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Record No. 6294

In the

Supreme Court of Appeals of Virginia

at Richmond

ROBERT BERNARD CLARKE

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ESSEX 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 of Appeals of Virginia

AT RICHMOND.

Record No. 6294

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 24th day of November, 1965.

ROBERT BERNARD CLARKE, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA. Defendant in error.

From the Circuit Court of Essex County
Daniel Weymouth, Judge

Upon the petition of Robert Bernard Clarke a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Essex County on the 9th day of June, 1965, in a prosecution by the Commonwealth against the said petitioner for a felony; but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

* * * * *

page 1]

COMMONWEALTH OF VIRGINIA, COUNTY OF ESSEX, to-wit:

IN THE CIRCUIT COURT OF SAID COUNTY:

COMMONWEALTH OF VIRGINIA
vs.
ROBERT BERNARD CLARKE

INDICTMENT FOR A FELONY

The Grand Jurors of the Commonwealth of Virginia, in and for the Body of the County of Essex, and now attending the said Court at its February term, 1965, upon their oaths present, that Robert Bernard Clarke, on or about the 21st day of December, 1964, in the County of Essex aforesaid, a certain store house rented and occupied by one Charles Henry Corbin, said building not then and there being a dwellinghouse or outhouse adjoining thereto or occupied therewith, situated in the County aforesaid, in the nightime, unlawfully and feloniously did break and enter, with intent the goods and chattels of the said store house, in the said building then and there being, then and there unlawfully and feloniously to steal, take and carry away: 2 ladies Bulova wrist watches of the value of $30.00; 15 Ingram mens wrist watches of the value of $150.00; 1 Waltham man's watch of the value of $29.95; 1 green car coat of the value of $7.00; 1 12 gauge 26″ single barrel Iver Johnson shotgun, used, of the value of $15.00; 8 boxes of 12 gauge shotgun shells of the value of $16.00; 35 cartons of cigarettes of the value of $72.00; I GE Transistor Portable Radio, used, of the value of $24.00; 3 flashlights of the value of $2.75; 24 flashlight batteries of the value of $2.88; 1 belt type change counter, used, of the value of $5.00; lawful money (coins) of the United

page 2] States of the value of $60.00; 18 Timex wrist watches of the value of $180.00; of the aggregate value of $594.58, the property of the said Charles H. Corbin, in the said store house, in the County aforesaid, then and there

being found, then and there unlawfully, feloniously, and burglariously did steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia.

We, the jury, upon the issue joined, find the defendant Robert Bernard Clarke guilty of grand larceny as charged in the within indictment and we fix and ascertain his punishment at confinement in the penitentiary for a term of five years and we recommend that three and one-half years of said sentence be suspended.

/s/ FRANKLIN Y. HUNDLEY
Foreman

* * * * *

page 10]

* * * * *

ORDER

It appearing to the Court that the above named defendant was this day indicted for a felony in this Court and has no counsel and is unable to employ same; therefore

It is ADJUDGED and ORDERED that A. FLEET DILLARD, a competent attorney at law practicing before this court, be, and he is hereby, appointed as counsel to defend the said Robert Bernard Clarke, which said appointment is made in the presence of the accused and of said attorney.

ENTER — LAW
February 15, 1965

DANIEL WEYMOUTH
Judge

* * * * *

page 41]

* * * * *

ORDER

This day came the Attorney for the Commonwealth, and

Robert Bernard Clarke, who stands indicted of a felony, to-wit, Statutory Burglary, with intent to commit larceny, was led to the Bar in the custody of the jailor and represented by A. Fleet Dillard, a competent and experienced attorney at law, heretofore appointed by this Court to defend him.

Whereupon the accused was duly arraigned and, after being advised by his counsel, pleaded not guilty to the indictment, which plea was tendered by the accused in person, and thereupon the accused put himself upon the *country* for trial and the Commonwealth doth likewise and issue is joined thereupon. Whereupon came a panel of twenty jurors, summoned as provided by law, all of whom were duly examined by the Court and found free of all legal causes of exception and qualified in all respects to serve as jurors for the trial of this case. Thereupon the Commonwealth and the accused each erased four names from said panel, beginning with the Commonwealth and acting alternately, the remaining twelve, against whom there was no objection, being, to-wit; Thomas J. Bareford, Larkin B. Johnson, E. S. Ransone, F. Y. Hundley, Franklin Johnson, Ryland Davis, Emmett B. Harmon, James Russell Taylor, Henry R. Hodges, page 42] Banks B. Bayton, Maxie L. French and Richard O. Haynes, were sworn to well and truly try and a true deliverance make between the Commonwealth and the accused and a true verdict *render* according to the law and the evidence; and having heard the evidence, received the instructions of the Court and heard arguments of counsel were sent to their room to consult upon their verdict and after some time returned into Court, having found the following verdict, to-wit:

"We, the jury, upon the issue joined, find the defendant Robert Bernard Clarke guilty of grand larceny as charged in the within indictment and we fix and ascertain his punishment at confinement in the penitentiary for a term of five years and we recommend that three and one-half years of said sentence be suspended.

FRANKLIN Y. HUNDLEY
Foreman"

Thereupon the counsel for the accused moved the Court to set aside the verdict as being contrary to the law and the evidence and without evidence to sustain it and to grant the defendant

a new trial, which said motion was overruled by the Court and to which said ruling counsel for the accused noted his exception.

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 Robert Bernard Clarke be, and he hereby is, sentenced to confinement in the penitentiary of this Commonwealtlh for a term of Five (5) Years, the period ascertained by the jury as aforesaid,

page 43] the Court being of the opinion in this particular case that the recommendation as to a suspension of part of the sentence is not compatible with the public interest, and that the Commonwealth of Virginia do recover against the said Robert Bernard Clarke its costs by it about its prosecution in this behalf expended, including an attorney's fee of Two Hundred and Fifty Dollars ($250.00), which the Court doth Adjudge and Order to be paid by the Commonwealth of Virginia to A. Fleet Dillard, counsel for the accused in this case.

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ENTER — LAW
June 9, 1965

DANIEL WEYMOUTH
Judge

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page 46]

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MOTION IN ARREST OF JUDGMENT

Comes now the accused, Robert Bernard Clarke, by his court-appointed attorney, A. Fleet Dillard, and moves the Court, in arrest of judgment, to reconsider its judgment pronounced against the accused on the 9th day of June, 1965, whereby, overruling the motion of the accused to set aside the verdict of the jury as being contrary to the law and the

evidence and without evidence to sustain it and to grant the defendant a new trial, the Court sentenced the accused to confinement in the Penitentiary for a term of five (5) years, to vacate the judgment rendered as aforesaid and to grant the defendant a new trial on the ground that, under the peculiar circumstances of the case, the Court erred in accepting the verdict of the jury, especially the part thereof wherein the jury recommended the suspension of three and one-half (3-½) years of the five year term of confinement imposed, and in failing to require the jury to retire and consider further of its verdict with proper instructions with regard to its prerogatives, inasmuch as the accused was thus deprived of his constitutional right to a fair and impartial trial by jury.

ROBERT BERNARD CLARKE

By A. FLEET DILLARD,Counsel

Filed in the Clerk's Office of Essex County, Va. Circuit Court the 21st day of June 1965
AUGUSTA WILKINSON, Deputy Clerk

page 47] I, F. Y. Hundley, Foreman of the Jury in the Circuit Court of Essex County, Virginia, which tried the case entitled *Commonwealth of Virginia* vs. *Robert Bernard Clarke* on June 9, 1965, do solemnly swear that I, along with other members of the jury, was under the impression that the jury had the right to recommend a suspension of a specific part of the punishment imposed upon the accused in a verdict of "guilty" and that the Judge trying the case would send the jury back with further instructions if he did not see fit to follow such recommendation; that had the jury been aware that the court might not do so they would not have agreed upon a verdict imposing as much as a five year prison term; that in our discussion of the case in the jury room it was suggested that the Court might not follow our recommendation for the suspension of three and one-half (3-½) years of the prison term imposed, but on the assumption that the Court would send the jury back for further consideration if it did not accept the recommendation, the jury agreed to report as it did, it being the express opinion of the jury that the interests of the public and the accused would be best served if upon release of the accused from his con-

finement he be under the restraint of a suspended sentence of three and one-half (3-½) years.

Given under my hand this 18th day of June, 1965.

F. Y. HUNDLEY

Taken, subscribed and sworn to before me this 18th day of June, 1965.

BARBARA B. BAREFORD
Notary Public

Offered in evidence by Def. Refused—Excepted to —

D. W.—Judge

Filed in the Clerk's Office of Essex County, Va., Circuit Court the 21st day of June 1965

AUGUSTA WILKENSON, Deputy Clerk

page 48] We have read the attached sworn statement of F. Y. Hundley, Foreman of the jury of which we were members, and find it an accurate statement in all respects.

E. S. RANSONE
RYLAND DAVIS
EMMETT HARMON
FRANKLIN L. JOHNSON
JAMES RUSSELL TAYLOR
BANKS B. BAYTON
LARKIN JOHNSON
T. J. BAREFORD
MAXIE L. FRENCH

Taken, subscribed and sworn to before me this 21st day of June, 1965.

A. FLEET DILLARD
Commissioner in Chancery

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page 64]

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This day again came the Attorney for the Commonwealth and the accused Robert Bernard Clarke in person and represented by his attorney A. Fleet Dillard upon a Motion in Arrest of Judgment filed by the accused by counsel; and the same was argued by both counsel.

In consideration whereof the Court doth Adjudge and Order that the aforesaid motion and the prayers therein, including the prayer for a new trial be, and the same hereby is, denied and overruled; and to which said ruling counsel for the accused noted an exception.

The Court certifies that all times during the trial of the case the accused was personally present, and that Ingeborg H. Salstrom, Court Reporter of H. J. Edwards and Associates pursuant to her oath and a former order herein did throughout the trial take down and record verbatim all of the evidence and incidents of trial, and the Court orders that the Commonwealth pay said Court Reporter $54.80.

And the prisoner is remanded to jail.

ENTER-LAW
June 26, 1965

DANIEL WEYMOUTH
Judge

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page 66]

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ORDER

It appearing to the Court that A. Fleet Dillard, a competent and experienced attorney at law, was heretofore appointed by this Court to defend the defendant, Robert Bernard Clarke, in the above entitled felony case because of the indigency of the accused and his consequent inability to employ counsel; that the accused stands convicted of said felony in this Court; that the said Robert Bernard Clarke desires to appeal said

decision by applying to the Supreme Court of Appeals for a writ of error but is still unable to employ counsel or pay for a transcript of the record; that only a transcript of part of the record has been requested; therefore

The Court doth ADJUDGE and ORDER as follows:

I.

That A. Fleet Dillard aforesaid be, and he hereby is, appointed as counsel for the said Robert Bernard Clarke for the purpose of prosecuting an appeal and applying to the Supreme Court of Appeals of Virginia for a writ of error in this case.

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page 67]

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ENTER-LAW
July 13, 1965

DANIEL WEYMOUTH
Judge

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page 69]

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO ARNOLD MOTLEY, CLERK:

The defendant, Robert Bernard Clarke, hereby gives notice of appeal from the orders entered in the above styled case on June 9, 1965 and June 26, 1965, and sets forth his assignments of error as follows:

1. The Court erred in accepting the verdict of the jury containing a recommendation which was not properly included

in the verdict and without instructing the jury in regard to their lack of prerogative to make such a recommendation a part of their verdict, thus denying the defendant his constitutional right to a fair trial by jury.

2. The Court erred in refusing to hear the testimony of the persons who had constituted the trial jury who were offered as witnesses by the defendant at the hearing of June 26, 1965 on his motion in arrest of judgment in support of the affidavit filed with said motion.

3. The Court erred in overruling the defendant's motion to set aside the verdict and grant a new trial inasmuch as the verdict was invalid on its face.

4. The Court erred in overruling defendant's motion in arrest of judgment for error apparent on the face of the record.

ROBERT BERNARD CLARKE

By A. FLEET DILLARD
His Attorney

Filed in the Clerk's Office of Essex County, Va., Circuit Court the 20th day of July 1965
AUGUSTA WILKENSON, Deputy Clerk

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6/9/65
page 1]

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THIS TRANSCRIPT IS AN EXCERPT FROM THE REPORTER'S NOTES OF THE TRIAL

Had on 9 June, 1965, before Honorable Daniel Weymouth, Judge, with a jury.

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6/9/65
page 2]

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Jury back in Courtroom 4:43 P.M. viz:

The Clerk: Gentlemen of the jury, have you agreed upon a verdict?

A Juror: No, we have not. We have a question which we wanted cleared up.

The Court: All right, sir.

A Juror: This instruction we have here lists the four verdicts that we might bring back: Statutory burglary with the intent to commit larceny, one. Grand larceny, petty larceny, and number four not guilty.

Instruction 4 we have that if we thought that Corbin did break and enter that he would be guilty of statutory burglary with the intent to commit larceny. Instruction 5 also states that if he was present aiding and abet- he would be guilty of statutory burglary with intent to commit larceny.

6/9/65 page 3]

Number 6, if he carried away without breaking and entering would be petty larceny.

We don't seem to have one for grand larceny here.

The Court: Grand larceny was listed in the first instructions here (Pointing to an instruction).

A Juror: Instruction 6 covers grand and petty larceny, is that correct?

The Court: That is my understanding. Isn't that correct, gentlemen? I thought so.

A Juror: All right. I think that answers the question.

The Court: All right. Take them back to the jury room.

Note: Jury returns to jury room about 4:45 P.M.

Jury come back into the courtroom 5:27 P.M., as follows:

The Court: Do you gentlemen waive the poll of the jury?

Note: The poll is waived.

The Court: Very well.

The Clerk: Gentlemen of the jury, have you agreed upon a verdict?

6/9/65 page 4]

A Juror: Yes, we have, sir.

The Clerk: Would you stand, please? (Speaking to the accused, who now stands) Look upon the prisoner and harken to his cause. Do you find Robert Bernard Clarke guilty or not guilty of the crime charged in the indictment?

A Juror: We the jury find Robert Bernard Clarke guilty of grand larceny and fix his confinement at five years in the peni-

tentiary with the recommendation that three and one half years of the sentence be suspended.

Note: The Court is now putting the verdict in proper form, viz:

The Court: Gentlemen of the jury, harken to your verdict, that is listen to your verdict as changed in form but not in substance: We the jury upon the issue joined find the defendant Robert Bernard Clarke guilty of grand larceny as charged in the within indictment and we fix and ascertain his punishment at confinement in the pentitentiary for a term of five years, and we recommend that three and one half years of his sentence be suspended.

6/9/65 page 5] If that is your verdict, gentlemen, each one of you raise your right hands.

(Jury so doing)

The Court: (Continuing) Let the record show that each juror raised his right hand.

Note: Now the foreman is reading over and then signs said verdict.

The Court: All right, show it to the Commonwealth's Attorney first, and then counsel for the defendant.

(So done)

The Court: Do either of you object to the form of the verdict?

Mr. Dillard: No, sir.

Mr. Spruill: No, sir.

The Court: Let the record show that both the Commonwealth's Attorney and counsel for the accused stated they have no objection to the form of the verdict.

Accordingly, the Court accepts the verdict of the jury.

Gentlemen of the jury, you are discharged. Or, at least, you do not have to come back so far as we know, and you will be paid for your services. The Court thanks you.

6/9/65 page 6] Note: The Court remains in session while the jury is now retiring, and following their departure the Court states:

The Court: Are there any motions?

Mr. Dillard: May it please the Court, on behalf of the defendant I should like the record to show that I move the Court to set aside the verdict of the jury as being contrary to the law and the evidence, and without evidence to support it; and also for misdirection of the jury; and also that the defendant be granted a new trial.

The Court: The Court feels that the issues in the case were properly submitted to the jury and therefore I overrule the motion of counsel for the accused. The record will show that counsel for the accused noted his exception to the ruling of the Court.

All right, sir, stand up.

(Accused standing)

Do you have anything to say as to why judgment and sentence should not be pronounced against you?

Defendant Clarke: No, sir.

The Court: It is the judgment of this Court that you be found guilty of statutory *burgulary* with the intent
6/9/65 to commit larceny as charged,—I mean that you
page 7] be found guilty of grand larceny as charged in the indictment and that you be sent to the Penitentiary for a term of five years.

The Court is not unmindful of their recommendation, but the Court does not feel in this particular case that the recommendation of the jury should be followed, and therefore sentences you to five years in the Penitentiary, and you will pay the costs of the Court.

All right, take charge of him. Is there anything else, gentlemen?

Reporter's Note: There being nothing else brought before the Court at this time, Court is adjourned.

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6/26/65
page 8]

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MOTION IN ARREST OF JUDGMENT ON JUNE 26, 1965

Complete reporter's transcript of hearing held before Hon-

orable Daniel Weymouth, Judge, on June 26, 1965, beginning at 10:00 o'clock a.m.

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6/26/65
page 10]

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The Court: Are you gentlemen ready in this matter?

Mr. Spruill: Yes, sir.

The Court: Let the record show that the court reporter is now sworn, and that the defendant is present in court with his attorney.

Would you like to make an opening statement at this time?

Mr. Dillard: If Your Honor please, it might be in order for me to state the substance of the defendant's contention on this motion.

Mr. Spruill: If Your Honor please, I would like to have the witnesses excluded. Mr. Dillard is going into argument here.

The Court: All right. Take them up there in the jury room.

Witnesses Excluded

Mr. Dillard: May it please the court, the substance of the defendant's contention on this motion on arrest of judgment is that on the face of the record, to wit: In the ver-
6/26/65 dict written for the jury by the court changing it
page 11] in form but not in substance, it appears that the jury exceeded its prerogative in making a recommendation for the specific suspension of three and a half years of the punishment of five years found in the verdict against the defendant, and that the court was in error in receiving the verdict without instructing the jury with respect to their prerogatives in the matter of suspended sentences, and that the jury may have been influencd by a misconception as to its prerogatives, and for that reason the defendant may have been denied his constitutional rights to a fair trial by a jury which he demanded in this case.

The jurors are summonsed here as witnesses this morning not to impeach their verdict but rather to affirm it, and, if their evidence is received, to demonstrate the mischief that can be wrought in a situation of this kind. The defendant does not take the position that had the court been trying the case

without a jury that it wouldn't have been justified by the evidence, nor that the court, but for the peculiar circumstances, wouldn't have been perfectly justified in not suspending any part of the sentence.

6/26/65 page 12] The contention then, in effect, is that the defendant has been denied a fair trial by the jury because of the fact that upon its face the verdict indicates that the jury may have had a misconception of its prerogatives, and that this misconception may have had a material influence on the finding of this verdict.

Now, depending upon what position the Commonwealth desires to take in the matter, I would have further argument to make either after the witnesses have been heard, if they are heard, or if they are not heard, then before the court rules upon the motion.

Mr. Spruill: May it please the court, our position in this case of course is that there has been no error committed by the court in the disposition of the verdict which was returned by the jury. Under the law in Virginia the jury has no authority to recommend a suspension of any sentence, and there are cases which support that.

In the second place, in cases where a jury does add into their verdict a recommendation for leniency, or a recommendation for a suspension, the law looks upon that as surplusage and no part of the verdict. Cases decided in Virginia have so held.

In the third place, in those cases in which a jury does make a recommendation, it is within the discretion of the trial court to either accept it or reject it, and of course in this case the court uses its discretion in not accepting the recommendation of the jury, which it had every right to do.

6/26/65 page 13]

And, finally, there are a number of cases in Virginia which have held that once a jury has reached its verdict, affidavits in cases such as this or testimony by the jurors should not be received or considered by the court to upset the verdict.

So we take the position that the verdict is good. There has been no denial of rights of the defendant, and we would object to any testimony or any affidavits of the jurors at this time.

Mr. Dillard: If Your Honor please, Mr. Spruill has correctly stated the general rule with respect to receiving affidavits or testimony of jurors, but all of the text writers and courts from time to time have been careful to say that the rule is a general rule, and that there are exceptions to the rule, and plainly stated, in order to prevent a failure of justice,

such affidavits and testimony may be received, and it is not without precedent in Virginia.

Such affidavits I might say are rare, and for a very good reason. I believe this is the first time in 28 years that I have practiced law that I have had occasion to be involved in any proceeding when a jury was summonsed to give any testimony with respect to their findings, but in the case of *Cochran* v. *Street,* 1 Washington, 103 Virginia, the court received the affidavits of four jurors in that case, and later on heard the testimony of the other eight jurors who supported the four who had given the affidavits, and the judgment of the court was set aside.

6/26/65 page 14]

Also in 6 Gratton, 219, *Moffett* v. *Bowman,* the court did the same thing, called the jury in and asked certain questions, and on the basis of their testimony reversed the decision of the trial court.

In a more recent case of *Winn* v. *Commonwealth,* 160 Virginia, 218, the court called the whole jury in and questioned them concerning their proceeding.

In that case a juror was heard by other members of the jury to express his opinion, quoting from the case, that "the defendant was guilty as hell," before the case was tried.

He didn't disclose the fact that he had formulated an opinion upon his *voir dire*, and the court called the jurors in and examined them with respect to the juror's statements prior to his being sworn as a juror, and the court reversed the decision of the lower court convicting the defendant, holding that he did not have a fair and impartial trial in that case.

(6/26/65) page 15]

So, although it is rare, it is not without material precedent.

But we offer these jurors, however, not to impeach their verdict this morning, but to affirm it rather and to show the court that their intentions in finding this man guilty and in fixing his punishment at five years wasn't carried out and that the verdict was actually effected by a misconception of their prerogatives, the result of which is in this case that we have an exception to the general rule, that in order to prevent a miscarriage of justice and to prevent the defendant's not having a fair trial by jury, as was his constitutional right, it may be necessary for the court to hear these witnesses.

The defense does not feel it is necessary, however, for the court to hear these witnesses in order to demonstrate that the court was in error in not sending the jury back with proper instructions when they had reported an improper verdict.

The court after changing the verdict in form, but not in

substance, formulating it for the jury, asked counsel if they took any exception to the form of the verdict, and counsel replied they took no exception to the form of the verdict.

The exception which we now take to the verdict isn't as to the form but as to its very substance.

6/26/65
page 16] It appears on its face that the jury undertook to exercise a prerogative which they didn't have, and that the verdict may have been influenced by such misconception. That is enough in a criminal case, a red flag, so to speak, to put the court in the same sort of position that the court would have been in in effect if the jury had come in with inquiries concerning the matter.

Now, the cases in Virginia that have dealt with verdicts of this kind have dealt with situations where the jury has come in and inquired as to whether or not, in one case, the Coward case, which I believe is the leading case on the subject, inquired with respect to how much time the defendant would get off from his confinement under the law relating to good behavior.

In another case, the Jones case, a more recent case, where the defendant being charged with murder, the jury came in and asked if the court could give the jury any assurance the defendant wouldn't get out, and the court proceeded to give the jury a statement of what the court conceived to be the law with respect to the prerogatives of juries and courts and the distinction between executive authority relating in part to clemency and the function of the court, and the

6/26/65
page 17] Supreme Court held that the court was in error in that case, and should in reply have stated the rule in the Coward case, which is this: Upon such an inquiry that the jury, if they find the defendant guilty, should fix his punishment within the limits prescribed by the instructions of the court and that what thereafter should happen they shall not be concerned with.

So I feel that this defendant's right to a fair trial by jury, which he asked for in this case, was denied by reason of the court's failing to send the jury back and give them a proper instruction with respect to their prerogatives.

Mr. Spruill: May it please the court, I am a little confused as to what Mr. Dillard is really after in this hearing.

If he is not seeking to impeach the verdict, but to affirm it, it seems that the verdict has been affirmed by the court. The jury reached a verdict and the court accepted it; the court merely failed to follow a recommendation which the jury

made but had no authority to make.

And I would cite to the court the case of *Mann* v. *Commonwealth,* 177 Virginia, 875, where the defendant was convicted of statutory rape, and the jury sentenced him to five years in the penitentiary, as they did in this case, and then they made a written recommendation signed by all of the jurors to the judge asking that the sentence be suspended. The judge refused to go along with this recommendation and the Supreme Court held that the judge wasn't bound to follow the recommendation of the jury, that the recommendation was merely surplusage, no part of the verdict, and that the trial court could use its discretion in either accepting it or refusing to go along with it.

6/26/65
page 18]

Now, assuming that Mr. Dillard regardless of what he says, wants to impeach this verdict and get a new trial, I would like to cite a couple of cases where this same question has come up.

In the case of *Bryan* v. *Commonwealth* in 131 Virginia, 709, at page 722, this was a murder case in which the man was given 20 years.

I would like to read from the opinion. "The court was asked to set aside the verdict upon the ground that the method of arriving at the same has been plainly prejudicial to the defendant and had been the result of an innocent mistake on the part of some members of the jury. It was conceded that the conduct of the jurors in arriving at this verdict could not be established except by the testimony of the jurors themselves, and the court held that their evidence wouldn't be admissible for the purpose of impeaching their verdict. The motion for a new trial on this ground was accordingly denied and the allegation that this was error."

6/26/65
page 19]

The court held here that "We find nothing in the facts as above stated to warrant an interference with the ruling of the trial court. It is unnecessary for us to say that there are no conceivable circumstances under which the testimony of the jurors of themselves may be resorted to in order to impeach their verdict." This court said in the Bull's case, 14 Gratton, "In view of all the authorities and of the reasons on which they are founded we think that as a general rule the testimony of jurors ought not to be received to impeach their verdict especially on the grounds on their own misconduct, and without intending to decide that there are no exceptions to the rule, we think that even in cases where the testimony might be admissible it ought to be received with very great caution." Otherwise it would offer strong temptation to tamper with

juries after their discharge and would be frowned upon. "The decision of the question as it arises and is presented to us in this case doesn't call for an extended discussion or a review of the authorities.

6/26/65 page 20] It seems to be conceded by counsel for the prisoner that the rule as established in Virginia that the testimony of jurors cannot be received to show their misconduct, the claim being that the same rule doesn't apply where there has been a mistake. The mistake here alleged could only have been due to the misconduct of the jury in ignoring the written instructions of the court in which they were plainly told that murder in the second degree 'is punishable by confinement in the penitentiary by not less than five nor more than twenty years.' "

I think this next line is very important: "The general rule, as approved by the United States Supreme Court, and by the courts of some of our sister states, permits more latitude in the admission of evidence of this character than has generally been permitted by the rule in Virginia . . . But even under the more liberal application of the rule, the evidence offered in the present case was properly rejected by the trial court."

"On the motion for a new trial affidavits of four jurors were offered stating in some detail that they didn't understand the legal effect of the verdict. Only one of the affidavits is in the record. The juror states that by finding the defendant guilty as charged in the indictment, without capital punishment, he

6/26/65 page 21] didn't understand what the punishment would be on such a verdict and agreed to it *onthe* understanding that the punishment would be only two years in the penitentiary. He further states that he was in favor of a verdict for manslaughter and would never have consented to the verdict had he thought or believed it would carry with it a longer penalty. Motion for a new trial was denied. We see no error in this ruling . . . The jury might have failed to understand the effect of their finding because in the federal courts the punishment is fixed by the court and not by the jury, but they weren't allowed to testify for the purpose of impeaching their verdict."

That is the same thing we have here in the instant case. "They necessarily understood the exact effect of their verdict. With the written instructions in their hands as to the maximum and to the minimum punishment, they fixed the grade of the offense as murder in the second degree and the punishment therefor at the maximum term of imprisonment. In view of these facts the court was clearly right in refusing to admit the testimony of the jurors as offered."

That is the principal case. The same question came up in

Fuller v. *Commonwealth,* a more recent case in 190 Virginia back in 1949, page 19. In that case, a seduction case, the man was given two years in the penitentiary and the day after the the trial, and while a motion for a new trial was
6/26/65 pending, the foreman of the jury went to see the
page 22] judge at his home, and the judge notified the Commonwealth's Attorney, counsel for the accused, and they got the jurors in court and examined them fully, and he testified that although the verdict was read in open court upon a polling of the individual jurors and he had announced his acquiescence therein, it wasn't in fact his honest verdict.

The court goes on to say that the court should not have considered the testimony of this juror, and they quote from a case in 6 Gratton in which the court did admit the testimony of jurors, and this is what this court, 1949, said about that case: "However in *Harnsberger* v. *Kenney* the opposite conclusion was reached." In other words, the jurors or some of them were allowed to testify. In this case, "After the verdict of the jury had been approved by the trial court as being supported by the evidence, it was subsequently set aside upon the affidavits of three jurors that they had assented to the verdict under a mistake or misunderstanding of the instructions of the court. One of the jurors swore that but for such mistake he wouldn't have assented to the verdict. In holding that the trial court committed reversible error in setting aside the verdict on this ground, this court said: 'To permit a verdict which
6/26/65 in the opinion of the court who tried the accused
page 23] wasn't contrary to the evidence and in which justice was done to be set aside on the evidence of a few jurors, made under circumstances described by the record on their understanding of instructions of the court upon questions of law raised at the trial would lead to dangerous consequences, as holding out inducements to tamper with the jurors after they were dismissed, and may have forgotten the circumstances which actually did occur."

The most recent case, if Your Honor, please, which I could find on this same issue was a civil case of *Phillips* v. *Campbell,* 200 Virginia, 136.

This was an automobile accident case. They had a trial, the jury returned a verdict for the plaintiff for $25,000.00, and a few days later the judge and the clerk of the court were in the clerk's office and a juryman came by and happened to mention the fact that while the jury was deliberating they had quite a discussion about the insurance that the defendant probably had.

So the judge wrote to counsel for both sides and they had a new trial on the issue of damages only. At the new trial

6/26/65 page 24] the jury returned a verdict for $7,500.00, and the plaintiff appealed to the Supreme Court, which voided this second verdict for $7,500.00 and reinstated the first verdict.

The trial court there permitted six jurors to testify as to their discussion in the jury room to the effect that the defendant probably had insurance because one of the lawyers was an insurance lawyer, and so forth.

The court there said in 1958: "No courts have been more careful than those in Virginia to protect the secrecy of their jurys' deliberations or adhered more strictly to the principle that the statements, affidavits or testimony of jurors should not be received to impeach their verdict other than in exceptional cases, and to prevent a miscarriage of justice."

This case goes on to quote from the Bryan case, which I have already cited, and it goes on to say "The tendency of courts, especially in Virginia, is to hold that as a rule jurors shouldn't be permitted to testify as to their own misconduct in the jury room. The testimony and affidavits of jurors are generally inadmissible to impeach their verdict."

We take the position first of all that the court was entirely within its discretion in not accepting the recommendation of

6/26/65 page 25] the jury, that that part of their verdict was surplusage, and that the court did not have to accept it; that no miscarriage of justice has been done, that the verdict is sustained by ample evidence, and that at this time the court should not permit jurors to come into court and force them to testify as to what went on in their jury room.

Historically jury rooms have been regarded as a sanctuary where they can go and discuss freely the issues which they are called upon to decide. I think to require jurors, not only in this case, but to establish a policy of allowing jurors to come in after a case has been decided and to subject them to cross examination would very definitely be against public policy, and put the jurors on the spot, and I think it is contrary to the law in Virginia.

Mr. Dillard: May I reply briefly, if Your Honor please. In none of the cases cited by Mr. Spruill did they treat this matter from the standpoint of the constitutional rights of an accused to have a fair and impartial trial under Article 8 of the Virginia Constitution and the 14th Amendment of the Federal Constitution.

I think that we are on new ground here. I am sure of that, because I don't find a case which has raised the point just like this. There may be some, but I have researched the authorities

at some considerable length and do not find one
6/26/65 which raises the issue in just the way we propose
page 26] to raise it here.

Secondly, I should like to say that the position of the defendant isn't, as was the case in several of the cases cited by Mr. Spruill, an instance of the jury misunderstanding the instructions of the court. The issue is simply this, that they weren't instructed upon a very material thing that related to their prerogatives and to the defendant's constitutional rights. Nor does this case and motion have to do with any misconduct of the jury. If the jury shouldn't have included that in its verdict, it wasn't a result of any misconduct on the jury's part, or of any invalid motives or any malfeasance on the part of the jury, or of the court, at all, but simply an inadvertent thing on the part of everybody, it being in a more or less surprising situation.

I should like to call the court's attention to what the Court of Appeals has to say in *Jones* v. *Commonwealth,* 194 Virginia, in which case the court set aside the judgment of the lower court convicting the defendant of murder and sentencing him to death in the electric chair, notwithstanding the contention of the Attorney General that the defendant had failed to make formal objection.

Now, this is a matter that Mr. Spruill hasn't
6/26/65 mentioned, but it is related here. Notwithstanding
page 27] the Attorney General's position that the defendant wasn't entitled to raise it in the Court of Appeals because he made no formal objection or exception to the statement made by the court to the jury in that case with reference to the respective prerogatives of courts and executive authorities in the matter of pardon and/or parole. "We are not inclined to dispose of this case on that ground . . .

The record indicates that they were rather depending on the court in a situation new to them and they assigned the action of the court as basis for their motion to set aside the verdict."

So it is not misconduct on the part of the jury that we want to get to nor any misunderstanding that they may have had on any of the instructions of the court itself but rather that of a material constitutional nature, a matter of constitutional right of the defendant explained to the jury, and on the very face of their verdict, which is objectionable not in form but rather in substance, indicates that they may have been under a misapprehension of their prerogatives, which affected their verdict and adversely to the interest of the defndant.

The Court: As I understand it, Mr. Dillard, you are not

offering the affidavit in evidence, you are offering
6/26/65 the jurors, is that right?
page 28] Mr. Dillard: I am offering the affidavit, of course, which I have filed with the written motion in the arrest of judgment, and I am offering the jurors as witnesses to support that affidavit.

That is the way it is usually raised in cases where jurors have been permitted to be examined.

The Court: Well, I am ready to rule on the case. Call the jurymen in. Eleven of them, is that right?

The Sheriff: It is twelve of them here.

NOTE: The abovementioned jurors called as witnesses are now brought into the courtroom and are present.

The Court: The court is ready to rule on the motion of Mr. Dillard, counsel for the accused in this case.

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6/26/65
page 29]

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We have this motion of counsel for the accused filed in writing. We have heard arguments from both sides, the attorney for the accused and the attorney for the Commonwealth, the attorney for the accused asking for a new trial in the event the court does not reconsider the suspension of the sentence in favor of the accused as recommended by the jury, and this motion of course is opposed by the attorney for
6/26/65 the Commonwealth.
page 30] The court overrules the motion for the arrest of judgment in this case as asked for by Mr. Dillard.

The court also feels that in this particular case it wouldn't be proper for the court or not necessary for the court to hear what the former jurors in this case have to say.

I think all of us recognize that they are no longer jurors in this case, but they heard this case.

The court feels that they were properly instructed as to the law, they never made any inquiry of the court as to not being properly instructed as to the law. They brought in a recommendation. While they were here in court they were jurors, They were in the custody of the court. They were told not to talk to anyone about this case. They were told not to permit

anyone to talk to them about this case, they were told not to talk about this case among themselves unless they were in the jury room, and I think they understood those things.

They brought in their verdict. The court accepted the verdict. The court asked counsel for the accused if he had any objection to the form of the verdict, and this is something for me to decide, but he could have made any statement that he wanted to make at the time, and I would have sent the jury back to their room and whatever motion he had to make or whatever he had to say the court would have given counsel full consideration.

6/26/65
page 31]

The Commonwealth's Attorney was asked the same question. Neither one of them objected to the form of the verdict.

Nothing was said about it in any shape or form.

The jurors have now been discharged in this case. They have gone out. They have undoubtedly talked about the case. That is something they have to decide.

The court isn't telling them that they don't have the right to go out and talk about a case. The court doesn't think it is advisable to do it. It don't think the court has any right to tell a man who is no longer a juror after he leaves the court that he cannot talk about it.

Personally I wouldn't do it if I were a juror, you see.

Mr. Dillard says that there is a strong probability in this particular case that these jurors didn't understand.

Now, they were told what grand larceny is. They were told that they could find him guilty of grand larceny, they were told what the punishment was, and they were given full instructions as to the law in this particular case. They were told in this case, as in all other cases in which we have a jury, the jury determines who they believe, what they believe, they are the judges of the evidence in the case. The court has nothing to do with that. That is their prerogative. They are told that the court decides the law in the case and that they have to accept the law as given to them by the court, and to apply the law to the facts as they understand them to be in arriving at a verdict.

6/26/65
page 32]

Now, they were told all these things. They came in with a recommendation, and I don't think anybody seriously contends that a member of this jury or foreman of the jury doesn't understand what the word "recommendation" means. I have always understood. I know I have recommended a lot of people for jobs, a person might come in and ask for a recommendation.

We will recommend them, and I always understand that is what is a recommendation. I didn't know that a man they were going to see would give them a job, or whether he would or

not. I never understood that the man who was maybe going to provide him with a job or employ him was to contact me as to whether he was going to give them a job just because I had given him a recommendation. That is what I understand the word "recommendation" to be.

6/26/65
page 33]

According to Mr. Fleet's argument here these gentlemen did understand what the word "recommendation" meant, and I think they understood well what it meant. I got the impression when they came in that they fully understood what the word "recommend" meant. Here is the piece of paper which they signed which I am putting in the file. We the jury find Robert Bernard Clarke guilty of grand larceny and fix his sentence at five years in the penitentiary with recommendation that three and a half years of the sentence be suspended. I am not being critical of the jury or the foreman of the jury. I am not being critical in any shape or form. It is well known that lawyers disagree about what the law is. And I don't think that it has ever been simple. I don't think anybody with any judgment at all has ever felt that the task of the jury is a simple one, that it is the kind of thing they would be supposed to fully understand.

If this court does something that is objected to and it goes up to Richmond, they can reverse it. They can do something about it up in Richmond. If it goes to Washington, they may reverse it. And that is just the way things are.

6/26/65
page 34]

I am reminded of something I read that Mr. Churchill said about democracy. He said it was awful. He never saw anything with so many bugs in it in his life. It was terrible. But he said it was the best thing in the world along that line. So I think a person could say the same thing about juries. They could say that the system has a lot of bugs in it, but nobody else has come up with anything any better. It is the best system that we have.

And so far as I know we don't have any real sensible people who want to get rid of it, but I think sometimes we can get the mistaken notion that we must understand everything fully, completely, beyond the shadow of a doubt. But the world isn't like that.

I am dealing with things continually that I would like to know more about them. I would like to understand them better. I would like to feel a little bit better about them when I make the decision, and I am sure every juror has that same problem. There is no assurance that if you go out here and get another *the* jury, gentlemen, and you don't even have any assurance that when you sit here and talk to them all day that they would end up and understand it as good as you do much less better, and you will always be confronted with those propositions,

because, like the judge and the sheriff and the lawyers and you, we aren't perfect, and that is what we are
6/26/65 dealing with.
page 35] Now, I gather from Mr. Dillard in this particular case that maybe these ex-jurors may be favorable to his view of the case. But I do not know that as a fact. I do not know that as a fact, and as a matter of public policy unless there is some real necessity for it, and I as I say in this case I don't feel that ex-jurors should be subjected to the grilling on the witness stand by the lawyer as to what they did or what they didn't do, and that is just the way I feel about it.

I seem to think that is public policy. I would no more think of going out here, and I never have from the day I started to practice law in any case and confront a juror and ask why they did what they did.

I have heard some jurors express themselves, but I have been away from them. I don't want to get involved. I don't feel that I have a right as a lawyer or as a judge to be asking jurors why they did this or why they did that.

Frankly, I don't feel that is any of my business, that is just the way I feel about it.

But I am not saying that that is the law, the jurors cannot talk or a lawyer, if you had a good friend on the jury, couldn't say something to him. I am not saying that is
6/26/65 not so, I am just telling you how I feel about it.
page 36] I think generally speaking that is against public policy to take a juror and bring him up here and put him on the witness stand and subject him to this, to that.

And I do know this, that you can talk to people on the outside, good people with good intentions, people who are straightforward people, but they can get right up here on the witness stand and things can be said and their views can be changed entirely. Maybe they don't understand the matter then like they understood it before, and I can see in a lot of these cases it would just be stirring up trouble. I can even see where it would affect the selection of jurors. I can see where a man would say that it is bad enough to have to go down there and sit in some terrible case where later you are going to be subjected to going down there and probed as to why you did this and why you did that sort of thing. That is why I feel it is against the public policy unless there is some real reason.

And certainly if it was shown that a jury couldn't make up its mind about a criminal case, they roll the dice and that is the way they decide it, then that would be misconduct. Things like that could be looked into. Or two or three of the
6/26/65 jurors got on a bender while they were in a jury
page 37] room. I am not saying that that ever happened,

but if it did certainly you could look into those things, but we are not here dealing with that kind of a case.

I am like Mr. Dillard on that, we have thousands and thousands of laws, thousands and thousands of cases notwithstanding that you have something that will happen and it is difficult to find something exactly like it. But I think these cases are just about as close to it as any you will ever get. Just about as close. And the case of *Carter* v. *Commonwealth* you gentlemen haven't mentioned that. That is 199 Virginia, 466.

In this particular case it was a statutory burglary case, just like this one I believe, burglarized a chicken house, in this case. No evidence in his case that the judge here even took the precautions that we did, that is to even poll the jury on the question. Asked both lawyers if they had any objections. I don't see where the lawyers were asked anything in here.

The indictment charged that the defendant on February 26, 1956, did break and enter in the nighttime with the intent to commit larceny in a certain chicken house belonging to the party mentioned there. That was the indictment in this case. Statutory burglary with intent to commit larceny.

6/26/65
page 38]

The jury went out in this particular case and they came back with the following verdict: "We the jury find the defendant guilty and fix his punishment at three years in the penitentiary with recommendation for suspension of one year." The order continues: "Which recommendation the court doth refuse to allow."

That was the order in that case. The order in this case in part reads as follows: "And it being demanded of the accused if it was anything for himself he had now to say as to why judgment shouldn't be pronounced against him according to law, nothing being offered or alleged to allay the judgment it is accordingly the judgment of this court that the accused, Robert Bernard Clarke be, and he hereby is, sentenced to confinement in the penitentiary of this Commonwealth for a term of five years, as ascertained by the jury as aforesaid, the court being of the opinion in this particular case that the recommendation as to a suspension of part of the sentence isn't compatible with the public interest."

In the case I just read you, *Carter* v. *Commonwealth,* the judge said, "Which recommendation the court doth refuse to allow."

6/26/65
page 39]

In our case we say in this particular case that the recommendation as to a suspension of part of the sentence isn't compatible with the public interest.

Now in this case here is what the court said, and in this particular case you have another issue of the judge forgot to do the sentencing in the order, and they sent him back to be sentenced, but they took up this question also.

They state in this case, following the recording of the verdict, the order states that the court refused the recommendation of the jury that one year of the term of punishment fixed by it be suspended.

The supreme court in this case, 1959, said it was clearly the power of the court to disregard that recommendation. Now, the court had reason. The court had legal reasons in its opinion for not following the recommendation of the jury.

I don't think the court is called upon to state what they were. But the court was of the opinion, like the order said, that it wasn't compatible with the public interest of the state of Virginia, or the County of Essex, to suspend the sentence, and we exercised that prerogative. Now, that is the way that the court sees the case. If Mr. Dillard wants to appeal the case, why he can of course, since he is counsel appointed to represent this man, he can do so, and it is the law if he so asks that he be furnished with a copy of the record.

6/26/65
page 40]

But the court as advised at the moment does not feel that the court made any mistake. The court wasn't asked by Mr. Dillard before these gentlemen went to their jury room to furnish them with an instruction that they couldn't make any recommendation, nothing was said after the recommendation was made.

And if you will look at all of these cases you will see that it is a very dangerous thing for the judge of the court to be sounding off about these various matters about suspended sentences and parole.

The supreme court has treated it very thoroughly, and they have said that if the jury make inquiry, if the jury comes in and makes inquiry, this is what you tell them, it is the duty of the jury if they find the accused guilty to impose such punishment as they consider to be just under the evidence and within the limits stated in the court's instructions, and that they must not concern themselves with what may afterwards happen.

Every now and then we have a jury that comes in and asks a question, and we read them that, and they go back. I do not know what discussion they have about it. Sometimes we even read it to them a second time when somebody indicates that he didn't understand it and would like to have it read again.

6/26/65
page 41]

The law of course is like everything else. It

is flexible, but basically this is what we are saying here, and has always been true. I think it has been the law. I think if you analyze it you will take it to be that way. It couldn't be some other way. Most of the people might think it is a lot of humbug. This is a little beside the point, but I feel that probably the greatest indictment against the court and the law is that a case never winds up.

Take this Reese case up here at Louisa, they are still battling it through the courts. They just keep right on and on and there seems to be no end to a particular case.

If you opened up this field, why this would just enlarge that. There never would be any end to it.

I am sure that is one of the main reasons that the courts feel that a juror should not be examined unless there is some grave reason for it. Some grave reason.

If you want to make any further motion, I will be glad to hear you, Mr. Dillard.

Mr. Dillard: If Your Honor please, I feel that the life or liberty of a person accused of a crime is always a grave reason. I take formal exception to the ruling of the court and on behalf of the defendant request that since all twelve of the gentlemen who formerly constituted the jury in this case are here, that the record should show what their evidence, which has been rejected by the court, would have consisted of.

6/26/65 page 42]

I believe that in the event of an appeal in this case the court of appeals would be interested in knowing, and I think that the judgment in the case to be thoroughly explored and considered would have to be based upon what this rejected evidence would have been.

The Court: Mr. Dillard, you have told us what it would be. You have already told us what the evidence would show, and we are assuming that it would show what you say it would show, and of course we rejected your affidavit as evidence, but it reflects your evidence and will remain in the file.

Mr. Dillard: With the affidavit?

The Court: I mean the affidavit will remain here, and of course the supreme court will have a right to determine whether or not the court was justified in rejecting that. I assume that they will look at it.

Mr. Dillard: I understand your position, sir.

The Court: Well, counsel has noted his exceptions in the record. That is the end of this particular case for the time being.

6/26/65 page 43]

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Commonwealth's Attorney for
Essex County

Tendered: July 30, 1965
Signed: July 30, 1965

DANIEL WEYMOUTH
Judge

★ ★ ★ ★ ★

A Copy—Teste:

H. G. TURNER, Clerk

INDEX TO RECORD

	page
Writ of Error and Supersedeas Awarded	1
Record	2
Indictment	2
Order — February 15, 1965	3
Judgment — June 9, 1965	3
Motion in Arrest of Judgment	5
Affidavit of Jurors	6
Order — June 26, 1965	8
Order — July 13, 1965	9
Notice of Appeal and Assignments of Error	9
Proceedings	10, 14
Verdict of Jury	11
Motion in Arrest of Judgment on June 26, 1965	13
Opinion	23