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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6166

In the Supreme Court of Appeals of Virginia at Richmond

C. C. PEYTON, SUPERINTENDENT, ETC.,

v.

JAMES E. FIELDS

FROM THE CIRCUIT COURT OF BEDFORD COUNTY

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. 6166

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 11th day of June, 1965.

C. C. PEYTON, SUPERINTENDENT, ETC.,
Plaintiff in Error,

against

JAMES E. FIELDS, Defendant in Error.

From the Circuit Court of Bedford County
Alex M. Harman, Jr., Judge Designate

Upon the petition of C. C. Peyton, Superintendent of the Virginia State Penitentiary, a writ of error is awarded him to a judgment rendered by the Circuit Court of Bedford County on the 14th day of January, 1965, in a certain proceeding then therein depending wherein James E. Fields was plaintiff and the petitioner was defendant; no bond being required.

RECORD

* * * * *

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14 Am. Jr., Criminal Law, Section 167:

page 2 } Virginia:

In the Circuit Court of the County of Bedford:

James E. Fields, Petitioner,

v.

C. C. Peyton, Supt., Virginia State Penitentiary, Respondent.

PETITION FOR WRIT OF *HABEAS CORPUS AD SUBJICIENDUM.*

To the Honorable Charles E. Burks, Presiding Judge:

Your petitioner, James E. Fields, respectfully represents that he is aggrieved by *unlawfuly* judgment orders of conviction and commitment, entered by the Circuit Court of the County of Bedford, Virginia, on the 7th day of July, 1959; and, pursuant to Sections 8-596-8-599, Code of Virginia, 1950, presents this petition.

Petitioner prays for leave of court to present this petition in proper person; and moves that he be allowed to proceed in *forma pauperis*, pursuant to Section 14-180 of said Code; so that it may be adjudged that his cause has merit for remedy, in that he is confined and restrained unlawfully and illegally by the respondent hereof, by virtue of his office as Superintendent of the Virginia State Penitentiary.

The void color of authority in law by which petitioner is restrained is the said court order of conviction and commitment, based upon a void process of law, totally foreign to the just concepts of law, and is, and has been, injurious to your petitioner and deprives him of the implied and organic rights guaranteed by Section 8 and 11 of the Virginia Constitution, and, the 5th and 14th Amendments to the Constitution of the United States.

Petitioner states that he has not filed in any other Court a petition for an extraordinary legal remedy.

Petitioner is a citizen of the United States and avers that his conviction, commitment, etc., is null and void, in that it violates the Constitutions, aforesaid, and, because it deprived

petitioner of the necessary and required "Due Process of Law" which is his right to demand.

page 3 } Commonwealth of Virginia,
City of Richmond, to-wit:

In the Circuit Court of the County of Bedford:

In *Re:* James E. Fields, *v.* C. C. Peyton, Supt.

AFFIDAVIT.

This is to certify that James E. Fields, the undersigned party, personally appeared before me in the City and State aforesaid and being duly sworn according to law, deposes and says:

Petitioner moves this Honorable Court to allow him to present this action and requests permission to proceed pursuant to Section 14-180, Code of Virginia, as he is without counsel to represent him, and, because of his poverty is unable to employ such; also, that he is without funds to file and prosecute this proceedings; wherefors, petitioner prays leave to proceed in *forma pauperis*, and, that counsel be appointed to represent him in this action before this Court in good faith for the remedy he is entitled to by law, and that the pleadings are true to the best of his knowledge and belief.

That as of this date he has the sum of 15 cents on his spending account at the State Penitentiary, Richmond, Virginia.

JAMES E. FIELDS
Petitioner.

Subscribed and sworn before me this 1st day of July 1964.

WILLIAM C. PERDUE
Seal Notary Public.

My commission expires on the 27 day of Feb., 1967.

page 4 } (STATEMENT OF FACTS).

On the 7th day of July, 1959 James E. Fields, then defendant, now petitioner was led into the Circuit Court of Bedford County, Virginia; and charged with two separate counts; the first indictment was for; statutory burglary and the latter was, escape.

Previous to this day, your petitioner had been an assigned

inmate on State Convict Road Force, Camp #24, who on the 25th day of June did go at large from said camp.

On this 7th day of July, 1959 in the Circuit Court of Bedford County, it being determined before any plea was tendered by the defendant that he was without counsel to represent him, so the court did appoint one Lacey E. Putney to represent him before the bar of said court.

Before the trial got under way, the Commonwealth Attorney and Mr. Lacey E. Putney the court appointed attorney had a conference with the then defendant and told him how much better it would be if he co-operated with them fully and went ahead and signed a waiver to waive a preliminary arraignment and also a jury trial.

Consequently, your petitioner was ignorant at the time as to what his constitutional rights were and thus he was counting on his court appointed attorney to safeguard and protect his rights. However, most obviously the attorney was *soley* interested in the $30.00 dollar fee which was his to collect after his incompetent services were rendered.

POINT ONE: Petitioner maintains that his conviction in the Circuit Court of Bedford County, Virginia was without Due Process of Law, because he did not have the effective representation by counsel which all persons accused of felonious crimes are entitled to enjoy under the scope, meaning and intent of the Due Process Clauses of the 14th Amendment to the National Constitution. This first point *arguement* pertains to the sentence imposed by the Circuit Court of Bedford County on the 7th day of July, 1959.

As shown by the records submitted to this Court, the fact that petitioner was not given the assistance of counsel until the day of his trial is easily verified and established.

Petitioner feels, as this Court must feel; that when being faced with two (2) separate charges the former be-
page 5 } ing statutory burglary which carried a *maxium* of ten years and the latter being escape which carries a *maxium* of five years.

It should be noted that even though the two charges were not capital ones, they still were charges that carried a *maxium* of fifteeen years in all, and what assistance is a court appointed attorney who doesn't speak more than ten minutes with his client before the trial is to begin. And who feels so confident of himself that he doesn't ask for a continuance so he can help prepare an adequate defense. It is quite improbable that even the most able attorney at law that can be found within this country could possibly prepare his client for trial in such a short time as in this case. It is *inmaterial* whether

or not the petitioner plead guilty, or even not guilty. The *stigmant* remains that he was not given effective representation by counsel because his counsel made no effort at all to prepare a defense of any kind, and further the Court made no effort to see that a continuance was given so that petitioner could explain his case to his court appointed counsel. Due Process of law requires that an accused be given ample time to prepare for his defense. Maybe this clause also means, that irregardless of how the accused pleads, that if an attorney is appointed to represent him on the same day of his trial, or during his trial such as in this case, that the Court may not accept a plea from the accused until it has seen that the accused was advised by his counsel has had ample opportunity to investigate the facts involved in the offenses with which the accused was charged. Can there be any possible way for a defense counsel to obtain sufficient knowledge of an accused's situation in less then a half hour's time.

It is maintained on behalf of the petitioner that the Trial Court was proceeding beyond the scope of due process of law when it accepted the plea of the petitioner, and tried the petitioner on the same day that an attorney was appointed to his defense.

The effective representation by counsel is a cardinal principle of due process of law concerning criminal proceedings in Virginia. Within this reasoning, the Courts of Virginia themselves, have stated that one of the rights of the accused, is that, an accused, whether guilty or innocent, must page 6 } have ample opportunity to become fully acquainted with the nature of the charge against him, and reasonable time in which to prepare his defense with intelligent aid and advice of counsel. See *Howard* v. *Com.*, 174 Va. 417.

In *People* v. *Cox*, Ill. 1957, 146 N. E. 2d 19, the defendant's mother employed a man who represented himself to be a qualified attorney. Five years after defendants conviction, it was learned for the first time that that person was not qualified to practice law. It was not until that man was prosecuted for unauthorized practice of law that the court and prosecution were made aware that he was not qualified. In a *habeas corpus* petition subsequently filed, there was no allegation that the defense was improperly conducted. The Court quoting from *Botts* v. *Brady*, 516 U. S. 455, 86 L. Ed. 1595, 1601, 62 S. Ct. 1252, held that under such circumstances, the concepts of fundamental fairness and rights as guaranteed by the Fourteenth amendment had been violated.

The effective assistance of counsel is a constitutional requirement of due process which no member of the union may

disregard. *Reece* v. *Georgia,* 350 U. S. 85, 90, 100 L. E. 77, 83.

As was said in *Malinski* v. *New York,* 324 U. S. 401, at page 416, 417:

"Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment *upon the whole course of the proceedings* in order to ascertain whether they offend those cannons of decency and fairness which express the notions of justice of English speaking peoples even towards those charged with the most heinous offenses. *These standards of justice are not authoratively formulated anywhere as though they were prescriptions in pharamacopoeia.*" (Italics supplied)

In each case "due process of law" requires an evaluation based on a disinterested inquiry in spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not adhoc and episodic but duly mindful of reconciling the needs both of continuity and of change in any progressive society. See *Rochin* v. *California,* 72 S. Ct. 205, citing *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 28 S. Ct. 529.

page 7 } The whole Rochin case, *supra,* is a superb demonstration of what due process of law really is. It acts forth the standing principle, that any conviction had in such a manner so as to "offend justice" is a conviction without due process of law, and thus, it is a conviction in violation of the 14th Amendment to the National Constitution.

Perhaps one of the most outstanding cases dealing with ineffective representation by counsel, is that of *People* v. *DeSimone,* 138 N. E. 2d 556, an Illinois case, decided November 26, 1956. In that Court the learned justices said:

"Such a contention finds its foundation in the decisions of this and the Federal courts which recognize that the conduct of counsel in a critical stage as a criminal trial may be such as to deny a defendant the fair trial that is contemplated by the due process provisions of both the State and Federal Constitution. See:

People v. *Morris,* 3 Ill. 2d 437, 121 N. E. 2d 810;
People v. *Stephens,* 6 Ill. 2d 257, 128 N. E. 2d 731;
People v. *Clark,* 7 Ill. 2d 163, 130 N. E. 2d 195;
People v. *Schulman,* 299 Ill. 125, 132 N. E. 530, 24 A. L. R. 1022;

U. S. ex rel. *Hall* v. *Ragen,* D. C., 60 F. Supp. 820; *Diggs* v. *Welch,* 80 U. S. App. D. C. 5x 148 F. 2d 667.

"The rationals of the cited cases is *that a defendant's right to assistance by counsel is not satisfied by the mere formality of an appointment of an attorney by the court,* but that such right embraces effective representation throughout all stages of the trial, and where the representation is of such low caliber as to amount to no representation or to reduce the trial to a farce, the guarantee of due process are violated."

The facts of this case can readily be seen by a complete reading of the attached exhibits. Assignment of counsel in the petitioner's case was nothing more than a mere compliance with state law. It was not done with the intentions of giving petitioner effective representation, but only to say that he did have counsel at the time of his trial.

And, in *Tompsett* v. *State of Ohio,* 146 F. 2d 95, the Court said:

"* * * and if his counsel gave him practically no representation, *habeas corpus* will lie to reach the violation of his constitutional guarantee."

In 23 C. J. S., Section 982, at page 325, it is said that "* * * it is the duty of the court to appoint counsel who has sufficient ability and experience to properly represent and defend accused, who can in good faith undertake such defense, and who are not trammeled by the conflicting interacts; *and it is the duty of the court to see that the appointed counsel* page 8 } *acts.*"

In *Wilcoxon* v. *Aldredge* (Ga.), 15 S. E. 2d 873, at page 876, the court said:

"* * * if appointed attorneys are so ignorant, negligent or unfaithful, that the accused was virtually unrepresented, or did not in any real or substantial sense have the air of counsel, he would be deprived of a fundamental constitutional right, and if convicted might successfully complain that he had been denied due process of law."

Also, in *Wilson* v. *State,* 51 N. E. 2d 848, at page 853, the court said:

"It seems unnecessary to search for other cases where either the word 'adequate' or 'competent' is used. Nor need we now draw a line, if there is one, between competency and

incompetentcy. *The spirit of these constitutional provisions requires that an accused must have something more than mere perfunctory representation.* This is true whether the attorney is appointed by the court or engaged by the accused."

It is respectfully submitted then, that in the petitioner's case, he did not have the effective representation by counsel guaranteed by due process of law.

"It is well settled that the right of an accused to have effective assistance of counsel is guaranteed by the due process clause of the Federal Constitution and the Virginia Bill of Rights." *Morris* v. *Smyth,* 202 Va. 832, 833, 120 S. E. 2d 465, 466, and cases there cited; also *Gideon* v. *Wainwright.* 372 U. S. 335, 339, 83 S. Ct. 792, 9 L. ed. 2d 799, 93 A. L. R. 2d 733.

The word "effective" in this context has a restricted meaning.

As pointed out in the well-reasoned opinion by Judge Prettyman, in *Mitchell* v. *United States,* 104 U. S. App. D. C. 57. 259 F. 2d 787 (cert. den. 358 U. S. 850, 79 S. Ct. 81, 3 L. ed. 2d 86), it came into the law in *Powell* v. *Alabama,* "and was used by the Supreme Court to describe a procedural requirement. * * *" Effective' assistance of counsel obviously means something other than successful assistance." (259 F. 2d 789)

As a general rule a person on trial for a crime cannot waive any of his constitutional rights (78 Exp. Glen 111, Fed. 257; in *re:* 189 U. S. 506 Mem.) and it has been held that on trials involving deprivation of life or liberty, defendant cannot waive any essential matter (*Spurgeon* v. *Com.,* 86 Va. 652, 10 S. E. 979); but must be considered as to standing on all his legal rights and waiving nothing. ACCORD: 80 *State* v. *Oakes,* 95 N. E. 50 A 26. See *Mooney* v. *Holchan,* 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 791 (1945), for a discussion and definition of "due process of law".

The Supreme Court of the United States, in *Hopt* v. *Utah,* 110 U. S. 574, 4 Sup. Ct. Rep. 202, said:

"That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be
page 9 } dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody to object to unauthorized methods."

(1) The fact that counsel is appointed to defend a case, and

is present throughout the time of trial, does not mean, *per se,* that he rendered any assistance; (2) If he is present, but does nothing to aid defendant, then, he might as well not be so appointed because: presence without assistance could hardly be considered to discharge the right to advice and effective assistance of counsel contemplated by the aforesaid constitutions; and such appointed counsel was there to safeguard the rights of defendant; such being fundamental to a "fair and impartial" trial.

In *Fugate* v. *Com.,* 254 Ky. 663, (1934), this is said:

"* * * And it is the duty of such appointed counsel * * * to confer with the accused * * * and * * * this is of special importance where the accused is represented by appointed counsel." ACCORD: *Fuson* v. *Com.,* 215 Ky. 804; 215 Ky. 800, 287, S. W. 17)

The leading case on this subject is generally considered to be *Powell* v. *Alabama,* 287 U. S. 45-58, 53 S. Ct. 55-60, 77 L. Ed. 158, 84 A. L. R. 527, where this is recited:

" '* * * with us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel. 1 Cooley's Constitutional Limitations (8th) 700. The same author, as appears from a chapter which he added to his edition of Story on the Constitution, regarded the right of the accused to the presence, *advice* and assistance of counsel as *necessarily included in due process of law.'* 2 Story on the Const. (4th), Chapter 1949, p. 668."

The Court went on to say, in the famous Powell case, while speaking of the essentials of a fair hearing, that:

"* * * HE REQUIRES THE GUIDING HAND OF COUNSEL AT EVERY STEP IN THE PROCEEDINGS AGAINST HIM * * *"

"* * * All that is necessary * * * is effective assistance of counsel * * *."

It is fundamental that any one accused of a crime shall be entitled to representation by counsel. As is said in 14 Am. *Jr.,* Criminal Law, Section 167:

page 10 } "The right to a hearing as a basic element of due process, includes the right to the aid of counsel, and failure to give the accused a reasonable time and op-

portunity to secure counsel prior to trial constitutes a denial of due process. The right includes a fair hearing."

In the Virginia Bill of Rights, being Article 1, of the Constitution of Virginia, guarantees the right of representation by counsel at any criminal hearing, as does the Sixth Amendment to the Federal Constitution. Although Section 8 of the Virginia Constitution does not, in specific terms, provides the constitutional guarantee of assistance of counsel at a criminal hearing, the Supreme Court of Appeals of Virginia, in the case of *Watkins* v. *Commonwealth,* 174 Va. 518, 522, specifically interpreted Section 8 to include representation of counsel:

"While there is no specific provision in the Constitution of Virginia guaranteeing to persons accused of crime the right to have the assistance of counsel, in *Barne* v. *Commonwealth,* 92 Va. 794, 803; 23 S. E. 784, this court recognized the right to be a fundamental one. It is, we think, one of the rights guaranteed to an accused under our Bill of Rights. Virginia Constitution Section 8."

This ruling was sustained by the Court in *Cottrell* v. *Commonwealth,* 187, Va. 351, but the conviction was upheld because the record did not show that the accused had been denied his constitutional rights. The Legislature of Virginia saw fit to enact a statute requiring the appointment of counsel in any case wherein a person is charged with a felony. Section 19.1-241 of the Code of Virginia provides as follows:

"In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, shall by order entered of record, appoint an attorney at law to represent him."

The position of Virginia regarding the necessity for defense counsel in a felony was strongly re-enforced by the Supreme Court of the United States in the very recent case of *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), in which the Supreme Court of the United States held that, the guarantee given citizens of the United States that in all criminal prosecutions under Federal law, the accused shall enjoy the right to assistance of counsel for his defense, was made obligatory on all states bv the Fourteenth Amendment to the
page 11 } Federal Constitution. In that decision the Supreme Court quoted with approval from *Grosjean* v. *American Press Company,* 297 U. S. 233, at 243:

"We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

Probably the leading case in the United States on this point is the already quoted case of *Powell* v. *Alabama,* 287 U. S. 45, which case was approved by the Supreme Court of Appeals of Virginia in the case of *Watkins* v. *Commonwealth, supra.* We quote again from *Powell* v. *Alabama,* at page 68:

"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the rights. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state of federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

And again we quote from *Powell* v. *Alabama,* at page 71:

"But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to

make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecution, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment as such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere to the very idea
page 12 } of free government which no member of the Union may disregard.' *Holden* v. *Hardy, Supra.*"

It is admitted, and the evidence clearly shows, that in the instant case the court did appoint an attorney to represent and defend the petitioner on the trial of the felony indictment. Do the facts show that the appointment and appearance of the attorney was sufficient to comply with the due process requirements of the federal and state constitutions? It is respectfully submitted that in the instant case the defendant was denied those fundamental rights guaranteed him under the federal and state constitutions.

It is further shown that under the evidence and record in this case, that the defendant was accorded a mere perfunctory representation to comply with the letter and not the spirit of the law.

In the case of *Mitchell* v. *United States,* 259 F. 2d 787, at 793, The Circuit Court of Appeals defined the term "effective assistance and that it does not relate to the quality of service rendered by a trial lawyer "except that, if his conduct is so incompetent as to deprive his client of a trial in any real sense-render the trial a mockery and a farse is one descriptive expression the accuse must have another trial, or rather, more accurately, is still entitled to a trial."

In the case of *Johns* v. *Smyth,* 176 F. Supp. 949, the United States District Court for the Eastern District of Virginia granted a writ of *habeas corpus* to the petitioner Johns against Smyth, Superintendent of Virginia State Penitentiary, on the grounds that Johns had not been accorded due and proper representation. We quote from page 952:

"(2-3) One of the cardinal principles confronting every attorney in the representation of a client is the requirement of complete loyalty and service in good faith to the best of his ability. In a criminal case the client is entitled to a fair trial, but not a perfect one. These are fundamental requirements of due process under the Fourteenth Amendment. *United States ex rel. Weber* v. *Ragen,* 7 Cir., 176 F. 2d 579, 586."

"The importance of the attorney's undivided allegiance and faithful service to one accused of crime, irrespective of the attorney's personal opinion as to the guilt of his client, lies in Cannon 5, of the American Bar Association Cannon of Ethics, in effect during 1942, where it is said:

"It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocence persons, victims only of suspicious circumstances, might
page 13 } be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that no person may be deprived of life or liberty, but by due process of law."

"(4) The difficulty lies, of course, in ascertaining whether the attorney has been guilty of an error of judgment, such as an election with respect to trial tactics, or has otherwise been actuated by his conscience or belief that his client should be convicted in any event. All too frequently courts are called upon to review actions or defense counsel which are, at the most errors of judgment, not properly reviewable on *habeas corpus* unless the trial is a *farse* and a mockery of justice which required the court to intervene. *Diggs* v. *Welch,* 80 U. S. App. D. C. 5, 148 F. 2d 667. But when defense counsel, in a truly adverse proceeding, admits that his conscience would not permit him to adopt certain customary trial procedures, this extends beyond the realms of judgment and strongly suggests an invasion of constitutional rights."

Reference is made to the decision in *Johns* v. *Smyth, supra,* on page 952, wherein the Court said:

"The difficulty lies, of course, in ascertaining whether the attorney has been guilty of an error of judgment, such as an election with respect to trial tactics, or has otherwise been *actuated by his conscience* or belief that his client should be convicted in any event." (Italics supplied).

It is clear, therefore, that the action of Mr. Lacey E. Putney were determined solely by his conscience and belief, and

because his conscience and belief interferred with his proper, full and loyal representation of the petitioner, it is respectfully submitted that the petitioner was not granted a fair and impartial trial, and that his rights were prejudiced thereby.

We refer again to the case of *Powell* v. *Alabama,* at page 71:

"* * * it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

In the recent case of *Spano* v. *New York,* 360 U. S. 315, the Supreme Court of the United States, on page 325 and 326, after quoting with approval from *Powell* v. *Alabama,* said as follows:

"Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself * * *

"As Professor Chafee once said, 'A person accused of crime needs a lawyer right after his arrest probably more than any other time. 'Chafee, Documents on Fundamental Human Rights, Pamphlet 2 (1951-1952), p. 541 * * * What we said in *Avery* v. *State of Alabama,* 308 U. S. 444, 446, 60 S. Ct. 321, 322, 84 L. Ed. 377 has relevance here:

"* * * the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of Counsel into a
page 14 } sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."

In concluding this aspect of the issue, it is respectfully submitted that the circumstances surrounding the denial of effective assistance of counsel indicates strongly that, defendant, with the whole power of the state arrayed against him was forced, so to speak, to place his life and liberty in jeopardy without the aid of such "effective" assistance of counsel as is contemplated by the fundamental laws of Virginia and of the United States.

Petitioner-defendant contends, as before, that the duty of safeguarding the constitutional rights of citizens, whatever

may be their estate, rests squarely upon the shoulders of the Courts and the various functionaries responsible for the vindication of the laws of this land; and, as such, it is further contended that this duty was not discharged, in the case at bar, to the satisfaction of the necessary, vial and essential, "due process of law".

The final question is: Can defendant at this late date challenge the validity of his conviction?

The great weight of authority is to the effect that he can challenge his conviction, by *habeas corpus,* without regard to time; so long as it appears that his substantial rights were violated.

The sound premise upon which these holdings rested seems to be that men incarcerated in flagrant violation of their constitutional rights do have a remedy. ACCORD: *Palmer* v. *Ashe,* 342 U. S. 134, 335, U. S. 437-439.

It was further held in these cases that petitioner is entitled to relief if he can prove his charges, as is the case here, and that he cannot be denied a hearing merely because the State contradicts the allegations set forth in the petition. ACCORD: *Brown* v. *Allen,* 344 U. S. 443.

Wherefore, your petitioner, James E. Fields, prays that the writ of *habeas corpus* be issued out of and from under the hand and seal of this Court, directed to the herein named respondent, commanding him to have the body of your petitioner before the bar of this Honorable Court, at a time specified therein, together with the true cause, if any there be; and to answer and show cause why the sentence and orders thereof should not be adjudged null and void under the organic laws and statutes of this Commonwealth and of the
page 15 } United States, and, your petitioner forthwith discharged from the unlawful custody by which the respondent aforesaid now detains your petitioner.

And your petitioner shall ever pray.

JAMES E. FIELDS
Petitioner.

CERTIFICATE OF SERVICE.

I, the herein petitioner, certify that I have this 1st day of July, 1964, placed a copy of this petition in the U. S. Mail, addressed to the Attorney General of Virginia, counsel for the above named respondent.

JAMES E. FIELDS
Petitioner.

page 16 } APPENDIX.

page 17 } Virginia:

Circuit Court of the County of *Beford*, July 7, 1959.

Commonwealth of Virginia,

against

James Fields.

Upon an Indictment for Statutory Burglary.

This day came the Attorney for the Commonwealth and James Fields who stands indicted of a felony, to-wit: Statutory Burglary who was led to the bar in the custody of the Sheriff of this County. 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 Lacey E. Putney an able and competent attorney at law, practicing before the bar of this court, to defend him.

Whereupon the accused, after private consultation with his counsel, stated that he was ready for trial and desired to be tried on this day. Thereupon the accused waived arraignment and after being advised by his counsel pleaded guilty to the indictment, which plea was tendered by the accused in person, and the court being of the opinion that the accused fully understood the nature and affect of his plea, proceeded to hear and determine the case without the intervention of a jury as provided by law, and having heard the evidence doth find the accused guilty of Statutory Burglary. as charged in the indictment, and ascertains his punishment to be confinement in the penitentiary of this Commonwealth for a term of three years.

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 James Fields be and he is hereby sentenced to confinement in the penitentiary of this Commonwealth for a term of three years as aforesaid, and that the Commonwealth of Virginia do recover against the said James Fields its costs by it about its prosecution in this behalf expended.

And it is further ordered that as soon as possible after the entry of this order the prisoner be removed and safely con-

veyed according to law from the jail of this court to the said penitentiary, therein to be kept, confined and treat-
page 18 } ed in the manner provided by law.

The court orders that the prisoner be allowed 10 days credit for the time spent in jail awaiting trial. 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.

A Copy—Teste:

/S/ H. P. SCOTT, Clerk.

Common Law Order Book 34 Page 118.

Virginia:

Circuit Court of the County of Bedford, July 7, 1959.

Commonwealth of Virginia,

against

James Fields.

Upon an Indictment for escape.

This day came the Attorney for the Commonwealth and James E. Fields who stands indicted of a felony, to-wit: escape who was led to the bar in the custody of the Sheriff of this And it appearing to the court that the accused is not represented by counsel, before accepting any plea of the accused, doth appoint Lacey E. Putney an able and competent attorney at law, practicing before the bar of this court, to defend him.

Whereupon the accused, after private consultation with his counsel, stated that he was ready for trial and desired to be tried on this day. Thereupon the accused waived arraignment and after being advised by his counsel pleaded guilty to the indictment, which plea was tendered by the accused in person, and the court being of the opinion that the accused fully understood the nature and effect of his plea, proceeded to hear and determine the case without the intervention of a jury as provided by law, and having heard the evidence doth find the accused guilty of escape as charged in the indictment, and ascertains his punishment to be confinement in the penitentiary of this Commonwealth for a term of three years.

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 James E. Fields be and he is hereby sentenced to confinement in the penitentiary of this Commonwealth for a term of three years as aforesaid, and that the Commonwealth of Virginia do recover against the said James E. Fields its costs by it about its prosecution in this behalf expended.

page 19

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 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 jail.

It is further ordered that this sentence is not to run concurrently with the sentence imposed by this Court on this day for statutory burglary.

It is further ordered that Lacey E. Putney be allowed the sum of $30.00 for his services in this case and in the case for statutory burglary.

A Copy—Teste:

/S/ H. P. SCOTT, Clerk.

Common Law Order Book 34 Page 118.

page 20 Commonwealth of Virginia,
County of Bedford, to-wit:

In the Circuit Court for said County.

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the said County of Bedford, and now attending said Court at its July Term in the year 1959, on their oaths do present that JAMES FIELDS on the 25th day of June, 1959, in the County of Bedford, unlawfully and feloniously did break and enter the dwelling house of one Dock Thompson, with intent to commit larceny of a quantity of food and wearing apparel therein found, of the goods and chattels of the said Dock Thompson, and of the aggregate value of Forty-Five ($45.00) Dollars, then and there being found, in violation of the provisions of Sections 18-160 and

18-161 of the Code of Virginia, and then and there unlawfully did steal, take and carry away said personal property all against the peace and dignity of the Commonwealth of Virginia.

(Witness Sworn by the Court and Sent to the Grand Jury to Give Evidence.)

R. T. Mitchell

A Copy—Teste:

/S/ H. P. SCOTT, Clerk.

page 21 } Commonwealth of Virginia,
County of Bedford, to-wit:

In the Circuit Court for said County.

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the said County of Bedford, and now attending said Court at its July Term in the year 1959, on their oaths do present that JAMES E. FIELDS was, to-wit: on the 22nd day of January, 1959, in the Circuit Court for Giles County, Virginia, tried and convicted in said Circuit Court of said County of statutory burglary in said County; and that thereupon the said James E. Fields, for the felony aforesaid, was afterwards, to-wit: on the 22nd day of January, 1959, by the judgment of said County, sentenced to imprisonment in the Penitentiary of the State of Virginia for the term of two years and six months, as will more fully and at large appear by the record of said Court, and which said judgment still remains in full force and is in no wise reversed or made void: and that the said James E. Fields, being so convicted of the felony aforesaid and sentenced as aforesaid, was, to-wit: on the day and year aforesaid, at the County aforesaid, by virtue of the conviction and judgment aforesaid, taken and conveyed in custody, and was thereafter delivered to the custody of the State Penitentiary for the Commonwealth of Virginia and was, then and there, confined in said Penitentiary on the conviction aforesaid; and the Grand Jurors aforesaid, upon their oaths aforesaid, further do present that the said James E. Fields, being so confined in the State Penitentiary aforesaid, on the conviction aforesaid, afterwards, to-wit: on the 25th day of June, 1959, while in the custody of the Superintendent of the Virginia State Penitentiary and while in the custody of the Superintendent of State Penitentiary Camp

No. 24, in the County of Bedford, Virginia, did feloniously, by force and violence, break the State Penitentiary and the said State Penitentiary Camp No. 24, by then and there forcefully breaking and fleeing from said Camp; and did then and there, in said County of Bedford, feloniously and by force and violence, effect his escape from the said Penitentiary and the said State Penitentiary Camp No. 24 and from the custody of the keeper thereof, and from his confinement
page 22 } aforesaid, and go at large, against the peace and dignity of the Commonwealth.

(Witness Sworn by the Court and Sent to the Grand Jury to Give Evidence.)

Sgt. J. V. Thomas

A Copy—Teste:

/S/ H. P. SCOTT, Clerk.

* * * * *

page 25 }

* * * * *

Filed in the Clerk's Office the 19 day of Aug., 1964.

Teste:

H. P. SCOTT, Clerk.

ANSWER.

Now comes the respondent, by counsel, and in conformity with the order of this Honorable Court of July 17, 1964, files his answer and says:

1. During the July Term, 1959, of the Circuit Court of Bedford County, the Grand Jurors returned a true bill on the indictment of petitioner for statutory burglary.

2. On July 7, 1959, petitioner was brought before this Honorable Court and it being ascertained that he was not represented by counsel, the Court appointed Lacey E. Putney, an able and competent attorney, to represent petitioner.

3. On July 7, 1959, petitioner, after consultation with his attorney, stated he desired to be tried that day and waived

arraignment, pled guilty to the charge in the indictment, was tried and convicted of Statutory Burglary and was sentenced to serve a term of three (3) years in the Virginia State Penitentiary.

4. Respondent says that petitioner is being detained pursuant to a final judgment of the Circuit Court of Bedford County which is valid in all respects.

page 26 } 5. Respondent denies any *an* all allegations which are not expressly admitted.

Wherefore, respondent prays that the petition for a writ of *habeas corpus* be denied and dismissed.

C. C. PEYTON, SUPERINTENDENT
OF THE VIRGINIA STATE
PENITENTIARY
By W. LUKE WITT
Counsel.

* * * * *

page 40 }

* * * * *

This day January 14, 1965, this matter came on for hearing and the Petitioner appeared in person and by counsel W. D. Martin, III, heretofore appointed by this Court to represent him in this matter and the Respondent appeared by counsel, W. Luke Witt, Assistant Attorney General for the State of Virginia.

Upon hearing evidence offered on behalf of both parties and upon hearing arguments thereon by counsel and after mature consideration thereof this Court doth find that the Petitioner is currently being detained by Respondent pursuant to a judgment of the Circuit Court of Bedford County of July 7, 1959 having being convicted of the crime of Statutory Burglary; and the Court doth further find that during the course of his trial on the above mentioned date, the total amount of time which elapsed from appointment of counsel to the actual sentencing of the Petitioner amounted to fifteen or thirty minutes and the Court doth further find that positive evidence offered in the case and unrefuted indicates that the sole person talked to by Court appointed counsel for the Petitioner was the Commonwealth's Attorney who prosecuted the case and the Court doth further find that other positive evidence indicates that the only conference held between Pe-

titioner and his court appointed counsel occurred on the day of trial just prior to the trial in the Court room while Court was in session.

Wherefore upon mature consideration of the facts as stated above the Court doth adjudge, order and decree that the petition for Writ of *Habeas Corpus* be granted and that the Commonwealth's Attorney for the County of Bedford be given thirty days within which to elect whether he will retry Petitioner in this matter or release him from the burden of the judgment as imposed on July 7, 1959 to all of which action of the Court the Respondent doth object and except and the Court doth further order that the prisoner be remanded to the custody of the Superintendent of Virginia State Penitentiary for such period as the Commonwealth's Attorney for Bedford County may need to determine whether he shall retry or release the Petitioner and the Court doth further

page 41 } order that this order shall be suspended if the Respondent files a notice of appeal within the prescribed thirty days.

And the Court doth further order that the Clerk of this Court shall certify copies of this order to the Petitioner, the Respondent the Commonwealth's Attorney for Bedford County and the Attorney General for the State of Virginia. And it is further ordered that the Court appointed counsel W. D. Martin. III, who represented the Petitioner in this matter be allowed the sum of $150.00 for services rendered to be paid out of the criminal funds under item 81G to be found on page 1010 of the Acts of Assembly 1964.

Enter Jan. 14, 1965.

A. N. HARMAN, JR., Judge Designate.

* * * * *

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ASSIGNMENTS OF ERROR.

To Honorable H. Page Scott, Clerk of the Circuit Court of Bedford County:

In support of his petition for a writ of error in the captioned matter, C. C. Peyton will rely on the following assignments of error:

1. The Court erred in granting the petition for a writ of *habeas corpus*.

2. The Court erred in sustaining petitioner's allegation that he was ineffectively assisted by counsel.

C. C. PEYTON, SUPERINTENDENT
OF THE VIRGINIA STATE
PENITENTIARY
By W. LUKE WITT
Counsel.

Filed in the Clerk's Office the 3rd day of February, 1965.

Teste:

H. P. SCOTT, Clerk.

* * * * *

Presiding The Honorable Alex M. Harman, Judge Designate.

William D. Martin, III, Counsel for Petitioner.

W. Luke Witt, Assistant Attorney General, Counsel for Respondent.

* * * * *

By the Court: Gentlemen, in order to proceed in an orderly fashion, this petition has a great many allegations in it and I wonder if it would be possible to indicate whether or not any of those are any more serious than others and more or less cut the field down a little bit if possible.

Mr. Martin: I think the only allegation that is substantial, Judge, and we rely on is the allegation that Fields was not afforded effective counsel.

By the Court: All right, sir, and that is your primary grounds.

Mr. Martin: Yes, sir, that is the only one.

By the Court: All right sir, you may proceed, Mr. Martin.

Mr. Martin: I have no statement, other than that we do rely on the fact that Mr. Fields was not afforded what is considered by the authorities to be effective assistance of appointed counsel and our evidence will deal with that.

By the Court: All right, now do you have any statement Mr. Witt?

Mr. Witt: No, I do not Your Honor, the respondent's posi-

tion is that the evidence that will be offered by the petitioner will not be sufficient to bear the burden as required by law and we feel that whatever evidence that we will put on will be enough to refute it.

By the Court: All right, sir, you may proceed with your evidence, Mr. Martin.

Mr. Martin: I just want to know if you wouldn't prefer to have Mr. Putney here.

page 2 } Mr. Witt: The Sheriff is calling him now Mr. Martin.

The Court: Let's suspend for the moment I think if Mr. Putney is going to be the object of our affections in this matter he ought to have a right to hear what is said. We will suspend until Mr. Putney gets here.

JAMES E. FIELDS,

a witness and the petitioner, sworn in behalf of the Petitioner, testified as follows:

Mr. Martin:

Q. You are James E. Fields?

A. Yes, sir.

Q. And you are the petitioner?

A. Yes, sir.

Q. Mr. Fields, when were you born?

A. June 28, 1938.

Q. And in what year did the arrest and trial of which you complain take place?

A. 59, June 25th.

Q. June 25, 1959? Were you a prisoner in the State Convict Road Force?

A. Yes, sir.

Q. Here in Bedford County?

A. Yes, sir.

Q. Did you escape on June 25th?

A. Yes, sir.

Q. When were you apprehended?

A. June 25th.

Q. How long after your escape?

A. Approximately an hour.

page 3 } Q. What was done with you after you were caught?

A. I was put in jail of the Camp over night and brought to Bedford the 26th, the next day.

James E. Fields.

Q. And how long were you in the Bedford County jail before your trial on the charge of statutory burglary?

A. I was tried on the 7th of the next month, the 7th of July.

Q. The 7th of July, during the period you were incarcerated in the Bedford County jail, did any one discuss the offense with which you were charged with you?

A. No, sir.

Q. Did the Sheriff's Office, did any one from his office discuss this matter with you?

A. No, sir.

Q. No one attempted to take any statement?

A. No, sir.

Q. Now what happened on July 7th, Mr. Fields?

A. Well, I was brought before the Court.

Q. Had anyone asked you before that if you desired a preliminary hearing?

A. No, sir.

Q. What happened when you were brought before the Court?

A. Judge Burks asked if I had an attorney and I told him no and he appointed me an attorney.

Q. Was that Mr. Lacey Putney?

A. Yes, sir, I don't remember him but that was his name.

Q. All right sir, how long, how much time passed between the time Mr. Putney was appointed and the time he talked to you?

A. From the time he was appointed, I would say it was 10 or maybe 15 minutes till I was tried.

page 4 } Q. Now, were you in the Courtroom that entire time?

A. Sir?

Q. Were you in the Courtroom that entire time?

A. Yes, sir.

Q. During that time, who did you see Mr. Putney talk to?

A. Well, actually I didn't see him talk to anybody.

Q. You didn't see him talk to anyone?

A. No, sir.

Q. Where did you talk to Mr. Putney?

A. I believe it was back on that bench.

Q. Through that door?

A. No, sir, I was on a bench over there.

Q. On the bench?

A. Yes, sir.

Q. You did not go out of the Courtroom?

James E. Fields.

A. No, sir, I didn't.

Q. Now, when you talked to Mr. Putney did he question you concerning the facts in the offense that you were charged with?

A. No, sir.

Q. What did he say to you, sir?

A. That he thought it was uh, he said he could get uh, the Commonwealth would recommend a three year sentence on a plea of guilty.

Q. What else did he say?

A. Actually, I don't remember it has been so long, he asked me if I wanted to plead guilty.

Q. And you said?

A. Yes, sir.

Q. Did he ask you if you were guilty?

page 5 } A. No, sir.

Q. Did you see Mr. Putney talk to the Sheriff or any of the Sheriff's deputies during the time?

A. No, sir.

Q. Did Mr. Putney advise you what the maximum punishment was for the offense involved.

A. Yes, sir.

Q. But he did not question you about the events which constituted the offense with which you were charged?

A. No, sir.

CROSS EXAMINATION.

Mr. Witt:

Q. Well, Mr. Fields at the time you talked to Mr. Putney you knew of no witnesses that could have been called in your behalf on this charge do you or did you?

A. Not that I know of, the only witness I had was the fellow that ran with me.

Q. Right, and he was here in Court wasn't he?

A. Yes, sir, he was in Court too, yes, sir.

Q. Now, Mr. Fields, you were aware of what your constitutional rights were as far as a jury trial was concerned and matters of that kind, were you not?

A. Yes, sir, I think so, yes, sir.

Q. So, any discussion which you may have had with regard to your constitutional rights would have been very short in view of the fact that you did know what your constitutional rights were, isn't that true?

James E. Fields.

A. I, I don't, I didn't exactly catch it all that sir.

Q. Well let me see if I can rephrase it for you.
page 6 } Maybe I wasn't clear. In view of the fact that you say you did know what your constitutional rights were at the time there would have been no need for any lengthy discussion as to what your constitutional rights were at that time, isn't that true? You wouldn't have had to spend a long time finding out what your constitutional rights were since you already knew what they were?

A. Well, I knew I could plead not guilty.

Q. Right, and you knew you could have a jury trial if you wanted it, didn't you?

A. Yes.

Q. And as I understand your testimony in response to Mr. Martin's question Mr. Fields there was no effort made on the part of any law enforcement official to coerce you into any statement made against yourself, was there?

A. No, sir.

Q. There was no effort made in that regard?

A. No, sir, that's right.

Q. Now, Mr. Fields, you say that you did not see Mr. Putney talk to anybody while he was in your presence with regard to your case this doesn't mean that he might not have talked to somebody prior to the time he talked to you, isn't that true or sometime when he was not in your presence?

A. I don't think he could have talked to anybody, no, sir.

Q. It was my understanding that you said when he did talk to you he said that on a plea of guilty that the Commonwealth's Attorney would recommend 3 years.

A. Yes, sir, that's right.

Q. All right, sir, I have no further questions Your
page 7 } Honor.

Judge Harman:

Q. Mr. Fields, did you understand when you were brought before this Court on the 7th day of July, 1959, that you stood indicted of two charges, one of them grand larceny and the other escape?

A. Yes, sir, I did.

Q. And you had been in the custody of the Sheriff for some time prior to that?

A. Yes, sir.

Q. You were fully aware of your right of a trial by a jury.

David Bagby.

A. Yes, sir, I was.

Q. You understood that if a jury were impaneled that they would determine your guilt or innocence and that if you were guilty fix your punishment.

A. Yes, sir.

Q. And you willingly agreed at that time to the sentence which Mr. Putney advised you that the Commonwealth's Attorney was willing to recommend.

A. Yes, sir, I didn't understand the evidence, I didn't know what the evidence was. I just couldn't understand nothing about the case at all.

Q. Well now you were in custody and escaped from custody, as I understood?

A. Yeah, yes, sir.

Q. This was not your first experience with the Courts?

A. No, sir.

Q. Did you tell Mr. Putney that you were guilty or not guilty of these offenses?

page 8 } A. No, sir.

Q. Did you tell him that you wanted to enter a plea of guilty?

A. He said he thought it was advisable that I enter a plea of guilty.

Q. You mean Mr. Putney told you that he thought it was advisable for you to enter a plea of guilty without asking you whether you were guilty or not.

A. Yes, sir.

Q. And you say that a total time elapsed from the time you were brought before the Court to the time of your trial of some 10 to 15 minutes.

A. Yes, sir.

Witness excused.

DAVID BAGBY,

a witness of lawful age, sworn in behalf of the Petitioner, testified as follows:

DIRECT EXAMINATION.

Mr. Martin:

Q. Mr. Bagby were you held in the Bedford County jail in July of 1959 with Mr. Fields?

David Bagby.

A. Yes, sir.

Q. Were you brought to the Courtroom for trial on the same day that he was?

A. Yes, sir.

Q. Were you with him all that morning, in this Courtroom, were you with him when Mr. Putney talked to him, I believe Mr. Putney represented you too, did he not?

A. Yes, sir.

page 9 } Interruption by the Court: Now, Mr. Bagby you are going to have to speak a little louder, this proceeding is being recorded, you can nod your head and mumble but it will not be recorded, so we want to speak up toward the speaker just a little bit.

Q. When Mr. Putney talked with Mr. Fields did Mr. Putney ask Mr. Fields anything about the facts of the offense with which Mr. Fields was charged?

A. No, sir.

Q. Did he ask him to tell his story?

A. No, sir, not that I can remember this was quite a long time ago.

Q. Well, Mr. Putney talked—

A. It wasn't long it didn't last but a minute he didn't talk to him but a few minutes.

Q. Mr. Putney talked to you. did he not?

A. Yes, sir.

Q. Did he ask you to relate the facts of the offense with which you were charged?

A. No, sir.

CROSS EXAMINATION.

Mr. Witt:

Q. Of course, Mr. Bagby you don't have a petition for writ of *habeas corpus* filed this morning we are not hearing any petition as far as you are concerned, are we?

A. Yes, sir.

Q. This morning?

A. No I don't have any this morning, no, sir.

page 10 } Q. You are here only as a witness on behalf of Mr. Fields, isn't that correct?

A. Yes, sir.

Lacey E. Putney.

Q. Do you have any idea how long you were in Court, Mr. Bagby?

A. Not long, a few minutes, 15 minutes maybe a half hour, I ain't got no recollection of time.

Q. You don't have any recollection of the time?

A. No, sir, I would say approximately 15 minutes to a half hour, fifteen minutes to half hour, it wasn't long.

Q. But you don't know that for a fact, do you?

A. I didn't have a watch on me.

Q. Right, could it just as easily been an hour, could it not?

A. No, sir.

Q. You are sure it wasn't an hour?

A. I'm positive.

Q. But it could have been 15 minutes or half an hour? All right, sir, now as far as you are concerned there were no witnesses that could have been called on behalf of Mr. Fields, were there?

A. Not that I know of.

Q. And you all were incarcerated in the Virginia State Penitentiary at the time these offenses occurred, were you not?

A. Yes, sir.

Q. So, both of you had been or had had experience before criminal courts prior to this time, had you not?

A. Yes, sir.

Witness excused.

page 11 } Mr. Martin: We rest, Your Honor.

LACEY E. PUTNEY,

a witness of lawful age, sworn in behalf of the Respondent, testified as follows:

Mr. Witt:

Q. Would you state your full name, please, sir, for the Court?

A. Lacey E. Putney.

Q. And what is your occupation, Mr. Putney?

A. I am an attorney here in Bedford.

Q. How long have you been practicing before this Bar, Mr. Putney?

Lacey E. Putney.

A. Seven and a half years.

Q. Seven and a half years?

A. Yes, sir.

Q. Now, Mr. Putney I direct your attention to a date in 1959, July 7th, do you recall having represented Mr. James E. Fields in a matter which he had pending before this Court on that day?

A. I recall being appointed to represent Mr. Fields, it has been about 5 years, but I remember the incident.

Q. Do you recall whether you had any conversations with anyone other than Mr. Fields at the time, that you represented him in his matter before the Court?

A. I can only answer the question this way, I distinctly remember the matter involving the escape, the statutory burglary and breaking and entering charge in a cabin I believe and I believe that Mr. Simmons had a truck that was missing in connection with this. I, in every case in which I have been appointed by the Court to represent an accused I have discussed the matter with the Sheriff, or the investigating officer, whoever it might be, in this particular case. I think that, I am pretty sure, I talked to Sheriff Mitchell, I al-
page 12 } ways talk with the Commonwealth's Attorney and review the file as to previous records and any information that I can get as background on every escape case I have ever had I have discussed the matter with Mr. Thomas or whoever the officer might have been in charge of the boys or the men down at the Camp. I don't recall ever representing an individual on a plea or on any court appointment case that I didn't go either into the Sheriff's office over here to my right or the witness room back there or the jury room here to discuss the matter, to go over it with the accused to talk with him about his educational background, family connections and things of this type. I do it in all cases and I certainly sure that I did it in this one.

Q. Have you had occasion to represent or have you had occasion to represent felons before the bar of this court prior to the time that you represented this gentleman?

A. Yes, sir, I have.

Q. On both a retained basis and an appointed basis?

A. Yes, sir, I have.

Q. What elective office do you currently hold, Mr. Putney?

A. I am a member of the General Assembly, House of Delegates, representing Bedford County.

Lacey E. Putney.

Q. I see, sir, and how long have you held that position?

A. I was elected in 1961 and went and served in the session of 1962, was the first session.

Q. I see, sir, and you have served *consistenly* since, is that true?

A. Yes, sir.

Q. Now, Mr. Putney, do you recall of your own independent recollection any conversation with Mr. Fields wherein he requested that a continuance be granted for any particular reason?

page 13 } A. No, sir.

Q. Do you recall whether he told you whether there were any witness that could have been called on his behalf?

A. No, sir.

Q. Do you recall whether he was able to provide a defense on his behalf with relation to these charges?

A. My recollection that was none.

Q. There was none?

A. None as far as I was concerned.

CROSS EXAMINATION.

Mr. Martin:

Q. Mr. Putney you can't testify, can you, that you talked to the Sheriff in this particular case?

A. To say that I discussed this particular one specifically I don't remember doing it but I am reasonably certain that I did, I will have to answer it that way.

Q. And you say that where escape is involved that you always talked to whoever may be in charge at the?

A. I always have.

Q. But you can't say that you did so in this case, can you?

A. I remember talking to the guard, the Sergeant or whatever he is, I am not certain of his rank or his title. I believe it is Mr. Thomas, I seem to remember talking to him in connection with these two individuals, Fields and Bagby.

Q. Now, can you testify that you discussed the facts involved with Mr. Fields in this particular case?

A. I don't recall going over the facts in detail with Mr. Fields as far as talking to him in this room or here

page 14 } in the Courtroom as he testified or any particular place, I do know that I talked to him about the case.

Lacey E. Putney.

Q. Can you testify that you asked him for his story of what happened?

A. I can only answer by saying that I have never represented an accused without asking him to relate to me what happened and then talk to the officers and get their version of it.

Q. Now Mr. Fields was tried that morning, isn't that correct?

A. My recollection is that it was the same date of the appointment the exact time or the hour of that day I don't recall that.

Q. You don't have in your possession a file or any notes made in connection with the case.

A. I do not we have moved, I have moved twice and I was unable to locate any file on it, if I had one. I am sure that I had notes, how much I don't know, but I always use to jot down notes because, to be prepared for any questions from the bench, we all do that but I don't recall, I can't locate the things.

Witness excused.

Mr. Witt: We have no further evidence Your Honor.

The Court: I will be glad to hear from you gentlemen now on your views of the law and what authorities you are relying on.

Mr. Martin: I have no long set of citations, Your Honor, I believe that now both in the State Courts and the Federal Courts that where counsel is provided in those cases where it is necessary and it seems to be necessary in most all cases now that the assistance rendered by counsel must be effective. In this case and a great many cases that were tried in this Courtroom I do not believe that effective assistance was rendered. I believe the evidence is that no investi-
page 15 } gation of the facts were made to enable appointed counsel to determine whether or not a plea of guilty or a plea of not guilty should be entered in this case. Mr. Fields has testified that the facts were not discussed with him. And I believe that the evidence is that you cannot make any determination on how to plead or how to proceed without making a thorough investigation and in particular discussing the facts with the accused. That is the sole point on which the petitioner relies.

The Court: All right, thank you, Mr. Martin.

Mr. Witt: Your Honor, of course the determination to be made in this case with regard to effective assistance of counsel must not necessarily rest on the amount of time in minutes or hours that was spent in preparation by the attorney who represented the petitioner. The case must be considered on all merits with regard to what could have been done, what was done when information was provided the attorney by the individual involved and what exactly could have been done to assist him most ably in the matter. Now, if you take the petitioner's evidence as he has offered it, you will find that there is a basic inconsistency in his testimony in which he states that he doesn't believe that his attorney ever talked to anybody about the case and that he never asked him anything about the case and yet he says that his attorney told him that if he pled guilty he would *reveive* a recommendation of three years by the Commonwealth's Attorney. Now, obviously Mr. Putney could not have made such a statement to the petitioner unless he had talked to the Commonwealth's Attorney prior to talking to the petitioner. Mr. Putney certainly is not going to come in and tell a defendant what the Commonwealth's Attorney is going to do unless he knows that is what the Commonwealth's Attorney is going to do and the only way he could know that would be by having had a con-
page 16 } versation with him. Now if you accept Mr. Putney's testimony as the correct reflection of what took place we will find that Mr. Putney did talk to the witnesses who would appear for the Commonwealth, he states that in all escape cases that he has handled that he always talked to the members of the guard force who would be directly involved who would appear as witnesses for the Commonwealth to determine what their testimony would be and to be sure as to exactly what took place. He states that he does not recall having tried or assisted anybody as representative or by counsel in any case in which he would advise someone to plead guilty without knowing what the facts were. Mr. Putney has been before the bar of this Court certainly a sufficient number of years and has had enough criminal experience before the bar of this Court to have the proper approach in these matters. And furthermore the petitioner states on the stand that direct to, in direct response to, cross examination questions that he did understand his constitutional rights, he knew he had a right to a trial by jury, he knew he could plead not guilty if he wanted to plead not guilty. So he was not deprived of any knowledge that at that point which would have assisted him to do anything different. From the defendant's own mouth and from his own witness'

mouth we know that there were no witnesses that he could have called on his behalf and that there were no defenses that he could have offered on his behalf. So what would have been gained by doing anything other than what Mr. Putney did. And Mr. Putney has stated what his general practice was and I believe that if you follow his testimony and also follow the testimony of the petitioner the Court is bound to come to the conclusion that all that could have been done was done for this petitioner at the time he was tried and that he was ably and effectively assisted by counsel and the laws of the State of Virginia there is reflected in the cases I am sure that the Court is well aware of state that unless such assistance is such that it makes a farce and a mockery of the trial that it should not be considered to be ineffective and I

page 17 } strongly urge the Court that in view of the testimony today that no conclusion can be reached other than that Mr. Putney did everything that possibly could have been done for this petitioner and for that reason the respondent respectfully requests that the petition be denied.

By the Court: Mr. Martin.

Mr. Martin: Mr. Fields may or may not have been aware of his constitutional rights, he states that he was, there are many constitutional rights. I assume, that he was aware that he could be tried by a jury but we contend that without the professional assistance and advice without deliberate weighing of the evidence that could be shown Mr. Fields was not in a position himself to determine whether or not to avail himself to the right of a trial by jury and we submit that under all of the testimony he did not have the effective assistance of counsel. Mr. Putney cannot testify that he discussed the evidence in the case with Mr. Fields, he cannot testify he talked to the Sheriff or to the investigating officer in this matter that he talked to the Commonwealth's Attorney is evident but the Commonwealth's Attorney of course, can relate facts that have been told to him by investigating officers and he weighs those facts himself and draws his own conclusions and develops his recommendations. I don't think talking to the Commonwealth's Attorney is any investigation of the facts. And we think that Mr. Fields is entitled to deliberate weighing of the evidence and professional advice as to whether or not to proceed to trial by jury or to plead and we don't believe that he received it.

By the Court: All right, gentlemen, I would like to take just a few minutes to read some cases. There is a

page 18 } recent case that I would like to read. I believe the last one decided by the Supreme Court, perhaps in

the advance sheets, if you will give me just a few moments, you may be at ease and I will take a look at that.

By the Court: Gentlemen, I have given this matter consideration after having reviewed case of *Whitley against Cunningham,* 205 Virginia, 251, I am of the opinion that the petition is well taken and that the writ should be granted. I am going to remand the defendant to custody for a period thirty days to give the Commonwealth's Attorney an opportunity to elect whether or not to bring this matter to trial again. I will provide in the order that in the event that an appeal is noted within the thirty day period that the order is stayed until final disposition of the appeal. So I will remand you to custody Mr. Fields but frankly I have this problem. In view of the positive testimony as to the time elapsed between the time of the appointment of counsel and the time of sentencing I do feel that you come within the doctrine laid down in the Whitley case and I don't intend this to be any criticism of Mr. Putney I am certain that if some of my former clients who may be sojourning in the penal system were brought back that I might have some difficulty in recalling what occurred, particularly on a plea of guilty in an appointed case, unless I could find my notes which Mr. Putney was unable to do. So we will remand you to custody and an order will be so entered.

Seen:

W. LUKE WITT
Counsel for Respondent.

WILLIAM O. MARTIN
Counsel for Petitioner.

JUDGE'S CERTIFICATE.

I, Alex M. Harman, Judge-Designate of the Circuit Court of the County of Bedford, State of Virginia, do hereby certify that the foregoing is a true and correct copy, as transcribed from the electronic recording device used in the Circuit Court of the County of Bedford, of all the testimony introduced, arguments of counsel and all other incidents of the trial, including the opinion of the Court, in the case of James E. Fields, *v.* C. C. Peyton, Supt. of the Penitentiary, tried in the Circuit Court of the County of Bedford, on January 14, 1965; and it appears in writing that the Petitioner's Attorney has had reasonable notice of the time and place when this

report of the testimony and other incidents of trial would be tendered and presented to the undersigned for certification, which was presented to me within sixty days after final judgment, and signed by me within seventy days.

Given under my hand this the 11th day of Feb., 1965.

A. M. HARMAN, JR.
Judge Designate.

The electronic recording device was operated by the Clerk of the Circuit Court of the County of Bedford and the evidence and other incidents of trial transcribed by said Clerk, H. P. Scott.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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