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Richmond, Va.

201VA135

Record No. 4944

In the Supreme Court of Appeals of Virginia at Richmond

RAYMOND THOMAS COUNCIL

v.

W. FRANK SMYTH, JR., SUPERINTENDENT, ETC.

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART II

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4944

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 14th day of October, 1958.

RAYMOND THOMAS COUNCIL, Plaintiff in Error,

against

W. FRANK SMYTH, JR., SUPERINTENDENT, ETC., Defendant in Error.

From the Hustings Court of the City of Richmond, Part II

Upon the petition of Raymond Thomas Council a writ of error and *supersedeas* is awarded him to a judgment rendered by the Hustings Court of the City of Richmond, Part II, on the 18th day of February, 1958, in a certain proceeding then therein depending wherein the said petitioner was plaintiff and W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, was defendant, no bond being required.

RECORD

* * * * *

ORDER.

This day came Raymond Thomas Council, the petitioner, and presented unto the Court a petition praying for a writ of *habeas corpus ad subjiciendum,* which petition with exhibits is now filed and it sppearing from reading said petition duly signed and verified, that there is probable cause to believe that the said Raymond Thomas Council, is illegally imprisoned and confined and restrained of his liberty without lawful authority in the custody of W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, and it also appearing wherein the said illegality consists, it is ordered that a writ of *habeas corpus ad subjiciendum* be, and the same is hereby ordered to be issued by the Clerk of this Court and directed to the said W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, Respondent, commanding him to have and produce the body of the said Raymond Thomas Council, before the Bar of the Hustings Court of the City of Richmond, Part II, at Richmond, Virginia, on the 22nd day of July, 1955, at 10:00 A. M. o'clock, together with the day and cause of his being taken and detained, to do and receive what shall then and there be considered concerning the said Raymond Thomas Council, by the Hustings Court of the City of Richmond, Part II, and that he have then and there said writ of *habeas corpus ad subjiciendum.*

page 2 } I respectfully ask for this:

W. A. HALL, JR.
Attorney for Petitioner.

Enter 5/20/55.

M. R. D.

* * * * *

page 3 }

* * * * *

Filed by order May 20th 1955.

Teste:

CHAS. R. PURDY, Clerk
By IVA M. ROBB, D. C.

O. B. 36 Page 287.

PETITION FOR WRIT OF *HABEAS CORPUS.*

To the Honorable M. Ray Doubles, Judge:

Petitioner, Raymond Thomas Council, a citizen of the United States, showeth unto Your Honor that he is being restrained and imprisoned by the respondent, W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, in the Virginia State Penitentiary and that said restraint and imprisonment is illegal and void under Section 8 of the Constitution of the Commonwealth of Virginia.

On the 24th of April, 1951, in the Circuit Court of the County of Princess Anne, Virginia, petitioner, Raymond Thomas Council, was tried for the crime of rape upon an indictment returned in the said Court by a Grand Jury on April 2, 1951, and therein by the jury found guilty of rape, and his punishment fixed by said jury at confinement in the Penitentiary for life.

On May 25, 1951, Petitioner was sentenced in the said Court to life imprisonment in pursuance of the aforesaid verdict of the jury. Exception was noted but no appeal ever attempted.

A certified copy of the said proceedings in the trial of the petitioner in the Circuit Court of Princess Anne County on April 24, 1951 is hereby filed and marked Ex-
page 4 } hibit "A" and is made a part hereof and is prayed to be read and considered as if it were fully set out herein.

A certified copy of the said proceedings in the trial of petitioner in the Circuit Court of Princess Anne County of May 25, 1951, wherein he was sentenced to a term of confinement in the Penitentiary for life, in accordance with the verdict of the jury beforehand rendered, is hereby filed and marked Exhibit "B" and is made a part hereof and is prayed to be read and considered as if fully set out herein.

Section 8 of the Constitution of Virginia, says: "In criminal cases, the accused may plead guilty; and, if the accused

plead not guilty, with his consent and concurrence of the Commonwealth's Attorney and of the court entered of record, he may be tried by a smaller number of jurors or waive a jury."

It will be noted by inspection of the proceedings of the Circuit Court of Princess Anne County of April 24, 1951, that the record shows a trial by eleven jurors and does not show consent thereto on the part of the petitioner or of the attorney for the Commonwealth, and, therefore, petitioner alleges and avers that the verdict of the jury herein is void for such reason, and the sentence of the court being predicated on such void verdict is also a nullity.

Therefore, whereas the verdict of the jury and the sentence of the Circuit Court of Princess Anne County thereon are both void and nullities in law, petitioner prays that a writ of *habeas corpus ad subjiciendum* may be awarded him and directed to the respondent, W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, commanding him to have the body of the petitioner before the bar of the Hustings Court of the City of Richmond, Part II, in its court room, at a time therein to be specified, to-
page 5 } gether with the time and cause of this detention and that the verdict of the jury rendered against him on April 24, 1951, and the sentence of the court rendered May 25, 1951, both be adjudged and considered void, and petitioner discharged.

He avers that the Indictment herein upon which petitioner, Raymond Thomas Council, was tried, convicted and sentenced as aforesaid in the Circuit Court of Princess Anne County, Virginia, did not charge the crime of rape for which petitioner was convicted and sentenced, as the element of the crime of rape, via, that the carnal knowledge of Dorothy Van Nostrand was by force and against her will is omitted from the said indictment; and the charge against the petitioner was thereby merely one of fornication; whereby the Circuit Court of Princess Anne County was without jurisdiction to receive a verdict of "guilty of rape" or to sentence petitioner to a term of confinement in the penitentiary for life.

Said indictment is hereby filed and marked "Exhibit C" and is made a part hereof and is prayed to be read and considered as if fully set out herein.

Whereas said indictment is void he prays that his trial be herein also adjudged void for this reason and petitioner discharged.

Respectfully,

RAYMOND THOMAS COUNCIL
Petitioner.

W. A. HALL, JR.
His Attorney.

State of Virginia,
City of Richmond, to-wit:

This 17th day of May, 1955, personally appeared before me, Chas. R. Purdy, Clerk of the Hustings Court of the City of Richmond, Part II, W. A. Hall, Jr., Attorney for the petitioner, Raymond Thomas Council, and signed the foregoing petition and swore that the facts therein are true to the best of his knowledge, information and belief.

CHAS. R. PURDY, Clerk.

W. A. HALL, JR.
Law Building, Richmond, Va.
Attorney for Petitioner.

page 6 } "EXHIBIT A."

Virginia:

In the Circuit Court of Princess Anne County on the 24th day of April, 1951.

Commonwealth of Virginia,

v.

Raymond Thomas Council.

UPON AN INDICTMENT FOR RAPE.

This day came the Attorney for the Commonwealth, and the accused Raymond Thomas Council, who stands indicted for Rape, was led to the bar in the custody of the Sheriff of this Court, and also came the Attorney for the accused, Richard G. Brydges, said attorney being of the accused own choosing, and being arraigned plead not guilty, and thereupon came a jury, to-wit: B. Ernest Davis, William T.

Carter, S. G. T. Hosking, Thomas N. Chaplain, Albert Gomez, J. Linwood McKown, Richard Goodman, E. L. Corprew, H. A. Duplain, Robert E. Hogshire and I. V. Hargrove, who were duly sworn the truth of and upon the premises to speak, and after having fully heard the evidence and argument of counsel, retired to their room to consider of a verdict and after sometime returned into Court with the following verdict, to-wit: "We, the jury find the defendant guilty of Rape as charged in the within indictment, and fix his punishment at life imprisonment."

Whereupon, the accused by counsel moved the Court to set aside the verdict and grant him a new trial, on the grounds that the same is contrary to the law and the evidence, the hearing of which motion is continued.

A Copy—Teste:

JOHN V. FENTRESS, Clerk
By E. H. ATWOOD, D. C.

"EXHIBIT B."

Virginia:

In the Circuit Court of Princess Anne County on the 25th day of May, 1951.

Commonwealth of Virginia,

v.

Raymond Thomas Council.

UPON AN INDICTMENT FOR RAPE.

This day came the Attorney for the Commonwealth, and the accused, Raymond Thomas Council, was again led to the bar in the custody of the Sheriff of this Court, and also came the Attorney for the accused, said attorney being of the accused own choosing, and the Court having fully heard and considered the motion of the accused, made herein on the 24th day of April, 1951, doth overrule the same.

Whereupon, it is considered by the Court that the said Raymond Thomas Council be confined in the penitentiary of this Commonwealth for the period of life, to which action of the Court in overruling said motion and entering judgment on the verdict, the accused, by counsel duly excepted.

And the accused having signified his intention to apply to the Supreme Court of Appeals for a writ of error and *supersedeas* to said judgment, execution is suspended for a period of 60 days.

A Copy—Teste:

JOHN V. FENTRESS, Clerk
By E. H. ATWOOD, D. C.

page 7 } "EXHIBIT C."

Commonwealth of Virginia,
County of Princess Anne, to-wit:

In the Circuit Court of the County of Princess Anne:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Princess Anne and now attending the said Court, upon their oaths, present that Raymond Thomas Council on the 18th day of March in the year 1951, in the said County of Princess Anne, Virginia. with force and arms, in and upon one Dorothy Van Nostrand, a female over the age of sixteen years, to-wit: the age of twenty-five years, feloniously did make an assault and her the said Dorothy Van Nostrand, then and there, to-wit: on the day and year aforesaid, unlawfully and feloniously did carnally know and abuse, against the peace and dignity of the Commonwealth of Virginia.

(on back)

Commonwealth of Virginia,

v.

Raymond Thomas Council.

FELONY.

Indictment for RAPE A true bill.

JOHN B. DEY, Foreman.

WITNESSES:

Dorothy Van Nostrand

G. F. Bogdon
J. E. Moore Chief
J. C. Brady P. A. Police

G. J. 4/2/51.

We, the Jury, find the defendant guilty of rape as charged in the within indictment and fix his punishment at life imprisonment.

RICHARD C. GOODMAN, Foreman.

April 24, 1951.

A Copy—Teste:

JOHN V. FENTRESS, Clerk.
By E. H. ATWOOD, D. C.

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* * * * *

COMMONWEALTH OF VIRGINIA:

To: W. Frank Smyth, Jr., Superintendent
of the Virginia State Penitentiary
Richmond, Virginia.

We command you to take the body of Raymond Thomas Council, detained by you and under your custody as it is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called, you have before our Hustings Court of the City of Richmond, Part II, in the Courtroom thereof at 10th and Hull Streets, Richmond, Virginia, at 10 o'clock A. M. on the 22nd day of July, 1955, to do, submit to and receive all and singular those things which shall then and there be considered of him in this behalf. And have then there this writ.

Witness, Chas. R. Purdy, Clerk of our said Court, at the Courthouse thereof, in the City of Richmond, the 20th day of May, 1955, and in the 179th year of our Commonwealth.

CHAS. R. PURDY, Clerk.

Filed in Clerk's office May 24th 1955.

Teste:

CHAS. R. PURDY, Clerk
By IVA M. ROBB, D. C.

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Filed by order July 22nd 1955.

Teste:

CHAS. R. PURDY, Clerk
By IVA M. ROBB, D. C.

RETURN AND ANSWER OF RESPONDENT.

Now comes the respondent, W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, by counsel, and, in obedience to the writ of *habeas corpus* heretofore issued on May 20, 1955, produced the body of the petitioner, Raymond Thomas Council, before the Court.

In answer to the said writ and petition, the respondent does say as follows:

1. Respondent is detaining petitioner under a judgment order of conviction dated April 24, 1951, of the Circuit Court of Princess Anne County, whereby the petitioner was convicted by a jury of rape and sentenced to life imprisonment.

2. The aforesaid order of April 24, 1951, omitted the name of one juror. On July 7, 1955, the Circuit Court of Princess Anne County entered a *nunc pro tunc* order correcting the said order of April 24, 1951, by supplying the omission of the name of one of the jurors. As disclosed by a copy of the said order of July 7, 1955, the twelfth juror was present and did sit as a juror.

page 11 } 3. The said conviction of Raymond Thomas Council is now valid and lawful in all respects.

4. *Habeas corpus* does not now lie to attack the validity of the conviction for rape in Princess Anne County.

Respondent, therefore, admits that he is detaining the petitioner upon a lawful order of commitment and that a

petition for a writ of *habeas corpus* should be dismissed and the writ of *habeas corpus* discharged.

F. FRANK SMYTH, JR.,
Superintendent, Virginia State Penitentiary.
By THOMAS M. MILLER

* * * * *

page 13 } Virginia:

In the Circuit Court of Princess Anne County on the 7th day of July, 1955.

Commonwealth of Virginia,

v.

Raymond Thomas Council.

UPON AN INDICTMENT FOR RAPE.

This day came P. W. Askiss, the Attorney for the Commonwealth for Princess Anne County, and moved the Court to correct an order of this Court entered on April 24, 1951, by supplying the omission of the name of one of the jurors, to-wit: Emerson Macon; and, after due notice to the accused and his attorney, was argued by counsel, and

It appearing from the evidence produced in open Court, in the presence of the accused and his attorney, that the order heretofore entered herein on April 24, 1951, is defective in that it did not name Emerson Macon as one of the jurors sworn to try the case. And it further appearing to the Court that the Clerk's Minute Book and the original Sheriff's Jury List discloses that Emerson Macon was one of the jurors sworn to try this case together with the other eleven jurors named in the order of April 24, 1951.

It is therefore ORDERED that the Order heretofore entered herein on April 24, 1951, convicting the accused Raymond Thomas Council for rape, be amended and corrected so as to read as follows:

"This day came the Attorney for the Commonwealth, and the accused Raymond Thomas Council, who stands indicted for Rape, was led to the bar in the custody of the Sheriff of this Court, and also came the Attorney for the accused,

Richard G. Brydges, said Attorney being of the accused own choosing, and being arraigned plead not guilty, and thereupon came a jury, to-wit: B. Ernest Davis, William T. Carter, S. G. T. Hosking, Thomas N. Chaplain, Albert Gomez, J. Linwood McKown, Richard Goodman, E. L. Corprew, Emerson Macon, H. A. Duplain, Robert E. Hogshire, and I. V. Hargrove, who were duly sworn the truth of and upon the premises to speak, and after having fully heard the evidence and argument of counsel, re-
page 14 } tired to their room to consider of a verdict and after sometime returned into Court with the following verdict, to-wit: "We the jury find the defendant guilty of Rape as charged in the within indictment and fix his punishment at life imprisonment."

Whereupon, the accused by counsel moved the Court to set aside the verdict and grant him a new trial on the *gounds* that the same is contrary to the law and the evidence, the hearing of which motion is continued."

This order which should have been entered April 24, 1951, is here entered *nunc pro tunc.*

A Copy—Teste:

JOHN V. FENTRESS, Clerk
By R. H. WEST, D. C.

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This matter came this day to be heard in keeping with continuance of October 27, 1955, and the respondent again produced in Court, the petitioner, Raymond Thomas Council, in obedience to the Writ of *Habeas Corpus* heretofore issued herein.

The Court, having heard evidence and argument of counsel, but not being advised of its judgment at this time, doth take the matter under advisement, and the petitioner is remanded to the custody of the respondent.

Enter 12/19/56.

M. R. D.

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Filed December 19th 1957.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

AMENDED RETURN AND ANSWER OF RESPONDENT.

Now comes the respondent, W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, by counsel, and, in obedience to the writ of *habeas corpus* heretofore issued on May 20, 1955, produced the body of the petition, Raymond Thomas Council, before the Court.

In answer to the said writ and petition, the respondent does say as follows:

1. Respondent is detaining petitioner under a judgment order of conviction dated April 24, 1951, of the Circuit Court of Princess Anne County, whereby the petitioner was convicted by a jury of rape and sentenced to life imprisonment.

2. The aforesaid order of April 24, 1951, omitted the name of one juror. On July 7, 1955, the Circuit Court of Princess Anne County entered a *nunc pro tunc* order correcting the said order of April 24, 1951, by supplying the omission of the name of one of the jurors. As disclosed by a copy of the said order of July 7, 1955, the twelfth juror was present and did sit as a juror.

The Supreme Court of Appeals affirmed the validity of the said *nunc pro tunc* order in the case of *Council* v. *Commonwealth,* 198 Va. 288, thereby concluding the question.

page 21 } 3. The said conviction of Raymond Thomas Council is now valid and lawful in all respects.

4. *Habeas corpus* does not now lie to attack the validity of the conviction for rape in Princess Anne County.

Respondent, therefore, admits that he is detaining the petitioner upon a lawful order of commitment and that a pe-

tion for a writ of *habeas corpus* should be dismissed and the writ of *habeas corpus* discharged.

W. FRANK SMYTH, JR.,
Superintendent, Virginia State
Penitentiary
By THOMAS M. MILLER

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* * * * *

This case heretofore having been heard upon the Writ of *Habeas Corpus* heretofore issued herein, and the Court being of opinion:

1. That as to the first point presented by the Petition, viz. that of the original order of conviction showing a trial by only eleven jurors, this has now become moot by virtue of a *nunc pro tunc* order entered on July 7, 1955 in the Circuit Court of Princess Anne County and affirmed in *Council v.* Commonwealth, 198 Va. 288; and

2. That as to the second point presented by the Petition, viz. Whether the indictment charges the crime of rape sufficiently to sustain the verdict herein, the Court is of opinion that even though the said indictment might be held defective on direct appeal, yet where there is a trial by jury upon a plea of not guilty, it must be assumed on *collateral attack* that any defect in the indictment (trial upon indictment not being jurisdictional) becomes immaterial when considered with the presumption that the jury were correctly instructed, and that under such combination of circumstances no *denail* of due process of law is established;

Therefore, the Court doth deny and dismiss the Petition and the Writ of *Habeas Corpus* heretofore issued herein; to which action of the Court the petitioner, by counsel, objects and excepts.

Enter 2/18/58.

M. R. D.

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Filed in clerk's office April 8th 1958.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Raymond Thomas Council, Petitioner, hereby gives notice of appeal from the final order entered herein, wherein his petition writ of *habeas corpus ad subjiciendum* was dismissed and denied by the above styled Court, and assigns the following assignments of error:

1. Whereas, Petitioner, Raymond Thomas Council, was tried in the Circuit Court of Princess Anne County, by a jury on April 24, 1951, upon an indictment therein returned into open court by a Grand Jury on April 2, 1951; and on April 24, 1951, found guilty by the jury in the following verdict, to-wit: "We the jury find the Defendant guilty of rape as charged in the within indictment and fix his punishment at life imprisonment," and later, to-wit, May 25, 1951, the Honorable Judge of the Circuit Court of Princess Anne County, sentenced Petitioner to confinement in the Penitentiary for life in accordance with said verdict, and the above mentioned indictment, returned by the Grand Jury April 2, 1951, upon which petitioner, Raymond Thomas Council, was tried, convicted, and sentenced to life imprisonment, as aforesaid, did not charge the crime of common law rape, as it was not alleged in the indictment aforesaid
page 24 } that the carnal knowledge of the prosecutrix therein by the said Raymond Thomas Council, was accomplished BY FORCE AND AGAINST THE WILL OF THE PROSECUTRIX, Dorothy Van Nostrand, and these essential elements of the crime of common law rape being totally and wholly omitted from the pleading, there was no jurisdictional basis for the verdict of the jury finding Petitioner guilty of rape, and no jurisdictional basis for the sentence of the Court, adjudging that Petitioner be confined in the Penitentiary for life.

And, whereas, verdict of the jury was a nullity; and sentence of the Court was a nullity, the Honorable Judge of the Hustings Court of the City of Richmond in this *habeas corpus* action, should have so adjudged, and discharged the Petitioner; and thereby, on account of said Hustings Court of the City of Richmond, Part 11, not adjudging verdict and

sentence void, and for his failure to discharge the Petitioner in the *habeas corpus* action, he committed reversible error.

2. The indictment herein upon which conviction and sentence is based alleged the age of the prosecutrix, as twenty-five, and had it alleged prosecutrix, Dorothy Van Nostrand, was sixteen years (16) of age, it would have been the approved form indictment for statutory rape (where force and against the will of the prosecutrix are not elements of the offense and would have afforded no jurisdictional basis in Virginia for sentence over twenty years in the Penitentiary, and, if such had been the case and the age of Dorothy Van Nostrand had been alleged as sixteen instead of twenty-five, regardless, of whether the evidence established that the carnal knowledge of the prosecutric was procured by force and against her will, any sentence of over twenty years in the Penitentiary, would have been in excess of the jurisdiction of the Court under the statute, page 25 } and under the law, he would have been entitled to discharge on *habeas corpus* after serving twenty years minus deductions for good conduct, and upon the foregoing described premise, the Hustings Court of the City of Richmond, Part II should have adjudged the indictment merely an allegation charging fornication, the verdict of the jury a conviction of fornication (the word "Rape" in the verdict being surplusage), and adjudged that the only defective part of the trial of the Petitioner in the Circuit Court of Princess Anne County, was the illegal punishment attached by the jury to a conviction of a misdemeanor, and adjudged that the sentence was void as an illegal punishment for a misdemeanor (fornicatoin) and adjudged that a transfer of custody of Petitioner to the Circuit Court of Princess Anne County in event a proper indictment for common law rape was therein returned by a Grand Jury, his trial under said new indictment would be neither judicious or proper, and such further delayed incarceration of Petitioner a mere gesture, because, the offense if any committed by him, could not be split into two parts by the pleader, and thereby not adjudging and not releasing the Petitioner forever on *habeas corpus,* the Hustings Court of the City of Richmond, Part II, committed reversible error.

3. Had the Commonwealth's Attorney of Princess Anne County found out after drafting indictment and before presentation thereof to the Grand Jury, that the age of the prosecutrix was sixteen (16) years of age, instead of twenty-five (25), and acting on such belated information struck out the word "over" and substituted therefor, the word "of," and elided "the age of twenty-five (25) years," he

would have thus prepared a perfect standard form indictment for statutory rape, where the statute demands that no punishment above twenty years could be rendered therepage 26 } on, and any sentence over twenty years would be void whether the instructions were proper for common law rape, and the evidence establish common law rape or not, and surely evidence and instructions are not the criterion in any jurisdiction State or Federal for determination as to whether or not an indictment or information is valid or void, and the above showing so plainly, positively, and clearly, that the indictment upon which this Petitioner is condemned to life imprisonment does not by any stretch of imagination or even fallacious or illogical reasoning charge him with common law rape, and, thereby *habeas corpus* was the right and proper remedy for him to obtain rights of substance under the Constitution of Virginia and the Constitution of the United States, and the Hustings Court of the City of Richmond, Part II, committed reversible error in not so adjudging and declaring, and releasing the Petitioner, and its adjudication that the indictment was merely probably a good cause for direct appeal and not good cause for collateral attack on *habeas corpus* was clearly and patently erroneous, and constituted reversible error herein.

4. The Hustings Court of the City of Richmond, Part II, should have adjudged the trial of Petitioner a nullity and discharged him in the *habeas corpus* action even if the indictment were sufficient on which to base a felony conviction and sentence, for the following, to-wit: The order of the Circuit Court of Princess Anne County, entered April 24, 1951, showed conclusively that Petitioner was tried by eleven jurors, and the *nunc pro tunc* order of July 8, 1955, filed by the Respondent in the *habeas corpus* action, is a nullity as far as showing and does not show that Petitioner was tried by twelve jurors, as the finding of the Cirpage 27 } cuit Court of Princess Anne makes no finding of the crucial point, to-wit: that Emerson Macon sat as a juror throughout the whole case and rendered his verdict therein, but, there is merely a finding that the record of April 24, 1951, is defective in that it did not name Emerson Macon as one of the jurors sworn to try this case, and found that the Clerk's Minute Book and the original Sheriff's Jury List discloses that Emerson Macon was one of the jurors sworn to try this case, together with the other eleven jurors named in the order of April 24, 1951. As far as the Judge of the Circuit Court found was that Macon was sworn, and, the omission of the record supplied merely as to his

being sworn, and he may have been sworn and still not served throughout the entire trial.

The words in the Order, "it is therefore ordered that the order heretofore entered on April 24th, 1951, convicting the accused Raymond Thomas Council for rape, be amended and corrected so as to read as follows:—Then follows order showing twelve jurors, and the words, "It is therefore ORDERED" is insufficient to constitute an adjudication in the order showing twelve jurors, and even if it were, the order showing twelve jurors is not based on a finding that Macon served throughout the entire trial, but, merely that Macon was sworn.

The same Judge that heard and decided the *nunc pro tunc* proceedings sat and presided at the trial of Council on April 24, 1951, and whereas said Judge would have been a proper Judge to have heard the case in accordance with the decisions in Virginia for 130 years, yet, as he departed from these decisions, as did Council *v.* Commonwealth, 198 Va. 288, the *nunc pro tunc* proceedings were heard, decided, and affirmed by the Supreme Court, making it an
page 28 } established law that records could be supplied years after the trial on "any competent evidence," therefore, the Judge of the Circuit Court in hearing the *nunc pro tunc* case July 1, 1955 and deciding it by final order July 7, 1955, was presiding and rendering judgment in a matter in which he was both Judge and witness, and as a witness in a legal sense, he gave no evidence that was subject to cross examination, and this within itself made the *nunc pro tunc* order a nullity under both the State and Federal Constitution, and doubly so because the record establishes that the Attorney for Petitioner in the *nunc pro tunc* proceedings was not afforded the opportunity to be heard, a cardinal principle of due process, namely, to introduce witnesses and evidence aliunde that would have disputed the testimony of the Clerk, Mr. West, and raised a serious issue of fact as to whether Macon sat in the case or not, as no final disposition had been made to his motion that decisions in Virginia for a period of 130 years be applied in this case, but on the other hand before ruling on the application of these decisions, the Court amended the order of April 24, 1951, and Council or his Attorney was not notified and the Attorney for Council should have been notified that previous decisions in Virginia would not be applied in this case, and thereby afforded opportunity to introduce evidence to dispute West's testimony to-wit: At the end of proceedings and argument that the testimony of West was illegal and inadmissible, which was July 1, 1955,

the Court took the matter under advisement as to the admissibility of West's testimony and not until after July 7, 1955, was the prisoner or his Attorney advised by the Court in the matter, but presented with the final order of July 7, 1955, and whereas the Attorney for the Prisoner page 29 } should have been advised merely before entry of the final order, namely, that previous decisions in Virginia would not be adhered to and that the Court had decided to consider West's testimony as legal, competent and admissible testimony thereby affording the Petitioner opportunity to cross examine West and to introduce evidence of other witnesses who would have disputed the evidence of West adduced, and, by no other Court proceedings, notification or otherwise, the Attorney for the Prisoner, was deprived of the opportunity of having an issue of fact determined by an independent Judge and not a Judge who was both Judge and witness, as nothing took place in the case from July 1, 1955, until July 7, 1955, or any notification to the Attorney for the prisoner in the interim, and, on July 1, 1955, there was no occasion for the Attorney for the Prisoner to ask the Judge of the Circuit Court of Princess Anne County to disqualify himself and have another Judge to hear the case, because he naturally felt previous decisions in Virginia would be followed in this case, as the Court had heard his argument and citations of authorities, and believing these decisions would be followed during the interim of advisement by the Court, therefore, the Judge of the Circuit Court of Princess Anne County being both Judge and Witness in the *nunc pro tunc* proceedings and not affording the Attorney for the prisoner an opportunity to have the factual issue over which reasonable men may have differed in decision determined by another Judge, and, not affording the Attorney for the prisoner the opportunity of introducing evidence to dispute the testimony of West, it follows, that there is planted and imbedded in the *nunc pro tunc* order of July 7, 1955, such gross violation of Constitutional right as to deny the substance of a fair hearing, and the page 30 } Attorney for the prisoner was not able to raise the issue therein or protect the rights of his client, for reasons for which he was not responsible, and, therefore, the *nunc pro tunc* order is wholly void under the Constitution of Virginia and the due process of law clause of the Fourteenth Amendment of the Constitution of the United States, and, the Judge of the Hustings Court of the City of Richmond, Part II committed reversible error in permitting the *nunc pro tunc* order to overthrow the validity of the original order of April 24, 1951, the invalidity of the *nunc pro*

tunc order apparent on the face of the record in the *habeas corpus* action.

Further, the decision Council *v.* Commonwealth, 198 Va. 288, merely in the majority opinion, adopted new rules in respect to evidence, in *nunc tunc* proceedings, that was contrary to previous decisions, for guidance of the Courts in the future, and, its application against the Petitioner would be a discrimination, as all other defendants for a period of 130 years, in event a jurisdictional matter was lacking in the trial record, by the trial record itself, established the invalidity of their imprisonment, whereas to apply this decision against the Petitioner would force upon him a much greater burden, namely, to overthrow the testimony of a Court official after the elapse of many years by evidence *ore tenus,* and, application of Council *v.* Commonwealth, 198 Va. 288, against the prisoner would amount in effect to an *er post facto* law, and, would include an element of unfairness contrary to the Constitution of Virginia and the due process of law clause of the Fourteenth Amendment of the Federal Constitution, and also, for this reason it should have been disregarded by the Judge of the Hustings Court of the City of Richmond, Part II, in the *habeas corpus* case.

page 31 } And, for all the reasons stated in this Assignment of Error, the Judge of the Hustings Court of the City of Richmond, Part II, in the *habeas corpus* action should have disregarded the *nunc pro tunc* order of July 7, 1955, and, decided the case solely and wholly on the basis of the original trial order of April 24, 1951, showing a trial by eleven jurors, and no entry of record in compliance with Section 8 of the Constitution of Virginia, that the prisoner and the Commonwealth's Attorney consented of record to the trial of a felony case, by less than twelve jurors, and thereby committed reversible error in not declaring the trial and life sentence of Petitioner a nullity and discharged him.

RAYMOND THOMAS COUNCILL,
Petitioner
By W. A. HALL, JR.
Attorney for Petitioner.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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