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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 5135

In the Supreme Court of Appeals of Virginia at Richmond

CLYDE RAYMOND NEAR

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF POWHATAN COUNTY

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. 5135

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 15th day of January, 1960.

CLYDE RAYMOND NEAR, Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Circuit Court of Powhatan County

Upon the petition of Clyde Raymond Near a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Powhatan County on the 4th day of August, 1959, in a prosecution by the Commonwealth against the said Clyde Raymond Near for a felony, but said *supersedeas*, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

• • • • •

State of Virginia,
County of Powhatan, to-wit:

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, F. W. Simpson, Sheriff of Powhatan County has this day made complaint and information on oath before me, Howard Clark Clerk of the County Court of the said County, that Clyde Raymond Near, W-M-34 in the said County did on the 7th day of November, 1958: Unlawfully kill and slay one Barry Steele Chapman, against the peace and dignity of the Commonwealth of Virginia.

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the County Court of the said County, the body (bodies) of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon:

..... color ..... Address .....[ ]
..... color ..... Address .....[ ]
..... color ..... Address .....[ ]
..... color ..... Address .....[ ]
..... color ..... Address .....[ ]
as witnesses.

Given under my hand and seal, this 11th day of November, 1958.

HOWARD CLARK (Seal)
Clerk, County Court.

(on back)

DOCKET NO. .....

Commonwealth,

v.

Clyde Raymond Near, W-M-34.

WARRANT OF ARREST.

Executed this, the 21st day of November, 1958.

L. B. MARSTON, State Police.

Upon the examination of the within charge, I find the accused

* * * * *

page 2 }

* * * * *

OCTOBER TERM, 1958.

INDICTMENT FOR A FELONY.

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Powhatan, duly summoned to attend said October Term, 1958 of the said Court for the said County, upon their oath present that Clyde Raymond Near, on the 7th day of November, 1958, in the said County and within the jurisdiction of said Court, within one year prior to the finding of this indictment, feloniously did kill and murder one Barry Steele Chapman, against the peace and dignity of the Commonwealth of Virginia.

William R. Blandford, Attorney for
the Commonwealth.

Upon the evidence of F. W. Simpson, Sheriff and ....., witnesses sworn in open Court and sent to the Grand Jury to give evidence.

WM. E. MAXEY, JR., Clerk.

12/Dec/1958.

(on back)

INDICTMENT FOR A FELONY.

Commonwealth,

v.

Clyde Raymond Near.

√ A True Bill.

W. R. RICHARDSON, Foreman.

We the jury find the defendant guilty as charged for murder in the first degree and that punishment be death in the electric chair.

WILLIAM E. DAVIES, Foreman.

page 3 } Virginia:

At a Circuit Court of Law continued and held for the County of Powhatan at the Courthouse thereof, on the 6th day of January, in the year of our Lord One Thousand Nine Hundred Fifty-Nine and in the One Hundred Eighty-Third Year of the Commonwealth.

* * * * *

ORDER.

This day came the Attorney for the Commonwealth and Clyde Raymond Near who stands indicted of a felony, to-wit: feloniously did kill and murder one Barry Steele Chapman, was led to the bar in the custody of the Sheriff of this Court. And it appearing to the Court that the accused is not represented by counsel, the court, before accepting any plea of the accused, doth appoint Robert Randolph Jones, an able and competent attorney at law, practicing before the bar of this court, to defend him.

Whereupon with the consent and approval of the accused after private consultation with his counsel and with the approval of the Attorney for the Commonwealth this case is set for trial on the 9th day of February, 1959, at 10 o'clock A. M. And the accused is remanded to jail.

* * * * *

page 6 } Virginia:

At a Circuit Court of Law continued and held for the County of Powhatan at the Courthouse thereof, on the 9th day of February, in the year of our Lord One Thousand Nine Hundred Fifty-Nine and in the One Hundred Eighty Third year of the Commonwealth.

* * * * *

ORDER.

Clyde Raymond Near who stands indicted for murder in this court, being present in court, moved the court by his attorney Robert R. Jones to commit him to a state mental hospital for observation, and it appearing to the court from a

report of examination of the said Near by Dr. Harry Brick dated February 1, 1959, and filed with the papers in this case, that he is of the opinion the said Near should be committed to a mental hospital for observation, it is ordered that the said Clyde Raymond Near is hereby committed to the South Western State Hospital for observation and report and that the sheriff of this county deliver the said Near to said hospital, along with a copy of the indictment, this order, and the report of Dr. Brick.

• • • • •

page 7 } Virginia:

At a Circuit Court of Law continued and held for the County of Powhatan at the Courthouse thereof, on the 23rd day of February, in the year of our Lord one Thousand Nine Hundred Fifty-Nine and in the One Hundred Eighty Third year of the Commonwealth.

• • • • •

ORDER.

It appearing to the Court that Clyde Raymond Near is confined in Southwestern State Hospital, under order of this Court, for observation and report, it is hereby ordered by the Court that this case be continued to the first day of the next term of this Court.

• • • • •

page 9 } Virginia:

At a Circuit Court of Law continued and held for the County of Powhatan at the Courthouse thereof on the 20th day of April in the year of our Lord One Thousand Nine Hundred Fifty-Nine and in the One Hundred Eighty-Third year of the Commonwealth.

• • • • •

ORDER.

It appearing to the Court that Clyde Raymond Near, who stands indicted in this Court for murder, was committed on February 9, 1959, to Southwestern State Hospital for observation and a report of the findings, and whereupon the said report has been received by the Court, it is hereby ordered that the Superintendent of Southwestern State Hospital deliver the body of the said Clyde Raymond Near, into the cus-

tody of the Sheriff of this Court, to be by him safely conveyed, according to law, to the jail of this Court, there to be confined while awaiting trial on the charges now pending against him.

* * * * *

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* * * * *

MEMORANDUM.

To: Wm. E. Maxey, Jr., Clerk of the Court:

Please summons the below named persons to be witnesses on behalf of the Commonwealth in the subject case for Tuesday, May 26th at 10 o'clock A. M.:

Dr. Harold L. Beddoe
Office of the Chief Medical Examiner
404-406 N. 12th St.
Richmond, Virginia

Dr. Sidney Kaye
Office of the Chief Medical Examiner
404-406 N. 12th St.
Richmond, Virginia

Dr. William S. Lloyd
Beaumont, Virginia

Investigator J. C. Ogburn, Jr.
State Police Headquarters
Route 1
Hanover County, Virginia

Investigator L. B. Marston
State Police Headquarters
Route 1
Hanover County, Virginia

Rudolph A. Smith
Beaumont, Virginia

Mr. J. C. Bonucelli
Beaumont, Virginia

Mr. G. B. Wimmer
Beaumont, Virginia

Mrs. G. B. Wimmer
Beaumont, Virginia

Thomas Howard Spencer
Trenholm, Virginia

Bessie Garretson Campbell
(Note: The Sheriff will get you the address, which is somewhere in Henrico County.)

William R. Blandford, Attorney for the Commonwealth.

Received and filed this the 18th day of May, 1959.

WM. E. MAXEY, JR., Clerk.

page 11 } Virginia:

At a Circuit Court of Law continued and held for the County of Powhatan at the Courthouse thereof on the 25th day of May in the Year of our Lord One Thousand Nine Hundred Fifty-Nine and in the One Hundred Eighty-Third Year of the Commonwealth.

• • • • •

ORDER.

On motion and ordered that this case be set for trial on the 26th day of May, 1959.

• • • • •

page 18 } Virginia:

At a Circuit Court of Law continued and held for the County of Powhatan, at the Courthouse thereof on the 26th day of May, in the year of our Lord One Thousand Nine Hundred Fifty-Nine and in the One Hundred Eighty-Third year of the Commonwealth.

• • • • •

May 26, 1959.

ORDER.

This day came again the Attorney for the Commonwealth and Clyde Raymond Near who stands indicted of a felony, to-wit: Murder was led to the bar in the custody of the Sheriff of this Court.

Whereupon the accused was arraigned and after private consultation with Robert Randolph Jones, his counsel, pleaded not guilty to the indictment, which plea was tendered by the accused in person. And the Sheriff of this Court having returned the writ of *venire facias* issued by order of this Court entered on the 27th day of April, 1959, together with the names of forty-one (41) persons summoned by him in pursuance thereof and taken from the list of forty-five (45) names

attached to said writ and drawn by the Clerk of this Court in the presence of the Judge of this Court from the box and in the manner provided for by law, and of the veniremen so summoned and attending a panel of twenty qualified jurors, free from exception for the trial of the said defendant, was made up and completed.

Whereupon the accused by counsel, moved the Court to quash the *venire* on the grounds that no women were called to make up the panel of jurors, which motion was overruled by the Court and to which ruling the defendant by counsel noted an exception.

Whereupon, a jury to-wit: E. W. Berry, Jr., Roy W. Braudrick, William E. Davies, Cecil DeNoon, Emory Finney, L. L. Jessup, W. T. Johnson, Jr., R. J. Kornegay, Will Lawson, Roy A. McGlocklin, Will T. Nichols Nichols and George M. Palmore, was selected in *in* the manner pre-
page 19 } scribed by law, and duly sworn the truth of and upon the premises to speak, and having heard a portion of the evidence, the Court did order at 5:00 o'clock, P. M. that this case be continued to 10:00 o'clock, A. M. May 27th, 1959.

The Court not having directed otherwise and there appearing no objection by the Attorney for the Commonwealth or the attorney for the accused, the jurors were allowed to separate at such time as the Court directed during the course of the trial, and the Court did instruct the jurors not to discuss this case with any one other than themselves and to let no person discuss the case in their presence and directed that they read no newspaper accounts of the trial, and this case is continued to May 27, 1959.

• • • • •

page 23 } INSTRUCTION NO. 2.

The Court instructs the jury that to constitute a wilful, deliberate, and premeditated killing it is not necessary that the intention to kill should exist any particular length of time prior to the actual killing; it is only necessary that such intention should come into existence for the first time at the time of such killing, or at any time previously.

J. G. J.

page 24 } INSTRUCTION NO. 3.

The Court instructs the jury that whenever the killing is

wilful, deliberate and premeditated, the law infers malice from this fact.

J. G. J.

page 25 } INSTRUCTION NO. 4.

The Court instructs the jury that every homicide in Virginia is presumed, in the absence of other evidence, to be murder of the second degree, and in order to elevate the offense to murder of first degree the burden is upon the Commonwealth; and in order to reduce the offense to manslaughter or to show justification or excuse for the killing, the burden is upon the accused to introduce evidence to show extenuating circumstances, or justification, unless it appears from the evidence of the Commonwealth.

J. G. J.

page 26 } INSTRUCTION NO. 5.

The Court instructs the jury that the law is that malice may be implied from the deliberate use of a deadly weapon in the absence of proof to the contrary.

J. G. J.

* * * * *

page 39 } Virginia:

At a Circuit Court of Law continued and held for the County of Powhatan at the Courthouse thereof on the 27th day of May, in the year of our Lord One Thousand Nine Hundred Fifty-Nine and in the One Hundred Eighty-Third of the Commonwealth.

* * * * *

ORDER.

This case having begun on May 26, 1959, and having been continued to May 27, 1959, this day came Clyde Raymond Near who was led to the bar in the custody of the Sheriff of this Court and accompanied by his counsel, Robert Randolph Jones, and came also the Attorney for the Commonwealth and the Jury being polled the Court did ascertain that all Jurors

in this case were present and the Jury having heard all of the evidence, the instructions of the Court, and the argument of counsel, upon their oaths do say: "We the jury find the defendant guilty as charged for murder in the first degree and that punishment be death in the electric chair. William E. Davies, Foreman." And the jury was dismissed.

Thereupon counsel for the defendant made a motion to the Court to set aside the verdict as being contrary to the law and evidence and the Court doth take time to consider of its judgment and doth order the defendant remanded to jail.

The Court certifies that at all times during the trial of this case the accused was personally present.

And the prisoner is remanded to jail.

* * * * *

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* * * * *

MOTION.

Now comes the defendant, Clyde Raymond Near, by counsel, and formally moves the Court to set aside the verdict of the jury finding him guilty of murder in the first degree, and fixing his punishment at death in the electric chair, and grant a new trial because the verdict was contrary to law and evidence, and for other errors committed during the trial, some of which are more particularly as follows, to-wit:

1. That counsel for defendant made motion that all witnesses for the Commonwealth be sworn and separated before any witness was heard and it was granted by the Court; that the Court erroneously allowed F. W. Simpkins, Sheriff, M. L. Jones, Deputy Sheriff, and Stewart Gathright remain in the courtroom and later testify, over the objection of defendant by counsel; that this was excepted to each time by defendant's counsel; and, that the testimony given by these witnesses was material and so argued before the jury by the Commonwealth Attorney and his assistant.

2. That the jury was allowed to mingle with a crowd at the front door of the Courthouse at a lawn party, which had the nature and atmosphere of an all-day carnival, on two separate days, during which time sandwiches, pies and soft drinks were sold and consumed on the premises of the Courthouse lawn; that cakes and other items were sold to be taken home; and, where curiosity seekers and spectators discussed the

trial, and expressed opinions as to what penalty should be given and what they would do if they were on the jury, all within the hearing of jurors.

3. That inflammatory exhibits and material were consistently paraded before the jury with the idea of prejudicing them against the defendant.

4. That the jury ignored the instructions of the Court and the evidence in the case.

5. That the decedent worked at Virginia Indus-
page 41 } trial School for Boys, at Beaumont, Virginia, and that the parties who operated the lawn party, carnival, bazaar and benefit party, were known as the "Jefferson Home Demonstration Club" located within two miles of Virginia Industrial School for Boys, Beaumont, Virginia, and some members of the Club were employed at the Virginia Industrial School for Boys, or some of the Club members' husbands were employed there; that among these spectators, in this carnival-like atmosphere, who were discussing the trial, were the decedent's father, mother and uncle; former officers of the Virginia Industrial Schoool for Boys and present officers of the Virginia Industrial School for Boys, and the Commonwealth's witnesses, who had been sworn, and sent from the courtroom so as to be out of hearing of other Commonwealth witnesses testifying before the jury; that at times the crowd was estimated to be approximately one hundred and fifty people, although at other times it may have decreased to a much smaller number.

6. That at one stage the attention of the attorney for the defendant was called to a conversation between a juror and an interested spectator; that after observing the matter, the interested spectator was taken aside from the juror and asked what he thought about the case to which he replied, in a voice loud enough to be heard on the front steps of the Courthouse, that he thought the defendant should have the electric chair; that he spoke loud enough for the jury to hear, whereupon attorney for the defendant reported to the Court that jurors were talking with spectators, outside the Court on the front of the Courthouse lawn where the lawn party was being held; and, that whereupon the the Court sent the Sheriff out to separate the witnesses from the spectators attending the bazaar.

7. That a member of the decedent's family discussed with a member, or members, of the jury, during recess and before the jury received instructions from the Court, the matter of whether or not the decedent was asleep at the time he was killed; and, that after the verdict, a member of the jury was heard discussing with a member of the decedent's family, the

evidence, and the juror was heard to say, "They never brought up that thing I told you about"; and, that the member of the decedent's family again stated that he knew the decedent was asleep when killed.

8. That the Court refused to strike the entire panel of jurors and impanel another jury when the attorney for the page 42 } defendant made objection and exceptions to the Court ruling, stating that women jurors had been systematically eliminated from the jury and that no women had been called for this jury panel of forty-five prospective jurors; and, that the Section of the Code providing for women jurors in Virginia is unconstitutional in that it puts jury service on a volunteer basis.

CONCLUSION.

I respectfully submit, for the above mentioned errors, that the Court set aside the verdict of the jury and grant the defendant a new trial.

Respectfully submitted,

ROBERT R. JONES
Counsel for Defendant.

Filed June 12, 1959.

J. G. JEFFERSON, JR., Judge.

* * * * *

page 46 } Virginia:

At a Circuit Court of Law continued and held for the County of Powhatan at the Courthouse thereof on the 4th day of August, in the year of our Lord One Thousand Nine Hundred Fifty-Nine and in the One Hundred Eighty-Fourth year of the Commonwealth.

* * * * *

HEARING ON MOTION AND PRONOUNCEMENT OF SENTENCE.

This day came again the Attorney for the Commonwealth and Clyde Raymond Near, who stands convicted of a felony, to-wit: Murder of one Barry Steele Chapman, was again led to the bar in the custody of the Sheriff of this Court and came also Robert R. Jones, attorney for the accused.

Counsel for the defendant having moved the Court to set

aside the verdict of the jury, as contrary to the law and the evidence, the Court proceeded to hear and determine the matter, according to law, and after having heard the evidence and argument upon and considered the defendants motion to set aside the verdict as contrary to the law and the evidence, the Court doth overrule the said motion.

And it being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him, according to law, and nothing being offered or alleged in delay of judgment it is accordingly the judgment of this Court that the said Clyde Raymond Near be and he is hereby sentenced to die in the electric chair at the Virginia State Penitentiary, the sentence by the jury ascertained as aforesaid. It is further ordered by the Court that execution of the said sentence shall take place on the 10th day of November, 1959.

And it is further ordered that as soon as possible after the entry of this order the prisoner be removed and safely conveyed according to law from the jail of this Court to the said penitentiary, therein to be kept, confined and

page 47 } treated in the manner provided by law.

The court certifies that at all times during the trial of this case the accused was personally present.

And the prisoner is remanded to the Virginia State Penitentiary.

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS.

To: William E. Maxey, Jr., Clerk of the Circuit Court of the County of Powhatan, Virginia:

The undersigned, counsel of record for the defendant in the above-styled case, hereby gives notice of his intention to appeal from the final judgment of this Court, heretofore entered on the 4th day of August, 1959, and assigns the following errors:

1. That the Court erred in failing and refusing to set aside the verdict of the jury.

(a) The Court erred in admitting in evidence prejudicial testimony.

(b) The verdict of the jury is contrary to law and evidence.

(c) Inflammatory exhibits were constantly presented to the jury by various witnesses and stored in the jury room for the jury's ready inspection.

2. That counsel for the defendant made motion that all witnesses for the Commonwealth be sworn and separated before any testimony was heard, which motion was granted by the Court.

(a) The Court erred in permitting the witnesses, Sheriff F. W. Simpson and Deputy Sheriff M. L. Jones, to remain in the courtroom throughout the trial and have custody of the jury, even though Sheriff Simpson and Deputy Sheriff Jones investigated the charges against the defendant and were of the principal witnesses for the Commonwealth.

(b) The Court erred in permitting the witness, Stuart Gathright, an employee of the Virginia Industrial School for Boys, to remain in the courtroom and hear other Commonwealth witnesses testify, before his own testimony was page 49 } given.

3. That the Court erred in allowing the jury to mingle with the crowd, outside of the front door of the courthouse, at a lawn party which, for the two days of the trial, had the nature and atmosphere of an all-day picnic and carnival.

4. That the Court erred in not setting aside the verdict of the jury because the jury ignored the instructions of the Court and evidence in the case.

5. That the Court erred in not setting aside the verdict of the jury because of conversations between jurors and interested spectators.

6. That the Court erred in not setting aside the verdict of the jury because of discussions of the trial by friends and relatives of the slain man within hearing of jurors.

7. That the Court erred in not setting aside the verdict of the jury because certain jurors discussed the case with relatives of the slain man.

8. That the Court erred in failing to strike the entire panel of jurors because women jurors had been systematically eliminated from the jury and could only serve as volunteers.

CLYDE RAYMOND NEAR
By ROBERT R. JONES
Counsel.

Received and filed, this the 30th day of September, 1959.

WM. E. MAXEY, JR., Clerk.

Stacy Clements.

* * * * *

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STIPULATION OF FACTS.

1. On May 26, 1959, after a panel of 30 jurors, all men, were called, 20 qualified to serve as jurors. Clyde Raymond Near, sometimes called "defendant," through his attorney, moved the Court to quash the panel of jurors and to order another panel of jurors because no women were on the jury panel; that the law authorizing women to serve on the jury is unconstitutional, in that it placed the service of women as jurors on a voluntary basis, allowing only those who volunteer to serve. The Court overruled the motion, to which counsel for defendant excepted for the reason stated.

2. Counsel for defendant moved the Court to exclude all witnesses who were to testify, from the courtroom, so they would be out of hearing while each testified during the trial of the case. The Court granted the motion but allowed Sheriff F. W. Simpson and Deputy Sheriff M. L. Jones to remain in the courtroom, to which counsel for defendant excepted.

3. The Commonwealth Attorney and counsel for defendant, with the Judge of the Court, went into the judge's chambers and it was agreed between the said Commonwealth Attorney and counsel for defendant that the jurors would not be kept together when court was not in session during the trial. The Court later instructed the jury not to talk to anyone about the case, except among themselves, and not to allow anyone to talk to them about the case; not to read any newspapers, nor look at television and not allow anyone to discuss the case in their presence, which was repeated several times during the course of the trial.

4. The trial began on May 26, 1959, and lasted two days. Evidence on behalf of the Commonwealth was presented in the following order, to-wit:

STACY CLEMENTS,

5. The first witness called was Stacy Clements,
page 51 } an employee of Virginia Industrial School for Boys,
who testified that he found the body of Barry Steele Chapman at approximately 1:00 o'clock p. m., Monday, November 10, 1958, in the bathroom of the Chapman apart-

ment. He described the condition of the body and identified certain exhibits, including a gun, article of clothing, and pictures of the living room of the Chapman apartment. He described the living room as being approximately 12 feet by 15 feet in size, and stated that it was orderly except for the area from the bed to the bathroom.

J. C. BONUCELLI,

6. The second witness called was J. C. Bonucelli, also an employee of Virginia Industrial School for Boys, who described the condition of the body and identified certain exhibits, including a gun, articles of clothing, and pictures of the living room of the Chapman apartment. He described the living room as being approximately 9 feet by 12 feet in size, and stated that it was orderly except for the area from the bed to the bathroom.

DEPUTY SHERIFF M. L. JONES,

7. Deputy Sheriff M. L. Jones was called as the third witness. Counsel for defendant objected to his being allowed to testify because the ruling of the Court to segregate witnesses had not been complied with, and Deputy Sheriff Jones had remained in the courtroom while the first two witnesses testified. Motion was overruled, to which counsel for defendant excepted for the reason stated. Deputy Sheriff Jones testified he arrived on the scene shortly after 1:00 o'clock p. m., Monday, November 10, 1958, and remained until about 5:00 o'clock p. m. He described the condition of the body and identified certain exhibits, including a gun, articles of clothing, and pictures of the living room of the Chapman apartment. He described the living room as being orderly except for the area from the bed to the bathroom, and stated that the body was not disturbed until Dr. Lloyd, the coroner, arrived.

DR. W. S. LLOYD,

8. Dr. W. S. Lloyd, the fourth witness, testified that Chapman's skull was fractured and his neck injured. He stated the living room was approximately 15 feet by 18 feet in size and was in a dishevelled and disordered condition; that there was a pool of blood at the end of the sofa and a streak of blood leading from the living room and through the hall to the bathroom. He further stated that he did not pay too much attention to the room.

G. B. Wimmer—Stuart Gathright—L. B. Marston.

G. B. WIMMER,

9. G. B. Wimmer, the fifth witness, testified that the defendant was his wife's uncle and had been visiting page 52 } them for about three or four weeks. He stated that Chapman was in the habit of visiting the Wimmer apartment and that the defendant became acquainted with Chapman through him (Wimmer); that they played cards and listened to Western music; that the defendant went to Baltimore with Chapman and often visited him in Chapman's apartment. He stated that he last saw Chapman at 6:00 o'clock p. m., November 7, 1958, in the dining hall; that he had obtained two different jobs for the defendant, which he quit; that he and his wife informed the defendant that they were going to their home and he would have to make other arrangements; that the defendant told him he was going to hop a freight and go to Chicago, and left his suitcase in the Wimmer apartment; that the defendant knew the paydays of the employees at Virginia Industrial School for Boys, and that he also knew that Chapman's wife was absent from the apartment and in Pennsylvania.

STUART GATHRIGHT,

10. Stuart Gathright, employed by the Virginia Industrial School for Boys as an accountant, was the sixth witness called. Counsel for defendant objected to his being allowed to testify on the ground that he had not been segregated with the other witnesses, but had been allowed to remain in the courtroom while the aforementioned witnesses testified. The Commonwealth Attorney stated to the Court that he did not realize the fact that Gathright had been in the courtroom. The objecion was overruled and counsel for defendant excepted to the Court's ruling for the reason stated. Gathright testified that Chapman was paid "under the Federal hookup" on November 3 and that he (Gathright) went to the bank with Chapman where Chapman cashed his check in the approximate amount of One Hundred Twenty-Five Dollars ($125.00), and that Chapman had not spent any money except about Twelve Dollars ($12.00) to buy some field glasses.

L. B. MARSTON,

11. L. B. Marston, Virginia State Police Officer, the seventh witness, testified that he arrived on the scene about 2:15 p. m. on November 10, 1958; that he saw the body of Chapman, lying face up with the feet toward the door, on the bathroom floor; that blood was spattered on the bathroom floor

Dr. H. L. Beddoe.

and blood was on the faucets of the wash basin and in the wash basin; that a shotgun, wrapped in a towel, was on the body; that the stock of the shotgun had been broken off, leaving a jagged tang and trigger guard; that parts of the trigger guard were found on the sofa in the living room; that the gun stock was broken and stock fragments were found in a box in a closet of the living room and were from the gun found on the body. He gave to page 53 } the jury a diagram, Exhibit No. 2, of the scene and stated the living room was approximately 13 feet by 15 feet, which, in his opinion, was not disturbed, except that there was blood on the floor and wall near the sofa, and hair on the wall. He identified gray work pants and shirt, spattered with blood, which he stated were found in a box in a closet. He further testified that after the defendant's arrest, he went to Greencastle, Indiana, and examined a Cadillac automobile and its contents, which he identified as belonging to Chapman; and found that Near had Chapman's pocketbook on his person; that the defendant had pawned several items belonging to Chapman, and had used Chapman's identification cards to pawn said items; that the defendant admitted killing Chapman, taking Chapman's automobile, money, and watch; that he washed his hands in the basin in Chapman's bathroom, changed his clothes, which were blood-spattered, put them in a box in a closet, and put on Chapman's clothes, then took the keys to the Cadillac automobile from Chapman's apartment. He testified that the defendant stated to him that there had been no argument between him and Chapman. He further testified that the dresser drawer's in Chapman's apartment were open.

DR. H. L. BEDDOE,

12. Dr. H. L. Beddoe, Assistant State Chief Medical Examiner, who performed the autopsy on the body of Chapman, was the eighth witness. He testified that, in his opinion, Chapman died from within 30 minutes to one hour after eating his evening meal on November 7, 1958, from injuries to his head and neck, which could have been inflicted by a shotgun. He stated the brain was bruised from very severe blows and that death was caused by a multiplicity of injuries, any one of which could have been the cause of death. He further stated that Chapman was 5 feet 10 inches tall, weighed about 160 pounds, and that he observed no physical defects.

Mrs. G. B. Wimmer—Thomas Howard Spencer—Sheriff F. W. Simpson.

MRS. G. B. WIMMER,

13. Mrs. G. B. Wimmer, the ninth witness, testified the defendant was her uncle and was visiting with her and her husband; that she had not seen him for 10 years prior to this visit. She identified certain articles of clothing, a gun, radio, banjo, and other items found in the Chapman apartment and car as belonging to Chapman, and a pair of blood-spattered gray pants and a shirt as belonging to the defendant. She stated that she last saw the defendant at 5:50 p. m. on the 7th of November when she left her apartment to attend to some of the boys in her cottage. She testified that her uncle had stolen some of her husband's blank personal-
page 54 } ized checks, and that the defendant knew the pay-
days of the employees.

THOMAS HOWARD SPENCER,

14. Howard Howard Spencer, the tenth witness, testified that he saw the defendant about 8:10 p. m. on November 7, 1958, driving a 1954 Cadillac automobile belonging to Chapman; that he works and resides on the R. J. Willis farm, which is located approximately 15 or 20 miles from the Virginia Industrial School for Boys; that the defendant had worked a few days on said farm; that defendant stated he had borrowed the car from Chapman and wanted to know where two girls were; that they drove to a drive-in movie located on Route 60 near Cumberland Court House, approximately 10 miles from the Willis farm, and located the two girls; that they talked to the girls about 15 minutes, then drove to the Cumberland Esso Station where defendant had the speedometer on the Cadillac fixed; that he noticed a suitcase on the back seat of the Cadillac, and the defendant stated to him that he was going to Southwest Virginia to take a job. He testified that the defendant brought him back to the Willis farm in Powhatan County and departed at approximately 9:50 p. m. on November 7, 1958.

SHERIFF F. W. SIMPSON,

15. Sheriff F. W. Simpson, who had remained in the courtroom during the entire proceeding, being in charge of the jury and defendant, was called as the eleventh witness. Counsel for defendant objected to his testifying on the ground that the Court did not exclude him from the courtroom with other witnesses, which objection was overruled and excepted to by counsel for defendant, for the reason stated. Sheriff Simp-

Sheriff F. W. Simpson.

son testified that he arrived at the scene approximately 2:30 p. m. on November 10, 1958. He described the living room as having blood on the floor and wall and not being "tidy," and the position of the body, lying face up with the feet toward the door, on the bathroom floor. He stated that blood was spattered on the bathroom floor and blood was on the faucets of the wash basin and in the wash basin; that a shotgun, wrapped in a towel, was on the body; that the stock of the shotgun had been broken off, leaving a jagged tang and trigger guard; that parts of the trigger guard were found on the sofa in the living room; that the gun stock was broken and stock fragments were found in a box in a closet of the living room, and were from the gun found on the body. He identified gray work pants and shirt, spattered with blood, which he stated were found in a box in a closet. He further testified that, after extradition papers were issued, he accompanied Investigator J. C. Ogburn, Jr. to Greencastle, Indiana, for the purpose of transporting the defendant back to Virginia; that he examined a Cadillac automobile page 55 } and its contents which he identified as belonging to Chapman; that the defendant told him he had killed Chapman and that he would explain it in court; that he did not want to talk about it to the sheriff or anyone else until he had a lawyer. He stated that the defendant had pawned several items belonging to Chapman and had used Chapman's identification cards to pawn said items; that defendant admitted taking Chapman's automobile, money, and watch; that he washed his hands in the basin in Chapman's bathroom, took off his clothes which were blood-spattered, put them in a box in a closet, and put on Chapman's clothes, then took the keys to the Cadillac automobile from Chapman's apartment. He further testified to questions he propounded to defendant, in the presence of W. R. Blandford, Commonwealth Attorney, and Leslie L. Mason, Jr., a privately paid assistant to the Commonwealth Attorney, immediately upon defendant's return to Virginia, where he was placed in Henrico County Jail at Richmond, and before counsel for defendant had been *appounted* by the court. He stated that the defendant was informed of his rights. The Sheriff then testified to other questions propounded to defendant while he was being transported from place to place in custody of the said sheriff, and testified that defendant stated he "was not going to stay there in all that mess," and that there had been no argument between him and Chapman. The Sheriff continued his testimony regarding his questions to the defendant and the defendant's alleged

answers, or his failure to answer certain questions which were prepared in advance and propounded to defendant.

J. C. OGBURN, JR.,

16. J. C. Ogburn, Jr., Virginia State Police Investigator, the twelfth witness, testified that he took the pictures which had been exhibited to the court previously, purporting to show the condition of the scene upon his arrival at approximately 2:15 p. m. on November 10, 1958. He stated that the victim was lying on his back, with a shotgun wrapped in a towel on his body, on the floor of the bathroom located down the hall from the living room; that the victim's heels had dried blood on them. He testified that he first saw the defendant in the Putnam County Jail, Greencastle, Indiana; that when he asked the defendant when he killed Chapman, he replied, "It was dark"; that the defendant stated that Chapman was lying on the couch when he entered the room; that he admitted washing his hands and did not think he was seen; but when asked how many times he struck the victim, the defendant made no reply but admitted, in answer to a question, that "there was less than One Hundred Dollars" in the
page 56 } victim's billfold. The witness testified that, after extradition proceedings were completed, he returned to Indiana to bring the defendant back to Virginia and during the return trip, the defendant admitted pawning several items of the victim's property and identified the pawn tickets received therefor.

HOWARD A. BRACKNEY,

17. Howard A. Brackney, the Indiana State Trooper who arrested the defendant, was called as the thirteenth witness. He testified that he first saw the defendant about 10:30 or 11:00 a. m. on November 18, 1958, after having been requested by the Town Marshal to investigate a parked automobile. He stated the defendant was asleep as he approached the car, and upon informing him that he was under arrest, and asking him if he was the one the Virginia authorities were looking for, the defendant replied, "I am the guy, I did it." The witness testified that Chapman's billfold, containing his driver's license and registration card for the automobile, was found in the left rear pocket of the defendant: that the defendant admitted he was wearing Chapman's clothing. The witness testified that as he was making the arrest, the defendant reached for a rifle in the floor of the car, which was in a case, and was not loaded.

CLYDE RAYMOND NEAR,

18. Counsel for defendant called the defendant, Clyde Raymond Near, who testified in his own behalf, as follows: That he was 34 years of age, weighed approximately 145 pounds, was 5 feet 8 inches tall, and that his right hand had been maimed and part of his index finger on that hand had been removed. He stated that he had served in the United States Army as a paratrooper and was with the invasion force that landed on the Normandy beachhead; that he had been dishonorably discharged from the Army as a result of overstaying a leave of absence when he was returned to England to recuperate from battle fatigue. He testified that he had been convicted of a felony since World War II; that he was a truck driver by occupation; that he came to Virginia on September 15, 1958 to visit his niece, Mrs. G. B. Wimmer, and her husband, and that while visiting them he had become friendly with Barry Steele Chapman, who frequently came to the Wimmers' apartment to play cards and to listen to Western music. He stated he also frequently visited Chapman in Chapman's apartment, where they talked and listened to tape recorded music. He testified that he had been rabbit hunting and on trips with Chapman, in Chapman's Cadillac, to Richmond, Washington, and Baltimore, as well as on short trips in and around the vicinity of Powhatan County. He stated that Chapman was easily angered and that he had page 57 } seen him display bad temper toward others on several occasions. He further stated that while visiting the Wimmers he had worked at two different jobs, and that he had a little money. He said that Chapman had been to Richmond on the Tuesday or Wednesday before his death, and had some repairs made to his automobile and that he had also made a trip to Goochland Court House. The defendant denied as being his, the answers testified to by Sheriff F. W. Simpson to certain questions propounded to him in the presence of W. R. Blandford and Leslie L. Mason, Jr. while he was in jail, and before counsel for his defense had been appointed by the Court, as well as certain other answers alleged to have been given by him to questions propounded to him in Indiana by Sheriff F. W. Simpson. He denied that he told Sheriff Simpson that he "was not going to stay there in all that mess," and that there had been no argument between him and Chapman. He testified that after supper on the evening of November 7, 1958, he went to visit Chapman at his apartment; that no one but Chapman was in the apartment, and that one one came into the apartment while they were there; that the living room was comparatively large, being approximately 13 feet by 20 feet, with two outside windows,

two closets, and a door which led into a hall approximately 6 feet wide; that the living room was sparsely furnished, the furniture consisting of a studio couch, a dresser, and a few chairs; that the bathroom was located down the hall, about 6 feet from the living room door. He stated that he and Chap- listened to some of the recordings; that they discussed various subject; that Chapman was lying on the studio couch in the living room and he was sitting in a rocker, approximately halfway across the room; that a shotgun belonging to Chapman was standing up against the wall, 4 or 5 feet away from him. He testified their conversation led to Chapman's wife, who had left him several weeks prior to that time and had returned to her family in Pennsylvania; that he told Chapman that he had a good wife and suggested that he do what he could to get her to return to him, whereupon Chapman became exceedingly angry and stated his wife was about 6 months' pregnant and that he did not believe the child was his because he had not "slept" with her for six months, and told the defendant, "You could have been 'jobbing' her for all I know." The defendant stated that he told Chapman he was "a damn liar" and Chapman called him "a rotten bastard"; that Chapman started to arise from the couch and the defendant thought Chapman was going to attack him, and page 58 } was frightened and terrified; that he, the defendant, got the gun and hit Chapman across the head with the stock of the gun, breaking the gun stock; that he struck several other blows, including a gouge into Chapman's throat with the broken end of the gun; that when he realized Chapman was unconscious, he dragged him to the bathroom with the idea of trying to revive him and finding it was too late, he became panic stricken and could not think clearly what he should do, other than to leave; that he washed his hands in the bathroom, closed the bathroom door and returned to the living room where he took off his clothes and put them in a box in a closet, along with parts of the gun stock, then put on Chapman's clothes: that he took Chapman's pocketbook with all its contents, including $52.00; his watch, radio, keys to the Cadillac, and other items. He testified that he then left the apartment, got into Chapman's car and drove to the R. J. Willis farm where he picked up Thomas Howard Spencer, and drove to a drive-in movie where they saw and talked with two girls, then went to an Esso service station at Cumberland Court House to get the speedometer fixed, then returned Spencer to the Willis farm; that he then returned to Cumberland, saw the girls again, drank a cup of coffee, and proceeded

towards Indiana. He testified that he did not premeditatedly, deliberately, nor with malice and aforethought kill and murder Barry Steele Chapman; that he was frightened and terrified when Chapman started toward him with his fists drawn back. On cross examination, the defendant testified he killed Chapman because he called him "a rotten bastard," and further testified that Chapman never completely got off the couch before he (Near) hit him (Chapman) the first time.

19. The testimony ended, the Court instructed the jury, and argument was made by counsel for the defendant. After deliberating for one hour and forty-six minutes, the jury returned a verdict of guilty of murder in the first degree and recommended death in the electric chair.

20. Counsel for defendant made motion to set aside the verdict as contrary to law and evidence, and other errors committed during the trial and asked permission of the Court to file formal objections and exceptions, which was granted.

21. The courtroom was crowded during the trial, with all seats occupied part of the time, and some spectators stood around the walls of the room, while others peered, from the outside, through the windows. On the lawn of the page 59 } courthouse, near the front door, there is a large shade tree with a circular bench around it. To the left, and facing the courthouse, tables were set up, from which sandwiches, soft drinks, cakes and pies were sold during both days of the trial, *teh* sale beginning shortly before the lunch hour and continuing until late in the afternoon. This sale was conducted by the Jefferson Home Makers Club for the purpose of making money to repair the community house at Michaux, less than two miles from Virginia Industrial School for Boys. One or more members of this club was employed by Virginia Industrial School for Boys, where Chapman was employed as a counselor. Among spectators attending the trial were Chapman's father, mother, and brother; a former superintendent of Virginia Industrial School for Boys, present and former employees and officers of the said School, and residents of Powhatan County and vicinity.

22. On the second day of the trial during an afternoon recess, counsel for defendant observed a juror sitting on the bench under the shade of the tree talking with a spectator, and reported to the Court that a juror was mingling with a spectator under the shade of the tree on the lawn of the courthouse, and requested the Court to have the sheriff keep the jury separated from spectators, who were talking in loud voices while making remarks concerning the trial. The

Court ordered the sheriff to separate the jurors from the spectators outside the courtroom.

23. On August 4, 1959, motion made by counsel for defendant to set aside the verdict as contrary to law and evidence, and for errors committed during the trial, was heard, with testimony as follows:

CARL SHIRES,

24. Carl Shires, a newspaper reporter who attended the trial on May 26 and 27, 1959, was called as a witness for the defendant and testified that immediately after the trial, he went to ask William E. Chapman, the victim's father, his opinion of the jury's verdict and death sentence recommendation. He testified that when he came up, Chapman was telling William E. Davies, the jury foreman, "They never brought up that thing I told you about"; that Chapman went on to say he knew his son was asleep when killed. The witness stated his inference from these remarks was that there had been prior conversation between Chapman and Davies but he did not know of any prior conversation. He identified a picture which he took immediately after the trial on May 27, 1959, of William E. Chapman, William E. Davies, the jury foreman, page 60 } and certain members of the jury, as they stood discussing the trial.

HAMILTON CROCKFORD,

25. Hamilton Crockford, a newspaper reporter who attended the trial on May 26 and 27, 1959, called as a witness for the defendant, identified a picture he took on May 26, 1959, on the courthouse lawn which showed a crowd around the picnic tables and people sitting on the bench under the shade of the tree, and testified that he could only identify Judge J. Garland Jefferson in the picture.

JAMES A. TILMAN, JR.,

26. James A. Tilman, Jr., called as a witness for the defendant, testified that he had been Clerk of the Circuit Court of the County of Powhatan for many years, and that he was present most of the time during both days of the trial; that during recess he would leave the courtroom and talk with people under the shade of the tree; that at various times he saw members of the jury talking with spectators under the shade of the tree; and, that he heard several spectators state what punishment they would give the defendant, which ranged from ten years to the electric chair, but he did not see or hear any of them talking to the jurors about the case.

Clifford J. Flanagan—Henry May—J. Wallace Porter.

CLIFFORD J. FLANAGAN,

27. Clifford J. Flanagan, called as a witness for the defendant, testified that he was present most of the time during both days of the trial; that part of the time he was on the outside of the courthouse, during recess and intermission; that the courtroom was full of people most of the time and part of the time people were standing up around the walls of the room; that during recess and intermission there was a considerable crowd under the shade of the tree and around the tables where sandwiches and drinks were sold; that he heard various spectators discussing the case and stating what punishment should be given the defendant; and, that he observed jurors mingling with the crowd on the courthouse lawn while the case was being discussed by spectators but he did not see or hear any of them talking to the jurors about the case.

HENRY MAY,

28. Henry May, a witness called for the defendant, stated he was present part of the time during both days of the trial; that he stayed outside the courthouse under the shade of the tree and heard the case discussed by spectators; that he did see jurors under the shade of the tree while the case was being discussed; that he remembered sitting on the bench under the shade of the tree talking with a member of the jury, but did not discuss the case with him. He stated he did not see or hear any spectator talk to any juror about the case.

page 61 } J. WALLACE PORTER,

29. J. Wallace Porter, called as a witness for the defendant, testified that he was present part of the time both days of the trial; that during recess and intermission he was outside the courthouse under the shade of the tree, and did take part in the discussion of the case with some of the spectators but did not discuss the case with any of the jurors, although he did see some of the jurors mingling with spectators under the shade of the tree and at the picnic tables but did not hear or see any of them discuss the case with the jurors.

30. The Commonwealth Attorney then called all twelve jurors, one at a time, and asked each of them, "Did you understand the Court's instruction when it instructed you not to discuss this case with anybody other than members of the jury?" Each juror answered in the affirmative. He asked, "Did you at any time during the trial of this case discuss it with anyone other than the jury?" Each juror answered in the negative. He asked, "Did you overhear any conversation of the spectators in the courthouse yard while they were discussing this

William E. Davies.

case?" Each juror answered in the negative. His question, "Was your verdict influenced by any statement, statements, or action of what you heard or saw outside the courtroom?" was answered by each juror in the negative. To his question, "Did you decide this case strictly on the law and evidence presented therein?" each juror answered in the affirmative. Counsel for the defendant then asked each juror if he had been under the shade of the tree or at the picnic tables where sandwiches and soft drinks were sold. All except two of the jurors testified that they had been under the shade of the tree and around the picnic tables from time to time during recess and intermission on both days of the trial. Two jurors testified that they did not talk with anyone.

WILLIAM E. DAVIES,

31. William E. Davies, foreman of the jury, testified that he talked to no one, nor to Mr. Chapman, about the case until after the verdict was rendered.

32. After argument of counsel, the Court overruled motion for a new trial and sentenced the defendant to die in the electric chair on November 10, 1959. Counsel for the defendant objected and excepted to this ruling on the ground that the Court failed to segregate the witnesses; that the jury mingled with the crowd while the case was being discussed by interested spectators, despite the Court's ruling, and for other reasons set forth in his motion for a new trial.

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ROBERT RANDOLPH JONES
Counsel for Defendant.

Seen and agreed to:

W. R. BLANDFORD
Commonwealth Attorney.
LESLIE L. MASON, JR.
Attorney assisting the Prosecution.

Approved: October 12, 1959.

J. G. JEFFERSON, JR., Judge.

Received and filed this the 12th day of October, 1959.

WM. E. MAXEY, JR., Clerk.

page 63 } State of Virginia,
County of Powhatan, to-wit:

This day before me, Robert Randolph Jones, a Commissioner in Chancery for the Circuit Court of the County of Powhatan, came T. J. Duty, Sr., who, after being duly sworn, says that W. T. Johnson, Jr., who served as a juror during the trial of Clyde Raymond Near at Powhatan, Virginia, on May 26 and 27, 1959, came to the home of Mr. and Mrs. T. J. Duty, Sr., and in their presence, and in the presence of Mrs. W. T. Johnson, Jr., on the night of May 26, 1959, and discussed the trial of the Near case with them, and that Mr. Johnson also watched and listened to the news report of the Near case on television the same night.

Affiant further states that he does not know Clyde Raymond Near personally, and he is not related to him by blood or marriage.

T. J. DUTY, SR.

Taken, subscribed and sworn to before me this 10th day of October, 1959.

ROBERT RANDOLPH JONES
Commissioner in Chancery.

The above affidavit was presented to the court on Oct. 12, 1959.

J. G. JEFFERSON, JR., Judge.

page 64 } State of Virginia,
County of Powhatan, to-wit:

This day before me, Robert Randolph Jones, a Commissioner in Chancery for the Circuit Court of the County of Powhatan, Va. came Evelyn Duty, who, after being duly sworn, says that W. T. Johnson, Jr., who served as a juror during the trial of Clyde Raymond Near at Powhatan, Virginia, on May 26 and 27, 1959, came to her home and in her presence and in the presence of her husband and Mrs. W. T. Johnson, Jr., on the night of May 26, 1959, and discussed the trial of the Near case with them, and that the said W. T. Johnson, Jr. also watched and listened to the news report of the Near case on television the same night.

Affiant further states that she does not know Clyde Ray-

mond Near personally, and she is not related to him by blood or marriage.

EVELYN DUTY.

Taken, subscribed and sworn to before me this the 10th day of October, 1959.

ROBERT RANDOLPH JONES
Commissioner in Chancery.

This affidavit was presented to the court on Oct. 12, 1959.

J. G. JEFFERSON, JR., Judge.

page 65 } AFFIDAVIT.

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

This day, before me, Ruth M. Bowers, a Notary Public of and for the City of Richmond, came Ruby D. Johnson, who, after being first duly sworn, says that she is the wife of W. T. Johnson, Jr., who served as a juror during the trial of Clyde Raymond Near at Powhatan, Virginia, on May 26 and 27, 1959, and further states that her husband, W. T. Johnson, Jr., came home on the night of May 26, 1959, and discussed the trial of the Near case with her father and mother, and with her, and that he also watched the news report of the same on television.

Affiant further states that she does not know Clyde Raymond Near personally and she is not related to him by blood or marriage, to her knowledge.

RUBY D. JOHNSON.

Taken, subscribed and sworn to before me this the 8th day of October, 1959.

RUTH M. BOWERS
Seal Notary Public.

My Commission expires January 28, 1963.

This affidavit was presented to the Court on Oct. 12, 1959.

J. G. JEFFERSON, JR., Judge.

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MOTION.

Now comes the defendant, Clyde Raymond Near, by counsel, and again moves the court to set aside the verdict of the jury and judgment of the court finding him guilty of murder in the first degree and fixing his punishment at death in the electric chair, and files with the court three affidavits; one by T. J. Duty, Sr., one by Ruby D. Johnson, and one by Evelyn Duty, stating that W. T. Johnson, Jr., one of the jurors in the above case, on the night of May 26, 1959, came home and discussed the trial of the Near case with them and also watched and listened to the news report of the Near case on television the same night, in violation of the instruction and admonition of the court. The said W. T. Johnson, Jr. then returned to court on May 27, 1959, and was one of the jurors finding the defendant guilty later that day.

Respectfully submitted,

CLYDE RAYMOND NEAR
By ROBERT R. JONES
Counsel.

Filed Oct. 14, 1959.

J. G. J.

* * * * *

page 69 } Virginia:

At a Circuit Court of Law continued and held for the County of Powhatan at the Courthouse thereof, on the 28th day of October, in the year of our Lord One Thousand Nine Hundred Fifty-Nine and in the One Hundred Eighty-Fourth Year of the Commonwealth.

* * * * *

ORDER EXTENDING DATE OF EXECUTION TO FEBRUARY 9, 1960.

This day came the defendant, by counsel, and moved the Court to postpone the date set for execution of the defendant in order to give him time to apply to the Supreme Court of Appeals of Virginia for a writ of error, and was argued by counsel.

On consideration whereof, the Court doth adjudge and order that the execution date for the defendant, Clyde Raymond Near, be changed from November 10, 1959, to February 9, 1960.

The Court doth further order that a copy of this order be transmitted forthwith to the Superintendent of the Virginia State Penitentiary, Richmond, Virginia, and a copy to Clyde Raymond Near.

• • • • •

page 70 } AFFIDAVIT.

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

In *Re*: Commonwealth of Virginia *v.* Clyde Raymond Near.

This day before me, Ruth M. Bowers, a Notary Public of and for the City of Richmond, State of Virginia, came Robert Randolph Jones who, after being first duly sworn, says that Ruby D. Johnson called him on the telephone on October 7, 1959, and advised him that W. T. Johnson, Jr., her husband, had come home on the night of May 26, 1959, after having served that day as a juror in the above style case, and discussed with her, her mother and her father, J. T. Duty, Sr. and Evelyn Duty, the trial of the Near case, and that he also watched and listened to the news report regarding the Near case on television the same night. (The jury trial was held on May 26 and May 27, 1959.) Affiant says that this is the first he, the said affiant, knew that this discussion had been carried on and, that on October 8, 1959, the said Ruby D. Johnson came to the office of Robert Randolph Jones, the affiant, and made affidavit, which was filed with the Court on October 12, 1959.

Affiant further says that on October 10, 1959, J. T. Duty, Sr. and Evelyn Duty made affidavits stating that W. T. Johnson, Jr., a juror who served in the above trial, came home on the night of May 26, 1959, and discussed the case in their presence, and in the presence of Ruby D. Johnson, and that the said W. T. Johnson, Jr. listened to the news report of the Near case and watched the same on television the same night. Affiant states that this is the first time he, the said affiant, discussed this matter with the said T. J. Duty, Sr. and Evelyn Duty, and that the affidavits of the said T. J. Duty, Sr. and

Evelyn Duty were duly filed with the Court on October 12, 1959.

Affiant further states that W. T. Johnson, Jr. is the same W. J. Johnson, Jr. who swore in open Court on August 4, 1959, that he had not discussed the Near case with anyone other than members of the jury during recesses of the Court, and that he did not look at television and did not read the newspapers. Affiant further says that Ruby D. Johnson, J. T. Duty, Sr., and Evelyn Duty were not members of the jury.

ROBERT RANDOLPH JONES.

Taken, subscribed and sworn to before me this 5th day of November, 1959.

My Commission expires January 28, 1963.

RUTH M. BOWERS
Notary Public.

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* * * * *

Filed Nov. 16, 1959.

J. G. JEFFERSON, JR., Judge.

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* * * * *

MOTION FOR NEW TRIAL.

Now comes the defendant, Clyde Raymond Near, by counsel, and again moves the Court to set aside the verdict of the Jury and judgment of the Court finding him guilty of murder in the first degree and fixing his punishment at death in the electric chair and grant him a new trial, because one of the jurors, W. T. Johnson, Jr., discussed the case with T. J. Duty, Sr., Evelyn Duty and Ruby D. Johnson and listened to and saw the news reports of the case on television on the night of May 26, as shown by Affidavit heretofore filed in this cause by

Ruby D. Johnson, T. J. Duty and Evelyn Duty and Robert Randolph Jones.

Respectfully submitted,

CLYDE RAYMOND NEAR
By ROBERT R. JONES
Counsel.

Received and filed, this the 27th day of November, 1959.

WM. E. MAXEY, JR., Clerk.

* * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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