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Record No. 6167

In the
Supreme Court of Appeals of Virginia
at Richmond

C. C. PEYTON, SUPERINTENDENT, ETC.,

v.

LEONARD FRENCH

FROM THE CIRCUIT COURT OF FAIRFAX 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.

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to be
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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6167

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

LEONARD FRENCH, Defendant in Error.

From the Circuit Court of Fairfax County
Arthur W. Sinclair, Judge

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 Fairfax County on the 22nd day of December, 1964, in a certain proceeding then therein depending wherein Leonard French was plaintiff and the petitioner was defendant; no bond being required.

RECORD

• • • • •

Virginia:

In the Supreme Court of Appeals.

Leonard French, Petitioner,

against

Commonwealth of Virginia. ex rel., C. C. Peyton, Superintendant of the Virginia State Penitentiary, Respondent.

Upon Petition for Writ of *Habeas Corpus Ad Subjiciendum*

MOTION.

Now comes the petitioner by mail, in *propria persona* in this said cause, and, moves this Honorable Court to
page 2 } proceed herein in *forma pauperis, and says:*

1. That; he is a citizen of the United States of America, by birth; and a resident of the Commonwealth of Virginia.
2. *That;* he is *a pauper,* without funds to secure the costs of this said suit; as within the meaning and intent of Section 14-180, of the 1950 Code of Virginia, as amended, said suit commenced in good faith, predicated upon grounds that relief may be granted.
page 3 } 3. *that;* on this 6th day of December, 1963, the said Leonard French has the sum of $...., on his Penitentiary Spending Account.

This he will ever pray.

LEONARD B. FRENCH
Petitioner in *Propria Persona.*

page 4 } State of Virginia,
County of Goochland, ss:

AFFIDAVIT.

This is to certify that: Leonard French, the undersigned party, personally appeared before me in my County and State aforesaid; after first being duly sworn as according to law

the same who deposes, and says, that; all statements as contained herein are true to the best of his knowledge, information, and belief.

LEONARD B. FRENCH
Affiant.

Given under my hand and seal this 6th day of December, 1963.

O. W. BARNES
Seal Notary Public
State-at-Large.

My commission expires on 10-7, 1967.

page 5 } PART-II.

page 6 } Virginia:

In the Supreme Court of Appeals.

Leonard French, Petitioner,

against

Commonwealth of Virginia, ex rel., W. K. Cunningham, Jr., Supt. of the Virginia State Penitentiary, Respondent.

Petition For *Habeas Corpus, Ad-Subjiciendum.*

Constitution of Virginia Section 88.

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page 10 } To the Honorable, the Justices of the Supreme Court of Appeals of Virginia:

PETITION.

Now comes by mail, Leonard French, petitioner in *propria persona* in this said cause, the same who presents his petition for *habeas corpus, ad subjiciendum, and says*;

I. STATEMENT OF THE MATERIAL PROCEEDINGS.

The petitioner, at the time of his conviction before the Circuit Court of Fairfax County, Virginia, at its November Term, 1961, was charged with crime, *as a juvenille,*
page 11 } seventeen (17) years of age, in Criminal cases numbered: 10779 through 10788, inclusive, with Larceny of Automobiles, and Statutory Burglary.

See: Attached Appendix; Exhibits 1 through 10.

On Criminal Cause No. 10780, (Grand Larceny), the said petitioner received imposition of sentence of five (5) years in the State Penitentiary.

On Criminal Cause No. 10781, (Grand Larceny); the said petitioner received imposition of sentence of an additional five (5) years, confinement in the penitentiary; said sentence to be served *consecutively* to the sentence as imposed in cause number 10780.

page 12 } See: Attached Appendix; Exhibits 1 and 2.

An additional five (5) year sentence, imposed on Criminal Cause No. 10782 was imposed to be served *concurrently* with criminal cause 10780; and, additional two (2) year sentences, as imposed on Criminal Causes, numbered 10783 through 10779, was imposed to be served *concurrently* with the five-year sentence imposed on criminal cause number 10780.

See: Attached Appendix; Exhibits 4 through 10.

Therefore, as indicated by the records, the petitioner is at present serving a total sentence of ten (10) years, as imposed by the Circuit Court of Fairfax County, Virginia, as on November 3, 1961.
page 13 } Also, and indicated by the records, each of the foregoing causes were certified, *in the original instance,* as from the Juvenile and Domestic Relations Court of the County of Fairfax. Virginia, as upon felony charges.

II. JURISDICTION.

Jurisdiction of the present court is invoked pursuant to Section 88, of the Constitution of Virginia, and Section 8-598, of the 1950 Code of Virginia, as amended.

page 14 } III

ALLEGATIONS.

Petitioner alleges, *that:*

1. As a *minor child,* he was denied *the effective assistance of counsel,* at time of the hearing, *upon petition,* as before the Juvenile and Domestic Relations Court of the County of Fairfax, Virginia, on August 11, 1961.

2. As a *minor child,* he was not advised of the purview of the Juvenile and Domestic Relations Court Law
page 15 } of 1950, under which he was being tried; and without the assistance of counsel.

3. The *orders,* as entered by the Juvenile and Domestic Relations Court for the County of Fairfax. Virginia, as on August 11, 1961; in each case wherein the petitioner, *as a minor child;* being then and there certified to the Circuit Court of Fairfax County, Virginia, for action by the Grand Jury, *a capitol felony,* are null and void, *ab-initio;* by reason of denial of effective assistance of counsel.

page 16 } 4. The several judgments, as imposed for *Statutory Burglary,* by the Circuit Court of Fairfax County, Virginia, on September 11, 1961; are null and void, *ab-initio.*

5. He is, *at present,* being illegally detained and restrained of his liberty, bv the within named respondent, without due process of law, in violation of his constitutional rights; and, therefore, is entitled to a plenary hearing upon the merits of his allegations presenting questions of unrecorded matters of fact relating to a previous judicial proceeding.

page 17 } IV.

ARGUMENT IN SUPPORT.

A.

Question One:

"As a minor child he was denied the effective assistance of counsel, at time of the hearing, upon Petition. as before the Juvenile and Domestic Relations Court of the County of Fairfax, Virginia, on August 11, 1961."

Recent rulings by the Supreme Court of the United States, notably, *Hamilton* v. *State of Alabama,* 368 U. S. 52, 82 S. Ct.

157, as decided, on November 13, 1961, ruled, *in*
page 18 } *part;*

"* * * Whatever may be the function and the importance of arraignments in other jurisdictions, we have said enough to show that in Alabama it is a critical stage in a criminal proceeding. What happens there may affect the whole trial. Available defenses may be irretrievably lost if they are not then and there asserted, * * * *C. F. Canzio* v. *People, etc.,* 327 U. S. 82, 85-86, 66 S. Ct. 452, 453, 90 L. Ed. 545 * * *

* * * The guiding hand of counsel is needed at
page 19 } the trial lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater that the law of the State exacts for the offenses which they in law and fact committed; * * * *Tompkins* v. *Missouri,* 323 U. S. 485, 489, 65 S. Ct. 370, 372, 89 L. Ed. 407.

* * * In this case, as in those, the degree of prejudice can never be known."

Reversed.

Opinion by, Mr. Justice Douglas.

The language of this decision, by the Supreme
page 20 } Court of the United States, is not only *directly in point* with the petitioner's case, but also, *pertinate* with surrounding circumstances of the issues involved in this cause.

Section 19.1-163.1 of the 1960 Code of Virginia, as amended; requires the recording of a *preliminary hearing* to determine the existance of probable cause, before a felony charge is certified to the Grand Jury in any case.

The aforementioned ruling, as by the Supreme Court of the United States, now requires the *assistance of counsel* at time of these hearings.

See also:

White v. *State of Maryland,* No. 600, Oct. Term, 1962 (U. S. S. Ct.) as touching on same question.

page 21 } Therefore, it can be maintained, that; the *hearing,* upon the *Petition,* as before the Juvenile and Domestic Relations Court of Fairfax County, Va. *supplants* the "hearing mandate" as required by said Section 19.1-163.7,

Supra., and petitioner should have been accorded the *assistance of counsel,* at time of this hearing, upon Petition.

There are a number of factors that substantiate this proposition, *They are*:

(a) Each of the Petitions, as by a police officer of the Juvenile Bureau of the County of Fairfax, Va., were sworn to on August 10, 1961.

page 22 } (b) The *hearings,* upon these *petitions,* were had on the following day—August 11, 1961.

(c) Petitioner was taken into custody, *without lawful process,* on the 16th day of July, 1961, and *illegally detained* in the Fairfax County Jail, in custody of its Sheriff, for approximately two (2) weeks.

(Note)—Virginia has carefully developed statutes dealing with delinquent children. These apply to children under Eighteen (18) years of age. These statutes will be discussed, by petitioner, following this Summary.

page 23 } (d) Petitioner was then committed to the custody of the Department of Welfare, and confined in the State Industrial School for Boys, (at Beaumont, Virginia), until the hearing date of August 11, 1961, in the Juvenile Court.

At this point, it should be well to note the development of the laws of *arrest* and statutes involving deliquent children. This will be set forth in two parts, following.

Part One: *The Laws of Arrest:*

It is well settled that unless the power to im-
page 24 } prison be plainly given, it does not exist, and, when given, before it can be exercised there must be judicial ascertainment by a competent tribunal of the guilt of the party accused.

Bolton v. *Vellines,* 946 Va. 400.

Section 52-21, of the 1950 Code of Virginia, requires that a defendant be "forthwith" produced before a committing authority, or, he be *illegally detained,* if such action is not taken by the arresting officer, within 4½ hours.

Winston v. *Comm.,* 188 Va. 386.

(Petitioner was held in the Fairfax County Jail for a period of approximately (2) weeks).

page 25 } As well, it is interesting to note that Justice Felix Frankfurter of the United States Supreme Court said in the Andrew Upshaw case in November 1948, that there should be a definite time limit as to detention. In this connection the Virginia General Assembly has given an indication that one arrested without a warrant *could not be held exceeding three hours.* In part, it is set forth in Section 18-118 of the Code of Virginia, 1950, as amended. It is reasonable to assume in the absence of a court decision that the Court may use this yardstick of the General Assembly as an indication of what the legislative body would consider a reasonable time of detention of one arrested.

page 26 } *Part Two: Virginia Statutes for the protection and care, as well as punishment, of delinquent children.*

Section 16-163 to 172, and, in particular, Section 172.61-63, forbids the issuance of a warrant for a child known or alleged to be between the ages of *14* and *18* years of age. Moreover, no juvenile is to be detained in any, jail, lockup, prison, or detained with any vicious or disolute criminals.

Also, the Code of Virginia, 1942, Subsections: 1906-1930 (c); Va. Code, 1950, Subsections: 63-257 to 63-307, provides, that; unless the child is of an extremely unruly
page 27 } disposition *no court shall send such a child to the Grand Jury nor sentence the child to the penitentiary.*

As well, these Sections provide that no judgment upon the status of any child under the provisions of the chapter dealing with juvenile delinquents shall operate to impose any of the disabilities ordinarily imposed by a conviction, *nor,* shall any such child be denominated a criminal by reason of any such adjudication.

page 28 } Therefore, had the petitioner be given the proper *assistance of counsel,* these defenses, herein plead to, would have been available to him, by law.

Petitioner, therefore, asserts that; these procedures were the result of an illegal conviction, *obtain* in violation of due process of law, as accorded the said petitioner by the State and Federal Constitutions.

page 29 } B.

Question Four:

"The several sentences, as imposed by the Circuit Court of Fairfax County, Virginia, on September 11, 1961, are null and void, *ab-initio.*"

Question (2) and (3), as having been heretofore discussed, as being closely related to *question one,* if sustained, will *entitled* the petitioner to release, since, if the proceedings in the Court of Original Jurisdiction, *are void,* by the denial of effective assistance of counsel, illegal jail detention,
page 30 } etc., then the proceedings following are of no consequence.

As a secondary defense, to sustain by a preponderance of evidence, his allegations as to illegal detention in this cause, the petitioner refers to the several Grand Jury Indictments in this cause.

In each instance there appears the person of one, "Julian Anderson Rice, etc., witnesses called by the Court, sworn and sent to testify before the Grand Jury."

The said *Julian Anderson Rice* was the petitioner's *co-defendant* in the commission of the larceny in cause No. 10780 and 10781, wherein the said petitioner received
page 31 } the imposition of the *two five (5) year sentences,* consecutively.

Also, where in fact, the said *Julian Anderson Rice,* in said causes numbered 10780, and 19781 was the driver of each of the stolen autos, in a *"joy-riding"* spree, on the night of June 24, 1961.

See: Appendix Exhibits, marked 1 and 2.

The said Julian Anderson Rice, also a juvenile has, since his testimony before the Grand Jury, in petitioner's case, been released from the jurisdiction of the Court.

Moreover, to hold to the proposition that the
page 32 } said petitioner went *"joy-riding"* in a number of automobiles with intent to permanently deprive the owner thereof * * * *is untenable.* Since all of the automobiles were recovered on the *same date* in the *immediate areas* of the owner's residences, the *logic* to "permanently deprive the owner * * * is utterly without foundation!

See: Section 46-3, Code of Virginia, 1950, (as amended.)

Notwithstanding the foregoing, the petitioner was, as well, *illegally sentenced* in criminal causes numbered:
page 33 } 10787, 10788 and 10779.

In *each* of the aforementioned cases, the *Petition* filed before the Juvenile and Domestic Relations Court, on August 10, 1961, allege, *in part;*

"* * * did unlawfully and feloniously—*break and enter in the nighttime the home of*—and did, steal, take and carry away—with the intent to permanently deprive the owner of the use thereof * * * (Italics supplied.)

The *only* difference in each of the Petitions, Orders, and Grand Jury Indictments, are the names and addresses of the owners of the property and the value and several
page 34 } amounts of the property alleged to have been stolen.

It should be noted, that, the petitioner was charged, in the *original instance,* in each case, numbered: 10787, 10788, and 10779, in the several indictments, orders, etc., with the common law offense of *Burglary,* which is primarily an offense against *the security of the habitation* of the several dwelling houses involved, whereby the slightest breaking was sufficient.

Fincy v. *Commonwealth,* 55 Virginia 643.

See Also:

Boyd v. *Comm.,* 156 Va. 934, 944.
20, Amer. Jur., Section 311, pp. 290-291.
page 35 } 170 A. L. R. (Anno.) at page 306.

Section 18-159, prescribes the punishment for the offense of Burglary, as,

"by confinement in the penitentiary not less than five nor more than eighteen years * * * (in part). Also, punishable by death."

Therefore, the several sentences of *Two (2) years,* as imposed in each of the aforementioned causes, are *illegal, null and void.*

See Also:

Appendix, Exhibits, Marked 8, 9, and 10

page 36 } L.

Question Five:

"he is, at present, being illegally detained and restrained of his liberty by the within named respondent, without due process of law, etc., * * *"

Petitioner states that he *has not* heretofore filed an application of a like nature, in this, or any other court of this Commonwealth, upon the issues herein set forth.

The scope of inquiry in a *habeas corpus* proceed-
page 37 } ing is limited to the propriety of the petitioner's present detention,

Smyth v. *Holland,* 199 Va. 92, 97 S. E. (2d) 745—

and, if he is being detained under a *void* sentence, he is entitled to credit for the time served under such sentence on a valid sentence, or sentences, entered against him.

Smyth v. *Midgett*, 199 Va. 727, 101 S. E. (2d) 575.

The Supreme Court of the United States, held in,

Herman v. *Claudy,* 350 U. S. 116-118-19, (1956).

page 38 } "* * * where a denial of these constitutional protections is alleged in an appropriate proceeding by factual allegations, the proceeding should not be summarily dismissed merely because a state prosecuting officer files an answer denying some or all of the allegations * * *" (*ex part*).

Moreover, Section 8-598 of the 1950 Code of Virginia, (as amended), provides for the issuance of the writ of *habeas corpus.*

page 39 } V.

CONCLUSION.

From the petition and the attached exhibits, the foregoing facts appear, all of which may be taken as true for the purposes of the relief sought.

Egan v. *Teets,* 251 F. 2d 571, 575, 9th. Circuit, 1957.

VI. PRAYER FOR RELIEF.

Whereupon; petitioner prays the *the* issuance of a writ of *habeas corpus, ad-subjiciendum,* be awarded the said petition-

er in accordance with the provisions of Section
page 40 } 8-598 of the 1950 Code of Virginia, (as amended),
said writ to be made returnable to the Circuit Court of Fairfax County, Virginia, for determination of unrecorded matters of fact;

Whereupon; petitioner prays for general relief in this cause.

Leave is reserved to amend this petition, and reply.

LEONARD B. FRENCH
Petitioner in *Propria Persona.*

page 41 } VII. CERTIFICATE OF SERVICE.

I hereby certify that, on the .... day of December, 1963, I mailed a true copy of the foregoing petition for *habeas corpus* to:

The Attorney General 203 No. Governor St., Richmond 19, Virginia,
as counsel for the within named respondent.

LEONARD B. FRENCH
Petitioner.

page 42 } State of Virginia,
County of Goochland, ss:

AFFIDAVIT.

This is to certify that, Leonard French, the undersigned party personally appeared before me in my County and State aforesaid, after first being duly sworn as according to law, the same who deposes and says, that: all statements as contained herein are true to the best of his knowledge, information and belief.

LEONARD B. FRENCH
(Affiant)

Given under my hand and seal this 6th day of December, 1963.

O. W. BARNES
Seal Notary Public.

My commission expires on 10-7, 1967.

* * * * *

page 168 }

* * * * *

Filed Oct. 16, 1964.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

OPINION.

Leonard French, petitioner, seeks his release from custody of the Superintendent of the Virginia State Penitentiary wherein he is currently serving sentences totaling ten years.

It is not deemed necessary to set forth the allegations of his petition alleging wherein he believes he is illegally detained but it suffices to state that a writ of *habeas corpus* was awarded him, that he was subsequently returned to this court and a hearing was held on October 9, 1964. The evidence both for the petitioner and the respondent was brief and revealed substantially thus.

On June 30, 1961, Robert Armstrong, a probation officer of the Juvenile Court of Fairfax County, signed a verified petition reciting that Leonard French, whom the record unfortunately reveals to have been no stranger to juvenile authorities, "* * * is in need of the care and protection of the State in that he comes within the purview of the Juvenile and Domestic Relations Court law of 1950 and is in need of the care and protection of the State in that within the said City or County of Fairfax he did on June 29, 1961, run away from his grandmother's place of residence and is still absent therefrom. That conditions are such that his welfare demands that custody be immediately assumed by the Court: * * *."

On the same day a detention order was issued page 169 } and on July 17, 1961, the youth, then sixteen years of age, was apprehended by Detective O'Connor, of the Fairfax County Police Department. On July 18, 1961, he was brought in the Juvenile and Domestic Relations Court for hearing. Present were the judge of the court, the mother, father and grandmother of the youth, the youth himself and Detective O'Connor. Upon completion of the hearing on the same day an order was entered by the court reciting in part the following: "Upon the hearing on the within petition, duly

held, * * *. It is Adjudged that the within named comes within the purview of the aforementioned law, * * * and that the welfare and best interests of said child or minor require that the State should assume his guardianship, and it is ordered Leonard French be committed to the State Department of Welfare and Institutions to be received, detained, managed and controlled in the manner prescribed by law." He was then placed at the Beaumont School for Boys.

The testimony of Detective O'Connor before this court reveals that during the juvenile hearing hereinbefore referred to he advised the judge that he was in the process of investigating some offences in which he believed French may have been involved. It is my recollection that he also testified that the judge discussed this with French.

O'Connor next testified that he was told by the judge to proceed with his investigation and to procure juvenile petitions against French upon completion of such investigation. He further testified that the judge stated he would then (after the petitions had been obtained) certify the youth to be dealt with as an adult and order him held for action of the grand jury.

On August 10, 1961, Detective O'Connor initi-
page 170 } ated as petitioner ten petitions charging French
with automobile larceny on June 24, 1961, automobile larceny on June 24, 1961, automobile larceny on June 24, 1961, with automobile larceny on July 2, 1961, with automobile larceny on June 7, 1961, with automobile larceny on July 13, 1961, with breaking and entering a dwelling on July 13, 1961, with breaking and entering a dwelling on July 2, 1961, with breaking and entering a dwelling on July 2, 1961, and with breaking and entering a dwelling on June 28, 1961.

On August 11, 1961, the Judge of the Juvenile and Domestic Relations Court of Fairfax County recited in separate orders relating to each petition that French was present in court upon a hearing on the petitions. Further he was certified for hearing as an adult in accordance with Section 16.1-176 of the Code of Virginia as amended.

In separate orders the Court noted that it had before it a report of investigation concerning the physical, mental, social conditions and personality of the child. Finally he was ordered held for action of the grand jury.

It is sufficient to recite that on August 11, 1961, the day of the purported hearing on the ten petitions, and despite the fact that the record shows the presence of French, he was in fact being detained at Beaumont and was thus not present, nor was anyone present who may have been interested in the

subject of the petitions nor were any hearings in fact conducted.

Petitioner was subsequently returned to Fairfax County to await action of the grand jury which thereafter returned ten felony indictments against him. In Circuit Court counsel was appointed for the petitioner and upon arraignment separate pleas of guilty were entered by petitioner to each indictment. Upon receipt of pre-sentence reports the petitioner was sentenced to five years in the penitentiary on each of two charges of automobile larceny. Lesser concurrent sentences were imposed in the remaining cases.

page 171

Counsel for the petitioner complains only of the proceedings, or lack thereof, in the Juvenile and Domestic Relations Court.

Title 16.1-164 of the Code of Virginia of 1950, as amended, provides as follows:

"Sec. 16.1-164. Information; investigation; petition; summons.—When the court receives reliable information that any child or minor is within the purview of this law or subject to the jurisdiction of the court hereunder, except for a traffic violation or violation of the game and fish law, the court shall require an investigation which may include the physical, mental and social conditions and personality of the child or minor and the facts and circumstances surrounding the violation of the law. The court may then proceed informally and make such adjustment as is practicable without a petition or may authorize a petition to be filed by any person, and if any such person does not file a petition a probation officer or a police officer shall file it; but nothing herein shall affect the right of any person to file a petition if he so desires. In case of violation of the traffic laws or the game and fish laws the court may proceed on any summons issued without the filing of a petition. In case of violation of the traffic laws such summons may be issued by the officer investigating the violation in the same manner as provided by law for adults."

It is seen therefrom that the Court may authorize a petition to be filed by any person. In this case the Court authorized Detective O'Connor to file the petitions with which we are now concerned.

Title 16.1-166 prescribes the things to be done after a petition has been filed. Title 16.1-167 relates to the service of the summons referred to in Section 16.1-166. Title 16.1-172 provides that no hearing shall proceed until the parent or

page 172 } parents of the child, if residing in the State, or person or agency acting in the place of the parents, in the event the parents do not have legal custody of the child, have been notified, and Title 16.1-173 provides when no person required to be notified under Section 16.1-172 is present in court at the time of the hearing, the Court shall before proceeding with the hearing appoint a probation officer or a competent attorney at law as guardian *ad litem* for the minor, and the guardian *ad litem* is by this statute enjoined to be present at the hearing. Title 16.1-174 provides that in cases wherein a summons is necessary at least three days shall intervene between the service of such summons and the hearing if objection to earlier hearing be made by the parties served or guardian *ad litem* appointed to represent the child. Finally, Section 16.1-178 provides for the various modes by which these juvenile matters may be disposed of.

Counsel for the petitioner urges that the statutes relating to the handling of youthful offenders are jurisdictional and that a failure to strictly comply with their mandatory provisions is fatal and should suffice to effect the petitioner's release.

Counsel for the respondent urges that the petitioner has had a hearing although he does not claim that any hearing was conducted on August 11, 1961, but rather that the petitioner was heard on July 18, 1961.

page 173 } Respondent's counsel further takes the position that in any event the statutes under consideration are procedural and not jurisdictional and that the matters cannot be properly raised in a *habeas corpus* proceeding. They rely upon *Snyder* v. *Commonwealth,* 202 Va. 1009, and *DeToro* v. *Pepersack,* 332 Fed. 2d 341, as authority for their position. In the former case the defendant raised no objection to a lack of a preliminary hearing or to an improper preliminary hearing, which it may have been more properly termed, until forty-seven days after the entry of final order of judgment. He ascertained the error was jurisdictional and could be raised even on appeal. Holding to the contrary the Supreme Court of Appeals held the statute relating to preliminary hearing was procedural and that defects relating thereto must be timely and properly raised, or will be considered as having been waived. In the latter case, a *habeas corpus* proceeding, petitioner alleged a denial of constitutional rights by not having been represented by counsel at two preliminary hearings wherein he entered pleas of not guilty to a charge of homicide. Pointing out the purpose of a

preliminary hearing in Maryland, where, like Virginia, the ultimate determination of guilt or innocence is not involved, the Court held that there was not even any likelihood of later prejudice arising from the failure to appoint counsel.

The purpose of a juvenile hearing under our statutes is not, however, as limited in its scope, for a juvenile judge is expressly empowered with the discretion of either retaining jurisdiction of a child charged with the commission of a felony or certifying such child for proper criminal proceedings in a court of record. It matters not, in my opinion, that the Commonwealth's Attorney is empowered to present the case to the grand jury if he be so advised, under some circumstances, if the juvenile court fails to certify the child. Title 16.1-176, Code of Virginia of 1950, as amended.

page 174 } I doubt that this case would cause me such difficulty were it not for the fact that it involved a youth who was sixteen years of age when brought into Juvenile Court and seventeen when convicted and sentenced as a felon.

Obviously now a preliminary hearing may be waived but it is unlikely a juvenile hearing may be waived, though I do not so decide, not finding it necessary to do so. The doctrine of waiver, however, contains an essential ingredient, that of awareness, an ingredient missing from this case. The petitioner could hardly be deemed to have waived a preliminary hearing which he did not attend, to which he was not invited, and which in fact was never held.

To hold that petitioner should have raised the question at his trial in Circuit Court, or on a motion to set aside his conviction, or on appeal to the Supreme Court of Appeals would be to place a premium on keeping him unenlightened, unprotected and unsuspecting. The result to me is unthinkable as well as unconstitutional.

It was assumed in Circuit Court from records apparently in order that petitioner was properly before the Juvenile Court. This assumption was shared by the judge and then counsel for the now petitioner. The petitioner was hardly in a position to have assumed anything.

Finally, I cannot conclude that there was any juvenile hearing on July 18, 1961, on any of the ten felony charges under consideration here. True, the judge questioned the petitioner about some of the matters brought to his attention by Detective O'Connor but there were no charges

page 175 } pending, the petitioner was not in court on any matter except that of being a runaway and for final proof that there could not have been a hearing as such

Detective O'Connor was merely investigating information he had received and was directed by the court to continue with this investigation and file formal petitions upon completion thereof, obviously only if the investigation pointed to the petitioner's complicity in the commission of an offence or offences.

Over objection of counsel for the petitioner, the Court permitted counsel for the respondent to call to the stand the judge of the Juvenile and Domestic Relations Court. The record will disclose that ruling on the objection was withheld and the judge permitted to testify under those conditions. I believe it clear from the applicable statutes that permitting the judge to so testify was in error and his testimony should thus be ordered stricken from the record. As a practical matter the error was harmless in view of my decision on the merits of the case.

For the reasons stated, the error being jurisdictional, I am of the opinion that the petitioner's detention is illegal and he should be now released from custody of the respondent and returned to the jail of this Court for such further proceedings as the Commonwealth may be advised.

ARTHUR W. SINCLAIR, Judge.

October 16, 1964.

* * * * *

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* * * * *

ORDER.

This proceeding came on to be heard on October 9, 1964, upon the petition of Leonard French for a writ of *habeas corpus ad subjiciendum,* the return and answer of the respondent, the petitioner appearing in person and by his attorney, Louis Koutoulakos, and the respondent appearing by Reno S. Harp, III and W. Luke Witt, Assistant Attorneys General.

Whereupon, the Court heard the evidence as presented by the petitioner and also heard evidence as presented by the respondents and heard arguments by counsel both for petitioner and respondents, and upon mature consideration thereof, doth find that the petitioner is being presently detained

by ten orders of the Circuit Court of Fairfax County, Virginia, of November 3, 1961, Nos. 10779, 10780, 10781, 10782, 10783, 10784, 10785, 10786, 10787 and 10788, by which the petitioner was committed to the custody of the Superintendent of the Virginia State Penitentiary, the petitioner having received five years on each of the two charges in orders Nos. 10780 and 10781, to run consecutively, and on the remaining charges he received two years on each count to run concurrently with the sentence imposed in orders Nos. 10780 and 10781; and for the reasons stated in the opinion of this Court on October 16, 1964, the Court doth adjudge that the proceedings pursuant to which the petitioner was incarcerated, stemming from the Juvenile and Domestic Relations Court initially, were void and illegal, and are thereby set aside and the sentences are vacated; and it is the further or-
page 178 } dered that the petitioner be forthwith released from the aforesaid confinement based on the above stated sentences, there being no other valid sentences to serve, and remanded to the custody of the proper jail authorities of the County of Fairfax, Virginia, for such further proceedings by the Commonwealth if it be so advised, to all of which action of the Court, the respondent, by counsel, objects and excepts.

It further appearing to the Court that respondent intends to note an appeal to the judgment of this Court, it is ordered that the said judgment be, and is hereby, stayed, for a period of 60 days in order that the respondent may apply for a writ of error and that if respondent properly perfects an appeal, this judgment is stayed pending a determination by the Supreme Court of Appeals of Virginia in the premises.

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

Entered this 22d day of December, 1964.

ARTHUR W. SINCLAIR, Judge.

Entered in Common Law Order Book No. 66 at page 400 and Ex.

I ask for this:

LOUIS KOUTOULAKOS
Counsel for Petitioner.

Seen and objected to:

W. LUKE WITT
Counsel for Respondent.

* * * * *

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* * * * *

ASSIGNMENTS OF ERROR.

To Honorable Thomas P. Chapman, Jr., Clerk of the Circuit Court of Fairfax 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 holding that the petitioner had not been granted the proper hearings in accordance with the Juvenile and Domestic Relations Law of the State of Virginia.
2. The Court erred in holding that the hearings held after the Juvenile and Domestic Relations Court had determined that the petitioner should be treated as an adult, should have been conducted within the purview of the Juvenile Domestic Relations Law instead of as a preliminary hearing required for an adult.
3. The Court erred in granting the petition for a writ of *habeas corpus.*

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

Filed Jan. 12, 1965.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

Fairfax, Virginia

Friday, October 9, 1964

The above-entitled matter came on for hearing before the Honorable Arthur W. Sinclair, a Judge of the Circuit Court of Fairfax County, Virginia, in Courtroom No. 3, Fairfax County Courthouse, Fairfax, Virginia, commencing at 10:00 o'clock, a.m.

Appearances: On behalf of the Respondent: W. Luke Witt, Esq. and Reno S. Harp, III, Esq.
On behalf of the Petitioner: Louis Koutoulakos, Esq.

page 2 } PROCEEDINGS.

(Whereupon, the reporter was duly sworn by the Clerk of the Court)

The Court: Mr Harp?
Mr. Harp: May it please the Court, at this time I should like to introduce to this Honorable Court Mr. W. Luke Witt, Assistant Attorney General of the Commonwealth of Virginia. I have known Mr. Witt for many years and I can vouch for his ability and integrity. And I respectfully move his admission to the bar of this Honorable Court, sir.
The Court: All right. Thank you, Mr. Harp.
Mr. Harp: Thank you.

(Whereupon, Mr. W. Luke Witt was duly sworn by the Clerk of the Court.)

The Court: Are counsel ready in French v. *Payton*?
Mr. Koutoulakos: Yes, Your Honor.
Mr. Witt: Yes, Your Honor.
Mr. Koutoulakos: Did Your Honor want some opening remarks on this?
The Court: If you gentlemen would care to make them. The reason I was late in coming to the courtroom, I was hurrying through this file, but you gentlemen can make some opening remarks. I will be very glad to hear from you if you have a statement to make.
Mr. Koutoulakos: All right, Your Honor. Just briefly—
Mr. Witt: Just a minute, please, sir.
page 3 } At this point, if I might, sir, I would like to tender for filing in this case the Return and Answer by

the respondent in this matter, a copy of which was submitted to Mr. French on the 17th day of September, 1964.

The Court: All right, sir.

Mr. Koutoulakos: Your Honor, the defendant advised me that he did receive a copy.

The Court: All right, it will be received in the record.

Mr. Witt: Thank you, sir.

OPENING STATEMENT ON BEHALF OF PETITIONER

By Mr. Koutoulakos:

Mr. Koutoulakos: If Your Honor please, this case, as you know, is here on a writ of *habeas corpus* filed by the young defendant himself and submitted to the Supreme Court, of which Court was ordered a hearing by this Court.

I think the evidence is going to show—and, first, before I get into that, I want to represent this to the Court: I am not concerned with what happened in the Circuit Court. I feel, in checking the record out, that everything that was done there complied with the law, and this boy was protected as far as the Circuit Court was concerned. Our argument is what took place initially in the Juvenile Court, and we feel that what took place there was void. So even with the admission of what took place in the Circuit Court was correct, we contend that because of the void proceedings that took

page 4 } place on these felony charges in the Juvenile Court it voided everything that took place thereafter.

Now, this young man was 16 years old at the time when these alleged crimes were committed, and he was 17 when he was tried for them in the Juvenile Court.

Now, if Your Honor please, I am concerned again with the felonies. I believe, in my checking out the record—I may have miscounted—there is some ten felonies, as I counted. I could be wrong, but its the felonies that eventually ended up to the Circuit Court. I find that the petitions were filed on August the 10th of 1961, and orders were signed certifying this young man to be tried as an adult on August the 11th, the following day, of 1961. My investigation further shows that on, there has never been any guardian *ad litem* appointed of record. There never was an attorney appointed on record. There was nobody present at the hearing, and the defendant advised me, and will testify, that he doesn't believe he was even here on the 11th when he was certified as an adult to stand charges on these ten felony cases which ended up in ten years in the penitentiary and of which he has served, I believe, better than three years already.

And, furthermore, Your Honor, we feel that the failure to notify as required by the code under the Juvenile Act, either the parents or have an attorney appointed, the failure to have a guardian *ad litem* appointed, the fact that the page 5 } three-day notice, the three-day trial period that is required by the code before they can proceed on a felony charge in the Juvenile Court was never complied with, we just feel that this man, or this boy I should say initially, never was supplied with the mandatory statutory rights that are furnished him by the legislature. And we feel that because of that, and as the record—we are going to stand on the record—will show, that everything that took place thereafter should be voided, if Your Honor please, and that he be discharged from custody under this thing.

Now, I realize that a writ of *habeas corpus* won't apply to voidable proceedings. We are concerned with void proceedings. And we contend that that's what they are, Your Honor.

The Court: Mr. Witt?

Mr. Witt: Yes, Your Honor.

OPENING STATEMENT ON BEHALF OF RESPONDENT.

By Mr. Witt:

Mr. Witt: If it please the Court, I will direct my remarks to those framed by Mr. Koutoulakos in this proceeding with regard to what he expects his evidence to show.

We will expect to rebut Mr. Koutoulakos' evidence in, hopefully, two ways and certainly more than hopefully at least by one; one being legal and one being factual.

We expect the evidence to show that there was, in fact, a hearing by which this young man was advised of the fact that he was to be certified to the Grand Jury on the charges which finally in substance he was convicted of in page 6 } the Circuit Court of Fairfax County.

And, secondly, we expect to show that during that hearing not only his mother and father were present, but, also, his grandmother. And that he was amply protected by not only his parents presence, but also by the laws that require that either a probation officer acting as a guardian *ad litem* or natural parents be present at such a hearing. Secondly, we expect to show the Court authorities as to why a hearing in the Juvenile Domestic Relations Court cannot be considered to be a constitutional or jurisdictional question which can be attacked on *habeas corpus*. It is well settled in the law that a writ of *habeas corpus* can attack only constitutional

and jurisdictional questions; that, as Mr. Koutoulakos says, voidable proceedings are not susceptible to *habeas corpus* attack. Only void proceedings are. And we expect to show the Court authorities by which we can substantiate the thought that a Juvenile and Domestic Relations Hearing, in which a juvenile is certified to the Grand Jury and treated as an adult, is in purpose and in fact the same as a preliminary hearing by which an adult is certified to the Grand Jury. And, consequently, is under the law of Virginia, as is set forth by Supreme Court rulings dealing with this fact, not jurisdictional but procedural. And, therefore, any defect which occurred at that time must be raised at a proper time or forever lost.

page 7 } Now, these are the bases on which we expect to prevail in this case this morning.

The Court: Very well, sir.

Will there be a request for a ruling as to witnesses?

Mr. Koutoulakos: Well, I don't particularly have any reason for it.

If Your Honor please, to send this young lady back to her duties as a clerk, I wonder if we could have her sworn just to get the record in, and then she can leave.

The Court: Sure.

Whereupon,

LINDA MORRIS,

was called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Koutoulakos:

Q. Now, I am a little embarrassed. I forgot your name and I am going to ask for it here. What is your name? Do you want to state it for the record.

A. Linda Morris.

Q. Pardon.

A. Morris.

Q. Oh, yes, Miss Morris. Miss Morris, do you want to state your full name?

Linda Morris.

A. Linda Morris.

page 8 } Q. And what is your occupation?

A I am a clerk in Juvenile Domestic Relation Court.

Q. And pursuant to a subpoena *duces tecum* on behalf of the defendant did you produce here the record of Mr. French, Leonard French, who is here on a writ of habeas corpus?

A. Yes.

Q. And is that the complete record of the cases that ended up in the Circuit Court?

A. This is the complete legal record.

Mr. Koutoulakos: Your Honor, I would like to offer that.

Mr. Witt: Your Honor, if I might just have an opportunity to look at it before it's finally tendered.

Mr. Koutoulakos: Yes, I am going to give it to you now.

Mr. Witt: I don't expect to have any real objection to it, but I just want to see what's in it.

(Counsel examined file.)

Mr. Witt: All right, sir.

The Court: All right, Mr. Koutoulakos, the record will show that the juvenile record of this petitioner will be received in evidence and marked as Exhibit No. 1.

Mr. Koutoulakos: Your Honor, in there, also, are the Circuit Court orders based on their findings when this—I think this boy entered a plea of guilty in the Circuit Court—based on the cases from the Juvenile Court.

The Court: We will admit the entire file as Peti-
page 9 } tioner's Exhibit No. 1.

(The document heretofore referred to was marked as Petitioner's Exhibit No. 1 for identification and was received in evidence.)

The Court: Miss Morris, you are excused, if you care to go, and you may remain if you care to stay.

(Witness excused.)

Mr. Koutoulakos: Your Honor, I would like to have the Petitioner sworn.

Whereupon,

LEONARD BRITTON FRENCH,
was called as a witness in his own behalf, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Koutoulakos:

Q. Son, now speak up so everybody can hear, especially these two gentlemen here because they will want to ask you some questions.

Will you state your full name.

A. Leonard Britton French.

Q. And presently where are you confined?

A. At the County jail.

Q. And were you brought up here from the penitentiary in Virginia?

A. I was brought up here from the State Farm, Southside.

Q. And you were sentenced to the penitentiary
page 10 } as a result of, was it, ten felonies?

A. Yes, sir.

Q. And are those the same felonies that arose in the Juvenile Court on August the 10th?

A. Yes, sir.

Q. How old are you, son?

A. I'm 20 now.

Q. And how long have you been in the penitentiary?

A. A little bit over three years.

Q. How old were you at the time when these alleged offenses were committed?

A. 16.

Q. 16. And at the time of the alleged hearing, which was August the 11th of 1961, how old were you then?

A. 17.

Q. Now, on August the 10th, were you aware that petitions were filed against you for some ten felonies in the Juvenile Domestic Relations Court?

A. No, sir.

Q. On August the 11th when you were certified to be tried as an adult by the Juvenile Court, were you present during any of those hearings?

A. No, sir.

Q. Do you know where you were at that time?
page 11 } A. Yes, sir.

Q Where was that?

A. At the study home down near, outside of Richmond.

Leonard Britton French.

Q. All right. Now, you heard the Attorney General's office make an opening—

The Court: Study home, did you say?
The Witness: Study home, yes.

By Mr. Koutoulakos:
Q. —make a remark that your grandmother was present and your folks were present on August the 11th.

Mr. Witt: Your Honor, just a minute, please, sir, if I might correct that. I didn't state the date in my opening remarks. I said we would expect to prove that at a hearing at which these matters were considered. I would like to correct the record on that point.
The Court: All right.
Mr. Koutoulakos: As long as he is not talking about August the 11th.

By Mr. Koutoulakos:
Q. Then it's your testimony that on August the 11th you weren't even here?
A. No, sir.
Q. Was there any guardian *ad litem* appointed for you for these August 10th crimes, that is, petitions?
A. No, sir.
page 12 } Q. Did you ever have any notice of it?
A. No, sir.
Q. Did you have any opportunity to obtain counsel or have your folks present for August the 11th of 1961?
A. No, sir.
Q. When did you first become aware that you had been certified as an adult?
A. When I was down there at Beaumont, they come up here and picked me up—they come down there and picked me up from Beaumont and brought me back up here.
Q. And when was that?
A. Sometime in early September.
Q. And was that for purposes of the Grand Jury, or do you know?
A. I believe it was.
Q. Was there any—to your knowledge, was there any report made on these specific charges, these ten felonies, with reference to you? Did anybody ask you any questions or come

Leonard Britton French.

to you in any way to ascertain your condition, physical, mental, and otherwise, regarding these ten felonies that you were finally certified for on August the 11th?

A. Not to my knowledge.

Q. There came a time when you filed a writ of *habeas corpus,* is that correct?

A. Yes, sir.

page 13 } Q. At that time you didn't even know me, did you?

A. No, sir.

Q. And as a result of that writ you are here today asking for, to be discharged on the basis of the void proceeding in the Juvenile Court, is that correct?

A. Yes, sir.

Q. All right, sir.

Mr. Koutoulakos: He's your witness.

CROSS EXAMINATION.

By Mr. Witt:

Q. Now, Mr. French, you do recall, do you not, a hearing which was held on July the 17th, 1961, in which you were present in court, presided over by Judge John A. Rothrock, and at which time you were accompanied by your mother and your father and, also, your grandmother, the purpose of that hearing being to determine whether or not and why—

Mr. Koutoulakos: Your Honor, I don't want to cut him short. I don't know if he is making a statement or if he is asking a question. He's asked six questions in the one, and if he would ask the boy the questions one at a time so he can answer them.

Mr. Witt: Your Honor, what I am trying to do is to lay a foundation to help his recollection, if I might.

The Court: When Mr. Witt finishes his question, if Mr. French doesn't understand it, just say so.

Mr. Witt: Thank you, sir.

page 14 } By Mr. Witt:

Q. Were you not in court on that day in July with regard to a petition charging you as being a run-away from your grandmother's home?

A. No, sir.

Leonard Britton French.

Q. You were not in court on that day?

A. I might have been in court that day, but not on those charges.

Q. Well, what were you there for?

The Court: This is on the date, Mr. French, that Mr. Witt asks if you were not in court on a specific day with your mother, father, and grandfather. And now he asked—I mean, with your grandmother. And now he asked what were you in court for on that day?

The Witness: I believe it was for those ten charges.

By Mr. Witt:

Q. It was on these ten charges?

A. Yes, I believe it was.

Q. Well, then, you were mistaken when you told Mr. Koutoulakos that you had never been in court with reference to those ten charges in the Juvenile and Domestic Relations Court, is that correct, sir?

Mr. Koutoulakos: Well, Your Honor, I don't agree with that, and I think the record shows that he couldn't have been in on those ten charges because the petitions page 15 } weren't filed until August the 10th. And the record so shows. I object to that question.

The Court: He told you that he wasn't in court on the 11th of—

Mr. Witt: August.

The Court: August.

Mr. Koutoulakos: But if Your Honor please, the record shows that these petitions were filed on the 10th of August. That's what the record shows.

Mr. Witt: Well, Your Honor, as I understand this proceeding by which we are trying this case this morning, this is a proceeding by which unrecorded matters of fact can be looked into by the Court. Now, I would presume that if the petitioner has the right to look into unrecorded matters of fact, that the respondent also has a right to do that in bringing to light before this Court all matters which should be considered thereby.

The Court: I think we would have to. It is this young man's recollection that he has been before the Juvenile and Domestic Relations Court on these ten charges.

Mr. Witt: That's correct, Your Honor.

Leonard Britton French.

The Court: Now, I think it becomes pertinent as to when he was there.

Mr. Witt: Yes, sir. This is my point.

The Court: I will permit the question.

By Mr. Witt:

page 16 } Q. Then if you would, please, Mr. French, answer my question with regard to whether you were mistaken or not as to what you told Mr. Koutoulakos with regard to the fact that you had not been in Juvenile and Domestic Relations Court concerning these charges?

Mr. Koutoulakos: Your Honor, he didn't say that. I asked him if he was there on August the 11th and he said no.

Mr. Witt: All right, sir, I will withdraw the question then if he answered with regard to August the 11th.

By Mr. Wit:

Q. But then as I understand your testimony you had been in court some time prior to August 11th *cercerning* these matters, is that not correct, sir?

A. I'm not actually sure. It was so long ago. I mean, I am not sure. I remember I was in front of Mr. Rothrock, but I am not sure what the charges were.

Q. Well, do you remember being in court prior to that time, August the 11th?

A. I believe I was in front of Judge Rothrock.

Q Right. Now, at that time these particular charges were discussed and evidence was given with regard to them, wasn't it?

Mr. Koutoulakos: Your Honor, I object to that because the Court order says that the petition is the 10th, and the Court order says that they heard the charges on the 11th.

page 17 } And the record speaks for itself. And I think it's unfair, and I think the boy is confused, but the record which I am standing on speaks for itself. Each order on the 11th says they heard the evidence on the 11th, is what each order says on these ten charges.

The Court: I realize the order says this, but this youngster has testified that he was before the Court on these charges. Maybe he was and maybe he wasn't, but I am going to permit the facts to be explored, Mr. Koutoulakos.

Leonard Britton French.

By Mr. Witt:

Q. Now, if we can get back to my question, please, Mr. French, do you recall now that evidence was given with regard to these charges before Judge Rothrock at a hearing in July?

A I honestly can't remember. I remember I was in front of him, but I am not sure of what the charges were.

Q. All right, sir. Then you would not categorically or definitely say that you had not been in court on these charges, would you?

A. I was in front of Mr. Rothrock, but I am not actually sure what the charges were.

Q. All right, sir.

Now, Mr. French, do you recall who was with you in court that day that you were before Judge Rothrock?

A. I believe my people were there.

page 18 } Q. That's your mother and your father, and I believe your grandmother was there also.

A. I am not sure about that.

Q. But you do think your mother and father were there anyway?

A. Yes.

Q. Right. Now, do you recall whether Detective O'Connor was there or not?

A. No, I don't recall that.

Q. You don't recall that. All right, sir.

Mr. Witt: I have no further questions, Your Honor, at this point.

RE-DIRECT EXAMINATION.

By Mr. Koutoulakos:

Q. Let me see if I can clear your recollection up, son. As a matter of fact, you were never in court on July the 17th, were you? Are these the cases that he is talking about on July the 23d when you were referred to the Welfare Department? Take a look at them. See if it isn't July—I mean, September the 23d or July the 23d, and see if that isn't the cases that he is talking about.

Yes, that says the 23d of September, 1960. Is that the cases that he is referring to? On the back it says your folks were present, I think, if you will look at them, if these are

the cases. Do you see that? The record shows that
page 19 } your folks were present then. Are these the ones
that—

A. Yes, they look like them.

Q. Well, take a look at them so we can clear this thing up, and see if they are the ones so there will be no confusion.

A. I honestly can't remember.

Q. You don't recall? All right.

Now, getting back to these petitions—

The Court: Gentlemen, I don't know whether you heard his answer or not because you were conferring, but he said that he did not recall.

Mr. Witt: All right, sir.

By Mr. Koutoulakos:

Q. Now, were you ever served with a copy of the petitions that were ultimately filed?

A. No, sir. I didn't have a warrant of arrest or anything like that served on me.

Mr. Koutoulakos: That's all I have, Judge.

Mr. Witt: Your Honor, if I might, please, may I take a look at Petitioner's Exhibit No. 1 just a minute.

The Court: Yes, sir.

Mr. Witt: I just want the folder.

(Counsel examined file.)

Mr. Witt: I understand you have no further questions, sir?

Mr. Koutoulakos: No, that's all I have at this point.

Mr. Witt: Your Honor, for the purposes of the
page 20 } record, I am referring at this point to a portion
of the Juvenile and Domestic Relations Court record, which has been offered in evidence earlier by counsel for petitioner, with regard to the matters before the Court.

The Court: All right, sir.

RE-CROSS EXAMINATION.

By Mr. Witt:

Q. Now, Mr. French, I show you the record of matters involving you before the Juvenile and Domestic Relations Court

Leonard Britton French.

of the County of Fairfax, this particular document being dated June the 30th, 1961—or pardon me, pardon me—yes, that's correct, June 30th, 1961, with a date on the reverse side of July 18th, 1961, this document which you are now looking at being a petition which was filed against you by Robert H. Armstrong, Probation Officer, charging you with being a run-away from your grandmother's place of residence and of still being absent therefrom. Do you recall this petition?

A. No, sir, I have never seen this before.

Q. You have never seen this before?

A. Never heard anything about it.

Q. You do not recall any disposition of a petition of this type, is that correct, sir?

A. No, sir, I don't.

Q. Then you would not recall whether your parents were there on that day or not, since you don't recall this page 21 } particular petition, is that correct, sir?

A. No, sir.

Q. All right, sir.

Mr. Witt: I have no further questions, Your Honor.

The Court: Mr. French, let me ask you a question. I assume, of course, that you obtained assistance down in Richmond in preparing this petition for a writ of *habeas corpus*. But your complaint, your primary complaint in this writ, or in this petition for a writ is that you were denied the effective representation of counsel at this particular hearing. Have you claimed anywhere in here that you were not at this hearing? I mean, are you familiar enough with your petition for a writ?

The Witness: Yes, I am familiar enough.

The Court: For instance, on page 17 of your argument in support of your position in a paragraph headed A and under that, question one, in quotes, "As a minor child, he was denied the effective assistance of counsel at the time of the hearing upon the petition before the Juvenile and Domestic Relations Court of the County of Fairfax, Virginia on August 11, 1961."

The Witness: Well, see, I wasn't even there at that hearing sir.

The Court: Is that what you mean, is that you meant by,

that you were denied the assistance of counsel, meaning you weren't there?

The Witness: That's right.

page 22 } The Court: And thus didn't have counsel.

The Witness: (Nodded head affirmatively.)

The Court: Gentlemen, I believe that is all I have.

Mr. Koutoulakos: That's all I have, Judge.

The Court: You may step down.

Mr. Koutoulakos: Mr. French.

Whereupon,

GEORGE ALBERT FRENCH, JR.,

was called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Koutoulakos:

Q. Now, do you want to state your full name, please, sir.

A. George Albert French, Jr.

Q. And what is your relationship with the young man who is here on this writ of *habeas corpus?*

A. I am his father.

Q. All right. Turning your attention to August 11, 1960, I believe—'61, were you ever notified of a hearing taking place involving some ten, more or less, felonies involving your young son here?

A. That was August the 10th, 1960?

Q. Yes—'61.

A. '61?

Q. '61, yes.

page 23 } A. No.

Q. Were you present on the 11th when the hearing did take place, according to the record?

A. No.

Mr. Koutoulakos: He is your witness.

CROSS EXAMINATION.

By Mr. Witt:

Q. Mr. French, do you recall being present at a hearing

George Albert French, Jr.

that was conducted on July 18th, 1961, before Judge Rothrock in the Juvenile and Domestic Relations Court?

A. We, the wife and myself, were there, yes.

Q. All right, sir.

Mr. Witt: I have no further questions.

RE-DIRECT EXAMINATION.

By Mr. Koutoulakos:

Q. That hearing involved the question of whether this boy had run away from home, didn't it?

A. Yes.

Q. And not any charges of felonies, did it?

Mr. Witt: Now, Your Honor—

Mr. Koutoulakos: I made him his witness, Your Honor, and I am clearing up what he said.

Mr. Witt: Well, what I am objecting to is Mr. Koutoulakos' leading the witness.

The Court: The question was leading.

page 24 } Mr. Witt: I think that Mr. French could be asked what he recalled that took place, but I don't think that Mr. Koutoulakos should tell him and then ask him to say so.

Mr. Koutoulakos: Well, I thought I made him his witness and in my question I was leading him. So I will ask him directly.

By Mr. Koutoulakos:

Q. Do you recall who was present, other than yourself and your wife?

A. His grandmother, with Judge Rothrock.

Q. Do you recall whether or not your son was there?

A. Now, this is the 18th we are speaking of?

Q. Yes, July.

The Court: July what?

Mr. Koutoulakos: July the 18th

The Witness: Yes, he was there.

By Mr. Koutoulakos:

Q. What was the disposition of that charge of being a runaway from his grandmother, do you recall?

Mariposa Alice French.

A. The only thing I can recall is that he was there for running away.

Mr. Koutoulakos: That's all I have, Your Honor.
Mr. Witt: I have no further questions, Your Honor.
The Court: Thank you, Mr. French. You may step down.

(Witness excused.)

Mr. Koutoulakos: Mrs. French, do you want to
page 25 } step up here, please.

Whereupon

MARIPOSA ALICE FRENCH,
was called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Koutoulakos:
Q. Do you want to state your full name, please, ma'am.
A. Mariposa Alice French.
Q. And what is your address?
A. Address?
Q. Yes.
A. 6012 Illinois Avenue, McLean, Virginia.
Q. And what is your relationship to the young man here today?
A. I am his mother.
Q. Inviting your attention to the 10th and 11th of August, 1961, and please confine yourself in this question to those two dates, do you recall ever being notified with reference to any proceeding against your young son in the Juvenile Court in Fairfax?
A. Not on those dates.
Q. Were you notified at any time prior to those dates with relation to some felony or felonies that developed on August the 10th upon which petitions were filed?
page 26 } A. I can't say anything about what exact date, but I do know that we came to a hearing in the Court, in the Judge's chambers earlier. And it was that he

had been picked up, although I did not know he was on a runaway charge.

Q. Would that be the charge that your husband just testified to?

A. Yes.

Mr. Koutoulakos: That's all.

Mr. Witt: I have no further questions, Your Honor.

The Court: All right. Thank you, Mrs. French.

(Witness excused.)

Mr. Koutoulakos: Your Honor, that's going to be the evidence for the defendant at this time, with the record.

The Court: Mr. Witt?

Mr. Witt: Your Honor, I would call Detective J. E. O'Connor of the Police Department of the Fairfax County Police.

Whereupon,

DETECTIVE J. E. O'CONNOR,

was called as a witness on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

The Court: Have a seat, Mr. O'Connor.

DIRECT EXAMINATION.

By Mr. Witt:

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

A. Detective Joseph E. O'Connor.

page 27 } Q. Mr. O'Connor, by whom are you employed?

A. Fairfax County Police Department.

Q. And how long have you been—

Mr. Witt: At this point, Your Honor, Mr. Koutoulakos has kindly consented to save the Court some time and stipulate that Detective O'Connor was employed officially as a police officer by the Fairfax County Police Department at the time this young gentleman was before the Court, and that he was professionally occupied in that capacity.

The Court: Thank you, Mr. Koutoulakos.

Detective J. E. O'Connor.

By Mr. Witt:

Q. Now, Detective, O'Connor, I direct your attention, sir, to the date of July the 18th, 1961, and several weeks prior to that date. Do you have any recollection of any occurrence in which you came involved with Mr. Leonard French at that time?

A. Yes, sir, I do.

Q. Would you tell the Court, if you would, please, sir, as best you can what you remember with regard to the events that took place that required you to become associated with, or rather to come in contact with Mr. French at that time.

I am not so much interested in the facts behind whatever violations of law that you may have been looking into with regard to any felony charges that may have been
page 28 } tried later on, but rather what took place with regard various occurrences in court up to and including July the 18th, 1964.

A. On July the 17th, Mr. French was apprehended, at which time he was placed in detention, along with a detention order that had previously been filed by his probation officer, Mr. Armstrong.

Q. All right, sir. Now, did you appear on court on July the 18th with reference to matters to be disposed of involving Mr. French before the Juvenile and Domestic Relations Court?

A. Yes, sir, I do.

Q. Do you remember what those matters were?

Mr. Koutoulakos: Your Honor, I think the record speaks for itself and that's the best evidence. I am going to object to that.

Mr. Witt: Well, Your Honor, at this point, Mr. Koutoulakos has directed his evidence and his testimony to the dates of August the 10th and August 11th with regard to what the record shows. And as previously stated by me, this particular proceeding concerns itself with unrecorded matters of fact which may be necessary for the Court's attention in order to provide a sound basis for a decision. And we are particular concerned with any hearing which may have been heard concerning these felonies by which, or for which Mr. French was convicted in September or October of that year. And I think we have the right to go into unrecorded matters of
page 29 } fact concerning those matters. The petitioner has the right to go into unrecorded matters of fact

when he files his petition and when he puts his evidence on.

Now, it appears to me that the respondent should have the same opportunity to present its case, the whole purpose being to give the Court an opportunity to become aware of all facts. And as long as they are facts, then they should be before the Court. And this is what I am doing.

The Court: I would overrule the objection. And do you want to take an exception, Mr. Koutoulakos?

Mr. Koutoulakos: I will make my exception.

The Court: You have your exception.

Mr. Witt: Thank you, Your Honor.

By Mr. Witt:

Q. Please proceed, if you will, Detective O'Connor.

A. Would you repeat your question again, please.

Q. Yes, sir. Would you please tell the Court as best your recollection serves you what matters were before the Juvenile Domestic Relations Court at the time that you appeared on July the 18th, 1961, concerning Mr. Leonard French, and what transpired on that court day.

A. This was the hearing that is heard the day after apprehension. It was on the detention order that was filed by Mr. Armstrong in the Court, at which time it was carried as a run-away on Mr. French. At this time, as I re-
page 30 } call, I was asked, or the probation officer was asked, was there any other circumstances—

Mr. Koutoulakos: Now, Your Honor, again I object, and I object not only on that ground, I would object on the additional ground that nothing that took place in a court of inferior jurisdiction can ever be testified to in the court of record by statute. And I object to it. And I object, again, Your Honor, and cite Michie's Jurisprudence. that where the interests of an infant are concerned it must affirmatively appear from the record, period. I object to going behind the record on both grounds.

The Court: Well, this is not a matter that we are interested in any other crimes, if any, that this youngster may have committed. Nothing that went on in this court relating to other matters is, of course, going to be held against this boy. What appears to be of essential interest here is, has this boy had a hearing on—

Mr. Koutoulakos: On these charges.

The Court: —as I understand it, these particular felonies

for which he is serving time. And I think the questions addressed to the witness, whether they be the questions that are ultimately going to answer the case or whether they be merely preliminary leading up to the ultimate question, are important.

Mr. Koutoulakos: I take an exception on this, Your Honor.

By Mr. Witt:

page 31 } Q. Do you remember the question, sir?

A. Yes, sir. I was asked, as I recall, by Judge Rothrock if there was any other circumstances leading up to the time that Mr. French was apprehended on the run-away charge.

Q. All right, sir. Well, proceed with your answer then, if you would, please, sir?

A. I advised Judge Rothrock at the time that an investigation was being conducted on several offenses that occurred during the period of time that Mr. French was reported to us as a run-away.

Q. Was evidence admitted by Judge Rothrock concerning those offenses?

Mr. Koutoulakos: Well, Your Honor, he said that the matter was being investigated. I don't see how there could be any evidence admitted on that basis. And I object to the question. I think he is impeaching his own witness.

The Court: It just calls for a yes or no answer at this point. You may answer.

The Witness: Would you repeat your question.

The Court: Was evidence, was any evidence admitted by Judge Rothrock relating to these offenses which you stated that you were investigating, or were being investigated?

The Witness: The only evidence that was at this time given to the Court was when Judge Rothrock, as I recall, asked Mr. French in regards to some of these offenses, asked

page 32 } him the question.

By Mr. Witt:

Q. I am sorry, I didn't understand everything you said, Detective. Could you speak a little louder, please, sir.

A. Well, at the time, as I recall, Judge Rothrock asked Mr. French, at the time was he involved in any of the offenses that were being investigated at this time.

Detective J. E. O'Connor.

Q. I see. Now, would you go ahead, sir, and tell this Court what transpired after that on this day?

A. As I recall, Your Honor, I advised Judge Rothrock as to what the offenses were. At which time he had Mr. French held in detention until a complete investigation could be finished regarding these offenses. And I was advised at the time to secure the necessary petitions involving these offenses.

Q. Now, Detective O'Connor, do you recall at what date those petitions were actually secured?

Mr. Koutoulakos: Your Honor, I think the record speaks for itself.

Mr. Witt: That's all right, sir. I will withdraw that question. I will withdraw that question.

May I have just a minute, please, sir?

The Court: Sure.

(Short recess.)

By Mr. Witt:

Q. Let me ask you this further question, if I page 33 } might, please, Detective O'Connor. The evidence that was submitted by you in regards to these offenses with which we are concerned with now, of your best recollection, were they the same offenses which Mr. French was later convicted of in the Circuit Court of Fairfax County?

Mr. Koutoulakos: I am going to object to that, Your Honor. The record will speak for itself on that. I don't think the officer can come to that conclusion.

The Court: This record may not, may not—

Mr. Koutoulakos: Well, then I object.

The Court: I mean, there may be other offenses. And Mr. Witt is just trying to find out whether it was this or whether it was something else.

Mr. Koutoulakos: Well, then I object to it as calling for a conclusion of fairness, that the best evidence is any other record that may be available that he can produce.

Mr. Witt: Well, Your Honor, if I am calling for a conclusion, I am not aware of it. What I am trying to do is to elicit from this witness, of his best recollection, exactly what these offenses were and what the correlation was between these and the others with reference to the fact that he did

have a hearing on these things. This is what I am trying to establish. And, of course, the Return and Answer which has been filed by the respondent in this matter sets forth the indictments and offenses for which Mr. French is currently detained. However, it does not set forth the ones
page 34 } which were shown in the Juvenile Court that Mr. O'Connor is talking about. And the record which Mr. Koutoulakos has introduced here may or may not show. I don't know until this witness answers the question. And then if it is something different I think he might have a good objection. But if Mr. O'Connor's evidence is going to clarify the situation, then I think he, it's an ancillary matter and not in conflict with the record. I am not trying to show that the record is right or wrong in that matter. I am just trying to clarify it for the Court's edification.

The Court: I think there is certainly some confusion, and if Mr. O'Connor can answer in the affirmative, then I think that, as Mr. Witt says, that ends the question—or rather if he answers in the negative it ends the question because we are not interested in any other matters.

Do you recall, Mr. O'Connor, in answer to Mr. Witt's question?

The Witness: Yes, sir.

By Mr. Witt:

Q. They were the same?

A. Yes, sir.

Q. All right, sir.

The Court: Related to these particular offenses of automobile larceny and breaking and entering?

The Witness: Yes.

page 35 } Mr. Witt: I have no further questions, Your Honor, at this time.

CROSS EXAMINATION.

By Mr. Koutoulakos:

Q. Let me see if I understood your testimony, Mr. O'Connor.

This young man, as I understood your testimony, was brought into court because he was a run-away from his grandmother, right? Wasn't that the charge before the Court at that time—

Detective J. E. O'Connor.

A. Yes.

Q. —on July the 17th or 18th?

A. Yes.

Q. And you are telling the Court, when he was there on a run-away charge, that the Judge asked him whether he was involved on a series of investigations that you were making, is that what you are telling the Court?

A. No, sir, he asked me.

Q. I thought you told us a while ago that he asked the boy if he was involved. Do you want to retract that?

A. He asked me—

Q. You said, specifically, and I will read it to you, Judge Rothrock asked Mr. French if he was involved in these offenses.

A. This was after he had asked me as to what they were.

page 36 } Q. Yes. And this boy was there on one charge of run-away, a minor charge, and you are telling us then that the Judge asked him about these investigations as a result of his conviction and some ten years in the penitentiary, is that correct?

A. The subject was brought up, yes, sir.

Q. And the Judge asked him directly, is that correct?

A. I don't recall just how directly it was, sir.

Q. And at that time there was no lawyer present, was there?

A. Not to my knowledge.

Q. He wasn't even charged at that time, was he?

A. Only on a run-away, sir.

Q. And that's all?

A. Yes, sir.

Q. Not only that, to further compound it, if you are familiar with this boy, you knew that he had been sent away because the Court felt that there was some mental condition, some mental disorder with this boy, isn't that correct?

Mr. Witt: Your Honor, I object. I see no reason at all to get into why this young man may have been dealt with in any particular way in any other matter by the Juvenile and Domestic Relations Court. This is going to confuse the issue substantially. And we are not concerned with any action taken by the J and D Court prior to this time. It's only going to confuse the issue.

Detective J. E. O'Connor.

Mr. Koutoulakos: Your Honor, it can't be any more confusing or any more enlightening than this—

page 37 } The Court: Prior to July, 1961, Mr. Koutoulakos?

Mr. Koutoulakos: Yes. This man was sent down for mental observation, this boy. And the point that I am making is that if there was, apparently the Court found evidence that he was mentally disturbed. If that is so, I think that what took place, from what this officer says, should further buttress his position that his rights have completely been violated in this thing.

The Court: I think that is outside the scope of this matter this morning.

Mr. Koutoulakos: All right, sir.

By Mr. Koutoulakos:

Q. Now—and you say that at that time then, on this runaway charge, he was asked, specifically, questions by Judge Rothrock. No lawyer was present. No guardian *ad litem* had been appointed either, had there, at that particular time, when you told the Judge you had some matters that you were investigating and then the Judge proceeded to propound questions to him about them?

A. Would you repeat your question, Mr. Koutoulakos.

Q. Well, I won't make the same one, but there was no guardian *ad litem* appointed, that you know of, at that time when he was being asked questions about these other crimes?

A. No, attorney; no, sir.

Q. No guardian *ad litem* either.

A. Well, unless you mean—his probation officer

page 38 } was there.

Q. Well, forget his probation officer. Was any guardian *ad litem* appointed that you heard?

A. Not—I don't recall, sir.

Q. And did anybody waive any three-day requirement of going to trial that you know of?

A. Not to my knowledge.

Q. Not to your knowledge.

A. Yes, sir.

Q. And then you told us. I believe, in your direct testimony that as a result of this investigation that this boy, the Judge told you to hold him in custody while you went ahead and got some petitions, is that what happened?

Detective J. E. O'Connor.

A. He instructed the Court to hold the boy in custody.

Q. Instructed what court? Who?

A. His probation officer.

Q. As a matter of fact, you had had him in custody the day before, on the 16th, did you not?

A. On the 17th, sir.

Q. Didn't you pick him up on the 16th?

A. It was on July 17th that he was apprehended.

Q. That's when he got into court on the run-away charge, but didn't you pick him up on the 16th though?

A. Not to my knowledge. It was on the 17th.

Q. On the 17th. Did you arrest him on the 17th?

page 39 } A. No, sir.

Q. Who arrested him?

A. Sergeant Lester.

Q. Sergeant Lester arrested him. Then you don't know what transpired—

A. No, sir, I do not.

Q. All right. Then getting ourselves over to the, when you finally got the petitions. Now, there is no question, and the record so shows, that these petitions were gotten on August the 10th, isn't that correct?

A. If this is what the record shows, sir, this would be right.

Q. Which is some one month or so later, or roughly a month—a little less—from the time that you say this interrogation took place in court when this boy didn't have a guardian *ad litem* or a lawyer present, is that correct?

A. I would assume; yes, sir.

Q. All right. And then on August the 10th when you got this petition, this boy was in Beaumont, wasn't he?

A. I cannot answer that, sir. I do not know.

Q. You can't.

A. No, sir.

Q. As a matter of fact, he wasn't even there on the 11th when the Court had a hearing on these, according to the record, on August the 11th, isn't that correct?

page 40 } A. I was not there; no, sir.

Q. You weren't there either, were you?

A. No, sir.

Q. Are you familiar with the court order which said that the Court took evidence on the 11th?

A. No, sir, I am not.

Detective J. E. O'Connor.

Q. Well, I don't want to mislead you, Officer, but each order indicates that on August the 11th, on every one of these—

The Court: He said that he wasn't there, Mr. Koutoulakos.
Mr. Koutoulakos: All right. That evidence was—

By Mr. Koutoulakos:
Q. Then, to your knowledge, you were the investigating officer. You would be the one who would be presenting this evidence, isn't that correct?
A. Yes, sir.
Q. And you weren't even there on the 11th, were you?
A. Not to my knowledge; no, sir.

Mr. Koutoulakos: I don't have any further questions, Your Honor.
The Court: Mr. O'Connor, let me ask you one question to see if I understood you.
The Witness: Yes, sir.
The Court: When you brought to the attention of Judge Rothrock that this boy was possibly implicated in some offenses, that was on the 18th of July, I believe.
page 41 } The Witness: That's correct. Yes, sir.
The Court: Now, between the 18th of July and the 10th of August, did you investigate these alleged offenses?
The Witness: Yes, sir.
The Court: And then as a result of that investigation you procured these juvenile petitions.
The Witness: That's correct.
The Court: As instructed.
The Witness: As instructed; yes, sir.
The Court: All right, sir.
Mr. Witt: I have one further question, please, Judge, if I may, sir.
The Court: Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Witt:
Q. Do you recall who else was in court on the 18th of July besides yourself and the Judge?
A. As I recall, his mother and father *was* there.

Detective J. E. O'Connor.

Q. All right.

Mr. Witt: That's all.
The Court: All right, sir, you may step down. Thank you.
Mr. Koutoulakos: Oh, I had one question.

RE-CROSS EXAMINATION.

By Mr. Koutoulakos:

Q. You made no report to the Court on the matters that came to be heard on the 11th regarding the specific charges that were heard on the 11th, did you?

page 42

A. On what day, sir?
Q. On August the 11th, on those charges that developed from August the 10th petitions. You made no report to the Court on August the 11th.
A. If I signed the petitions on that day—
Q. Well, forget the petitions. I am talking about a report now. You didn't make a report to the Court after that.
A. No, sir, I did not.

Mr. Koutoulakos: That's all. Thank you.

(Witness excused.)

Mr. Witt: Your Honor, at this time I would like to call Mr Lewis D. Morris, who is an attorney at law. He has been subpoened and he has appeared here, but he said that he had some matters in another court. I wonder if we could take a short recess.
The Court: Yes. Suppose we take a short recess and we will send for Mr. Morris.
Mr. Koutoulakos: Your Honor, I told Mr. Harp this, and I will so represent to the Assistant Attorney General, I am not fussing about what happened in the Circuit Court, and I don't think Mr. Morris had any involvement in the Juvenile Court, if it will eliminate it, maybe by stipulation or something. If that's all that's involved, why it might be—

page 43

Mr. Witt: Well, I am not concerned with matters that took place in the Circuit Court, Your Honor. I am concerned with Mr. Morris' investigation.
The Court: All right.

Lewis D. Morris.

(Whereupon, a short recess was taken.)

The Court: Mr. Morris. I believe you are to be sworn, sir.
Mr. Morris: All right, sir.

Whereupon,

LEWIS D. MORRIS,

was called as a witness on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

Mr. Koutoulakos: Your Honor, I certainly do want the record to show that I know Mr. Morris, and I stipulate his official qualifications without question.
The Court: Thank you, Mr. Koutoulakos.
Mr. Witt: All right, sir. Thank you.

DIRECT EXAMINATION.

By Mr. Witt:
Q. Mr. Morris, do you recall an occasion in 1961 on which you were appointed by the Circuit Court of Fairfax County to represent Mr. French in some matters which were to be disposed of by that court?
A. I do.
Q. Now, I am not going to get into any matters which actually transpired before the Circuit Court of
page 44 } Fairfax County. However, I do direct your attention to the investigation which you made of this matter prior to the time that Mr. French was actually tried on those matters.
Did you have an opportunity to discuss the cases with Mr. French prior to the time that they were tried?
A. Yes, I did. After I was appointed by Judge Brown to represent the defendant, He and I went back into the back room, that's the Judge's chambers behind the courtroom, and we sat there and we discussed the ten different offenses that this boy had been charged with.

Mr. Koutoulakos: Now, Your Honor, I don't think it's proper to go any further. It's a privilege here. And I don't see how it effects this particular hearing. We are concerned with the Juvenile Court. I opened, as I recall, by saying that

Lewis D. Morris.

whatever happened in the Circuit Court, I feel, was proper. It's just what happened in the Juvenile Court that we are contesting.

The Court: What do you propose by Mr. Morris, Mr. Witt?

Mr. Witt: Your Honor, I propose to show through Mr. Morris at this particular time that during the investigation which Mr. Morris was making of the charges which Mr. French was standing trial for, that pertinent information was given to Mr. Morris concerning a hearing which was held on those charges by the Juvenile and Domestic Relations Court which became knowledgeable to Mr. Morris because he was counsel.

The Court: I think that would be admissible.

page 45 } Mr. Witt: That's the sole purpose of having Mr. Morris on the stand, sir.

The Court: I think that would certainly be admissible.

Mr. Koutoulakos: Well, Your Honor, except for this, I think the record shows, and I think their evidence shows, that there was no hearing, in effect. The police officer said he wasn't there on the 11th. The order says that the hearing was on the 11th.

The Court: Well, Mr. O'Connor says that he wasn't there on the 11th, but we haven't finished yet.

Mr. Koutoulakos: Yes. And the defendant said he wasn't there on the 11th.

Mr. Witt: Well, Your Honor, again, I am not directing my attention to the 11th. I am directing it to the 18th of July.

The Court: All right, go ahead.

The Witness: This was the particular day that he had been indicted by the Grand Jury on these ten counts. I took the indictments back to the back room and I asked him if he had had a hearing or a trial—I don't know which word I used, whether it was a "trial" or a "hearing—in the Juvenile Court. And he said he had had either a hearing or trial. And I asked him had he been represented by counsel in the Juvenile Court, and he said he had not been represented by counsel in the Juvenile Court. I did not go into any of the, what happened in the Juvenile Court as to any testi-

page 46 } mony or what happened. I merely recall asking him if he had a hearing or a trial.

Mr. Witt: I see. I have no further questions.

Frank Deierhoi.

CROSS EXAMINATION.

By Mr. Koutoulakos:

Q. Mr. Morris, on the question of a hearing or a trial, you didn't develop that to see just what the boy was talking about, did you?

A. No, I didn't. I merely asked him as to whether or not he had made any admissions as to these offenses, and so forth. And I said, "Now, did you have a hearing, or, a trial" —I don't recall which word it was—"in the Juvenile Court?" He said, "Yes, I did." I said, "Were you represented by counsel?" He said, "No, I wasn't." So what sort of hearing he had, I don't know.

Q. All right, sir. And you don't even know if he had a hearing on these specific charges.

A. No, sir. All I know, I asked him if he had—well, I was discussing these and I asked him if he had had a hearing, or, a trial, and he said, "Yes."

A. All right, sir.

Mr. Koutoulakos: That's all I have, Judge.
Mr. Witt: I have no further questions.
The Court: All right, you may be excused.
The Witness: May I be excused? Thank you.

(Witness excused.)

page 47 } Mr. Witt: At this time, Your Honor, I should like to call Mr. Frank Deierhoi, who is the Director of Court Services for the Juvenile and Domestic Relations Court.

Whereupon,

FRANK DEIERHOI,

was called as a witness on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Witt:

Q. Would you state your name and occupation for the record, please, sir.

Frank Deierhoi.

A. Frank Deierhoi, Director of Court Services for the Fairfax County Juvenile and Domestic Relations Court.

Q. Were you connected with the Juvenile and Domestic Relations Court of Fairfax County in the year of 1960, or '61, excuse me.

A. Yes, I was.

Q In what capacity, sir?

A. Chief Probation Officer.

Q. All right, sir. Now, during the course of your duties as Chief Probation Officer for the Court of Juvenile and Domestic Relations of Fairfax County, is it necessary that you maintain certain records?

A. Yes, it is.

Q. Are you an officer of the Juvenile and Domestic Relations Court, Mr. Deierhoi?

page 48 } A. Yes, I am.

Q. All right, sir. What type of records is it required that you maintain?

A. These are our social records, prehearing or court reports, and chronological reports prepared by the probation officers.

Q. All right, sir. Do you have in your possession such a record concerning Leonard French?

A. Yes, I do.

Q. Do you have that record with you?

A. Yes, I do.

Q. Now, do you have within those records certain records concerning occurrences which occurred or activities which were engaged in by Mr. French during the spring and summer months of 1961?

A. Yes, I do.

Q. Do your records reflect any court activity that may have taken place on July the 18th, 1961?

A. Yes, I do.

Q. Would you state for the Court, please, what your records do reflect with regard to a court proceeding which took place in the Juvenile and Domestic Relations Court of the County of Fairfax on the 18th of July, 1961?

Mr. Koutoulakos: If Your Honor please, I don't know, is this an official court record or are these just mem-

page 49 } orandums?

The Court: Will you answer that question, Mr. Deierhoi, please.

Frank Deierhoi.

Mr. Koutoulakos: Are these your own personal memoranda, or are these—

The Witness: No, these are not my personal memoranda. These are records of the Court.

Mr. Koutoulakos: Of the Court?

The Witness: Yes.

Mr. Koutoulakos: Could I see them then, please?

Mr. Witt: Yes, sir.

(Counsel examined file.)

By Mr. Witt:

Q. Would you proceed to answer the question, please, sir. What do your records reflect as to what court activity took place on July the 18th, 1961, and the disposition of the matters considered therein?

A. There is an entry on 7-18-61, a case in court.

"Present: Mr. and Mrs. French, Lennie French, Mrs. Geyer, Detective O'Connor, and Probation Officer Armstrong. Judge Rothrock, presiding.

"Lennie admitted to being a run-away and to performing to several acts that Detective O'Connor discussed."

"The disposition: Judge Rothrock found Leonard within the purview of the Juvenile and Domestic Relations Court Law of 1950, as amended, and committed him to page 50 } the State Department of Welfare and Institutions.

"He further ordered that petitions on each charge were to be filed and that Lennie was to be certified on each charge to the Grand Jury hearing which would be held on 9-11-61."

Q. All right, sir.

Mr. Witt: I have no further questions of the gentleman, Your Honor.

Mr. Koutoulakos: Let me get this straight here.

CROSS EXAMINATION.

By Mr. Koutoulakos:

Q. You were in this hearing?

A. No, sir.

Q. But that reports indicates that this boy admitted being a run-away, is that correct, your report there?

Frank Deierhoi.

A. The report states, "Lennie admitted to being a run-away and to performing the several acts that Detective O'Connor discussed."

Q. Yes, but you knew that there were no charges on these acts that the detective had discussed, isn't that correct?

Mr. Witt: Well, Your Honor, I object to that. I don't know whether Mr. Deierhoi—

The Court: Mr. Deierhoi wasn't there.

Mr. Witt: He wasn't there.

Mr. Koutoulakos: All right.

By Mr. Koutoulakos:

page 51 } Q. Does the record reflect any other charges other than him being a run-away on the 18th?

A. "No other charges had been filed at that time."

Q. All right. Does the record reflect a hearing on any other charges other than the run-away charge?

A. It only reflects what I read to you.

Q. Well, it reflects a conversation. Does it reflect a hearing?

Mr. Witt: Your Honor, again, I think that calls for a conclusion of law as to this gentleman, and I am not sure he is qualified within the meaning of the law as to what a hearing is or whether it's a conversation.

The Court: I don't believe, really, Mr. Koutoulakos, that it could be much clearer than the notes that Mr Deierhoi read.

Mr. Koutoulakos: That's right. I just want to bring that out.

By Mr. Koutoulakos:

Q. And you being the Chief Probation Officer, did any petitions on that day come to your attention, on the 18th, regarding any other charges other than being a run-away?

A. No, sir.

Q. And was anybody appointed as guardian *ad litem* on the 18th for this boy?

Mr. Witt: Again, I object, Your Honor. Mr.

page 52 } Deierhoi, again. wasn't there.

Frank Deierhoi.

By Mr. Koutoulakos:

Q. Does the record reflect a guardian *ad litem* being appointed?

A. No, sir.

Q. Does the record reflect a lawyer being appointed for him?

A. No, sir.

Q. And this action was taken when this boy didn't have a guardian *ad litem* or a lawyer appointed for him, is that correct?

A. According to this record—

Mr. Witt: Objection, sir.

The Court: Insofar as he knew from the record.

By Mr. Koutoulakos:

Q. From the records that you have, isn't that correct?

A. That's correct.

Q. Now. were you present on August the 11th?

A. No, sir.

Q. Was anybody present, to you knowledge, when the Court certified this young man on these ten felony charges?

A. Not to my knowledge.

Q. Do you know if any—

The Court: He couldn't know. He wasn't there.

Mr. Koutoulakos: Well, I was wondering if he page 53 } had any knowledge of anybody else being in there. That's all I have.

Mr. Witt: Nothing further.

The Court: Thank you, Mr. Deierhoi.

(Witness excused.)

Mr. Witt: Your Honor, again. I have a witness whom I am going to call, which I did not subpoena, but who has agreed to testify, and he is not in the building, he is directly across the street, Judge Rothrock, who conducted these proceedings. I am going to call him for the purpose not of going into any merits of anything that he may have heard or did not hear on that day, but rather to clarify the proceedings as

to what exactly took place and what was expected by the Court at the time over which he was presiding.

The Court: Do you have, Mr. Witt, any other witness who could testify pending the arrival of Mr. Rothrock, or is he your last one?

Mr. Witt: No, I do not, Your Honor. I think that Judge Rothrock would be my last witness.

Mr. Koutoulakos: Your Honor, before the Judge is called and maybe inconvenienced, I want to cite Section 19.1-268 to the Court. And the statute says there, "No judge or justice of any court, or clerk of either, or justice of the peace, or other person having the power to issue warrants or try cases shall be competent to testify in any criminal or page 54 } civil proceeding, except proceedings wherein the defendant is charged with perjury * * *" And I say that on the basis of this statute Judge Rothrock can't testify, and move that he not be called.

Mr. Witt: Well, Your Honor, in anticipation of the objection of Mr. Koutoulakos on this point, there is certainly no question at all but what the statute is outstanding. I don't contend that it's not there. However, I must consider for a moment the somewhat peculiar nature of these proceedings by which we are detained here this morning. Again, it's necessary for the purpose of allowing the Court to have at its disposal every possible fact that it can have, not only from the petitioner but from the respondent, as to what took place with regard to matters outside of the record, and, also, as to any other matter that must be considered by the Court.

Now, this petitioner is contending that he had no hearing on this matter. He is contending, also, that, as I understand his allegations, he did not know he was under the purview of the Juvenile and Domestic Relations Law. It is pertinent and extremely important from the standpoint of the respondent that Judge Rothrock be given an opportunity to clarify the situation as it sits.

Now, the records reflect that petitions were filed on August the 10th and that this gentleman was certified on August the 11th. And we have offered evidence to show that a hearing was held by which these matters were considered, page 55 } but it was not on those dates.

Now, Mr. Koutoulakos very ably and understandably has continued to urge the Court that it must concern itself only with the August dates, and, obviously, I am urging the Court otherwise. And the only way that I can explain the disparity between the hearing date and the date that the petitions show on their face is by having the Judge testify

as to exactly what the situation was. Now, he is the only man who can say.

The Court: Well, taking the entire evidence as we, evidence all to date, it would appear from the respondent's evidence. certainly as well as that from the petitioner, that on the, what was it, 18th day of Juy, 1961, this boy was brought into the Juvenile and Domestic Relations Court, apparently, as a run-away from the custody, I would assume, of his grandmother, at which time his mother, father, and grandmother appeared. I would assume, again, from Detective O'Connor's testimony—as a matter of fact, I guess I don't have to assume because Mr. O'Connor so testified—that in a discussion with Judge Rothrock of this matter for which this boy was then detained, to wit, as a runaway, Detective O'Connor brought to Judge Rothrock's attention that this boy was under investigation for certain other alleged offenses. And now certainly there is an inference from a fact, if not the fact itself, that Judge Rothrock asked Detective O'Connor what the nature of these offenses were. Then Judge Rothrock decided that this boy, as a run-away, came within the pur-
page 56 } view of this Act, ordered him committed to Beaumont, directed Detective O'Connor to investigate these alleged ten felonies, or ten charges which turned out to be felonies, against this boy, and upon completion of his investigation obtained juvenile warrants, or juvenile petitions, however they are correctly described. And that on the 10th day of August, 1961, Detective O'Connor obtained these warrants, which relate to automboile larceny and, I believe, to breaking and entering, and on the 11th of August, the following day, Judge Rothrock, pursuant to the mandate of the statute, signed an order which on its face states that there had been compliance with the mandatory investigation relating to the physical, mental and social condition of this child.

At this stage, of course, it would appear that when the warrant was, when the juvenile petitions were obtained by Detective O'Connor, this boy was in Beaumont. And that when this order relating to the investigation of his mental, physical and social conditions and his personality were signed, the boy was in Beaumont. And that he was ordered to be held and certified, ordered and certified as an adult and held for action by the Grand Jury in the Circuit Court of Fairfax County.

I would assume that that would be about all that Judge Rothrock would testify to, but then my assumption might be assuming too much.

Mr. Witt: Well, Your Honor, the only thing
page 57 } that I could say in addition to that would be by way
of actually giving evidence myself, which I don't intend to do. And all I can say is that I have reason to believe that there would be some clarification made as to the actual issuance of these petitions.

Now, there is no question about what the record shows as to when they actually were, in fact, issued. However, I do think that if certain evidence which I would expect to present were entertained by the Court, that it might well throw some light on that. And that's what I have in mind. I have no thought of going into any merits or anything ansillary to this proceeding at all, as far as the Juvenile and Domestic Relations Court is concerned. All I am interested in doing is giving the Court the opportunity to have every available fact at its fingertips in order to provide a sound basis for a decision. And I recognize the fact that this statute states categorically that a judge cannot be called in a proceeding. But by the same token, Your Honor, I must remind the Court that a *habeas corpus* proceeding is a unique proceeding, and it is one which is made available to the petitioner for the purpose of bringing before the Court facts which could not be brought before it in any other proceeding. And, therefore—well, that's not quite true because you certainly can't bring it forth in an appellate proceeding. But I mean after other proceedings have gone by the board, he still has an opportunity to bring forth
facts which he may not have been aware of or just
page 58 } didn't present at that particular time.

Now, the latitude of *habeas corpus* proceedings is very, very wide and its range is almost totalitarian in its scope. And it appears to me, with the philosophy of these proceedings being what it is, that the whole idea is to present as complete a picture as we possibly can in order to give this petitioner every opportunity to protect himself, even after his normal procedures have long since gone by the board. And I think the same opportunity should be given to the respondent.

The Court: Mr. Koutoulakos, this, of course, doesn't make it right and no question was raised, but I remember being called in this Court in a habeas corpus petition as a witness in a case which I tried and which another judge heard. As I say, that doesn't make it right because no objections were raised. It's a unique question. The testimony of the Juvenile and Domestic Relations judge being in this case would not relate to the commission of a crime by this boy.

Mr. Koutoulakos, I am going to do what I consider the

next best thing. I am going to take that motion under advisement, hear Judge Rothrock's testimony, and if I should decide later upon consideration that it was improper, I will strike it from the record.

Mr. Koutoulakos: Yes. If I may answer, I merely wanted to point out, Your Honor, that in answer I was a little surprised at the scope of the writ of *habeas corpus,*

page 59 } which, in my opinion, was limited as to a legal custody, but it became totalitarian apparently on this issue. But this statute is so clear. It says that no matter, he can't testify as to any matter which may have come before him in the course of his official duties. And this is what the legislature laid down. I didn't make the law, and I certainly feel that we are bound by it just like they were. And, as a matter of fact, I was prevented one time from calling a justice in our Circuit Court to show that a man that was charged with drunk wasn't drunk and the judge so told him. And they wouldn't permit that in over objection.

And then, too, the other thing in this case which I think is grounds for a second objection—the record is clear. He is trying to go beyond the record and he can't do that. I think all the law is clear that he can't in any way deviate from the record itself.

The Court: Well, thus far there has been no attempt on the part of the Commonwealth to show that there was a hearing with witnesses on the 11th day of August, or the 18th of August—

Mr. Koutoulakos: Because the record shows—yes. On the back there is nothing registered, which indicates that there were no witnesses. Whereas on these others, at least on July the 18th there were. So I say he can't—this is a collateral attack on the record, is what he is trying to do, and I object to it on that ground.

The Court: As I say, I will permit it and take

page 60 } that objection under advisement, Mr. Koutoulakos.

Mr. Witt: Well, then, Your Honor, if I might again indulge the Court's indulgence to request just a five-minute recess.

The Court: Surely. You say he is in his office?

Mr. Witt: Yes, sir.

The Court: All right, we will take a short recess.

(Whereupon, a short recess was taken.)

The Bailiff: Be seated and come to order, please.

Mr. Witt: Your Honor, I have neglected to ask the indul-

gence of the Court to excuse Detective O'Connor. Neither Mr. Koutoulakos nor myself have any further need of his testimony, and if he could be excused, I would appreciate it.

The Court: Thank you, Mr. O'Connor. You are excused.

Detective O'Connor: Thank you.

The Court: Now, Judge Rothrock.

Mr. Koutoulakos: If Your Honor please, I would like to let the record show that I object to any testimony by the Judge on the grounds heretofore stated.

The Court: All right, sir. I believe the record shows that the Court has ruled with reservations, and the ruling will stand.

Mr. Koutoulakos: I take an exception, Your Honor.

The Court: All right.

Whereupon,

JOHN A. ROTHROCK, JR.

page 61 } was called as a witness on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

Mr. Koutoulakos: Your Honor, I will certainly stipulate that Judge Rothrock was a properly constituted judge and was judge of the Juvenile Court.

The Court: Thank you, sir.

DIRECT EXAMINATION.

By Mr. Witt:

Q Judge Rothrock, if you will bear with me for just a minute, I'll direct your attention to the date of July the 18th, 1961, at which time you had before you a matter involving Mr. Leonard French, who at that time, I believe the records reveal, was an infant of 17 years of age before your Court—16, excuse me. I am sorry.

Do you recall the proceeding that took place on that date?

A. I recall the name, but I don't recall the proceeding.

Q. All right, sir. Now, Judge Rothrock, do you have any knowledge of what took place on that date with regard to certain matters on a run-away petition which was filed concerning Mr. Leonard French at that time?

A. I can say that at the request of a state police inspector that I reviewed the record. And that would be the source of

my recollection. Without the help of the record, I couldn't have recalled anything as to what happened.

page 62 } Mr. Witt: Well, Your Honor, if the witness may look at Petitioner's Exhibit No. 1 there, it might reflect something which he might—

Mr. Koutoulakos: Your Honor, I will certainly let the record speak for itself.

By Mr. Witt:

Q. Judge Rothrock, I show you now a document which is in the record of the proceedings concerning Leonard French in your Court in July of 1961. Do you remember the petition which was filed with regard to the petitioner in this case on that day, July the 18th, 1961, or rather that he was in court on that day? The petition was filed June the 30th, 1961.

A. I can only testify as to what the record discloses. This would be my record; yes, sir.

Q. All right, sir. Do you recall at all who was in court that day?

A. I could not recall of my own recollection, unless this record would disclose that the—I am certain that based upon the order that Leonard French would have been in court, together with a parent or guardian.

Q All right, sir Do you recall during that day any action taken by you as the Judge presiding over that Court concerning certain other petitions?

Mr. Koutoulakos: Now, Your Honor, there is no other petitions on that day and I think he knows it, and I page 63 } object to the question as leading, on top of the other objections. There is no evidence of any other petitions on that day.

Mr. Witt: I am not stating. Your Honor, that there were any petitions filed on that day other than that. The question that I asked is directed to action that may have been taken as to any petitions which were to be.

The Court: All right.

The Witness: I can testify to the best of my recollection that Larry French was brought into Court and would have appeared with a parent or a guardian. The petition was read to him. I had the benefit of the file, or the current history of Larry French before me. Having knowledge of this petition and of his past histories with the Court, I conducted a hear-

ing and probably informed Mr. Deierhoi, as well as Mr. French and his parents, that in my opinion this would be a proper case for certification, that the Juvenile Court could offer nothing more for this boy.

By Mr. Witt:

Q. All right, sir. Now, Judge, you mentioned in your testimony a current report. Did that contain a current social history? Is that what you have reference to?

A. In each case they give not only the current petition, but all the, the social report, or the social history of the juvenile that the Court would have.

Q. I see. Was that report influential in your decision?

A. It was. I note here that he was brought in on page 64 } a petition that he did run away from his grandmother's residence. And I believe that during the course of the testimony that there were other matters cited and I was not certain, or would not have been certain, based upon this type of petition, whether or not he could have been certified as such on that. And based upon my recollection of the case, what I did was to order that petitions be filed based upon the crimes that were alleged to have been committed during the course of the officer's testimony in this particular hearing.

Q. All right, sir.

Mr. Witt: I have no further questions, Your Honor.

The Court: Mr. Koutoulakos?

Mr. Koutoulakos: Yes. Let me ask a couple of questions, Judge.

CROSS EXAMINATION.

By Mr. Koutoulakos:

Q. The normal procedure of the Court is, if there is a hearing, on the back of the petition the names of the people that appear are recorded thereon, isn't that correct?

A. Should be; yes, sir.

Q. And if there are no names on any petition, that would indicate to you that nobody was present to record their names, isn't that correct?

A. Unless there was a mistake.

John A. Rothrock, Jr.

Q. All right. And you are willing to let the rec-
page 65 } ords speak for themselves?
A. This would be the best of my recollection.

Q. And, as you indicated, this boy was brought in apparently on a petition of being a run-away, but if there were other charges upon which a petition was ordered to be brought in, that would require a hearing on those other charges, would it not?

A. I didn't think so. I think that I heard the evidence, all the evidence that I needed to hear to just summarily ask that the petitions be filed on this and enter the order that I did.

Q. All right. Then what you did, you heard evidence of other matters, or at least allegations of other matters without any formal petition. And then when the formal petition was filed it wasn't necessary to have a hearing on that. He was just ordered to be held.

A. That's apparently what happened in this case.

Q. And there was no hearing then on the formal petitions?

A. On the formal petition itself, no, sir.

Q. And there were no witnesses present?

A. Not to my knowledge.

Q. No guardian *ad litem* present?

A. Well, there was—

Q. I mean on the formal petitions after they were filed.
A. Not to my recollection.
page 66 } Q. And no lawyer?
A. Not to my recollection.

Q. And the defendant wasn't present either, was he?

A. I doubt it.

Q. All right. Thank you, Judge.

Mr. Koutoulakos: That's all.

Mr. Witt: I have no further questions, Your Honor.

The Court: Thank you, Judge Rothrock. You are excused.

(Witness excused.)

Mr Witt: Your Honor, that's the respondent's case. I have no further witnesses.

The Court: Any rebuttal, Mr Koutoulakos?

Mr. Koutoulakos: No, that's all.

The Court: Are you gentlemen prepared to argue this matter?

Mr. Koutoulakos: I am, Your Honor.
Mr. Witt: Yes. sir.

ARGUMENT ON BEHALF OF PETITIONER.

By Mr. Koutoulakos:

Mr. Koutoulakos: If Your Honor please, first I want to read the sections that we are guided by in the Juvenile Court. And I tried to outline the sections in my research so that I won't read the ones that wouldn't be necessary.

The first thing, I point to 16.1-166 which starts out with, "After a petition has been filed"—after a petition
page 67 } has been filed—" and after such further investigation as the Court directs, unless the parties hereinafter named voluntarily appear, the Court shall issue a summons reciting briefly the substance of the petition or the charge upon which it is alleged that the child is within the purview of this law, and requiring all proper or necessary persons to appear personally before the Court at a time and place stated. If the person so summoned shall be other than a parent or guardian of a child, then the parent or parents or the guardian, or both, if their address be known, shall be notified of the pendency of the case, the charge, and of the time and place appointed for the hearing.

"If it appears that the child"—well, it doesn't, that only talks about protecting the child.

So we start off and, first, there has to be a petition on a specific charge.

The Court: Mr. Koutoulakos, let me ask you one question. I am satisfied as to what the answer is, but this is the law in effect in 1961, that you are reading from, is it not?

Mr. Koutoulakos: Yes, this is the old—I haven't gone to the amended section.

The Court: Right.

Mr. Koutoulakos: All right.

Now, then, Your Honor, we go down to 16.1-172, which says, "In no case shall the hearing proceed until the parent or parents of the child if residing within the state"—and
page 68 } I recognize that before the law was changed—now they require a lawyer, but then they didn't, but the parents had to be present. And I contend under all the evidence—of course, His Honor indicated that when he testified. There was nobody present. This was a summary hearing based on a petition filed the day before. So there was nobody

present. I think that has to be conceded, neither guardian *ad litem,* nor parents, nor anybody else.

And I also say the record shows, as the law requires, that a report be made on the specific charge upon which he has certified, if Your Honor please. And I am satisfied that the record has no such report. And I cite the case of *Tilton versus the Commonwealth,* wherein they remanded a case back, saying that the Circuit Court had no jurisdiction until that report is filed, even assuming that they get beyond the initial thing.

The Court: You speak of this socialogical report?

Mr. Koutoulakos: Yes, there was none filed insofar as this specific charge. And that's what the Court said in that case. There is not any background there so it has to involve that specific charge that the boy is there on and he is being certified on. And I think the record will speak for itself; it does not have that.

Then from there, if Your Honor please, we go to 16.1-173.

"When no person required to be notified under 16.1-172 is present in court at the time of the hearing, the Court shall"—

page 69 } shall—mandatory—"before proceeding with a hearing appoint a probation officer"—they didn't even do that here, although I always question the right of a probation officer, who is the one that is sitting with the Court, in effect, as an arm of the Court, to be a guardian *ad litem* to protect the interests of a juvenile—"before proceeding with a hearing appoint a probation officer or a discrete and competent attorney at law as guardian *ad litem* to represent the interests of the child or minor, and such guardian *ad litem* shall be present"—shall be present—"at the hearing."

Well, of course, it's clear what happened here, without taking any more of the Court's time.

16.1-174: "In cases in which a summons is necessary it shall be sufficient to confer jurisdiction if service is effected at any time before the time fixed in the summons for the return thereof, but the Court shall not proceed with the hearing earlier than the third day after the date of service if objection thereto be made"—not only could objection not have been made, the boy wasn't even there.

Now, here is a felony case, if Your Honor please,—whether it initiates in the Juvenile Court or not, it makes no difference —and the law has been clear and overwhelming ever since I can recall, that in a felony case the defendant has to be present at every stage of the proceeding, even a preliminary

hearing. They can't even start the thing without the defendant being present. Here is a case where a young
page 70 } man on the basis of a petition filed on the day before is summarily ordered to, held for action of the Grand Jury without any benefit of counsel, of guardian *ad litem,* of his parents, or anything else. And it says here that, "With the hearing earlier than the third day after the date of service if objection thereto be made by the parties servied" —by the parties served. There is no service. It's obvious from the testimony. "—or by a guardian *ad litem* appointed to represent the interests of the child.

I say this, and I want to bring to the mind of the Court a recent case where in that case the Supreme Court was alarmed—I don't want to use the term "alarmed," but disturbed over the fact that there was a lawyer appointed to defend a man, and I think he talked to him, and there were some ten charges, as I recall, in that recent decision, and the defense later on the writ was: ineffective assistance of counsel. And there the Court was a little disturbed, even though the man admitted everything and went ahead and plead. And the lawyer was asked about the time he spent with him, and he said that, well, a half an hour was all that was necessary. Here there was a lawyer appointed in that case and the Court said, "Well, I don't see how it is possible on ten felony charges that a half an hour or an hour would be sufficient." Here this boy had not only no lawyer, but no guardian *ad litem.* He wasn't even present. And as the evidence clearly shows, he was already in Beaumont, if Your Honor please.

Now, going from there, the failure to comply
page 71 } with any part of these mandatory requirements, Your Honor, I take the position, makes these proceedings void.

Now, Your Honor, we are dealing with an infant, as he is termed by the law. He was 16 and then 17. And on guardian *ad litems,* and I am citing this law in both instances, in citing *Mickie's* Jurisprudence with, of course, any number of cases under it, it says, "Where the interests of infants are concerned, it must affirmatively appear on the record"—you can't go behind the record—"on the record that a guardian *ad litem* was duly appointed. Where the record is silent on the subject, it will not be presumed It is not sufficient that the creed recites that the cause came on to be heard upon the answer of defendant * * * the record must show the appointment of a guardian *ad litem* and the filing of an answer in his behalf or the proceedings are void."

Well, I think the proceedings here, Your Honor, should be declared null and void, not only for just the one but for everything that took place here, in violation of every constitutional safeguard, of the mandate of the statute, of the law. And I recognize that the defendant is here, and I recognize what took place in the Circuit Court, but that isn't the test here. The law protects equally the guilty and the innocent. It stresses that their rights be protected. And I feel in this instance that not only were they not protected, but page 72 } they were arbitrarily violated if Your Honor please. I feel very definitely that this boy has, in my opinion, proper grounds for a writ of *habeas corpus* in that he is being illegally detained on the basis of void proceedings, as the record indicates and as evidenced to by the evidence.

The Court: Mr Witt?

ARGUMENT ON BEHALF OF RESPONDENT.

By Mr. Witt:

Mr. Witt: Your Honor, I will direct my attention to two separate approaches to the same argument, and that be that the petition should be denied. One is purely a legal argument based on cases which have recently been decided, both in the Commonwealth of Virginia and by the Federal courts concerning the character of preliminary hearings as to whether they are procedural or jurisdictional.

It is the position of the Commonwealth in this case that a preliminary hearing or a hearing in the Juvenile and Domestic Relations Court in which a juvenile has been treated as an adult and certified to the Grand Jury under the statutes that are outstanding setting forth that procedure is, in fact, a preliminary hearing. And it is considered, or should be considered to be a preliminary hearing of the same character that an adult felon gets when he is first brought into court. The law is well settled with regard to adult felons that a preliminary hearing is not jurisdictional but is, rather, page 73 } procedural. And any matters which might be raised as objections to any defects that occurred during that preliminary hearing must be raised prior to a hearing on the merits or they are forever lost, or the complaint thereof is forever lost to the aggrieved party. Now, this position, the position on the preliminary hearing as such im amply supported by the case of *Snyder against the Commonwealth*, which is a Virginia case, decided by the Virginia,

the State of Virginia Supreme Court of Appeals, the citation being 202 Virginia, page 1009, 121 S.E. 2d, 452. Also in the case of *Detoro against Pepersack* in 332 Fed. 2d, page 341 which also supports that position; that the preliminary hearing is not jurisdictional, but is, rather, procedural. And, as such, any defects must be raised at the proper time or they must be lost.

It is the contention of the Commonwealth that the hearing which is held on a juvenile who is treated as an adult is, in fact, the same thing as a preliminary hearing, because there is nothing between the juvenile hearing and the Circuit Court proceeding which would take the place of a preliminary hearing. And, therefore, it must be considered to be a preliminary hearing. At that time the Judge of the Juvenile and Domestic Relations Court must have at his fingertips a report, or facts available to him which will allow him to make up his mind as to whether he is going to treat this juvenile as an adult or not. And the evidence presented by Judge Rothrock here shows that he did have available to him at that time current information of the nature prescribed by the case which has been cited by Mr. Koutoulakos, in *Tilton against the Commonwealth,* as to whether this boy should be treated as an adult or not. And he made his determination based on that report. In a response to a direct question the Judge stated that the reports that he had were of the nature of the social report required and that that report was influential in his decision as to whether or not he should treat this boy as an adult.

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And, therefore, it is the position of the Commonwealth that the pertinent sections of the Juvenile and Domestic Relations Law were complied with in that the report was there. The day on which this particular matter was considered by the Court, as far as evidence is concerned, was the 18th of July, 1961, and there were witnesses there at that time. The detective presented certain evidence which was considered by the Court. The court, based on that, told him to issue petitions. At that hearing were present the parents and one of the grandparents of the petitioner. Now, when the presence of the parents in these matters is a fact, you are not required to gain appoint a guardian *ad litem* to protect this petitioner for his natural parents are there. And the only purpose that a guardian *ad litem* has is to fill the shoes of natural parents in the event of the absence of those parents. And since the parents are there there is no need for a guardian *ad litem.*

And I would remind Mr. Koutoulakos that prior to this time, during 1961 there was no requirement in the Juvenile and Domestic Relations Law that a

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lawyer be present if the parents were there. The parents were there and this is a matter of fact which has been testified to here. So the position of the Commonwealth being that since the Juvenile and Domestic Relations hearing culminated in the certification of an adult, that the preliminary hearing was held and consequently the preliminary hearing cannot be attacked at this time on a *habeas corpus* proceeding.

Now, with regard to the second approach that we must take, counsel for the petitioner has argued urgently before the Court that this young gentleman never had a hearing as prescribed by the Juvenile and Domestic Relations Law, or even by the law concerning adults as far as preliminary hearings are concerned, it's the position of the Commonwealth, Your Honor, that in fact he did have a hearing. We have testimony by three witnesses here, or four witnesses here, not only the detective but the evidence that was supplied by Mr. Deierhoi from his records, the evidence that was supplied by Judge Rothrock, stating that—and also the evidence—excuse me—the evidence that was supplied by Mr. Lewis Morris—we have before the Court facts which would show that this man was not only aware of the fact that he was being certified to the Grand Jury as an adult but that he knew this. He knew this on the day that he was indicted by the Circuit Court, because

page 76 } Mr. Morris during his investigation of this matter of this gentleman asked him, point blank; Have you had a hearing or trial on this matter? And Mr. French answered yes. And he knew when he came up before the Circuit Court to be indicted what he was being indicted for. And in response to a direct question he said that he had had a hearing in the Juvenile and Domestic Relations Court on this matter.

Now, Mr. Koutoulakos asked the question: Well, was it this matter or some other matter, and Mr. Morris answered the question by stating: I was talking to him about the felonies at the time. The only interest being that he was talking about those felonies when he said that he had had a hearing in the Juvenile and Domestic Relations Court.

The reference that Mr. Deierhoi has submitted for the consideration of the Court showed that Detective O'Connor was there, as we know, on July the 18th, 1961. And that evidence was considered by the Court at that time in the Juvenile and Domestic Relations Court concerning these felonies. And that pursuant to questions the petitioner admitted that he was involved in these matters. And that pursuant to that and other facts that the Court had before it at that time the petitioner was informed that he was going to be certified to the Grand Jury and treated as an adult.

Now, it is the position of the Commonwealth that in this matter no rights of this boy have been violated. He knew at the time of July the 18th, 1961 that he was going to
page 77 } be certified to the Grand Jury and be treated as an adult. We have ample evidence to that effect. And I submit to the Court that not only legally can we not attack this proceeding under a *habeas corpus* proceeding, but also factually we must consider that, in fact, a hearing was held, the purpose of which under the statute is to apprise the accused of what the nature of the complaint is, and, also, of what the decision of the Court is regarding that complaint. And this petitioner by his own admission to his attorney at the time that he was indicted stated that he had had a hearing on these matters. And I can only ask based on the law and fact that this Court deny and dismiss the petition for a writ of *habeas corpus* and remand the petitioner to the custody of the Virginia State Penitentiary.

ARGUMENT BY MR. KOUTOULAKOS—in rebuttal

Mr. Koutoulakos: Your Honor, a *habeas corpus* is guided by the record. And the record shows that there was a hearing allegedly held on the 11th. And there are ten orders in this case and every one of those orders say that there was a hearing, and on the evidence heard on the 11th of August this man was held for action, or this boy was held for action by the Grand Jury, as I recall the orders. Now, where is there any evidence of that?

I have listened with great patience to the argument of the Commonwealth, but I suggest that we just weren't listening to the same case.

page 78 } It says here, and signed on August the 11th, and every order is the same: "This cause came on to be heard this 11th day of August on the petition heretofore filed charging Leonard French, 17 years of age, with the crime"—and that's spelled out. "And it apparent to the Court that said child is 17 years of age," *et cetera, et cetera, et cetera.* Now, where was the hearing? Where is the evidence that came in?

Now, I don't know just what it takes to talk about an illegal hearing, but I am just going to read the last paragraph of what the Supreme Court of Virginia said in the Tilton case, and I think this applies to the Commonwealth strongly. It says, "Section 8 of the Virginia Constitution guarantees to an accused, whether he be guilty or innocent, that he shall not be deprived of life or liberty except by the law of the

land." Now, I ask, if Your Honor please, where in Heaven's name did this boy have any due process? Where did they meet this statute? What hearing did he have on the 11th? The evidence doesn't show any hearing in July. They were in August that he remarked to the Judge that this boy might have been involved in some other things. And the Judge said: Well, look into it, investigate it, file your petitions. The petitions get filed and this boy isn't even here. Nobody is notified. They fracture all the statutes, all the requirements of the statute. What are they up for? The three-day rule is fractured. No parents are here. No lawyer is here. No guardian *ad litem.*

page 79 } If Your Honor please, I am a little surprised. When I first talked to the boy about the case, I was a little concerned about whether or not he was, in fact, telling me what he was setting out to show. And the more that the prosecution put their case on the more convinced I became that this boy did have a cause. He certainly was deprived of his liberty without due process. He didn't have any preliminary. What preliminary is he talking about? The Judge got a petition on the 10th and then he signs an order on the 11th confining this boy. The boy wasn't even present. He was down on the Farm on another charge, some misdemeanor for running away from his grandmother. That's the hearing that he got. I submit, Your Honor, that he certainly has overwhelmingly sustained the burden, and that this man should, that the writ should be granted on the evidence that appeared before Your Honor today.

The Court: Gentlemen, I believe, and I believe that counsel share my views, that this is a matter of considerable importance. I would take this matter under advisement to give me an opportunity to read what you have mentioned. I regret to say I am certainly not sufficiently familiar with them. I want to read the cases cited by counsel.

I have some other matters here this afternoon that I must take up so I would excuse you gentlemen. I would remand Mr. French to the custody of the Superintendent of the Penitentiary pending the decision that I make.

page 80 } Mr. Koutoulakos: Your Honor, could he stay here? He has been locally detained until the final decision.

The Court: I would be guided by the wishes of the representatives from the Attorney General's Office. Generally I think the Superintendent of the Penitentiary likes to have these prisoners back just as soon as possible. Of course, if I also correctly recollect, the law of *habeas corpus* is appeal-

able, and I assume that if I should release this boy he would still remain in custody.

Mr. Koutoulakos: Well, Your Honor, I have already been advised by the Attorney General's representative that this case, of course, as Your Honor indicated, is of a grave nature, without any question. We feel strongly that we have made a case. I am sure they feel the other way. And they tell me that they plan an appeal. So on that the boy will have to remain in custody. I was just concerned with him remaining here pending the final disposition.

The Court: Well, I will certainly not be, will not take any lengthy amount of time in arriving at a decision, but, of course, if the decision is appealed by one side or the other, that is going to take some time.

What is the feeling of you gentlemen?

Mr Witt: Your Honor, of course we are guided by the necessity for the efficient operation of the Virginia State Penitentiary. And it has been the policy stated to us
page 81 } in the past in these matters that if at all possible the Superintendent prefers to have the petitioner remanded to his custody for the purpose of his maintaining proper security measures which he is required to do.

The Court: That has been my experience. And I know that when the writ is granted to bring them up here they want them back as soon as possible.

Mr. Koutoulakos: I know that's their policy, Judge.

The Court: So I would have to, in the normal course of events, I would have to remand Mr. French to their custody. But as I state Mr. French is going to have an answer to this particular hearing today very soon.

I will contact you, gentlemen, and you, Mr. Koutoulakos.

Mr. Koutoulakos: Thank you.

Mr. Witt: Thank you, Judge. You have been very indulgent and I appreciate it.

The Court: The Court will stand adjourned until 2 o'clock.

(Whereupon, at 1:10 p.m. the hearing in the above-entitled matter was adjourned.)

A Copy—Teste:

H. G. TURNER, Clerk.

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