of actual success in any such case, or in any case involving what appears to be opposition to the military organization, at the present time.

Salmon registered and at the same time sent a letter to the President announcing that he would go no farther in the military organization.

When he received his questionnaire he wrote to the Board stating that he would not sign it as he would not become a part of the military organization. In both these letters he took his position solely on the ground of religious conviction against war, and stated (in the last letter in any event) that he had grounds for claiming exemption but would not resort to them.

The Local Board reported him to the police and he was brought before the Board on January 4th, the seven day period for returning the questionnaire having expired on December 31st.

On January 4th he was given an opportunity to fill out and sign a questionnaire, but he declined to do so.

Thereafter he was threatened with arrest and consulted us, and this was our first acquaintance with him.

We told him that we were not versed in the technicalities of the criminal law, would take the case and handle it and present it entirely on the broad propositions involved, and he expressed very little hope of success, and we did not give him any assurance and never have.

The case finally came on for trial. The assignments of error which we are about to present bring out the principal points and give you a pretty good idea of the case. Accordingly we have had an extra copy made of the assignments of error and enclose the same herewith.

You will see from these assignments of error that we have a record in which it appears that we offered to prove Salmon's religious conviction in accordance with the terms of the act, and also his membership in a religious organization as described in the act, and both of these offers were rejected by the court so that it stands admitted on the face of the record that Salmon had and for years has had a religious conviction described in the act, and has been a member of a religious organization such as is described in the act.

Our position then is that by the terms of the act itself, Salmon could not be required to fill out and return a questionnaire in which he would be required to specify the branch of the military service in which he desired to serve because the act expressly exempts him. Second, that his own religious conviction in opposition to war exempts him from the operation of the act, and that the provision in the act that one holding such a religious conviction,, in order to obtain the benefits and exemption therefor---in order to freely exercise the same----must also belong to a certain kind of an organization, which means that he must also subscribe to all of the other tenets or portions of the creed of such organization, and likewise must contribute or pay dues' if such organization requires that.

In the case of Davis vs. Beason, decided February 3, 1890, 10 Supreme Court, Report 299, the United States Supreme Court held that the statute which was passed disfranchising those who believed in bigamy or polygamy was constitutional and did not violate the first amendment, even though bigamy and polygamy were claimed to be protected as part of the Mormon religion. The court said that bigamy and polygamy had always been recognized as destructive of the peace, prosperity and morals of the community and had always been recognized as crimes in all civilized nations, and therefore they could not be protected or exempted from the operation of law simply by claiming that their exercise was a part of a certain religion. The court distinctly said however that unless the practice in question was dangerous to the peace, prosperity or morals of the community, its exercise as a part of religion could not be interfered with by any statute. In other words, that any statute which attempted to restrict the exercise of a religious conviction, which exercise of conviction was not destructive of the peace, prosperity or morals of the community, would be an unconstitutional statute.

In the selective service law, Congress has declared that a religious conviction against war is not destructive of the peace, prosperity or morals of the community, because it has expressly provided that nothing in the act shall be construed to require military service of one holding such beliefs; and conviction against war or participation therein has therefore been declared by Congress not to be destructive of the peace, prosperity or morals of the community, therefore, by the reasoning of the Supreme Court in the case of Davis vs. Beacon, that part of the selective service law which prohibits the free exercise of the conviction against war or the participation therein, unless the holder of the conviction also joins a religious organization and subscribes to all of the various tenets of its creed and complies with all of their requirements of its membership, is an unconstitutional restriction, first because it denies to the individual the free exercise of his religious conviction, and secondly because it establishes as specially favored religious organizations, those organizations which have opposition to war as a part of their creeds.

You will note also that the information charges that from December 24th to December 31st, Salmon was under a duty to fill out and return his questionnaire; that he did not do so and that he was called before the Board on January 4th and given an opportunity to sign, but he refused to sign, and the crime is charged on January 4th. The information charges that he was under no duty to sign on January 4th and therefore charges no violation of the duty imposed by the act or the regulations, and therefore charges no crime. The offense which he committed, if any, was committed at the time of the expiration of the seven-day period, and the opportunity which was thereafter given him on January 4th was in the nature of a pardon, and a man is not obliged to accept a pardon. The information charged the offense on an impossible date. Moreover, the regulations do not impose any duty on the registrant to fill out the questionnaire at any time except during the seven-day period. There was no offense committed on January 4th and could not be. Ordinarily the variation as to the date alleged would not make any difference, but where the information shows on its face that the date charged is an impossible date, we think a conviction cannot be sustained, and we presented this matter in a motion for arrest of judgment.

In the course of the argument of the motion for new trial, Judge Lewis said that he had read a newspaper clipping referring to a recent decision of one of the Federal judges in Delaware or Maryland, in which he had held after conference with one of the circuit judges, that there could be no conviction under Section 6 of the Selective Service Act, or at least no conviction under any act which was merely a violation of the selective service regulations. Judge Lewis could not cite us to the case, and we did not see the reference, but perhaps you can locate it.

You will note that we have also raised the question that the President exceeded his authority in prescribing the selective service regulations, and we are also raising the point that the statute is unconstitutional in attempting to delegate to unqualified military boards the power to finally pass upon such rights as those involved in this case.

In his charge to the jury, Judge Lewis stated that Salmon could have presented his claim for religious exemption to the local board, and if they had refused to pass on it he could have had recourse to the courts, and we took exception to this and assigned it as error, and in the argument on the motion for a new trial, Judge Lewis admitted that he might have been wrong in saying that the decision of the Board would not be final in such case.

When we have the recordand the briefs printed we will send you copies of them.

We feel that at least we have a chance to get a clean cut decision on the question of the constitutionality of this act as an infringement on the free exercise of religious conviction, because on the face of the record no question can be raised that our client had this conviction.

In the argument on the motion for new trial, Judge Lewis referred to Salmon's membership in the Catholic Church and said he thought it was audacious of him to contend that the creed of that Church was opposed to war, in view of the conduct and declarations of the Bishops and other officers of the churches, and he said that he understood that the District Attorney was ready to have the Bishop of the Catholic Church at the trial to refute any such claim. We told the Judge we were sorry that his ruling had precluded us from cross-examining the Bishop as to the creed of his church because we were prepared for such examination, but as his ruling had cut out any such question we felt that we were entitled to rely on the offer of proof as madeand on the record as it stood, and he said he thought that was true.

If there is any further information that you desire regarding this case, we shall be very glad to furnish it.

With best wishes, we are,

Yours very truly,

WHITEHEAD & VOGL,

Per Earle Whitehead

W-P
Enc.