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Record No. 6259

In the
Supreme Court of Appeals of Virginia
at Richmond

BILLY JUNIOUS RUSSELL

v.

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

FROM THE CIRCUIT COURT OF NELSON COUNTY

RULE 5:12 BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court ofAppeals of Virginia

AT RICHMOND.

Record No. 6259

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 14th day of October, 1965.

BILLY JUNIOUS RUSSELL, Plaintiff in error,

against

C. C. PEYTON, Superintendent of the Virginia State Penitentiary, Defendant in error.

From the Circuit Court of Nelson County
C. G. Quesenbery, Judge

Upon the petition of Billy Junious Russell a writ of error is awarded him to a judgment rendered by the Circuit Court of Nelson County on the 23rd day of March, 1964, in a certain proceeding then therein depending wherein the said petitioner was plaintiff and W. K. Cunningham, Superintendent of the Virginia State Penitentiary, was defendant; no bond being required.

RECORD

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page 1]

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(Petition for a writ of *Habeas Corpus Ad Subjiciendum*)

To: The Honorable C. G. Quesenbery, Judge of the aforesaid Court.

To-wit: Your petitioner Billy Junious Russell here-in-after referred to as petitioner will respectfully present and show unto this Honorable Court that he is unlawfully held, detained, and restrained of his liberty by W. K. Cunningham, Jr. Superintendent of the Virginia State Penitentiary at 500 Spring Street, Richmond 19, Virginia, and that he have an unlawful detainment consisting of, to wit: Denial of due process of law.

Statement of Facts:

(1)

This is a petition for a writ of *Habeas Corpus* in *Formal Pauperis,* Petitioner has never heretofore filed an application for a writ of *Habeas Corpus* in no Court of the Commonwealth of Virginia. Petitioner is confined to the Virginia State Penitentiary under a conviction of one charge of murder in the first degree; petitioner pleaded "Not guilty" to the offense of aforesaid charge. However, petitioner received *an* sentence of life. Petitioner counsel was appointed by the Court, trial by jury in the Circuit Court for the County of Nelson, *Nelson,* Virginia on March 1, 1961. Counsel motion to have the verdict set aside, the True Bill that is photostated is no key phrase in the court order, reciting that the trial jury was to: wit: (*Free from exceptions*) also the records enclosed herein will show in the photostated copies that there is no written verdict signed by the trial jury foreman in his own handwriting. (See Exhibits marked 1234)

Petitioner will raise the following points in his subheads brief attached.

(1) That he was denied effective assistance of counsel.
(2) Denied due process of law on a capital offense.

page 2] Petitioner's Brief:

(1) *Wsa* petitioner denied effective assistance of counsel? Counsel made motion to have the verdict set aside as *be* contrary to law and to the evidence.

Petitioner pleaded "Not guilty" to the charge of murder a capital offense. The Court overruled counsel's motion and petitioner informed counsel he wished to appeal in the *Forma Pauperis*. Counsel then advised petitioner that he could not appeal because he had no money or transcript of trial proceedings. The record attached does not explain what reason counsel gave for not appealing the case. But the records plainly show that counsel did not preserve petitioner rights of appeal after he made the motion to have the verdict set aside. Petitioner learned while confined that Virginia does provide a remedy whereby a person confined may appeal in the *forma pauperis,* citing Section 19262 of the Code of Virginia, which states that upon an affidavit of the indigent that he is without funds to prosecute an appeal, he may proceed in the *forma pauperis*. Therefore, your petitioner have been denied the right to appeal his convictions and petitioner had adequate remedies freely available in a Court of General Jurisdiction and counsel failed to protect his client's rights to appeal. The United States Supreme Court is in controlling in *Hawk* v *Olson,* 326 U.S. 271; 90 Led. 61 S. Ct. the Court said, "A denial of effective assistance of Counsel in prosecutings in State Courts violate due process of law." Accordingly, petitioner's convictions should be declared void. See *Wood* v. *U.S.,* 128 F 2d, 265, the Court said, "The constitutional rights of the accused to counsel includes time for adequate preparation and extends to every step of the proceedings against the accused." At what point in the trial did counsel terminate his duty to petitioner? Did he take notes of the trial? Did Petitioner's rely on counsel to perfect an appeal and did failure of counsel to protect his client's rights prejudice petitioner so as to deny him due process of law? The instant case involves one layman whose rights have been aggrieved. See *Herman* vs. *Claudy,* United States Supreme Court October term 1955 opinion decided January 9th 1956, also see *Jones* vs. *Huff* 152 Federal 14 decided Nov. 26, 1945. Accord-

ingly petitioner have made sufficient averment and shown facts in this connection and it should be deemed sufficient to grant the prayers of the petitioner. Certainly as was said in the *Hawk* case, petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations but he is entitled to an opportunity. 326 U.S. 297, 90 Led. S. Ct. accordingly petitioner conviction should be set aside.

(2) Were petitioner denied due process of law?

page 3] Petitioner trial certainly was not conformed to the fundamental concepts of justice. The fact that the True Bill is not handwritten signed by the foreman of the indicting grand jury. The fact that the Court order does not recite the mandatory required key phrase that the trial jury was to: wit "Free from exceptions." See the August 1962 opinion of the Virginia Supreme Court of Appeals in *Cave* vs. *W. K. Cunningham, Jr. Supt*, also the fact that the photostated records herein enclosed shows that no written verdict is signed by the trial jury foreman in his own writing on the back nor the front of the indictment. Therefore the Court records herein are in error. It was Counsel's duty to investigate the facts in the case. The analysis of the factual situation in each case before it shows that if Counsel had *preserued* petitioner rights of appeal, petitioner would have *have* every chance to present his case to the Virginia Supreme Court of Appeals, and the facts mentioned herein, which when taken with all other testimony in the case might well have meant reversal of the conviction. Petitioner had been denied the important trial *requisitep* due process of law, as guaranteed him by the fourteenth *Ammendment* of the United States Constitution. See *Frank* vs. *Mangum,* 237 U. S. 309, 331, 59L.ed 969, S. Ct. That *Ammendment,* the fourteenth, has been *Voilated* in your petitioner's trial and petitioner conviction are void. Conclusion: This Honorable Court is requested in the name of Justice to grant the petitioner a Writ of *Habeas Corpus* in order that may be able to safeguard his Constitutional rights he is entitled to as a citizen of the United States of America, and further request this Honorable Court to appoint an able, competent Counsel to defend this cause for petitioner, and also requests this Honorable Court to command the respondent to produce petitioner body at a time and place specified along with a show cause if any, why the petitioner should not be released, and in the event grant the petitioner his liberty.

An certified copy of this petition have been furnished the Respondent.

I will pray

BILLY JUNIOUS RUSSELL,
Petitioner

Filed in the Clerk's Office the 1 day of March, 1963

LUCY S. BARNETT, Deputy Clerk

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COMMONWEALTH OF VIRGINIA
COUNTY OF NELSON, to-wit:

In the Circuit Court of Nelson County, January Term, 1961.

The grand jurors of the Commonwealth of Virginia, in and for the body of the County of Nelson, now attending the Circuit Court of said County, upon their oath present that Billy Junious Russell, within twelve months prior to the finding of this indictment, to-wit, on the 3rd day of December, in the year one thousand nine hundred and sixty and in the said County, feloniously and unlawfully did kill and murder one Alfonzo William Patterson, against the peace and dignity of the Commonwealth of Virginia.

Upon the evidence of H. L. Newman

witnesses sworn in open Court and sent to the grand jury to give evidence.

EXHIBIT II

page 27]

COMMONWEALTH
vs. INDICTMENT FOR A FELONY
BILLY JUNIOUS RUSSELL

A TRUE BILL

C. T. BRYANT, Foreman.

* * * * *

page 29]

Virginia:

Circuit Court for the County of Nelson, on Wednesday, the first day of March, nineteen hundred and sixty-one.

Present: The Honorable C. G. Quesenbery, Judge.

COMMONWEALTH
vs.
BILLY JUNIOUS RUSSELL
(Indictment this term for murder of Alfonzo
(William Patterson

This day came the Attorney for the Commonwealth, as well as Billy Junious Russell, who stands indicted for murder of Alfonzo William Patterson and who was led to the bar in custody of the jailor and was set to the bar.

Whereupon, the accused, having previously been arraigned and after private consultation with Robert L. Marshall, his counsel, pleaded not guilty to the indictment, which plea was tendered by the accused in person, and the accused having requested a jury for the trial of this case, there came a jury, to-wit: L. L. Crocker, E. P. Simpson, C. L. Babish, C. D. Collins, M. L. Allen, L. M. Spicer, Jr., W. S. Adams, Judson C. Carter, Lunsford Ashley, W. Lynn Harvey, Earl L. Campbell and Glenn A. Payne which jury was duly *impannelled,* selected and sworn in all respects, as directed by law.

Whereupon, the jury having heard all of the evidence introduced, arguments of counsel and received the instructions of the Court, were sent to their room to consider their verdict and after some time spent therein, returned into Court and presented their verdict in the following words and figures, to-wit: "March 1, 1961, We the jury find the defendant Billy Junious Russell guilty of First degree murder and fix his punishment at Life in the Penitentiary. (signed) L. M. Spicer, Jr., Foreman."

Thereupon the said Billy Junious Russell, by counsel, moved the Court to set aside the verdict of the jury because it was contrary to the law and the evidence and without

evidence to support it, which motion the Court doth overrule.

page 30] And it being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the said Billy Junious Russell be and he is hereby sentenced to confinement in the penitentiary of this Commonwealth for life, the period by the Jury ascertained as aforesaid, and that the Commonwealth of Virginia do recover against the said Billy Junious Russell its costs by it about its prosecution in this behalf expended.

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

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

And the prisoner is remanded to jail.

EXHIBIT IV

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ORDER

This proceeding came on to be heard on March 12, 1964, upon the petition of Billy Junious Russell for a writ of *habeas corpus ad subjiciendum* and the Answer of the respondent, the petitioner appearing in person and by H. H. Tiffany, an attorney heretofore appointed by the Court to represent petitioner, and the respondent appearing by Reno S. Harp, III, Assistant Attorney General.

Whereupon the Court heard the evidence and argument of counsel, and, upon mature consideration thereof, doth find that the petitioner is presently detained pursuant to a judg-

ment of this Court of March 1, 1961, wherein petitioner was sentenced to serve a term of life imprisonment, having been found guilty of murder in the first degree; that petitioner was effectively represented by his court-appointed attorney, Robert L. Marshall, who had been appointed to represent petitioner; and that petitioner was not denied any of his constitutional rights in connection with the aforesaid trial.

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

It is, therefore, adjudged and ordered that the petition for a writ of *habeas corpus* be, and is hereby, denied and dismissed.

The petitioner, in proper person, stated in open court that he did not desire to appeal the judgment of this

page 33] Court in the premises, and in view of his statement, it is ordered that H. H. Tiffany be, and is hereby, relieved of any further duties in connection with this proceeding.

It is further ordered that the Sheriff of this County return the said Billy Junious Russell to the Penitentiary as soon as possible.

ENTER C. G. Q.
Judge

I ask for this:
RENO S. HARP, III
Counsel for Respondent

Seen and objected to:
H. H. TIFFANY
Counsel for Petitioner

Entered: 3-23-64 Common Law Order Book R Page 218

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ASSIGNMENT OF ERROR

To: The Honorable Clerk of the said Court.

Comes now, Billy J. Russell, who before was the petitioner,

who was tried convicted and sentenced to a term of life in this Court on March 1, 1961, was heard on petition for writ of *habeas corpus* on March 12, 1964, the same was on that date denied and dismissed and error thereto is assigned hereby, to-wit:

That mature judicial consideration has not been granted on the petition for writ of *habeas corpus,* in that the allegations were apparent and substantiated by record.

Appellant was clearly denied the right and privilege to appeal from the said sentence at the time of the trial to the Supreme Court of Appeals, nor was counsel placed at his disposal to do so. This is the crux of the matter complained of and constitutes error on the part of the Court.

Respectfully Submitted,
BILLY J. RUSSELL, Appellant

* * * * *

Filed in the Clerk's Office the 12th day of May, 1964
AUSTIN EMBREY, Clerk

* * * * *

BEFORE:

THE HONORABLE C. G. QUESENBERY, Judge
March 12, 1964

APPEARANCES:

H. H. TIFFANY, Esquire
Counsel for the Petitioner

RENO S. HARP, III,
Assistant Attorney General
Counsel for the Respondent

page 1] By The Court: He originally applied here, did he not? The original application was dismissed, and then he filed an amended application, is that correct?

By Mr. Tiffany: Yes, sir.

By Mr. Harp: It was dismissed?

By Mr. Tiffany: By your motion, by the Court. You see, he had applied to some other Courts and he had not stated that in his petition, that is, his original petition for writ.

By The Court: *Alright* Mr. Tiffany, I'll be glad to hear you.

By Mr. Tiffany: At this time I move the Court that judicial notice be taken of the Order entered by this Court, with the stipulation that the Order entered by this Court for final judgement of this matter, on Wednesday, March 1, 1961 —

By Mr. Harp: May I help out by asking that we stipulate that all the papers in the file were entered by the Court. Will you so stipulate, Sir?

By Mr. Tiffany: Yes, Sir. I call Robert Marshall.

Note: The witness,

ROBERT MARSHALL,

being first duly sworn, testified as follows:

By Mr. Tiffany: If Mr. Harp has opening remarks to make I didn't mean to cut him short.

page 2] By Mr. Harp: No, I had my remarks.

DIRECT EXAMINATION

By Mr. Tiffany:

Q. Mr. Marshall, were you appointed to represent Billy Junious Russell at his trial for first degree murder?

A. Yes.

Q. Do you remember when you were appointed?

A I do, I remember the date.

Q. I show you now an Order of this Court that we are stipulating to be part of the evidence. This Order says "This day came the Attorney for the Commonwealth, as well as Billy Junious Russell, who stands indicted for murder, and Alphonso William Patterson, who was led to the bar in custody of the jailer, and was set to the bar, whereupon the accused having previously been arraigned, and after private consultation with Robert L. Marshall," now I wish to stop at that point. Now, Mr. Marshall, this man had been arraigned, I assume from this Order, before you did confer with him?

Robert Marshall

A. No, Sir, I don't think so.

Q. Do you have any memory of this occasion?

A. No, but I was appointed, and I did confer with him.

Q. As far as you know, is this Order correct?

A. Yes, as far as I know, it is.

Q. This Order does say, does it not, that he was arraigned prior to your consultations with him?

A. I don't think that's correct, if it does. I think I had consulted with him. I don't have any notes to that effect.

Q. Did you talk with this defendant about whether
page 3] or not he wished to have a jury trial?

A. I did.

Q. And what did the defendant say?

A. I don't remember exactly what he said. I discussed it with him in the jail several times. He furnished me with a list of witnesses he wanted called, and then the Commonwealth furnished me with a copy of his confession. I went over that with him.

Q. Do you remember him advising you that he wished to have a jury trial, rather than have the Judge try him?

A. Yes, I'm sure he did.

Q. Did you take it upon yourself to advise him not to, as to whether or not he should have a jury trial?

A. I told him I thought he should have a jury trial.

Q. What was your opinion based upon?

A. Based upon what he told me, that these officers forced him to sign that confession, and I figured that the confession was very damaging to him, and if he had a jury trial and anything was brought out that the officers had overstepped their bounds, he would stand a better show.

Q. When this trial was in progress there was some evidence that this man had had considerable drink, is that right?

A. Yes, Sir.

Q. Did you offer an instruction to the Court which would show that due to the alcohol consumed by the defendant that the sentence could be reduced, if it would negate premedication due to his extreme drunkeness.

By Mr. Harp: I object. That is a question of trial tactics,

your Honor, if the Court please.

page 4] By The Court: I don't think that that has anything to do with the application of the Writ of *Habeas Corpus*. The trial of the case was sort of like a situation where there is a sudden emergency. Counsel used their best judgement, and although, in retrospect, it may not have been quite the proper thing to do it has honestly been considered, as it was in this case —

By Mr. Tiffany: If the Court please, I say that Mr. Robert Marshall is my friend, but that my first duty here is to my client, and I have been appointed by this Court to represent my client.

By The Court: Yes, Sir. You do the best you can.

By Mr. Tiffany: Not stating any incompetence by Mr. Marshall, whom I deem to be very competent, it gets to where we can only determine by the amount. At one point it becomes similar to a sudden emergency, and that was forgotten, and that may be a sudden emergency, but unless we bring in this first one — In other words, although all of them together may constitute incompetence, which this man has alleged in his petition, any one of them may not, so that unless we bring them in one by one, then we cannot tell the cumulative effect to tell whether his allegation of incompetence was correct.

By The Court: What was your question?

By Mr. Tiffany: My question was, did Mr. Marshall offer any instruction to the Court on the reduction of sentence which could be made, or any reduction in the degree of the crime, based upon the alcohol consumed before this offense, by the defendant?

page 5] By The Court: Well, that presupposes that the man was intoxicated.

By Mr. Tiffany: I asked him if he had had conversation indicating that he had considerable to drink.

By The Court: Mr. Marshall had better answer that question.

By Mr. Tiffany:

Q. Did you have any conversation that indicated that he had had considerable drink?

Robert Marshall

By Mr. Harp: I object. We are going right into the merits of the case.

By The Court: I think that whole line, Mr. Tiffany, is improper at this stage.

By Mr. Tiffany: May I except to the ruling of the Court?

By The Court: Of course.

By Mr. Tiffany:

Q. Mr. Marshall, at the conclusion of this case, after the jury returned a verdict of "guilty of first degree murder," did the defendant talk to you about an appeal?

A. He did.

Q. What did you advise him at that time?

A. I advised him that there were no grounds for appeal that no error had been committed by this Court. I tried to put it in language that he could understand. I told him that the Court had to make some mistake before he could get a new trial.

page 6] Q. Now, did you at any time, speak to him in terms of the fact that he did not have any money, and therefore, could not appeal?

A. I notice in his petition that he alleges that that's the reason that I did not appeal. I do not remember that. It's very possible that I did say something to him about not having money to prepare the record. I say it's possible, be cause he seemed to be stunned when I told him that there was nothing else that could be done. He seemed just like the world had fallen on him, shocked, and went right back to that appeal.

Q. Did you ever take any action toward appeal for him?

A. I did not.

Q. Did you advise the Court that this man wanted to appeal?

A. No, Sir.

By Mr. Tiffany: I have nothing further.

CROSS-EXAMINATION

By Mr. Harp:

Q. Did he ask you to tell the Court that he wanted to appeal the case?

A. No, Sir, he didn't.

Q. Did he suggest to you any grounds upon which he could appeal the case?

A. He did not.

Q. Let me ask you this question, how long have you been engaged in the practice of law?

A. I have been here at Lovingston for a little over thirty years.

Q. And what portion of your work has been criminal work?

A. A small portion.

Q. But over a period of years, you've done a good bit?

A. I've done some, yes, Sir.

page 7] Q. I believe you stated that it was your considered opinion that there was no error in trial, nothing that could be appealed?

A. I thought so, and I told my client so.

By Mr. Harp: That's all.

By Mr. Tiffany: I now call Billy Junious Russell.

Note: The witness,

BILLY JUNIOUS RUSSELL,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Tiffany:

Q. State your full name?

A. Billy Junious Russell.

Q. Are you the same Billy Junious Russell that was convicted by this Court of First Degree Murder on March 1, 1961?

A. Yes, Sir.

Q. Mr. Russell, do you remember at what point the Court appointed you some Counsel?

A. He appointed Mr. Marshall. He asked me was I able to get a lawyer, and I said no, and he appointed him.

Q. Do you remember about what time this was? Do you know what an arraignment is?

A. No.

Q. You know when you go up there before the Court —

Billy Junious Russell

By The Court: I don't think you can lead him. But with this fellow's obvious intelligence, why —

By Mr. Harp: I understand that.

page 8] By The Court: Do you remember the day the Grand Jury sat over here and indicted you?

A. I think it was in April, wasn't it?

By The Court: Was that the day I had you brought over here, and asked you about the warrant?

A. Yes, Sir, that was the day.

By The Court: Well, that was the day I appointed the attorney.

A. Yea, that's right.

By The Court: And then we set the case for trial, didn't we?

A. Yes, Sir.

By Mr. Tiffany:

Q. Do you remember when they asked you whether you were guilty or not guilty, at what point did they ask you that?

A. He asked me whether I was guilty, or not guilty.

Q. Now, do you know whether Mr. Marshall had been appointed for you before that happened?

A. No, not before he asked me that. As good as I can remember.

By Mr. Tiffany: Your Honor, I am going to offer at this time, the evidence of his statement to his counsel about the drinking, and what his Counsel knew about his drinking, and if the Court overrule them, I feel it's my duty to offer them again.

By The Court: You can put them in the record, but I do overrule them, but you can put it in the record.

By Mr. Tiffany: I except.

page 9] By Mr. Tiffany:

Q. Did you have any conversation with Mr. Marshall about whether you should have a jury, or not?

A. Yes, Sir.

Q. And at the time that you had this conversation with him, did he make any recommendations to you at all?

A. He asked me how many was around, and I told him

there wasn't anybody around at the time I committed the crime.

Q. I asked you if Mr. Marshall asked you if you wanted a jury, do you remember his asking you if you wanted a jury?

A. Yes, he asked me whether I wanted a jury, or the Judge, and I told him the jury.

Q. And what did he say?

A. He told me that the jury would be best.

Q. When did he say this?

A. When he talked to me.

Q. After the trial was all over did you ask him anything about appealing the case?

A. I asked him — we was sitting right over there — and I asked him if there was any chance if I appealed it. And he said he couldn't appeal because of money. I didn't have no money, so I never did ask him no more about that.

Q. Did he ever advise you of any statute whereby a pauper can appeal?

A. No, he didn't give me no kind of a show on that. Can't I appeal if I should?

By Mr. Tiffany: Just so that at a later time, should the record ever be requested, I'm going to have to make my objections very clear as to what I am offering in evidence here. I am offering evidence, in evidence, which page 10] will state the drinking, to excess, of alcohol; that he advised his Counsel that he had taken an excessive amount of alcohol before this crime was committed; that he was under the influence of alcohol at the time that the crime was committed, and that there was no instruction concerning the use of alcohol, and reducing the degree of the crime that was committed. I just want to make it clear for the record.

By The Court: Well, that's a trial tactic, and it presupposes the fact that this man was intoxicated to such an extent that he didn't know what he was doing, which can be shown in evidence to minimize a punishment. If I recall, the evidence showed that he was at some place called, oh, a dance hall or something, he went a distance of some five or six miles and got a gun, came back, and shot this man in the head who was asleep in a car, and he attempted to show that that

wasn't so, but it was pretty conclusive that that's what happened. A fellow that was able to do that certainly wasn't very intoxicated in the first place. I would judge that there wasn't enough evidence to justify such an instruction had it been offered. I don't know whether it was offered, or not. I have no idea.

By Mr. Tiffany: If your Honor please —

By The Court: I don't think, anyway, that that would be evidence which would be ground for granting this man a new trial, or grant an application for a Writ of *Habeas Corpus.*

By Mr. Tiffany: Is that the Court's recollection, or —

By The Court: No, I was just conjecturing.

page 11] By Mr. Tiffany: In other words, the Court feels that this evidence is not *admissable?*

By The Court: No, I don't feel that it is *admissable,* Mr. Tiffany.

By Mr. Tiffany: I except.

By Mr. Tiffany: I have nothing further.

By Mr. Harp: I have no questions.

By Mr. Tiffany: Your Honor, I wish at this time to move the Court, as a point of stipulation, of the respondent to the Order for a trial for a Writ of *Habeas Corpus,* that the Order be entered and the man set free from the penitentiary on the ground that the Order is fatally defective, number one, —

By Mr. Harp: Excuse me, but before we argue that I have some evidence to put on.

By Mr. Tiffany: This is a motion to preclude you from any evidence whatsoever.

By Mr. Harp: I'm sorry, I didn't understand.

By Mr. Tiffany: My motion is based purely upon the Order. The Order, in and of itself, gives rise to the presumption, I am sure, that he was arraigned first because the Order so states, and then afterwards had private consultation with his Counsel. Secondly, —

By The Court: The language is probably not

page 12] the best, but what the Order attempts to say is that he was arraigned after private consultation with his Counsel, and *plead* not guilty, which plea he entered in person, and then requested a trial by jury, and a jury was selected, and prior to the selection of a jury is what the Clerk

is attempting to say.

By Mr. Tiffany: I am going to take the opposite interpretation. I feel that at this point that it cannot be amended. We have to take what they have and the doubt has to be given to my client on the Order. And then below there, I think much more important, it is written "and which jury was duly *impanneled* and selected, and was sworn, in all respects as directed by law." Now, it is quite obvious to the Court that for some reason this Order does not say "free from all exceptions." The defendant does have a constitutional right to have a jury free from exceptions. At no point in this Order is it ever stated that the jury was free from exceptions. There was a case from Madison County which was tried in Judge Waddell's Court in which the words "as provided by law" were *insterted,* and the Supreme Court in *Kay* v. *Cunningham,* in their petition for *Habeas Corpus* stated that the use of the quoted words in the Court's Order to the effect that the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law would not satisfy jurisdictional requirement that the Commonwealth's Attorney waive the right to jury trial entered of record, and in the absence of such entry the Court was without jurisdiction to try the case without jury, and the conviction was void, and the petitioner was not entitled to leave it to the Court to dispose of the impending indictment against him. So the Court has very essentially stated that the law has been complied with in and of itself. It stipulates, or calls conclusively to be recognized, that certain facts that are necessary, and jurisdictional, during the trial, actually did page 13] transpire. Now this man was entitled to a jury free from exceptions. Ordinarily this is included in an Order, the *ommission* of which gives rise to the assumption that this did not occur, and therefore, on the face of the Order, and purely on the face of the Order, as in the case of *Kay* v. *Cunningham* which was not decided on evidence, but purely because the Order did not so state, this writ should be granted, and this man should be actually be gotten from the words "*impanneled* selected and sworn in all respects as directed by law." This is almost the wording that the Supreme Court has reversed on heretofore.

By The Court: Of course there is a big difference there. A person must waive jury and the Commonwealth's Attorney

must concur, and I don't think the statement "as provided by law" would cover those things, but here it says that the jury was *impannelled,* selected and sworn, and in all respects as directed by law. I think that is quite different. Quite a different situation. So I will overrule your motion.

By Mr. Tiffany: I except, your Honor. We rest.

By Mr Harp: I would like to recall Mr. Marshall to the stand at this time.

Note: The witness, being already sworn, returned to the witness stand and further testified as follows:

RE-CROSS EXAMINATION

By Mr. Harp:

Q. Mr. Marshall, did you confer with Billy Junious Russell before he entered his plea?

A. Yes, Sir.

page 14] Q. Were you present at the time that he entered his plea?

A. Yes, Sir, I was.

By Mr. Harp: We rest, your Honor.

By Mr. Tiffany: If the Court please, I renew my motion at this time that the Court should consider this evidence of the drunkeness, and that this is essentially a part of whether or not he received adequate Counsel.

By The Court: Overruled.

By Mr. Tiffany: I stand, your Honor, on the fact that, number one, the Counsel is in error, as the petition was drawn by the defendant himself, and it states that he did not have the right to Counsel as it should have been provided, in that he was not advised of certain matters; that he was not advised by Counsel, one way or the other; but much more important is the fact that he says on appeal — I think it would be the right of counsel to pursue any rights of appeal that the man wants. If he doesn't feel that he can do it because of lack of funds, then the law is in conflict. Mr. Russell has given evidence that he does recall telling Counsel that he wanted an

appeal, and at that time Mr. Marshall stated that he did not have any money to appeal, and he was never advised of the provisions of §19-262, in which a pauper can obtain funds over and above that for Court appointed attorneys for appeal. He was never advised of this, and therefore, was effectively denied the right of proper Counsel. I certainly urge the Court that the words "duly *impanneled*" means that they came in and were sworn; and selected, that means that the Court just didn't take bystanders and put them on the jury, and they were selected in all respects as directed by statute,

page 15] but nowhere does the Order say "free from exceptions."

By The Court: Now, if you select a jury, that means that the jury was struck by Counsel. Now, if you refer to the *Ruby* case they were two or three weeks and there wasn't any question of exceptions by attorneys.

By Mr. Tiffany: Your Honor, the Order of the court has to go further than "as directed by law." I stand on the point of law in the *Kay* case, which won a reversal on this same point of law, in which they said that "as directed by law" cannot mean the essential fact, and the essential fact in this case was that "free from exception" was not in the Order of the Court. Therefore, I respectfully submit to this Court again, that this petition ought to be granted — this writ ought to be granted on the basis that — of this particular point.

By Mr. Harp: Taking first this point, this catch all "free from exceptions" I think this argument is really predicated upon the *Kay* case, as in other cases are required to be entered or record as required by §8 of the constitution of Virginia, but there is no constitutional mandate that I am aware of which requires this specified language, to which the petitioner is making reference, to be entered in the Order on the Order book, consequently we feel that argument fails. The other point which is before the Court is the point whether, or not, the petitioner was denied his constitutional rights in connection with his appeal. I have several cases on that. The first one was *Griffin* v. *Illinois* in 1956, and I'm sure the Court will recall that in that case it was alleged by the petitioner that there were defects in the trial, that error had been committed, and consequently they could not appeal without a record, and

that the Illinois Court had denied them a record.
page 16] It was pointed out in that case that they were entitled to the record. Now, in more recent decisions, as in the case of *Lane* v. *Brown,* which was a decision of the Supreme Court of the United States, March 4, 1963, about a year ago, it was a *Colon Vocus* (?) petition. I don't know what *Colon Vocus* is, at any rate it is some kind of a collateral attack. The only thing I know about it for sure is that the Attorney General's Office does not have to defend it. In any event in this particular situation a man was sentenced to death, and he had gone by way of appeal all the way to the Supreme Court of the United States, and back down again, and then he filed this Latin Phrased collateral attack and he was represented by the public defender, and the public defender, after having defended him, and having lost, the public defender said to him "there is no sense in appealing this case. You have nothing to go on, no record has been made, and there is nothing to allege an error on." He said that he was not effectively represented by everybody. And that case went through the Indiana Courts, right back down to the district court and back up again. The second time around the Supreme Court of the United States said again that the man was entitled to a record, but here again this had become the alleged error. There is no case that I am aware of exactly like this one where there is no error, no *reversable* error not alleged in the Petition. Now, the petition with which we are dealing today is the one which the man prepared himself, and now this one I believe was prepared by Counsel. There is no allegation of error, there is no allegation of what
page 17] could be appealed, no assignments of error could be made, and consequently we take the position, in the absence of the same, that there was no right to appeal; that you have to have something upon which to base an appeal. Consequently the Petitioner's constitutional rights were not denied. We ask that this be dismissed, your Honor.

By Mr. Tiffany: Very briefly I want to point out to the Court that I am very glad that the Attorney General's Office feels the great concern because Constitutional rights may not be secure, but implies that they have been properly given to the petitioner, in other words, as according to law. He says

that this other case *occured* under §8 of the Constitution of Virginia, and that in criminal cases the accused may plead guilty, and if he is not guilty concurs with the Commonwealth's Attorney, and he may be tried by a smaller number of jurors, with a record. This is where my claim arises. The jury must be free from exceptions, because under §8 of the Constitution — because a man has a right to be confronted by his accusers, and to call for evidence in his favor, and that he be tried by an impartial jury, which is the same thing as saying "free from exceptions;" duly selected and free from exceptions means impartial. Therefore, this phrase that was omitted from the Order was secured to him under §8 of the Constitution of Virginia, and for that reason this Writ ought to be granted.

By The Court: Well, of course, the man has had an impartial jury. He thought so at the time of the trial, and this thing comes back to me now. I recall the obvious premeditation. There was no reason for the killing at all. Everybody thought this man was going to get the chair, and Mr. Marshall saved his life. I recall that was the general feeling
page 18] around here at the time. He had a good jury. He had a jury that was better than the Commonwealth desired, I think. I think that he did have a fair trial. I thought that Mr. Marshall did everything that he could for him. He certainly was persuasive with the jury. I don't see that this fellow has any claim, or grounds for a writ. I dismiss.

By Mr. Harp: I will prepare the Order and send it to Mr. Tiffany, and include his exception.

By The Court: I will say that Mr. Tiffany was advanced every conceivable and novel question that he can, which is his very ingenious and novel method of doing. It is the Court's job to be *harrassed* by these things.

By Mr. Tiffany: My apologies to Mr. Marshall. If the Court please, I have advised Mr. Russell that he can proceed with an appeal from the Order of this Court, today, and have advised him that he also could proceed in the form of a pauper, and he has told me that he does not wish to pursue an appeal on this Writ, and therefore, I would like to be relieved of further responsibility for his representation. If the Court would ask him if he wishes to take any further action —

Billy Junious Russell

By The Court: Mr. Russell, you have heard what Mr. Tiffany has had to say to the Court?

A. Yes, sir.

Q. Do you agree?

A. Yes, sir.

By The Court: The petitioner has indicated to the Court in the presence of his Counsel and having taken the advice of his Counsel, that he does not wish to pursue page 19] this case any further. I don't want to discharge you, Mr. Tiffany, I will relieve you of further responsibility in connection with this matter, with the thanks of the Court for acting capably for him.

COURT ADJOURNED

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A Copy—Teste:

H. G. TURNER, Clerk.

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