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Record No. 6138

In the Supreme Court of Appeals of Virginia at Richmond

JESSIE JAMES FREEMAN

v.

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY

FROM THE CIRCUIT COURT OF THE CITY OF HAMPTON

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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.

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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6138

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 28th day of April, 1965.

JESSIE JAMES FREEMAN, Plaintiff in Error,

against

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY, Defendant in Error.

From the Circuit Court of the City of Hampton
Frank A. Kearney, Judge

Upon the petition of Jessie James Freeman a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Hampton on the 10th day of August, 1964, in a certain proceeding then therein depending wherein the said petitioner was plaintiff and C. C. Peyton, Superintendent of the Virginia State Penitentiary, was defendant; no bond being required.

RECORD

* * * * *

PETITION FOR A WRIT OF *HABEAS CORPUS AD SUBJICIENDUM.*

To the Honorable Judge: Frank A. Kearney,

(1) Your petitioner, Jessie James Freeman, respectfully shows that he is unlawfully imprisoned, detained, confined, and restrained of his liberty by W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary in Richmond, Virginia; and that the said imprisonment, detention, confinement, and restraint are illegal, and that the illegality thereof consists in this, to-wit:

(2) Petitioner, were tried, convicted in the Hampton City Circuit Court on the following charges upon his plea of not guilty and sentenced to a total of twenty-four (24) years. A certified copy of each of the Court orders of the trials, convictions, and sentences are filed herewith as a part hereof marked Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," that the Court may know each one individual in its consideration. All indictments are filed herewith marked Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "D," certified copies by the Clerk of the said Court.

page 2 } (3) Petitioner, was charged with the serious crimes as the indictments will show. Sentences marked Exhibits "B" petitioner, does not make any allegations to it, but mentioned it to keep the records straight. However, the sentences marked Exhibits "C", D. E, F, G, H, I, and J, have a vital bearing on other sentences imposed upon him in the said court.

(4) Petitioner, was tried in the Hampton City Circuit Court on the following charges as Exhibits A, B, C, D, E, F, G, H, I, J and K, will show with one exception. Exhibits "C", D, E, F, G, H, I, J, and K. Were without warrants of arrest as a preliminary hearing as required by law.

(5) Petitioner, alleges that the trials, convictions and sentences marked Exhibits "C" D, E, F, G, H, I, J, K, are void for the followings reasons:

(1) Petitioner, was improperly represented by counsel at the said trials, convictions and sentences, here attached.

(2) Petitioner, did not have a preliminary hearing on the said charges marked Exhibits "C", D, E, F, G, H, I, J, and K. Here attached.

(3) Petitioner, was not given a Warrant of Arrest in the crimes that is marked Exhibits C, D, E, F, G, H, I, J, and K. Here attached.

(4) Petitioner, was not advised by the court or any one else that he was entitled to a preliminary hearing in the lower court in this matter.

(5) Petitioner, move by counsel the court to set aside the verdict of the jury in this cause rendered, which motion the court overruled.

(6) Petitioner, by counsel moved the court to suspend the foregoing sentences, which motion the court over-
page 3 } ruled, and the accused by counsel to have the sentences run concurrently, which motions the court over-ruled.

(7- Petitioner, shows here that the court show prejudice in all motions made by counsel to suspend the said sentences.

(8) Petitioner, shows the court accepted false testimony in the said trials marked Exhibits "C" D, E, F, G ,H, I, J, and K. by witness unknown to the accused in the said court; he did not have a presentence report.

(9) Petitioner, was without a witness in his defense in the said trials, convictions and sentences in the said court and the whole matter was all circumstance evidence.

(10) Petitioner, have never faced his occusers in the said trials because there were not any preliminary hearing in the lower court.

(11) Petitioner states the sentences marked Exhibit "C" D, E, F, G, H, I, J, and K, have a bearing on his chances of being granted a parole due to the statute of the parole system.

(12) Petitioner, states further, the jury were not even properly waived because of counsel failure to investigate the said crimes for which the accused were charge.

(13) Petitioner, had to get rid of his employed counsel, and accept a court appointed counsel as because the employed counsel refused to defend him in the said matter before the Court.

(14) Petitioner, believes that this writ of *Habeas Corpus Ad Subjiciendum* is absolute essential that justice may be ..... in the matter herein .....

(15) Petitioner, have served more than ten (10) months and days as of now; will apply to any sentence the Court may find valid.

page 4 } (6) If the Court upholds and sustains petitioner's claims that the aggregate sentences imposed upon

the petitioner in the Hampton City Court are ..... for each of due process of law, then petitioner is entitled to consideration for the due process lack in the said matter herein involved marked Exhibits C, D, E, F, G, H, I, J, and K.

Wherefore, petitioner, prays that a writ of *Habeas Corpus Ad Subjiciendum* may be issued from this, directed to W. K. Cunningham, Jr., Superintendent of the Virginia State's Penitentiary commanding him to have the body of your petitioner, before his honorable court, at a time and place therein to be specified, together with the cause of his detention; and that your petitioner may be heard for the reasons herein stated.

JESSE JAMES FREEMAN
Petitioner, Jessie James
Freeman.

Virginia:

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

I, R. M. Oliver, a notary public for the county and aforesaid state, hereby certify that Jessie Jones Freeman, the above named petitioner, personally appeared before me in my County and aforesaid state and made oath that the allegations contained in the foregoing petition are, to the best of his belief and knowledge, true.

Given under my hand this 24 day of Feb., 1963.
My Commission expires on the 23 day of May, 1965.

R. M. OLIVER
Notary Public.

page 5 } Virginia:

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

I, R. M. Oliver, a notary public for the county and aforesaid State, hereby certify that Jessie James Freeman, petitioner, personally appeared before me and being duly sworn according to law disposes and says; that he is destituted and with out funds, that he is illiterate and unable to competently represent himself; that due to his illiteracy he is unable to properly prepare his petition; that he is unable to pay for the professional services of an attorney and requests the Court to

appoint an attorney to prosecute his petition for a Writ *Habeas Corpus Ad Subjiciendum* for him as ..... *paupers.*

JESSE JAMES FREEMAN
Petitioner, Jessie James
Freeman.

Subscribed and sworn to me this 24 day of Feb., 1963.
My commission expires on this 23 day of May, 1965.

R. M. OLIVER
Notary Public.

Petitioner, Jessie James Freeman, desires the following witnesses summoned to court in his behalf. Namely W. A. Smith, Attorney at Law, Hampton, Virginia; John Maddy Jr., Attorney at Law. Hampton, Virginia.

I, R. M. Oliver, a notary public for the County and aforesaid, hereby certify that Jessie James Freeman, personally appeared before me in my county and aforesaid, and made oath that that the above named witnesses are absolute essential to his case of *habeas corpus ad subjiciendum* proceedings ad. And desires the Court to summoned them
page 6 } as a necessity to prove his claims that the crimes; and arguments mentioned in the petition can be proven.

Given under my hand this 24 day of Feb., 1963.
My commission expires on the 20 day of May, 1965.

R. M. OLIVER
Notary Public.

Virginia:

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

I, Jesse Freeman, certify that a certified copy of the petitioner as mailed to the Attorney General office in Richmond, Virginia on Feb. 25, 1963.
Respectfully submitted petitioner, Jessie James Freeman.

JESSE JAMES FREEMAN
Petitioner above.

* * * * *

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* * * * *

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 20th day of January, 1964.

Jessie James Freeman, Plaintiff in Error,

against

W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, (C. C. Peyton, now Superintendent of the Virginia State Penitentiary, substituted defendant in error), Defendant in Error.

From the Circuit Court of the City of Hampton

Upon mature consideration of the petition of Jessie James Freeman, a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Hampton on the 16th day of July, 1963, in a certain proceeding then therein depending wherein the said Jessie James Freeman was petitioner and W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, was respondent.

Upon further consideration whereof, the aforesaid judgment is hereby reversed and set aside, and the cause remanded to the Circuit Court of the City of Hampton with direction to said court to require the Attorney General of Virginia to file an answer to said petition, and if the court doth then find that the petitioner is presently detained pursuant to the judgment of which he complains, the said court shall then grant the said petitioner, Jessie James Freeman, a plenary hearing.

* * * * *

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* * * * *

ORDER.

This day came by mail an order entered on the 20th day of January, 1964, by the Supreme Court of Appeals of Vir-

ginia, awarding to the Plaintiff in error a writ of error to a judgment rendered by the Circuit Court of the City of Hampton, Virginia on the 16th day of July, 1963, in the above styled matter, and further, with directions to this Court to require the Attorney General of Virginia to file an answer to the petition above styled.

Upon consideration whereof, it is ORDERED that the Attorney General of Virginia file an answer to said petition within thirty (30) days from the date of this order.

Enter 1/29/64.

FRANK G. KEARNEY, Judge.

* * * * *

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* * * * *

ORDER.

This proceeding came on to be heard on July 21, 1964, upon the petition of Jessie James Freeman for a writ of *habeas corpus ad subjiciendum* and the answer of the respondent, the petitioner appearing in person and by Thomas H. Wilson, II, an attorney who was heretofore appointed by this Court to represent him, and the respondent appearing by Reno S. Harp, III, Assistant Attorney General.

Whereupon, the Court heard the evidence and argument of counsel, and, upon mature consideration thereof, doth find that petitioner is presently detained pursuant to a judgment of this Court of March 27, 1962, wherein he was sentenced to serve four years in the Virginia State Penitentiary, having been convicted of breaking and entering; that petitioner was represented at said trial by William A. Smith, an attorney who had been appointed by this Court to represent him; that said attorney ably, competently, and effectively represented petitioner at the aforesaid trial; that said attorney carefully prepared for the trial; and that petitioner has failed to show that he was denied any of his constitutional rights in connection with the aforesaid trial.

The Court doth further find that the same attorney represented the petitioner in this Court on April 12, 1962, on a

charge of breaking and entering; and that petitioner was sentenced to serve a term of four years in the Virginia State Penitentiary on said charge; and that the same attorney represented the petitioner in this Court on June 12, 1962, when petitioner was tried on eight charges of breaking and entering and sentenced to serve a term of two years on each charge; that with regard to the other nine charges, the sentences for which petitioner will serve in the future, petitioner was not given a preliminary hearing; that petitioner was indicted on each of said charges and was never arrested on a warrant in connection with the same; that the preliminary hearing in Virginia is procedural and not jurisdictional; and that petitioner was not entitled to a preliminary hearing on said charges; that said attorney ably, competently, and effectively represented the petitioner in connection with the aforesaid trials and carefully prepared for each of the same; and that petitioner was not denied any of his constitutional rights in connection with the same.

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For the foregoing reasons the Court is of opinion that the writ should not issue as prayed.

It is, therefore, adjudged and ordered that the petition for a writ of *habeas corpus* be, and is hereby, denied and dismissed, the writ discharged, and the petitioner remanded to the custody of the Superintendent of the Virginia State Penitentiary, to all of which action of the Court, the petitioner, by counsel, objects and excepts.

Let the Clerk of this Court certify a copy of this order to the petitioner, the respondent, and the Attorney General of Virginia.

Entered this 10th day of August, 1964.

FRANK G. KEARNEY, Judge.

• • • • •

Court: The matter on the docket is Jessie James Freeman v. W. K. Cunningham, now C. C. Peyton, Superintendent of the Virginia State Penitentiary. Are you gentlemen ready?

Mr. Harp: Yes, sir.

Mr. Wilson: I would like for the record to show, if your Honor please, that summons was issued, two summons were issued for John W. Maddy, Attorney at Law, directed to both the Sheriff of York County and City Sergeant of the City of Hampton, and due diligence was made by the City Sergeant of the City of Hampton, attempting to get Mr. Maddy,

but service was not effectuated, he is not present in Court and the Petitioner Attorney wishes to proceed without Mr. Maddy. I feel he is is of no value to the case one way or the other.

Court: All right.

(At this time, Attorneys for both sides presented their opening statements to the Court).

JESSIE JAMES FREEMAN,
called as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Wilson:

page 4 } Q. State your name to the Court.
Jessie James Freeman.

Q. How old are you?

A. 23 years old.

Q. Now Jessie, you are the petitioner in this matter, is that right?

A. Yes.

Q. Now tell the Court when and where you were first arrested as a result of all of these charges which we are here on today.

A. On November 2, I was in a pool room, approximately 9:30.

Q. That was November 2 of what year?

A. 1961. I couldn't be sure of the date.

Q. But it was in the City of Hampton?

A. Yes, sir, it was.

Q. And it was 1961, you are sure of that?

A. Yes.

Q. Was there a warrant of arrest at that time?

A. No, sir, I was taken down to the police station, and after I was down about an hour, they served the warrant on me.

Q. Served a warrant on you?

A. That is right.

Jessie James Freeman.

Q. Did that warrant charge you with breaking
page 5 } and entering?
A. That charged me with one count of breaking and entering.
Q. Was that North King Street Motor Service?
A. Yes, sir, it was.
Q. Did you get bail at that time, or did you go to jail?
A. No, sir, I wasn't allowed bail. I wanted bail.
Q. Was any bond set on you?
A. I could never find out about one.
Q. You could never find out?
A. That is right.
Q. How long after your arrest did you appear in Court for a preliminary hearing?
A. I was arrested on the 2nd and preliminary hearing on the 10th of November.
Q. A week later, or little better?
A. Yes, sir.
Q. Did you appear in the Criminal Court for the City of Hampton?
A. I guess so, it was lower court.
Q. Did you have a hearing at that time?
A. Yes, sir, I had a hearing on one charge.
Q. You actually went through the trial, you
page 6 } didn't waive it?
A. No, sir, I didn't waive nothing.
Q. Were you represented by an attorney at that time?
A. I was represented by Mr. Maddy, Attorney at Law.
Q. Who engaged or hired Mr. Maddy to represent you? Did you personally?
A. I gave Mr. Maddy some money and my mother also gave him some money.
Q. He was an attorney then that you chose, or your parents chose, to represent you?
A. Yes, sir.
Q. As a result of that hearing in the lower court, what happened?
A. The case was heard and Mr. Macy Carmel, the Judge, sent it to higher court.
Q. Were you returned to jail?
A. Yes, sir, I was.
Q. When you went back to jail, did anything happen? Did you stay there at the jail?
A. I was returned to the jail on the 10th of November, and 16th of November, I fled from jail.

Jessie James Freeman.

Q. Where did you go at that time?

A. I was in the State of New York until the last

page 7 } part of January.

Q. That would be the last part of January, 1962?

A. 1962.

Q. Were you brought back to the State of Virginia, or did you return voluntarily?

A. I returned voluntary.

Q. Did you surrender yourself to the authorities, or the police here?

A. Yes, sir, I did.

Q. Now at that time, did you know of any other charges pending against you other than the one charge that you had had the hearing for?

A. No, sir, I didn't. I never had a warrant for but one charge. The Court had never been but one time, for the one charge.

Q. When you came back and surrendered yourself, were you placed in jail?

A. Yes, sir, I was.

Q. When did you have a trial of any description?

A. I was scheduled for trial February 13, 1963. I went over for that trial and it was in the process of being tried. He said I stand indicted for sixteen counts of breaking and entering and one attempt. The Court was in process and judge was hearing the warrant.

page 8 } Court: You are talking a little bit fast. Are you talking of preliminary hearings?

Q. This was February 13?

A. That is right.

Q. That was in this Courtroom?

A. Right.

Court: You got to the point where there was a hearing.

A. On February 13, I was brought for trial, and the Clerk read the charge and said I stood indicted for sixteen counts of breaking and entering and one attempt.

Q. Had you known about these other charges prior to the hearing, prior to hearing that from the Clerk?

A. No, sir, I didn't. I was supposed to be heard on the charge resulting from the hearing.

Jessie James Freeman.

Q. Were you represented by an attorney at that time?
A. Yes, sir, I was.
Q. Who was that?
A. Mr. Maddy.
Q. And what happened at that time?
A. Well the trial was in process, the Judge was hearing the warrants. I pleaded not guilty, and he was hearing different people and I was talking to Mr. Maddy. I said
page 9 } I never had no preliminary hearing, no warrants, I don't know where they come from, and he said—

Mr. Harp: I object to what Mr. Maddy said. That is hearsay.

Q. Don't tell us what Mr. Maddy said. You can say what you said.
A. I told Mr. Maddy I had never heard anything about these charges, I never had the preliminary hearing, no warrant of arrest, don't know nothing about them. So he said to say something to the Judge. Any way they adjourned the court and the Judge goes back in his chamber and Commonwealth and Mr. Maddy go back, and stayed back there approximately seven or eight minutes, and Mr. Maddy come out of the chamber and comes behind me and said, "I just got the deal of your life." I said, "What do you mean?" I said, "What do you mean you got the deal of my life?"—

Mr. Harp: I object to that, that is hearsay.
Court: Let him answer that, go ahead.

A. "What do you mean?" He said, "The Judge promised he would give you ten years if you plead guilty and be tried by him today." I said—I don't know exactly what I said. At this point, Mr. Maddy said, "Come with me, James."—

page 10 } Court: Mr. Maddy said what?

A. Mr. Maddy said the Judge would give me ten years if I plead guilty. Mr. Maddy took me back in chambers. We got back in chambers, Mr. Maddy did the talking first. He said, "Your Honor, my client here seems to think I am not telling him the truth. I came out and said you were willing to give him ten years if he plead guilty to all this, and be tried

today," and Mr. Smith shook his head then and said, "Yes, I did. Do you want a hearing, or do you want to be tried today and get this over with?" I told the Judge, I said, "You have already convicted me on these charges I don't know nothing about. I never had a hearing and never had a warrant of arrest. I don't know where I was, what happened or nothing." And the Judge said, "You will have a hearing, you will also be tried." At this time, they took me back over to jail. I sat in jail approximately an hour and Mr. Maddy come back in jail. He said, "Jessie, you are kind of a hot headed fellow, aren't you? I guess your mother couldn't even tell you to plead guilty." I said, "No, sir, because I don't know nothing about it." He said, "I know Judge Smith, he is a very lenient judge. When the fellows hear that Mr. Smith is going to trial, they jump for joy to try to get a date on that docket. He is a very lenient judge. He never gave but one electric chair." I certainly said, "I want a preliminary hearing on the charges and grounds of
page 11 } arrest." He said, "I know that, let's go." I don't know nothing about the charges myself. He said, "If you have a change of mind about being tried and plead guilty and be tried by the Judge, just call and tell the jailer to call me." So he walked on out.

Court: Did you and Mr. Maddy have an argument about whether you were going to plead guilty before Judge Smith or not guilty before Judge Smith?

A. Yes, sir, we did.

Court: Is that what the argument was about?

A. Yes, he was telling me I was hot headed, I should have come in and set up what the Judge said, that the Judge was a lenient judge.—There was no argument, I told Mr. Maddy I wanted a preliminary hearing.

Court: When you came up before Judge Smith, he was here, but he didn't try your jury trial. I presided at the jury trial if I am not mistaken.—Did Judge Smith try you, or jury try you?

A. He tried me on June 12.

Jessie James Freeman.

Court: What did he do?

A. Convicted me on eight charges and gave me two years each.

page 11a } Court: How many times did I try you?

A. Twice.

Court: Jury gave you four years?

A. Yes, sir, they did.

By Mr. Wilson:

Q. Did you have any more conversation with Mr. Maddy then after that?

A. No, sir, Mr. Maddy walked out and I never did see him no more. He told me if I wanted to be tried and plead guilty to call and he would come over.

Q. Did you attempt to reach him?

A. Yes, sir, I did.

Q. Never did?

A. No, sir, I didn't.

Q. Did you attempt to get other counsel at that time, other lawyers?

A. Yes, sir, I did.

Q. Who?

A. I think first of all I called for Mr. Carmel.

Q. Percy Carmel?

A. Yes, sir.

Q. Did you reach him?

page 12 } A. Yes, sir, I did.

Q. Did he take your case?

A. He came to the jail, and I talked to Mr. Carmel, and he went back and he checked the records and came back to me and said, "Jessie. I cannot do you any good." He said, "Mr. Maddy has your case and there is nothing I can do because I won't take the case unless you get in some agreement." I said to myself, "I don't know where this man is, what is what, so I got to have another lawyer." So I called for Mr. Bivins—I think that is his name.

Q. Did you get in touch with Mr. Bivins?

A. Yes, sir. He came to the jail and he went back and came back and told me the same thing, he couldn't do anything

because Lawyer Maddy was my attorney and me and Mr. Maddy had to come to some terms before he could do anything, and I couldn't get in touch with Mr. Maddy, so the Court appointed the attorney.

Q. You didn't get Mr. Carmel and didn't get Mr. Bivins?

A. No, sir, I didn't.

Q. Were you brought to this Court and attorney appointed for you?

A. Yes, sir.

Q. Was that Mr. William A. Smith?

A. Yes, sir.

page 13 } Q. Did Mr. Smith represent you in two cases before the jury?

A. Yes, sir, he did.

Q. Was he also your attorney when you were tried on the eight charges without a jury before Judge Smith?

A. Yes, sir, he was.

Q. Did you at any time tell Mr. Smith you wanted a preliminary hearing or warrants or anything of that nature?

A. I had no reason to tell Mr. Smith I wanted them because the Commonwealth, after I was sent to jail, Judge Smith told me I would have a preliminary hearing. So after I went back to the jail, stayed there approximately five or six days, no preliminary hearing and no warrants of arrest, I had the jailer call over here asking for copies of arrest. Mr. Maddy told me before he left he didn't know I had those charges, and I wanted to make sure the other attorneys I would get wouldn't know I had these charges. So after about five days, I had the jailer call over here and about eight or nine days, the Commonwealth Attorney come to the jail and said, "I understand you have still been asking about the charges. You are scheduled to be tried on the 13th." I said, "Yes, sir, I want to know if I got a warrant, I can look on the dates and I can get witnesses. I don't know what is on them."

page 14 } Q. Had you ever seen any of the indictments on these charges?

A. No, sir.

Q. Have you ever been given a hearing or heard them read?

A. No, sir, I haven't.

Q. You haven't—

A. I heard the indictment when I came on the 13th. I heard the Clerk state I had seventeen counts.

Jessie James Freeman.

Q. Were these counts read at that time to you?

A. No, they just said sixteen counts of breaking and entering and one attempt. That is all I know. The Commonwealth Attorney told me, he said, "These charges that you remember we never arrested you on but one charge, remember?" And I said, "Yes, sir." He said "Those others, they had true bills returned on those, but they have been nol-prossed," and one of the jailors was there, and I said, "Tell them what it means, Mr. Richardson," and the Commonwealth said, "That means you won't be tried for those charges, so I had no reason to ask Mr. Smith for a preliminary hearing.

Q. After you were talking to the Commonwealth's Attorney over in the jail, that was before you were tried by the jury?

A. Yes, sir.

page 15 } Q. And then what was the second case you were tried on by a jury if the others had been *nolle prossed?*

A. It was the same charge that had been tried before. I was tried on this charge twice.

Q. You were tried on the same charge twice?

A. Yes, sir, I was, it happened on two different occasions.

Q. You mean the same place?

A. Yes, sir, the same place.

Q. But the dates were supposedly different, is that what you mean?

A. I guess so, I don't know.

Q. Mr. Smith was your attorney at that time?

A. Yes, sir, he was.

Q. After you had these two jury trials, what did you think these other charges were then that you were tried on?

A. I certainly didn't know anything about it. I was transferred from the courtroom to the penitentiary after that trial. I don't know about no other charges.

Q. When you came back here to be tried by Judge Smith, what did you think that was?

A. I was told I was coming back for a preliminary hearing on the 12th of June, and I was tried on the 12th and convicted and sent back the same day.

page 16 } Q. You thought it was the preliminary hearing you were coming back to get on the other charges?

A. Yes, sir.

Q. At any time since the time of your arrest until the time you got these copies forwarded to you by the Clerk of this

Court, had you ever had any notice or copy of anything citing those charges that were against you?

A. No, sir, I have never had anything stating that except this record.

Q. And you received one warrant and one preliminary hearing, is that correct?

A. That is right.

Q. Mr. Smith conferred with you about your cases or talked to you, did he?

A. Mr. Smith referred to me about the first case I was tried for and second case, but when I came the next time, I was told I was going for preliminary hearing.

Q. Who told you that?

A. When I came back on June 12 to be tried, Mr. Smith told me I was going for preliminary hearing.

Q. Are you sure of this?

A. Yes, sir, I am sure.

Q. You mean there was no misunderstanding whether there was a trial or preliminary hearing, or word, hearing, used?

A. No, sir.

page 17 } Q. When did you learn it was not a preliminary hearing?

A. At the end of the trial when the Judge asked me did I have nothing to say for myself, I think before he found me guilty and sentenced me to sixteen years, and then he asked did I have anything to say before he passed sentence upon me, and then I found out it all had been trial.

Mr. Wilson: Answer Mr. Harp.

CROSS EXAMINATION.

By Mr. Harp:

Q. When you had your preliminary hearing, do you know who the Judge of the lower court was before whom you were heard?

A. If I am not mistaken, it was Mr. Macy Carmel.

Q. And you were tried in this Court on the sixteen years—in June. Do you know by whom?

A. Mr. Smith, the judge that promised me ten years.

Q. Yet you didn't know you were being tried at that time because Mr. Smith told you he was going—

Jessie James Freeman.

A. If I had known I was coming in front of Judge Smith, I would have had a jury trial.

Q. You sat over there and kind of talked to-
page 18 } gether?

A. Yes, sir.

Q. How did you plead?

A. Not guilty.

Q. Then the Clerk read the indictments out to you?

A. The Clerk said I was charged with fifteen counts.

Q. I am talking in June.

A. This is June.

Q. You were tried on fifteen counts in June?

A. That was stated in the indictment.

Q. But he didn't read the indictment to you?

A. No, sir, he didn't read no indictment to me.

Q. Now when did you first see Mr. Smith?

A. Approximately two weeks before the first trial.

Q. Did you discuss the case with him?

A. Yes, sir, I discussed the case with him.

Q. And you had a jury trial?

A. Yes, sir.

Q. And you discussed the next case with him and you had a jury trial?

A. Yes, sir.

page 19 } Q. Did you discuss with him the other charges that were tried on June 12, 1962?

A. No, sir, I didn't, I don't know anything about them.

Q. You didn't discuss the eight charges on which you got sixteen years, with Mr. Smith?

A. No, sir.

Q. And when you were brought back from the penitentiary, Mr. Smith told you you were coming over here for a preliminary hearing?

A. That is right.

Q. Did you say you talked with Mr. Smith on the fact that you had not had a preliminary hearing on any of these charges?

A. No, sir, I have never had no reason to discuss that with Mr. Smith.

Q. Never did?

A. No, sir.

Q. Never asked him about it?

A. I asked Judge Smith, not Lawyer Smith, I asked Judge Smith for preliminary hearing.

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Q. But you never asked your lawyer, Lawyer Smith, about it, did you?

A. No, sir, I didn't.

Q. But he told you when you came from the penitentiary that you were coming for preliminary hearing?

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A. Yes, sir.

Q. And you didn't have any idea you were being tried on eight charges until you—

A. I was tried on fifteen counts that day and didn't know I was being tried until the man pronounced sentence on me.

Mr. Harp: That is all.

Mr. Wilson: Any questions by the Court?

Court: No, sir.

Mr. Wilson: You may step down.

WILLIAM ALFRED SMITH,

called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Wilson:

Q. Mr. Smith, you were appointed by this Court to represent Jessie James Freeman?

A. That is correct, sir.

Q. Do you know anything about the case, or did you, prior to your appointment.

A. Not of my own knowledge, sir. I was aware that the first trial had been stopped in process and I was advised that the question was whether a jury would be waived or not. This was my understanding why the trial was stopped.

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Q. He was represented by other counsel at that time?

A. That is correct, sir.

Q. You were subsequently appointed. Did you confer with Mr. Freeman prior to the trial, first jury trial?

A. I did, sir.

Q. Where was that?

A. In the Hampton City Jail.

Q. And do you know approximately how many times you conferred with him?

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A. Several times. I couldn't say exactly, but there were several conferences.

Q. Mr. Smith, was this trial to be on the charge for which he had received a preliminary hearing?

A. That is correct, sir, this first trial.

Q. Did you represent him before the jury?

A. I did, sir.

Q. Were there any witnesses requested by him to you?

A. There was one witness whom he stated worked at Babe's Pool Room. His alibi was that he was in Babe's pool room on the day in question. He was unable to give me the last name of the man, no one in Babe's Pool Room page 22 } could identify such a man. He gave me a brief description. I never could locate him, but I made every effort to try to find this man at Babe's Pool Room. I also talked with the defendant's mother at her home trying to get someone to come in as a character witness. She did not appear. He had no religious affiliations or any other persons to summons. I did make effort. There was no one whom I could summons.

Q. How long after the first trial approximately was it before the second jury trial?

A. I don't recall exactly, sir, a period of several weeks. I would say some weeks. It could have been more really.

Q. This was on indictment?

A. That is correct, sir. When I came into the case, all of the indictments had been returned. I might say there were sixteen indictments for breaking and entering and one for attempted breaking and entering, and during the process of my representation of this defendant, at least four of the charges were *non-prossed* and at the trial he was dismissed on at least two other counts for lack of evidence brought out by counsel. This is why his convictions were substantially less than the number of crimes of which he was indicted.

Q. At the time that he was tried on eight charges before Judge Smith, you represented him at that time?

page 23 } A. Yes, I did.

Q. Had you had any conversation with him concerning what the nature of the hearing or trial would be?

A. Most certainly.

Q. What was that?

A. I made an abstract of the indictments in which I listed the name of the places alleged broken into and location and the date given on the indictments, as to the time and place

of the alleged break-ins, and whenever I talked with him, I used this list so he would know exactly what we were talking about. I have a copy of it now made on the Thermofax machine. There is no question in my mind that he knew the exact nature, and time, and place of the break-ins because I abstracted them.—

Court: Did he know them before the day of the trial?

A. Yes, sir. I got these as soon as I was appointed because the indictments were there for me to see.

Q. Did he know that this—that the trial was not a preliminary hearing on these various places and times and dates?

A. I have no doubt in my mind that he knew.

Q. Do you recall any time he was specifically told one way or the other you recall?

page 24 } A. The question of preliminary hearing never came up. The first time I heard this was when I read the petition in the Clerk's Office. There was never any question raised about preliminary hearing.

Q. Was evidence heard on the eight counts—or more counts—for which Judge Smith eventually sentenced him?

A. Yes, sir. Evidence was heard. Frank Jackson, who was an accomplice with the defendant on most of the alleged break-ins, was brought here from the State Farm to testify. Commonwealth also had fingerprints from various places. I think the Commonwealth made a strong case. I think each trial was eminently fair.

Q. Did the petitioner at any time during your representation of him make any statement to you concerning the conversation that he had had earlier with Judge Smith or Mr. Maddy or with the Commonwealth's Attorney, when his first trial was declared a mistrial?

A. I don't recall that he did.

Q. And you state there was never any request by the petitioner to you for a preliminary hearing or anything of that nature?

A. Never. The only thing that I do recall, we discussed about the jury. This is why we went through two jury trials because he insisted it is his right for trial by jury, and he was granted that privilege.

page 25 } Mr. Wilson: Your witness.

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CROSS EXAMINATION.

By Mr. Harp:

Q. Isn't it a fact, Mr. Smith, that after the first two jury trials in which he got four years on each that the defendant had a change of heart and decided he didn't want any more jury trials?

A. That is correct.

Q. Isn't it a fact further that his defense in each of these cases was alibi?

A. That is correct.

Q. And isn't it also a fact that you thoroughly investigated each of those charges in an effort to locate witnesses whose names he gave you?

A. All I had to go on.

Q. Did he give you the names of witnesses, other prospective alibi witnesses in connection with the other charges?

A. No, sir, just general denial.

Q. So actually you had very little to go on?

A. That is right.

Q. I believe you stated on cross examination—no, on direct examination, that you were able to have several charges *nolprossed* and two dismissed?

A. That is right.

page 26 } Q. When were you admitted to practice, sir?

A. September 2, 1958.

Q. It was testified to by the petitioner on direct examination that you told him that on the 12th of June when he was brought back, that he was coming to the preliminary hearing. Is that true or false?

A. That is absolutely false. I never made any such statement.

Q. Did you lead him to believe he was coming for a preliminary hearing?

A. I did not.

Q. Did you tell him he was to come to be tried?

A. Yes, he knew he was coming to be tried.

Q. Do you recall how many times you saw him while he was in the jail?

A. Several times, I don't know exactly, but I went over several times.

Q. You don't have any record to indicate how many times?

A. No.

Q. But you did make an abstract of each of the charges

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and where they took place and dates in an effort to establish some type of defense?

A. Yes, sir.

page 27 } Q. Do you have a photostatic copy of that with you, sir?

A. Yes.

Q. May I have that, please.

(At this time, witness complied with request of counsel).

Mr. Harp: Have you seen this?

(At this time, Mr. Wilson examined the copy).

Mr. Wilson: No objection.

Mr. Harp: I ask that this be marked Respondent's Exhibit One in Error, please.

(At this time, photostatic copy of abstract was accepted in evidence as Respondent's Exhibit One).

A. Those are my markings on it, sir, I didn't know you were going to use it as evidence.

Q. I understand that.—Did the petitioner testify in his own behalf in these trials?

A. Yes, he did.

Q. Each one?

A. Yes.

Q. Including the one in June when he was tried here on the sixteen counts?

A. Yes.

page 28 } Q. Do you recall whether the Clerk read the different indictments, sixteen counts of breaking and entering?

A. Yes, he did.

Q. Did he read each of those?

A. Yes, he did.

Q. Each indictment?

A. Each and every one.

RE-DIRECT EXAMINATION.

By Mr. Wilson:

Q. Were there any charges *non-prossed* other than after

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evidence had been heard on them? Were there any charges *nol-prossed* prior, do you recall?

A. All of the ones that were *nol-prossed,* as I recall, were prior to the last trial, the one in which there were eight convictions, and two dismissed as not guilty. But when we came to that trial, I had told him four would be *nol-prossed.* I have them somewhere in my notes. The one attempt at breaking and entering was *nol-prossed,* and three others. This was done before the last trial.

Q. Prior?

A. Prior to the last trial. As I recall, subsequent to the first two trials, the two Bickford charges were dismissed, the Dougherty Bros., and Gannaway Construction Company, were *nol-prossed.*

Mr. Wilson: That is all.

page 29 } RE-CROSS EXAMINATION.

By Mr. Harp:

Q. One further question. Did the petitioner complain? Have you heard anything from the petitioner since he was in the penitentiary?

A. Yes, sir, I believe he wrote me twice.

Q. Has he complained in any way about the way you represented him?

A. No, he asked me to represent him in this writ.

Q. He asked you to represent him in this proceeding. did he?

A. Yes.

Mr. Harp: That is all.

Court: That is all, sir.

Mr. Wilson: That is the petitioner's evidence, your Honor.

Mr. Harp: Respondent has no evidence, your Honor.

(At this time, Attorneys for both sides presented their final arguments to the Court).

Court: In this case, it looks like to me that the courts did everything to protect this man's interest. In the first place, he got counsel of his own choosing, he got Mr.
page 30 } Maddy to represent him. He and Mr. Maddy had a little argument before Judge Smith on the date

the case came to be tried. Mr. Maddy wanted to plead without a jury, and this man wanted a jury, and when it was brought to Judge Smith's attention that this man wanted a jury, he stopped the proceeding and continued the case, and gave this man the opportunity.

I was in that case myself. I remember the case well. This man came in, he denied that he had done anything, and the jury went out and gave him four years in the penitentiary for that offense. Then the next term, they brought up another case. Now the evidence is, this man was arrested; I think he was given this one preliminary hearing; but he was advised—his counsel was advised anyway—long before the case was tried, that there were other cases against him. He came up on the second case, tried before a jury on that charge, and they gave him four years more on that charge.

Then it was that Mr. Smith said the man was brought back down here to get rid of these other charges; that he had discussed with him the question of the other charges; and he had agreed that the defendant wanted to plead
page 31 } guilty in those case—whether he wanted to plead guilty or not, I am not sure, but he wanted to get the case over with and didn't want to have the case hanging over him. He had gotten eight years on those and he still had a number of others, so I don't know any more you can do for these men that come up other than what we have done in this case.

Now I think Judge Smith has a reputation of being a lenient judge, has a reputation of being a fair judge, and in this case I really think he was fair and lenient, and I would deny the Writ all the way through.

Mr. Wilson: Note the exception of the petitioner to the ruling of the Court.

Mr. Freeman: I would like to appeal this back to the Supreme Court of Appeals—with Counsel.

Court: With counsel?

Mr. Freeman: Yes, sir, I understand that is my right.

Court: All right.

(At this time, Court was adjourned).

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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