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Record No. 6304

In the
Supreme Court of Appeals of Virginia
at Richmond

ROBERT LEE CLARK
v.
C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY

FROM THE HUSTINGS COURT OF THE CITY OF ROANOKE

RULE 5:12 BRIEFS

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§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. 6304

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 30th day of November, 1965.

ROBERT LEE CLARK, Plaintiff in error,

against

C. C. PEYTON, SUPERINTENDENT, ETC., Defendant in error.

From the Hustings Court of the City of Roanoke
Richard T. Edwards, Judge

Upon the petition of Robert Lee Clark a writ of error is awarded him to a judgment rendered by the Hustings Court of the City of Roanoke on the 1st day of March, 1965, in a certain proceeding then therein depending wherein the said petitioner was plaintiff and C. C. Peyton, Superintendent of the Virginia State Penitentiary, was defendant; no bond being required.

RECORD

* * * * *

IN THE CIRCUIT COURT OF POWHATAN COUNTY
POWHATAN, VIRGINIA

PETITION FOR WRIT OF *HABEAS CORPUS AD SUBJICIENDUM*

Received and filed, this the 29th day of February, 1964

WM. E. MAXEY, JR., Clerk

FILED BY LEAVE OF COURT 7/29/64

ROBERT F. FRENELL, Deputy Clerk

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page 4] VIRGINIA

IN THE CIRCUIT COURT OF POWHATAN COUNTY, POWHATAN, VIRGINIA

ROBERT LEE CLARK 83595 Petitioner,

vs.

COMMONWEALTH OF VIRGINIA
C. C. PEYTON, SUPT. OF STATE PENITENTIARY
M. L. ROYSTER, SUPT. OF STATE FARM, VIRGINIA
Respondent.

Petition for the Writ of *Habeas Corpus Ad Subjiciedum*

Complaints:

May it please the Court:

Comes now the petitioner herein in this cause, on this 22 of Jan 1964 and Says:

1. That the petitioner is serving a term of 15 years as imposed by the Hustings Court of Roanoke at Roanoke, Virginia June 13, 1963

page 5] That Petitioner is illegally detained and restrained of his liberty by the Respondent C C Peyton *Superintendant* of the Virginia State *Penitetiary* at the State Farm, in Powhatan County, Virginia, in violation of due process of law as enumerated in Article I and Amendments: IV V VI VIII IX and XIV of the Amendments to the Constitution of the United States. Article I see 7-8-9-10-11-12-17 and Article IV Sec 58 of the Constitution of Virginia.

In consideration whereof, Petitioner moves this Honorable Court for an order under the Rule, To Show Cause for the Issuance of a Writ of H*abeas Corpus Ad subjiciendum* in Petitioner's behalf in accordance with the provisions of Title 17 Sec 97 of the Code of Virginia in that there be probable cause as to illegal detention by C C Peyton, Supt. of Virginia State Penitentiary commanding him to have the body of the petitioner in its Court Room before the bar of the Circuit Court of Powhatan returnable, in proper person, A day and date certain to be specified there in, for further proceeding to be had; so that this Honorable Court may do and receive what

shall then and there be *concidered* concerning your petitioner and the true cause of petitioner's detention and said writ whereupon petitioner prays that his trial, conviction and sentence be adjudged void for the reasons herein expressed also in supporting *memoradum* and that petitioner be discharged from the custody of the respondent, without *day*.

Also section 8-598 (Code of Virginia)

"ET-INDE Petit Judicium."

LEAVE is reserved to amend this petition and response

ROBERT LEE CLARK
Petitioner *pro se*

page 6] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR *HABEAS CORPUS AD SUBJICIEDUM.*

A. Subordinate right of every citizen is that of applying to the courts of justice for redress of grievance since the founding of Article IV Sec 58 of the Virginia Constitution and Article I Sec 9 par 2 of the United States Constitution

The supreme arbiter of every man's life, liberty and due process of law are the courts of justice which must be opened to the subject at all times and the law duly administered therein (20 Va Law-Reg-240-*et seq*).

B. The sole question *befor* this Honorable Court relative to petitioners allegations as to illegal detention, is to ask this Honorable Court if he is to remain under servitude of a 15 year sentence as imposed upon the petitioner by the Hustings Court of Roanoke City, Roanoke, Virginia on June 13 1963 although his state constitutional and United States Constitutional rights to due process of law has been violated?

SUPREMACY OF CONSTITUTION OF UNITED STATES
Article VI General Provisions

This constitution, and the laws of the United States which shall be made in (this constitution) pursuance thereof and all treaties made, or which shall be made, under the
page 7] authority of the United States, shall be the SUPREME law of the land and, the JUDGES

IN EVERY STATE SHALL BE BOUND THEREBY ANYTHING IN THE CONSTITUTION OR LAWS OF ANY STATE TO THE CONTRARY NOT WITHSTANDING.

Article I Constitution of United States.

Congress shall make no law respecting an establishment of religion, or prohibiting the *freebom* of speech, or of the press, and to petition the government for redress of *grieances.*

Constitution of United States — Article I Sec 9

The privilege of the writ of *Habeas Corpus* shall not be suspended, unless when in cases of rebellion or invasion the public *safty* may require it.

(An Official Document requiring an accused person who is in prison awaiting trial to be brought into court to inquire whether he may be legally held).

Constitution of United States — Article XIV Sec I

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws

Constitution of Virginia — Article I Sec 8

page 8]

"He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers."

ART I SEC II Cons't of Va.

"No person to be deprived of property without due process of law."

Constitution of Virginia — Article I Sec 7

Laws should not be suspended

Suspending laws, or the execution of laws by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised.

Constitution of the United States — Article IX

"The enumeration in the constitution of certain Rights shall not be construed to deny or disparage others retained by the People."

Constitution of Virginia — Article 1 Sec. 8

That in criminal prosecutions a man hath a right to demand the cause and nature of his accusations, to be confronted with the accusers and witnesses. To call for evidence in his favor and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found Guilty. He shall not be deprived of *live* or liberty except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceedings to give evidence against himself nor be put Twice in Jeopardy for the Same Offense

page 9] Art I Sec. Const. of Va.

Note: Sec. 19, 1-241 of the Code of Virginia provides the right to counsel.

Constitution of United States — Article VI (Amendment).

In all criminal prosecutions, the Accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and District where in the crime shall have been committed. Which district shall have been previously *assertained* by law and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, *an* to have the assistance of counsel for his defense.

Constitution of Virginia — Article I Sec. 10

The general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particular described and supported. By evidence are *grevous* and oppressive and ought not to be granted.

Constitutions of the United States — Amendment Article IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause supported by oath or *affirmention,* and particularly describing place to be searched, *an* the persons or things to be seized.

page 10] Constitution of Virginia Article I Sec. 8

"Nor be compelled in any criminal Proceeding to give evidence against himself."

Constitution of United States — Amendment Article V

"Nor shall be compelled in any criminal case to be a witness against himself."

Constitution of Virginia — Article I Sec. 9

"Nor cruel and unusual punishment inflicted"

Constitution of United States — Article VIII Amendment

"Nor cruel and unusual punishment inflicted."

Therefore we can observe that the constitution of both state and nation fully guarantee due process of law and the right to have access to the courts. And we are guaranteed the privilege against.

1. False arrest
2. Illegal search and seizure
3. Self incrimination
4. Preliminary examination (*Guranteed*)
5. Witness for defense (*Guranteed*)
6. No cruel and unusual punshment inflicted.
7. Right to appeal (*Guranteed*)
8. No law suspended
9. Counsel of Choice (*Guranteed*)

page 11] ARGUMENT

Right to Appeal

Petitioner will show how he has been denied totally, right or means to appeal from an unfair and unput decision rendered for attempted extortion in Hustings Court. Roanoke, Virginia 13 June 1963. Petitioner received 15 years. 5 years to run *concurrant* with 10 years.

Right to appeal has been withheld from petitioner through *subterfige* and denial of due process of law from 14 June 1963 till present date. Petitioner will prove this, through actual exhibits and factual evidence.

Article I Constitution of United States

"The procedure of the law is as important as the law of the land"

JUDGE PERCY FROMAN
Federal Court, U.S.A.

Illegal Arrest Entrapment

Petitioner was invited into car by Charles Henderson (alleged victim) at 3rd and Bullitt Street, Roanoke, Virginia at 8:15 p.m. on 5 Dec. 1962. Petitioner, after door of car was thrown open by Henderson, entered and closed car door started to say "How are you? When unknown man. (later identified as detective Smyth) lying on floor in back seat raised up and grabbed petitioner around neck and said "I got you," It is agreed decoys are permissible to entrap criminals, but does not it deny due process of law to use enticement to create them?

There were no demands or motions toward Henderson to indicate particular intent toward soliciting money or anything.

page 12] Since "*Mens Rea*" is necessary to make an act a crime. Where then, had there been any intent to constitute a felony or any crime? Detective Smith the "Unknown" man in the entrapment admitted under oath that petitioner had made no attempt, he stated "I didn't hear a thing" Henderson admitted under oath, he did not give petitioner any money and that he did not have any money with him. How then could this enticement be construed as an attempt?

"Ex Nihilo, Nihil Fit."

An attempt consists of intent plus a direct act. *Cates* v. *Comm* 111 Va. 837 69 SE 520.

Mere preparation is not sufficient *Martin* v. *Comm.* 195 Va. 1107 81 SE (2d) 574.

Petitioner jumped out of car and ran. Detective jumped out and started shooting (This entrapment was set up to catch a "tiger" but instead caught a "donkey").

Petitioner stopped running was surrounded by other men, was arrested and there was found, that the arresting party did not know what he had until after petitioner was arrested and searched. Keys, papers, money and other valuables taken. None of the officers had a warrant for petitioner's arrest or a search warrant to authorize the search of his person and that he had not in the presence of the officers or any of them violated any law, that petitioner protested when he was arrested and demanded of the man to show his authority but the man had none, but arrested and searched him with pistols struck in back and *stumach*, no *idenification* was shown, without evidence of crime committed, seized petitioner. How can the existence of an attempted extortion be argued page 13] from what could have been possible if petitioner had reacted to illegal entrapment as had been anticipated by officers?

Was not this arrest, without probable cause, being based solely on information obtained from a sexual psychopath whose reliability is neither alleged nor established.

If the police had sufficient information and evidence for probable cause and an affidavit was sworn out on information by a supposely reliable witness, Henderson, why then did not the police take this information and alleged evidence before "a "neutral and detached magistrate who obviously is in a better position to determine probable cause than an "officer engaged in the often competitive enterprise of ferreting out crime." See *Johnson* v. *United States,* 333 U.S. 10, 14 (1948) Since the police acted without an arrest warrant, was not this failure alone, absent exceptional circumstances, sufficient to invalidate this arrest? Is it possible that courts can put a stamp of approval upon action of the police, when the officers, challenged by an accused, fail or refuse to demonstrate compliance with the rules which circumscribe their authority, certainly the police must have been properly trained in handling American citizens. Detective Smyth made the decision to arrest petitioner on the basis of the limited information he him-

self possessed. Placed *petitioners* life in *in* danger and actually became accessories to attempted premeditated murder as

ILLEGAL SEARCH AND SEIZURE

planed by a diabolic mind (Henderson) and totally denied petitioner equal protection of the law as guaranteed by the XIV amendment, United States Constitution. Petitioner was taken to police station and made to remove all clothing. Hands were cuffed behind back. After *strenous* questioning and by using duress and coercion and actual slaps, peti-
page 14] tioner was, through fear made to give place of residence and to tell which key fitted door to my residence Petitioner refused but through more threats finally told address. Police searched petitioner's room on same night 5 December 1962. Did not have search warrant or permission to enter room. Names of people known to petitioner's tapes and recorder were seized and used to distort facts against petitioner and were used as a basis to cause line-ups.

Unable to perceive that the seizure of a mans private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. *Boyd* v. *United States*, 116 US 616,630 (1886) also Section 19.1-88 (Code 1950 Sec. 19-33; 1960 C366) It was enacted to prevent searches upon mere suspicion. *Durham Bros. & Co.* v. *Woodson,* 155 Va. 93, 154 SE 485. And to protect personal liberty and privacy. *McClannan* v. *Chaplain,* 36 Va. 1; 116 SE 495 meaning of "house" "place" or "thing" *Mc Clanan* v. *Chaplain,* 136 Va. 1, 116 E 495 "Unless defendant has been compelled to produce it" *Hall* v. *Comm.* 138 Va. 727, 121 SE 154.

If a seach warrant issued, how could any policeman know what he was going to search for? Henderson's accusations did not charge that he had been "Blackmailed" with *ponography* or tape recorders, what possible "thing" could they have been after, if they had not searched the room before they made affidavit for a search warrant?

Section 19.1-85 (Code 1950 Sec. 19-30; 1960 C336) No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably decribing the house, place, vehicle or baggage to be searched the things to be searched for thereunder, alleging

briefly material facts constituting the probable
page 15] cause. (In Part) an officer *marking* an illegal
search is a trespasser; the evidence illegally obtained and the *officers* testimony are not *admissable* in Court. *Hall* v. *Com.*, 138 Va. 727, 121 SE 154.

Every witness and every statement with exceptions of Charles Henderson, Mrs. Henderson and detectives (one in illegal entrapment) Smyth were secured through illegal search.

Was this not a violation of due process of law?

We hold that all evidence obtained by searches and seizures in violation of the constitution is by that same authority inadmissible in a state court: *Mapps* v. *Ohio,* 170 Ohio St. 427, 166 N.E. 2d 387 *reversed.*

"*Judicia Posteriora sunt in lege fortiova*"

The rule in Criminal cases is that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, *arkids* nothing unless the *corpus deliti,* the fact that the crime has been actually perpetrated, be first established. 1 Starkie on Ev 510 *Jones* v. *Com.,* 103 Va. 1012, 1019, 49 SE 663 *Hamilton* v. *Com.,* 163 Va. 1089, 177 SE 847.

This does not mean an illegal search or seizure in order to establish the "*Corpus deliti.*" Does it?

Self Incrimination

Petitioner was within the vicinity of numerous committing magistrates was not told of his rights to counsel or to a preliminary examination before a magistrate nor was he warned that any statement made by him might be used against him. Petitioner was subjected to insults, threats and physical abuse
in fear of worse treatment promised, orally gave
page 16] account of how he was trying to *to* prevent future
felonies perpetrated by Henderson on Children, felonies that are covered in the Code of Va. 18-1-212-18.1-213 (Sodomy) as brought out at trial. Petitioner volunteered to take lie detector test. Henderson, the accuser, refused to take a lie detector test claimed he was "too *nervos.*"

Petitioner after serveral hours of intense questioning, made up a story, but kept partially to the truth. This alleged confession was brought out at the trial.

The privilege against self-incrimination protects a person from any disclosure sought by legal process against him as a witness. *Owens* v. *Com.,* 186 Va. 689, 43; SE (2d) 895 *Phillips* v. *Com.,* 202 Va. 207, 116 SE (2d) 282.

Privilege against self-incrimination is not limited to those cases where witnesses are called to testify in criminal prosecu-

tions against themselves but the privilege is as broad as the mischief against which it seeks to guard, and insures that a person shall not be compelled, when acting as a witness in any investigation to give testimony which may tend to show that he himself has committed a crime. *Cullen* v. *Com.*, 24 Gratt. (66 Va.) 624; *Litton* v. *Com.*, 101 Va. 833, 44 SE 923; *Sprouse* v. *Com.*, 81 Va. 374 *Kendrick* v. *Com.*, 78 Va. 490; *Temple* v. *Com.*, 75 Va. 892.

But it is not permissible to trifle with him and detain and interrogate him for the *ulterrior* purpose of extracting a confession. *Sands and Co.* v. *Norvell,* 126 Va. 384 101 SE 569. Even though an abortive false confession was obtained.

Was this not a violation of due process of law? to force a supposely true confession. Also *Wong Sun* v. *United States, supra,* 371 U. S. at 485-488.

page 17] Preliminary Examination

Petitioner was questioned from 8:15 pm 5 Dec 1962 Until 1:45 am 6 Dec 1962. All clothes had been taken.

In *Winston* v. *Com.*, 188 Va. 386, 49 SE 2d 611, 615 (1948). It was said with reference to a five hour jailing prior to hearing before a magistrate "That such detention was illegal is too plain for argument." Conviction reversed. At 9 am 6 Dec 1962 after having spent the night in isolated solitary confinement cell, Petitioner was given "Jail Bird Blues" (Paint smeared rags and shoes) was taken to crowded courtroom, in these "Bum's" clothes, and led before judge. No witnesses, no accuser, no defence witnesses and no evidence was presented. Judge asked "Do you know what you are charged with?" Petitioner answered no sir! I do not. I would like to know. And I would also like to know, why my clothes were taken, Judge said, "This will all be explained later." Then told jailor to take me back to jail. No bond set. Petitioner still had not seen a warrant of any kind.

19.1-101 (Code of Virginia 1962) The judge or justice of the peace before whom any person is brought for an offense shall as soon as may be in the presence of such person examine on oath the witnesses for and against him and he may be assisted by Counsel (Code 1950, 19-79 1960 C 366-368) as applied in *Wormeley* v. *Com.* 10 Gratt (51 Va.)

"The Constitution gives to the accused the right to demand the cause and nature of his accusation and this right cannot be taken away from. But there is inhibition on the legislative to fix a stage of the procedure beyond which he cannot go in

the assertion of his constitutional right'' *Flannary* v. *Com.*, 133 Va. 665, 112 SE 604.

page 18] Should not a preliminary examination be a ''fair hearing?'' more than a token compliance with the statutes at large, but also an investigation of the grounds for an Accusation against a person arrested for alleged crime. Affirmative proof of allegations by accuser; relevancy of fact proved. With a view to discharging the person so arrested and not for the specific purpose of issuring a warrant and committing him?

Why then is a citizen, who has fought two wars and has four honorable discharges in his hand from military service, with the constitution in his right hand, denied the very thing he gave some of his life's blood to protect? Denied not by legislative laws under the constitution but by the officials who have been entrusted with the responsibility of seeing that these laws are carried out.

Is this not a flagrant and corrupt violation of due process of the law.

Respect for law will not be *adanced* by resort, in its enforcement to means which shock the common man's sense of decency and fair play. *Burdeau* v. *McDowell,* 256 U.S. 465, 476, 65 L ed 1048, 1051 (1921)

Mallory v. *United States* app. D.C. 406, 236 F.2d 701 *Reversed.*

Witnesses for Defence

Witnesses for defence were not in the court room, court appointed lawyer claims to have subpoenaed them but offered no objection, except a half-hearted protest that *seened* to be ignored by court. List of names were given to lawyer before 26 May 1963. This ''trial'' on 13 June 1963.

''To have compulsory process for obtaining witnesses in his favor.'' Article VI Constitution of United States.

page 19] No cruel and Unusual Punishment Inflicted

Petitioner will show court how cruel and unusal punishment has been inflicted even though unwarranted. Petitioner was subjected to cruel and unusual punishment in a manner that inflames the mind of decency and fair play. Which he will show the court, article I Section 9 constitution of Virginia.

Counsel of Choice

Petitioner was appointed a lawyer by the Court 6 May 1963. Talked with lawyer K. A. Pate on request. Lawyer was *blery*-eyed and obviously under the influence of some type of intoxi-

cants. either *alcolhol* or drugs. Trial was set for 26 May 1963. Petitioner went to trial was told jury not available. Another date "would be set for trial" Petitioner even though considered innocent until proven guilty was taken from court and placed in solitary confinement. Lawyer was called (by jailor) and told that petitioner would be ready to confess and plead guilty by the time he came up lawyer Pate told petitioner what had been said. Petitioner refused to plead guilty was taken back to solitary confinement Petitioner never knew trial date until 12 June 1963, one day before trial.

Court-appointed lawyer did not remember name of petitioner. Had no brief or notes *strickly* impromptu defence. Defence *Witneses* were not in courtroom. Lawyer refused to properly cross-examine witnesses, flatly refused to even question one "The judge told me not to go too deep into this," he said. Counsel would not object to *heresay* testimony that was *irrevelant* and *imiterial* to the case before the court. Counsel was, without doubt, under the influence of either drugs or *alcolhol* at trial. Counsel told petitioner everything would be alright. Counsel struck jurors without *confering* page 20] with Petitioner although the jury to be challenged was not present before the court. Old jury was in jury box, Jury for trial took stand after *premptory challange.*

Counsel refused to object to prejudicial errors or make motion for execution of judgment to be arrested so that an appeal for Writ of error could be presented.

It is true that Counsel was present at trial, but in what way did Counsel provide effective representation?

The right to an attorney embraces effective representation throughout all stages of the trial, and where the representation is of such low caliber as to amount to no representation. The guarantee of due process has been violated. *Johns* v. *Smyth,* 176 F Supp. 949.

Imunity granted to a class, however limited, of a personal or property right, is just as clearly a *deniel* of equal protection of the laws to the latter class as if the immunity was in favor or the deprivation of the right permitted worked against the latter class.

In the Hustings Court Part II in the City of Richmond Virginia (1948) The honorable Judge, J. Doubles, said "It is well settled now that the constitution of United States Guaranteed to a defendant in a state case, the right to effective representa-

tion by counsel in cases involving serious felonies and complex legal questions.

Since Petitioner had a right under Virginia statute to be appointed a counsel who was competent and who would supply effective assistance, the failure of the court so appointing counsel to appoint competent counsel capable of rendering effective assistance constitutes a denial of equal protection of the laws. And does it not also deny petitioner due process of law?

In *Hawk* v. *Olson,* 326 US 271, 906 EL 61 SC The
page 21] court said, "A denial of effective assistance of counsel in prosecutions in state courts violates due process of law."

The Court-appointed lawyer Pate, in denying me effective assistance of counsel, was instead acting as an assistant prosecutor while masquerading as my defence counsel. Is this not a corrupt practice, because of the time element and the amount of money awarded for defence, in preparing a proper and effective defence instead of a "mock" trial that is held merely to satisfy the provisions of the Constitution so as not to offend the lookers-on?

This is deplorable indeed when an American citizen's liberty is at stake. Certainly, the canons of professional ethics has not been abolished nor were the decisions of the Honorable Judges of the higher courts made to be overruled by an overzealous, apathetic prosecutor whose main objective was to convict and not to put the truth before the court.

Was not this a flagrant denial of due process of law?

A defendant is entitled to the faithful and devoted services of his attorney uninhibited by a dictating conscience *John* v. *Smyth,* 176 F Supp 949.

The "trial" held on the 13th June 1962 was a mockery of justice. Equal rights guaranteed by the 14th Amendment were unequal from the start. And during the trial this was proven. The Court-appointed lawyer, selected the names to be struck from the jury without consulting petitioner. Commonwealth Attorney brought two cases before the court and court and jury heard only one. Commonwealth-Attorney insinuated that petitioner had been convicted previously of felony, by handing F.B.I. folder to petitioner and stating "read your record"

Petitioner has never been convicted of any crime
page 22] prior to this. Witnesses were allowed to confess their own crimes as "approvers" would and it

was made to appear that this testimony was relevant to the case before the court. No objections were made by defence counsel Commonwealth-Attorney swayed the jury with his jokes about petitioners truthful testimony while petitioner testified, one of the juryman leaned over and talked with Commonwealth-Attorney "buddy," "buddy" fashion. Completely ignoring testimony. The jury had two men who were "known" to petitioner as habitues of the Elmwood park area. They obviously were not coming regularly to the park to pick plums, because there are no plum trees there. I informed my counsel that I recognized these men and he said "Its alright, everything's going to be in our favor, besides *its* too late." Commonwealth Attorney completely bullied the only *defence* witness present and so impugned the witness as to make his truthful testimony seem rediculous. Though investigation could have verified his statements. Petitioner was told by court-appointed lawyer that he could not have a recorder, "because it cost too much." Section 17-30.1 refutes this. The Commonwealth-Attorney used alleged evidence before the jury (radio, tape recorder) After it had been objected to and sustained by the court. Burden is on Commonwealth to show objectionable comment was harmless, *Joyner* v *Com,* 192 Va. 471, 65 SE (2d) 555. There was no proof by state that petitioner had attempted to extort money from Henderson. The Judge became a forth prosecutor when he asks a witness "you don't know anything about this, do you?" Witness, was in fact a principal in the case and if questioned properly, could have put before the court the exact truth.

Since petitioner was denied recorder he cannot have a transcript of trial and an indigent, where the record is unclear or the errors are hidden, has only *the*
page 23] the right to a meaningless ritual, while the rich man has a meaningful appeal.

Was this equal rights promised by the 14th Amendment of the Constitution of the United States? The jury which was composed of local business men, who were admitted friends of the Commonwealth-Attorney stayed out approximately 15 minutes before bringing in the verdict asked for by the Commonwealth-Attorney 10 years. An attempt is an offense of a lower grade than the consummated felony. *Cates* v. *Com* 111 Va 837 69 SE 520. *Hicks* v *Com* 86 Va 223, 9 SE 1024

The term "Fair Trial" is often used but not often defined, it is of broad scope. While we shall not undertake to give a formal definition of the term, yet it may not be amiss to mention in part at least, its contents. It means a trial conducted in all material things in substanial conformity to law. It consists not in an observance of the naked forms of law, but in Recognition and just appreciation of its principal. . . . It means a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm . . . Being impartial means indifferent as between the parties . . . it means that *he* acts and language of the prosecuting attorney are subject to control; that his duty consists not in securing conviction at all hazards but in ascertaining the truth . . . It means that the defendant shall have a fair opportunity through his counsel to outline his defence to judge or jury. It means that the right of cross examination shall be respected. It means that the judge . . . may not extend his activities so far as to become in effect either an assistant prosecutor or a thirteenth juror. *Sunderland* v. *United States* 19 F 20 202, quoted by Patter, J. in *People* v. *Biddle* 288 Mich 417, 285 NW 5 (1939). Where any legal right has been denied to a party on trial for a criminal offence, or any of the safeguards thrown around him by law for his protection, have been disregarded page 24] it is not for the court to say what might or what might not have been the effect upon the case of the accused the law will intend prejudice if it be necessary to enable his rights to have the judgment reviewed in the appellant tribunal and will hold it impossible in such a case to say that a fair and impartial trial has been had. *Montague* vs *Com* 10 Gratt 763 (Affirmed: *Bank* vs *Wadell,* 27 Gratt 448 to; *Hummer* v *Com* 122 Va 826 9ASE 157 and Ad Inf.)

QESTION

In view of all the facts as set down here: how can petitioner be legally deprived of his freedom, after the manner in which he has been arrested indicted and tried. Is this not a violation of Due process of law?

The petitioner respectfully quotes an opinion in part from the case of *State* v. *Brizile* Va. 775 So 2d 856

The object of a criminal prosecution is not to convict: neither is it acquit, the real ultimate object is a trial in accordance with the constitution and the laws of the State and

United States. We must not condemn accused in *hastor*. But our Judicial conscience must always *rember* that justice can always afford to wait until actual evidence of guilt is heard by Due process of law.

Where as the Petitioner respectfully ask this honorable court, how an accused person can be imprisoned in the manner that the accused has been, where upon the complaining witness failed to submit evidence to show probable cause.

Is that not a flagrant violation of his state and United States Constitutional rights and by conduct indecent and unworthy of those charged with the administration. Also to be imprisoned without means or right of appeal. Is this not a violation of every concept of justice and both constitutions state and federal and should be condemned as a

page 25] violation of equal law and justice for all.

Therefore the petitioner by his confinement which violates his due process of law, the petitioner stands deprived of his liberty where upon no amount of money can give back these precious seconds, minutes, hours, days, months or years of unlawful deprivation of liberty which, petitioner has fought two wars and given 12 years of his life to help preserve, for if the *contray* were true, this nation might have fallen long ago, because liberty is our *nations* most important product, where as the petitioner has set *fourth* sufficient facts to demonstrate that the *petitioners* due process of law has been violated.

Whereupon the petitioner moves this honorable court for the issuance of a rule against the respondent to show cause if any as to why the petitioner should not be awarded a writ of *habeas corpus ad subjiciendum.*

Here in return able to this said court as made and provided for, by the Va. Code see 8-598 (As Amended) so that this court may do and receive what shall then and there be considered concerning your said petitioner where upon, petitioner ever so prays.

Leave is reserved to amend this petition and *responce.*

ROBERT L. CLARK
Petitioner Pro Se.

page 26] CERTIFICATE OF SERVICE

I certify that on the ——— day of ——— 1964. I mailed a

true copy of the foregoing petition to the honorable Reno S. Harp III *assitant* attorney-general, counsel for the respondent herein named.

Supreme Court Library Bldg.
Richmond 19, Virginia

83595 ROBERT LEE CLARK
Southside
State Farm, Virginia

page 27] State of Virginia
County of Powhatan

AFFIDAVIT OF POVERTY

This is to certify that, Robert Lee Clark the undersigned party personally appeared before me in my state and county afore said, and after first being *dully* sworn according to law, deposes and says, that he is without funds to procure the amount of money *necesary* to defray the expenses of an attorney at law to prosecute his cause and case..

Therefore, because of his poverty and without collateral-et cetera. He comes in bona-fide having filed his petition for a writ of *habeas corpus ad subjiciemdum* seeking release from alleged illegal detention et cetera, and certificate of service affidavit thereto, executed to the counsel for the respondent, respectfully moves this honorable court to proceed herein in this cause as a pauper, in *forma pauperis* and in accordance with the provision of sec 14-180 and 17-30.1, Code of Virginia (1950) as amended, on this 22 day of January 1964.

ROBERT L. CLARK
Affiant

Sworn and subscribed by me and given under my hand and seal this 22 day of January 1964.

My commission expires 10-3-1967

JOHN S. GATHRIGHT
Notary Public

page 28] AFFIDAVIT

STATE OF VIRGINIA:
COUNTY OF POWHATAN

This is to certify that Robert Lee Clark petitioner herein named in this said cause, the same who personally before me in my county and state aforesaid, and after first being duly sworn according to law, deposes and says: that all statements contained herein are true to the best of his knowledge, information, and belief.

Given under my hand and seal this 22 day of January 1964

JOHN S. GATHRIGHT
Notary Public

My commission expires on 3 day of October 1967

page 29]

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IN THE CIRCUIT COURT OF POWHATAN

ORDER

This matter came on this day to be heard upon the petition of Robert Lee Clark alleging that he is illegally detained in the Virginia State Penitentiary and praying that a writ of *habeas corpus* may issue.

On consideration whereof, it is ordered that C. C. Peyton, Superintendent show cause within 30 days from the date of this order why a writ of *habeas corpus* should not issue and that a copy of this order be mailed to Robert Lee Clark, C. C. Peyton, Superintendent, and Reno S. Harp, III, Assistant Attorney General of Virginia.

Enter: 19 March '64
S. D. CARLETON MAYES, Judge

Teste: W. E. MAXEY, JR., Clerk

page 30] COMMONWEALTH OF VIRGINIA
Office of the Attorney General
Richmond
April 21, 1964

Honorable William E. Maxey, Jr., Clerk
Circuit Court of Powhatan County
Powhatan, Virginia

Re: *Robert Lee Clark* v *Peyton*

Dear Mr. Maxey:

I am enclosing the Answer of the respondent in the captioned matter. Please file the same.

Your cooperation is appreciated.

Sincerely yours,
CURTIS R. MANN
Assistant Attorney General

page 31] VIRGINIA:

IN THE CIRCUIT COURT OF POWHATAN COUNTY

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ANSWER

Now comes the respondent, by counsel, and, in conformity with the order of this Court of March 19, 1964, files his answer to the petition for a writ of *habeas corpus* and says:

1. Petitioner has filed a petition for a writ of *habeas corpus* which presents a case for the determination of unrecorded matters of fact relating to a previous judicial proceeding in the Hustings Court of the City of Roanoke, Virginia.

Wherefore, respondent prays that a writ of *habeas corpus* be issued in conformity with the provisions of § 8-598 of the Code of Virginia, returnable to the Hustings Court of the City of Roanoke, Virginia.

C. C. PEYTON,
Superintendent of the Virginia State Penitentiary

By: CURTIS R. MANN
Counsel

* * * * *

Received and filed, this the 22nd day of April, 1964

WM. E. MAXEY, Clerk

page 32] VIRGINIA:

IN THE CIRCUIT COURT OF POWHATAN COUNTY POWHATAN, VIRGINIA

ROBERT LEE CLARK,
South Side, State Farm, Va. Petitioner,
vs.
COMMONWEALTH OF VIRGINIA, Respondent.

UPON A PETITION FOR A WRIT OF *HABEAS CORPUS*

To: The Honorable Carlton Mayes, Judge

Comes now, the petitioner, by motion on this —— day of —— 1964 and does make it known to this Court that petitioner, Robert Lee Clark, submitted a petition for a writ of *Habeas Corpus Ad Subjiciendum* on 20th day of February, 1964 — in *Forma Pauperis* alleging that said petitioner was illegally detained in the Virginia State Penitentiary and praying that a writ of *Habeas Corpus* may issue.

On the 19th day of March 1964 the Honorable *Careleton* Mayes, Judge of the Circuit Court of Powhatan County ordered a show cause within (30) days entered 19th day of March, 1964.

On the 21st day of April 1964, petitioner received the answer of the respondent, by counsel, praying that a writ of *Habeas Corpus* be issued in conformity with the provisions of Section 8-598 of the Code of Virginia returnable to the Hustings Court of the City of Roanoke, Virginia.

page 33] Whereupon, the petitioner moves this court to appoint a competent counsel to defend this suit therein and if the action so requires, to appeal this case all the way.

Your attention is directed to Section 14-180 of the Code of Virginia, your attention is also directed to the following

language, which is found in item 73 Chapter 640 Acts of Assembly, 1962:

"Out of this appropriation shall be paid the expenses incident to the prosecution of a petition for a writ of *Habeas Corpus* by an indigent petitioner, including the payment of counsel fees as fixed by the Court, said expenses shall be paid upon receipt of an appropriate order from a Court." (This language also appears in the 1964 Appropriation Act). See also *Dearhart* vs. *Virginia* No. 745 Misc. decided June 17, 1963.

Whereupon, petitioner prays that this motion herein set out will be read and considered and acted upon without undue delay and that counsel will be appointed forthwith.

Respectfully submitted
ROBERT LEE CLARK
Petitioner, *Pro Se*

page 34] State: Virginia
County: Powhatan

Sworn and subscribed to before me on this 6 day of July 1964.

JOHN S. GATHRIGHT
Notary Public

My commission expires on 3 day of Oct. 1967.

AFFIDAVIT

State of Virginia
To-wit:
County of Powhatan

I, John S. Gathright, a notary public in and for the State and County aforesaid, do hereby certify that Robert Lee Clark the petitioner whose name is signed to the foregoing writing this day personally appeared before me in my county aforesaid and made oath that the statements contained therein are to the best of his knowledge, information and belief are true:

Sworn and subscribed and given under my hand and seal this 6 day of July 1964.

JOHN S. GATHRIGHT
Notary Public

My commission expires on 3 day of Oct. 1967.

page 35] CERTIFICATE OF SERVICE

I certify that on the 6th day of July 1964, I placed in the hands of a guard to be mailed, a true copy of the foregoing petition and affidavit to the Honorable Reno S. Harp III Assistant Attorney General for the Commonwealth of Virginia 207 N. Governor Street, Richmond, Virginia. Counsel for the respondent herein named. And the Clerk of Circuit Court, County of Powhatan, Powhatan, Virginia.

ROBERT LEE CLARK
South Side, State Farm Virginia

Sworn and subscribed by me and given under my hand and seal this 6 day of July 1964.

JOHN S. GATHRIGHT
Notary Public
my commission expires on 3 day of Oct. 1967.

page 36] VIRGINIA: IN THE CIRCUIT COURT OF POWHATAN COUNTY

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ORDER

This matter came on this day to be heard upon the papers formerly read and upon motion of the Respondent requesting the Court to issue a writ of *habeas corpus* and to remove this cause to the Hustings Court of the City of Roanoke for a hearing upon this *habeas corpus,* and it appearing by affidavit upon reading of the petition of Robert Lee Clark, by him duly signed and verified, that there is probable cause to believe that

the said Robert Lee Clark is illegally imprisoned, confined, detained and restrained of his liberty without lawful authority by C. C. Peyton, Superintendent of the Virginia State Penitentiary, at the State Farm in Powhatan County, Virginia, and it appearing said illegality consists, it is ORDERED that a *habeas corpus* be and the same is hereby ORDERED to issue out of the Circuit Court of the County of Powhatan, directed to the said C. C. Peyton, Superintendent of the Virginia State Penitentiary, commanding him to have and produce the body of the said Robert Lee Clark together with the day and cause of his being taken and detained, before the Hustings Court of the City of Roanoke at *it's* courtroom in Roanoke, Virginia, on the 7th day of September, 1964 at 10:00 o'clock A. M. to do and receive that shall then and there be considered concerning the said Robert Lee Clark and that he have then and there this writ of *habeas corpus.*

And the Clerk of this Court shall forthwith transmit to the Clerk of the Hustings Court of the City of Roanoke, by certified mail, the papers in this matter, and it is further ordered that a copy of this order be mailed to Robert Lee Clark, C. C. Peyton, Superintendent of the Virginia State Penitentiary, and Reno S. Harp, III, Assistant Attorney General of the Commonwealth of Virginia.

Enter: 23 July 1964

S/WILLIAM OLD, Judge
Designate

A COPY
Teste: WM. E. MAXEY, JR.,Clerk

page 37]

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To: C. C. Peyton, Superintendent

We command you, that the body of Robert Lee Clark detained by you and under your custody, as it is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called, you have before the Hustings Court of the City of Roanoke at *its* courtroom in Roan-

oke, Virginia, on the 7th day of September, 1964 at 10:00 o'clock A. M. to do, submit to and receive all and singular those things which shall then and there be considered of him in his behalf. And have then and there this writ.

Witness, Wm. E. Maxey, Jr., Clerk of our Court, at the Courthouse thereof, in the County of Powhatan, the 23rd day of July, 1964, in the 189th year of the Commonwealth.

S/WM. E. MAXEY, JR., Clerk

Legal and timely service is hereby accepted this 24 day of July, 1964, to have the same effect as if served by the Sheriff of the City of Richmond, Virginia.

S/C. C. PEYTON
Superintendent Virginia State Penitentiary

A Copy: Teste
WM. E. MAXEY, JR., Clerk

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page 70-A]

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LETTER OPINION

ROANOKE, VIRGINIA

February 19, 1965

The Honorable Curtis R. Mann
Assistant Attorney General
Supreme Court of Appeals
Library Building
Richmond, Virginia

Dear Mr. Mann:

Re: *Robert Lee Clark,* Petitioner
vs.
C. C. Peyton, Superintendent
Virginia State Penitentiary,
Respondent

I have reviewed the record in the above-styled application

for a writ of *habeas corpus* and, since I have been somewhat under the weather myself for the past month, I have not had occasion to write an opinion in the matter.

Of the nine grounds set forth for the granting of a writ, I deem only two of any applicability namely, denial of right of appeal and, lack of effective assistance of counsel. The others deal with matters which are not, in my opinion, applicable. For instance:

2. There was no evidence of illegal arrest through entrapment.

3. There was no evidence of illegal search and seizure.

4. There was no evidence of failure to advise the defendant of his constitutional rights concerning self-incrimination.

5. There was no denial of a legally constituted preliminary hearing.

page 70-B] 6. There was no indication that one of the three witnesses summoned by the petitioner and who failed to appear and testify was at all material.

7. There was no evidence of cruel or unusual punishment.

8. The *habeas corpus* filed with Smyth County was not at all applicable.

Ground no. 9 deals with lack of effective assistance of counsel. The evidence shows that Mr. K. A. Pate, a competent lawyer, did his best in a very difficult matter to defend this petitioner. After the trial the petitioner, according to Mr. Pate's testimony, wrote a derogatory letter to Judge Kuyk about him.

As to Ground No. 1, denial of right of appeal, the evidence was conflicting as to when the petitioner asked Mr. Pate to file an appeal and whether or not the time had expired, as Mr. Pate seems to think, is not clear. Certainly, in 1963 the case of *Douglas* vs. *California,* 372 U. S. 353 was the law of the land and as I interpret that case it did not say that the trial court is required to furnish counsel in a matter involving a discretionary appeal to the State Supreme Court.

I would appreciate it if you will please send me an order denying Robert Lee Clark a writ of *habeas corpus.* If for any reason you cannot or do not have time to prepare the order, let me know and I will draft one.

With kindest regards, I am,

Very truly yours,
RICHARD T. EDWARDS

RTE:wk
cc: Mr. Charles Osterhoudt
Shenandoah Building
Roanoke, Virginia

page 71]

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ORDER

This proceeding came on to be heard on November 17, 1964, upon the petition of Robert Lee Clark for a writ of *habeas corpus ad subjiciendum* and the return and answer of the respondent, the petitioner appearing in person and by Charles H. Osterhoudt, an attorney previously appointed by this Court to represent him, and the respondent appearing by Curtis R. Mann, Assistant Attorney General.

Whereupon, the Court heard the evidence and argument of counsel, and, upon mature consideration thereof, doth find that petitioner is presently detained pursuant to a judgment of this Court of June 13, 1963, wherein petitioner was sentenced to serve a term of ten years in the Virginia State Penitentiary, having been convicted of attempted extortion; and, for the reasons stated in the Court's opinion of February 19, 1965, the Court is of opinion that the writ should not issue as prayed.

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

page 72] Let the Clerk of this Court certify a copy of this order to the petitioner, the respondent, and the Attorney General of Virginia.

Entered this 1 day of March, 1965.

RTE, Judge

I ask for this:
CURTIS R. MANN
Counsel for Respondent

Seen and objected to:
CHARLES H. OSTERHOUDT
Counsel for Petitioner

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page i]

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TRANSCRIPT OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED before the Honorable Richard T. Edwards, Judge, in the Hustings Court of the City of Roanoke, Virginia, on the 17th day of November, 1964, at a *habeas corpus* hearing in the above-styled case.

APPEARANCES: CHARLES OSTERHOUDT
Attorney for the Petitioner

CURTIS R. MANN
Assistant Attorney General
Attorney for the Respondent

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page 1] Judge Edwards: File please. Are you ready?

Mr. Osterhoudt: Your Honor, we have a witness who is not in the courtroom by the name of Swaggerty, but has been served and we understand he will be here.

Judge Edwards: Let me announce the case. This is a petition for a *Habeas Corpus* by Petitioner, Robert Lee Clark, 83595, against C. C. Peyton and Commonwealth of Virginia. Mr. Clark, you are represented by Mr. Charles Osterhoudt, Attorney at this bar, who was appointed to represent you and the Commonwealth and C. C. Peyton, Superintendent of the Virginia Penitentiary are represented by Mr. Curtis Mann, of the Attorney General's Office. This matter is being recorded by the Court reporter of this Court. All right gentlemen, if you will proceed to outline the reasons for the writ of *Habeas Corpus*. Mr. Osterhoudt.

Mr. Osterhoudt: Your Honor, please, this case comes on a petition for a Writ of *Habeas Corpus* filed by thePetitioner, Robert Lee Clark, who was the defendant in two criminal cases tried in the Hustings Court of the City of Roanoke
page 2] on the 13th of July, 1963 — on the 13th of June 1963, at which time he was convicted of the crime of attempted extortion on one count on a plea of not guilty, subsequent to his conviction on that count, sentenced to a ten year term in the State Penitentiary. He did on the advice of counsel plead guilty to another charge of the same offense and received a concurrent five year term. He has subsequently filed his petition for Writ of *Habeas Corpus* in Powhatan County and the petition having been sent here for hearing on the merits under I take it authority of *Cunningham* vs. *Fry,* which provides that where the issue involves a case where the facts had been unrecorded at the trial, the trial court, shall hear the petition for the Writ of *Habeas Corpus.* It is the contention of the petitioner that his constitutional rights have been violated on nine separate counts. He raises these nine points in his petition, which are that he was denied effective right of appeal, that he was illegally arrested, that the case and the testimony presented involved illegal search
page 3] and seizure, that he was not protected from self-incrimination, that he was denied a proper preliminary hearing, that the defense witnesses which he requested were not called to testify, that he received cruel and unusual punishment at the hands of the authorities, that he was represented by inadequate counsel, and that no notice was taken by the Court of proceedings which were pending in another Court of record concerning this matter at the time of his trial. It is on these contentions that he says that his constitutional rights have been violated and it is these which we will attempt to prove today that his petition may be granted and a new trial may be had in this matter.

Mr. Mann: All I have to say, Your Honor, is that the Commonwealth intends to show that the contentions are not true that the petition is frivolous and therefore should be denied.

Judge Edwards: *Alright.*

Mr. Osterhoudt: Your Honor, please, the, excuse me, I'm sorry.

Judge Edwards: Go ahead, Go ahead Mr. Osterhoudt.

Mr. Osterhoudt: I want, are you going to swear the wit-

nesses, *are you*

page 4] Judge Edwards: I would like to have you swear the witnesses first.

All witnesses duly and properly sworn by the clerk

Mr. Osterhoudt: I would respectfully move the Court that the witnesses who are to testify in this case be separated from the trial and kept excluded until the time they are to testify.

Judge Edwards: You don't object to Captain Griggs staying in here, do you?

Mr. Osterhoudt: I'll call Captain Griggs probably as the first or second witness. I have no direct exception as to him.

Judge Edwards: *Alright* — Why don't you go into the Commonwealth Attorney's office?

Witnesses Excluded

Mr. Osterhoudt: The first witness, however, will be Detective Smith, if you can call him back.

Judge Edwards: Mr. Smith—call Detective Smith back.

MR. JACK SMITH,

a witness of lawful age, who having first been duly sworn testified as follows:

DIRECT EXAMINATION

By Mr. Osterhoudt

Q. Would you state your name please to the Court?

A. Jack Dempsey Smith.

page 5] Q. And what is your occupation, Mr. Smith?

A. I am a member of the Roanoke Police Department assigned to the Detective Bureau.

Q. Did you have any connection with the criminal case of Robert Lee Clark which was tried in this Court on the 13th of June, 1963?

A. Yes, I did.

Q. Did you testify as a witness in that case?

A. Yes, I did.

Q. Were you involved in the pre-trial investigation and arrest of this individual defendant?

A. Repeat that.

Q. Were you involved in the investigation which led to the

arrest and then, further, the pre-trial investigation which led to the trial of this individual?

A. A portion of pre-arrest.

Q. Is this gentleman seated beside me here the defendant?

A. Yes.

Q. Do you recall specifically what your first connection to this case was?

A. Yes sir. I was called to the office of the Lieutenant of the Detectives and given an assignment to participate in what we thought to be the arrest of a subject
page 6] who had asked a citizen of Roanoke, who had made a formal complaint, for money.

Q. Did you see any warrant for arrest at the time you were given this assignment?

A. No, sir.

Q. To your knowledge was any warrant of arrest issued?

A. No, sir.

Q. Do you know whether or not any formal complaint had been made before a magistrate or proper person before whom one can make such complaint according to law?

A. No, sir.

Q. Well, what crime were you out to catch this individual in?

A. Extortion.

Q. Extortion.

A. Yes, sir.

Q. And what part did you play in apprehending the defendant?

A. My assignment was to be in the back seat of the complainant's automobile. He was to drive to the designated spot and subject was to come to the automobile and actually get into the vehicle and at that time I would place him under arrest.

Q. As soon as he got into the vehicle.

page 7] A. The original idea was not that, it developed that that was the procedure.

Q. Whom did you accompany to the place where this was supposed to occur?

A. I was in the vehicle of the complainant.

Q. Who was the complainant, do you recall?

A. Charles Henderson. Also I was in the company of Detective Sergeant J. T. Mitchell,, Detective W. G. Cowan.

Q. But when you accompanied the complainant, Mr. Hender-

son, to the place where these events were supposed to occur did you at that time, or any time prior to the apprehension of this individual, sitting beside me, see the complaint that had been made out against him?

A. Yes, I did.

Q. And, did you hear or see in writing, here made by Mr. Henderson, see in writing any representation, made by Mr. Henderson as to why he had reason to believe that a crime of the nature of the attempted extortion would occur at the time and place that you apprehended this man?

Mr. Mann: No I believe we are going into the trial.

Judge Edwards: Yes, I think so, you've got into the record that the man was arrested without a warrant.

Mr. Osterhoudt: That's correct, your Honor.

Judge Edwards: Go ahead.

Mr. Osterhoudt: (Continuing)

page 8] Q. I would like to get into the record that there was no proper complaint made against this man leading to the point of his arrest.

Judge Edwards: You are talking about probable cause?

Mr. Osterhoudt: Yes Sir.

Mr. Mann: I think that would be a question of the appeal.

Mr. Osterhoudt: Your Honor I would respectfully like to point out that one of this man's contentions is that he was denied an effective appeal and I feel therefore that we can go into matter which would *which would* effect an appeal and might more properly be brought at one.

Judge Edwards: Go ahead a little further along, ask him about the complaint. Ask him directly about it.

Mr. Osterhoudt: (Continuing)

B Q. Do you remember what was in the complaint that Mr. Henderson made or rather alleged?

A. Yes, sir.

Q. What did he allege?

A. The complaint that was made by Mr. Henderson was that a boy had got into his automobile in the vicinity of Elmwood Park, Greyhound Bus Terminal, when he had stopped for a traffic control. The boy wanted him to buy him beer or give him money to buy beer.

B'

Mr. Jack Smith

Q. Did he say when this occurred?

Mr. Mann: Your Honor, we are still going into
page 9] the trial that was the testimony.

Judge Edwards: Yes, it's too far, I don't think we need to go into facts.

Mr. Osterhoudt: (Continuing)

Q. Do you have uh any documents to show that a proper complaint was made in this case?

A. I do.

Q. Would you show them to me, please?

Judge Edwards: What has that got to do with it?

Mr. Osterhoudt: I want to see the complaint your Honor, to see that it was proper.

Mr. Mann: I object.

Judge Edwards: I don't seen any reason to go into the original complaint.

Mr. Osterhoudt: I will respectfully except to the court's ruling on that matter.

Judge Edwards: *Alright*, you may.

Mr. Osterhoudt: (Continuing)

Q. What night did this occur or when was it that this occurred?

Mr. Mann: I don't see where that's material, Your Honor.

Judge Edwards: What's your reason for it?

Mr. Osterhoudt: I think we ought to establish when the crime occurred if nothing else to let it be shown in the record when the actual crime was supposed to have occurred.

page 10] Judge Edwards: Well doesn't the record show when it occurred?

Mr. Osterhoudt: This record does not show, Your Honor, now the trial record does.

Judge Edwards: Go ahead, I don't think it will make any difference.

Mr. Mann: Note my exception.

Mr. Smith: A. This guide was given to me on the night of December the 5th, 1962 at 7:15 P.M.

Q. Was that the night you made an apprehension?

Mr. Jack Smith

A. Yes, sir.
Q. Now, the man you apprehended that night, is he this individual?
A. Yes, sir.
Q. Did you know his name at that time?
A. No, sir. I knew a name.
Q. What name did you know?
A. Johnson, Claude Johnson.
Q. Alright, now at the time that you made the apprehension of this individual did you have reasonable cause to believe that a crime of extortion had occurred?
A. Yes, sir.
Q. What constituted this reasonable belief in your mind?

Mr. Mann: I object.
Judge Edwards: I think you have asked him specifically if he had reasonable cause and I think that is as far
page 11] you can go.
Mr. Osterhoudt: We would except your Honor to being unable to go into the background as to the subjective reasons for determining what in his mind is probable cause.
Judge Edwards: Probable cause, Mr. Smith. Do you consider this?
Mr. Smith: Yes sir.
Judge Edwards: I think that's all we can ask him.

Mr. Osterhoudt:
Q. (continuing) For the crime of extortion, is that correct:
A. Yes, sir.
Q. Did you consider the probable cause for the crime of attempted extortion?
A. Yes, sir.

Judge Edwards: We will be here until next month if we go into those things.

Mr. Osterhoudt:
Q. (continuing) Now, Mr. Smith, when you apprehended this individual did you make a search of his person?
A. Yes, sir.
Q. Did you remove things from his person?
A. Yes, sir.
Q. Did you find any weapons on his person?

Mr. Jack Smith

A. No, sir.

Q. Did you take into control those pieces of property which you found on his person?

A. Yes, sir.

page 12] Q. You did not return them to him?

A. No, sir.

Q. Did he resist this search and inspection?

A. Yes, sir.

Judge Edwards: At that time was he under arrest?

Mr. Smith: A. Yes, sir.

Mr. Osterhoudt:

Q. (continuing) Did you notify him that he was under arrest?

A. Yes, sir.

Q. Did you inform him of what he was arrested for?

A. Yes, sir.

Q. Now, did you then accompany him back to the Roanoke Police Department?

A. Yes, sir.

Q. Now, after you returned here, did you take part in the questioning?

A. Yes, sir.

Q. Did you advise him at that time what he had been charged with?

A. Yes, sir.

Q. Did you advise him of his constitutional right not to be forced to testify against himself?

A. I did not personally, no, sir.

page 13] Q. Do you of your own knowledge know that someone did advise him?

A. Yes, sir.

Q. Do you know who?

A. Yes, sir.

Q. Who?

A. Former Lieutenant Mahlon B. Southerland.

Q. Was the defendant also advised of his right of counsel?

A. Yes, sir.

Q. Did he make any effort to obtain counsel?

A. Yes, sir.

Mr. Jack Smith

Q. At that time?
A. No, sir.
Q. Did he request to be granted permission to obtain counsel at that time?
A. I do not recall.
Q. But he might.
A. I do not recall.
Q. Was any efforts made by the police department to deny him an opportunity to obtain counsel at that time?
A. No, sir.

Mr. Mann: I object to that.
page 14] Judge Edwards: Well, Mr. Osterhoudt this is your witness of course you know that.
Mr. Osterhoudt: That is correct, sir.
Judge Edwards: Well don't impeach him.

Mr. Osterhoudt:
Q. (Continuing) Subsequent to the night of the arrest, Detective Smith, did you take any further part in the investigative procedures of this case?
A. Yes, sir.
Q. What further part did you play?
A. I participated in the search of a room in the Savoy Apartments which was registered to the subject.
Q. When did this search occur?
A. On the same night, December the 5th, 1962.
Q. Was a search warrant issued for this search?
A. It was.

Judge Edwards: I beg your pardon.

A. Yes, it was.
Q. Do you have the search warrant with you?
A. Yes, I do.
Q. Would you show it to us, please?

(Mr. Osterhoudt inspects warrant) Is this the search warrant now or a copy thereof which was issued that night prior to the time you went to the Savoy Apartments?
page 15] A. Yes, it is.
Q. You are the person who made the affidavit obtaining the search warrant?

Mr. Jack Smith

A. That is very correct, sir.

Q. Now, I notice a signature down here at the bottom of the search warrant of Alexander Anderson, is that correct?

A. Yes, sir.

Q. Who is Alexander Anderson?

A. Deputy Clerk of the Municipal Court.

Q. Does he have any other job?

A. Yes, sir.

Q. What is his other job?

A. He is a member of the Roanoke Police Department, Lieutenant of a platoon of men.

Q. Is he, does he have any job as judge or hold any judicial job?

A. None other than Clerk of the Municipal Court—Deputy Clerk.

Q. I have it that you say that you want this because it contains documents or papers containing name of the victim Charles Henderson, is that so of the license number. Do you have reason to believe that those documents came from his apartment.

A. I did.

page 16] Q. What gave you reason, to believe this?

A. In the initial complaint, the complainant had made to the Detective Bureau, information was that he had been called a number of times by telephone and in the telephone conversation, the automobile was described that he would be driving and for that reason I had—on that information—I had reason to believe I would *fine,* in his room, documents with Mr. Henderson's name, address and phone number and license number on them.

Mr. Osterhoudt: If your Honor please, I would like to *to* present this in evidence, as Exhibit I for the Petitioner.

Judge Edwards: *Alright,* let me initial it.

Mr. Osterhoudt: (Continuing)

Q. Did anyone accompany you, Detective Smith, in your search of Mr. Clark's room?

A. Yes.

Q. Who accompanied you?

A. Detective W. G. Cowan, Commonwealth Attorney, Leroy

to go back to the witness room? He will be called in again.

Mr. Osterhoudt: I have already illicited his testimony, Your Honor, and this is all I was concerned with, however, I would like to see him again excluded, I would suggest that if he has things to do he can go on back down to the Police Department and we can get him—we can get him in a *minutes* time.

Judge Edwards: Does this suit you Mr. Mann?

Mr. Mann: Yes sir.

Judge Edwards: Are you off duty or on duty?

Mr. Ousterhoudt: Oh he's off.

Mr. Smith: Off.

Judge Edwards: Is this your day off? Bless your heart. Well, if you don't mind, go on down there, you will be more comfortable down there, unless you want to go in my office.

E. A. GRIGGS,

a witness of lawful age who having first been duly sworn testifies as follows:

DIRECT EXAMINATION

By Mr. Osterhoudt:

Q. Would you state your name and position for the Court, please.

A. Captain E. A. Griggs, Captain of Detectives, Roanoke City Police Department.

Q. Captain Griggs, were you on duty with

page 21] the Roanoke City Police Department on the night of December the 5th, 1962?

A. I returned to the Bureau, Yes sir, it was after my working shift, but I returned there and was in a duty status.

Q. Do you recognize the gentleman seated to my left?

A. Yes sir.

Q. Did you see him on the night of December 5th?

A. Yes sir, I did.

Q. Was it in connection with his case that you returned at this time?

A. Yes.

Q. Did you take any part in his case prior to the time he was apprehended?

E. A. Griggs

A. No sir, I talked to him after his arrest, but prior to his actual arrest I was not active in the case except that I knew about the case and I realized that the case was in progress.

Q. You took part in the questioning of this witness — this individual rather?

A. Yes sir, I talked with Clark shortly after his arrest on the night of December 5th.

page 22] Q. Do you know whether or not he was advised as to his constitutional rights at the time which you talked to him?

A. When I talked with him, I advised him of his constitutional right, however, I did not take a formal statement from him. He did make a statement in effect, not a formal statement, but what he did tell me, I reduced to writing and incorporated in the special report. He was advised at the time that I talked with him that he did not have to make a statement. The usual admonitions along that line.

Q. Did you go to the defendant's hotel room on the night of December 5th?

A. No sir, I was not along. Some other officers did but I was not one of them.

Q. Do you know what he was charged with the night he was apprehended, Captain?

Judge Edwards: What difference does it make?

Mr. Osterhoudt: Well, I want to establish whether or not he was advised at that time what he was charged with.

Mr. Griggs: (Continuing)

A. Well, we are going back a couple of years, but as I recall, he was charged with attempt extortion and I know that he was advised of what he was being charged with. During the conversations that I had with him, he knew what he had been arrested for.

page 23] Q. On the night of December the 5th, was Mr. Clark charged with any other offense than the attempted extortion?

Judge Edwards: Wouldn't the records show that better

than Mr. Griggs? Captain Griggs has to get it from memory and you can get the records. He would only know by hearsay. You would do better to get the record and I think that speaks for itself.

Mr. Osterhoudt: Are you talking about the records?

Judge Edwards: Yes, such as desk blotter or some record which may have been taken. He can only say what he thinks, or heard, if he knows.

Mr. Osterhoudt: From the Municipal Court?

Judge Edwards: Some record of which may have been taken — Desk blotter. He can only say what he thinks or hear and heard, if he knows.

(Police Court Docket, City of Roanoke was obtained.)

Mr. Osterhoudt: (Continuing)

Q. Captain is this the police Court docket of the City of Roanoke?

A. Yes sir.

Q. *Alright,* now, Captain, I am going to show you entry on this docket, this entry (would you like to come around and see it — No) Is that the docket entry for the complaint which was filed by Mr. Henderson?

page 24] A. Yes, sir, that's officer McCowan, Mitchell and Smith and he was put on docket and charged with attempted extortion.

Q. Now, on December 17th the docket shows another entry concerning Robert B. Clark, is this for the same offense or is for another offense?

A. That is for another offense involving a complaining witness by the name of Charles Neal. He was in custody and it developed that another offense had occurred and he was subsequently charged with it on December 17th but that is another case.

Q. Captain, do you, of your knowledge, know whether or not information concerning Mr. Neal was found in Mr. Clark's room at the Savoy Hotel?

A. Well, I did not search the room as a result of the search warrant which was issued and the room was searched on the basis of that warrant and some material concerning Neal case was found. I did not find it, but I know that it was found. I

know that of my own knowledge, yes.

Q. Do you know whether or not it was this material which led to the charge being placed against Mr. Clark as the attempted extortion of Mr. Neal?

A. Well, the material which we recovered from the room gave us knowledge of the *of the* Neal case.

page 25] However, that material was not the sole evidence. As a matter of fact was never actually admitted in evidence that I recall. In other words, what I am trying to say is that the entire Neal case did not depend on what we found in the room.

Q. Wasn't it that material that led the police department to consult with Mr. Neal and which in turn resulted in the charge being placed against Mr. Clark?

Judge Edwards: Is the Neal case in issue today? I thought it was the Henderson case.

Mr. Osterhoudt: I would take it sir, that they are both in issue.

Mr. Griggs: (Continuing)

A. The only record I have here is the Henderson case. Is this record incomplete?

Mr. Mann: Your Honor, the second charge runs concurrently.

Judge Edwards: In other words, he got ten years on the attempted extortion in the Henderson matter.

Mr. Osterhoudt: And five years on the Neal case to run concurrently.

Judge Edwards: He pleaded guilty or what?

Mr. Osterhoudt: This was a plea of guilty entered subsequent to his conviction on a plea of not guilty in the Henderson case.

page 26] Judge Edwards: Not guilty in the Henderson case?

Mr. Osterhoudt: That's exactly right.

Judge Edwards: Well, ask him about the Henderson case. What effect does this have on the Henderson case?

Mr. Osterhoudt: The Courts ruling is that I am excluded

from asking him about the Neal case?

Judge Edwards: No I think not, I just wanted to know for information.

Mr. Osterhoudt: (Continuing)

Q. *Will,* I will ask you again, then was it the information alone which was found in his apartment which led the police department to contact Mr. Neal?

A. That's correct, yes sir.

Q. And it is that information, then which indirectly led subsequently to the charge being placed against Mr. Clark for attempting to extort money from Mr. Neal. Is that also correct?

A. Yes material which we obtained from the room advised us of the circumstances regarding the Neal case and we then proceeded from there and we later contacted Mr. Neal and proceeded with the case.

Judge Edwards: Now, ask him about the Henderson case, you've gone this far.

Mr. Osterhoudt: (Continuing)

A. Does it have any effect on the Henderson case?

Captain Griggs: Will the material have any ef-
page 27] fect on the Henderson case?

Judge Edwards: Will the material have any effect in the conviction of the Henderson case?

A. Judge, as I recall, I would say "No." The Henderson case, to the best of my recollection, what material we obtained from the defendant's room did not materially affect the Henderson case.

Judge Edwards: You had a complaining witness, available and living which you knew about, who had come into the Detective Department didn't you?

A. Sir?

Judge Edwards: You had a living, complaining witness who had come in prior to the search?

A. Yes, sir, that is correct your Honor.

Judge Edwards: He testified in his own behalf?

A. Yes sir.

Leroy Moran

Mr. Osterhoudt: Q. Was the names of any witnesses used in the Henderson case obtained as a result of that search of Mr. Clark's room?

A. It's difficult for me to recollect.

Judge Edwards: You don't know do you?

A. I just don't know, your Honor, there was a number of boys involved, but I don't recall whether they testified in the Henderson case or not.

Mr. Osterhoudt: Q. Were any of the physical
page 28] objects which were recovered from his room, were they used in the trial any way?

A. Which trial was this?

Q. The trial of the Henderson case?

A. Henderson case.

Judge Edwards: I don't think physical objects would make any difference, they themselves wouldn't readily indicate anything incriminating.

Mr. Griggs: A. As I recall no physical objects used in the Henderson case came from the room of the defendant. I don't recall any.

Judge Edwards: Were tape recordings introduced?

A. Well the material which we are discussing was a tape recorder and a tape but they were never introduced into the evidence that I recall.

Mr. Osterhoudt: *Alright* that's all, Captain.

Mr. Osterhoudt: Any questions?

Mr. Mann: I have no questions.

Judge Edwards: Let's have about a three minute recess.

Mr. Osterhoudt: *Alright* sir.

Mr. Osterhoudt: I will limit my testimony and my questioning of Mr. Moran as to the trial.

LEROY MORAN,

a witness of lawful age, who having first been duly sworn testified as follows:

Leroy Moran

DIRECT EXAMINATION

Mr. Osterhoudt:

page 29] Q. State your name and occupation, please.

A. Leroy Moran, Commonwealth Attorney, City of Roanoke.

Q. Mr. Moran, were you the Commonwealth Attorney during the period from December 5, 1962 to June 13, 1963?

A. No sir.

Q. You were not?

A. No sir.

Q. When did you take office?

A. 1961-1962, I believe you said 1952.

Q. I said 1962.

A. Excuse me, yes sir.

Q. I call your attention to the night of December 5th, 1962 and ask if you on that night did accompany certain Police Officers to the Savoy Hotel and make a search of a room which was supposed to have been occupied by one Robert Lee Clark?

A. I don't recall the date but on the night, I believe it was the night Clark was arrested, I did accompany Sergeant Smith, and I believe there was another officer.

Q. Were any items taken from his room as a result of this search?

A. Yes sir.

page 30] Q. Do you recall what they were?

A. I believe there was a tape recorder, some papers with some names on them. I don't recall off hand anything else.

Q. Do you recall whether or not the name of any of these people who were on these bits of paper testified in the trial?

A. I believe they did. As a matter of fact, Mr. Osterhoudt, my name and Captain Griggs were among those.

Judge Edwards: Suspect to be.

Mr. Moran: A. Yes sir, I think so.

Mr. Osterhoudt: (Continuing)

Q. Were any of the physical objects recovered, were they used in the testimony in any way?

Leroy Moran

A. No sir.
Q. In evidence, rather, excuse me.
A. No sir.
Q. Was an effort made to introduce them in evidence?
A. No sir.
Q. Were they used by you in your argument in any way?
A. I don't recall, they might have been, I think there was some mention of what was found over there in
page 31] some of the testimony, but was never any effort, as I recall, made to introduce any of it, because it really wasn't necessary and had no bearing on the case.

Q. But the information which you found in that apartment was the source of the names of some of the people who testified in this case?

A. Could have been Mr. Osterhoudt, I don't recall. We had the names, of course, of several and when we talked to those, they gave us other names. I think we already had these names before any of them were discovered in the room.

Q. But you don't know do you?

A. I don't know absolutely for sure whether all of them were procured other than the names found in the room but as I recall we knew the names of all of the witnesses. We received those — the information of those names — from sources other than from information which we gathered in the room.

Q. Do you recall what other sources?

A. Well, in talking to the different — for instance some of the boys involved in this — we got the names of some of the boys involved and we talked to them and they gave us names of one fellow Neal, I believe, Swaggerty, and several names I don't recall all of them.

Q. In other words, you found some names
page 32] over there in the apartment in the room and you talked to these people and they in turn gave you more names?

A. No, No, I didn't say that. I said we found some names but I don't believe that we had to use the names procured in the building to get the *the* source of witnesses that we used. As a matter of fact, the search its self was negative. We didn't

use anything, didn't find anything really of any value over there. As I recall, we were searching for the name of Mr. Henderson; that is, some written address or phone number that might have been over there.

Q. Did you make an effort at the trial to submit the tape recorder or the tape recordings in evidence?

A. I don't believe that I did. If I did, I was unsuccessful I didn't make any real effort to do it. I don't believe that I tried it.

Q. Did you *did you* use it in any way in your closing argument in an effort to affect the impression that it had been involved in the case?

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

Q. Now you state that you think that you got the names of the witnesses who testified in the trial from sources other than out of the apartment, and you have stated that page 33] you got them from talking to other people in the case. Do you know who these people were?

A. You mean the names of them?

Q. The people that you talked to in order to obtain these other names?

A. Oh I don't know.

Q. Also on the list there would be —

A. I didn't, I didn't do that part of the investigating.

Judge Edwards: I think we are going *to* far, much *to* far a field.

Mr. Osterhoudt: Your Honor, please I am simply trying to establish that what Mr. Moran may say is true that he also got these names from talking to other witnesses. He had to start with talking to someone, and I would like to know where the chain started and see if the chain did not start with what we contend was *a* unlawful unwarranted search.

Mr. Mann: Your Honor, he has already testified to that.

Judge Edwards: He sure has. He is your witness and has already testified to that.

Mr. Osterhoudt: *Alright.*

Mr. Osterhoudt: (Continuing)

Q. Now Mr. Moran, at the time of the trial was the indictment read to the *to the* individual?

Leroy Moran

page 33-A] Mr. Mann: I object, your Honor.
Judge Edwards: Objection sustained.
Mr. Osterhoudt: Exception, Your Honor.

Mr. Osterhoudt: (Continuing)
Q. Was the indictment in the case for the crime of attempted extortion?

Judge Edwards: Record speaks for itself. It is.

Mr. Osterhoudt:
Q. Got the indictment?
A. Got it here.
Q. Is that the indictment in the case of the *Commonwealth* vs. *Robert Lee Clark?*
A. Yes, it looks like it.

Mr. Mann: *Its* already a part of the court records.
Judge Edwards: Yes it's in here.
Q. In this proceeding, Your Honor?
Judge Edwards: Which one, Henderson?
Q. In the *Habeas Corpus* proceeding Your Honor.
Mr. Mann: A carbon copy of *its* here.
Q. Yes sir.
Judge Edwards: The indictment of Henderson.
Q. Yes sir.
Judge Edwards: Yes sir, *its* in the proceeding.
Q. What about the Neal indictment is that also in there?
page 34] That's what I was looking for, I don't see that.
Mr. Mann: We did not file that, Your Honor, because he is not serving on that one. It's a concurrent sentence. *Its'* not in here Judge.
Mr. Osterhoudt: We request the court's permission to file that indictment in the proceedings of this case.
Judge Edwards: Well lets wait until after lunch on that I got to review this file and examine what the indictment was.
Mr. Osterhoudt: Your Honor, that's all the questions of Mr. Moran subject to the questions of the Neal indictment.
Mr. Mann: I have an objection.

Mr. Osterhoudt: On which I would like to have the opportunity to recall him if necessary.

Mr. Osterhoudt: Call Mr. Henderson.

Judge Edwards: Take the witness chair please.

CHARLES E. HENDERSON,

a witness of lawful age, who having first been duly sworn testified as follows:

DIRECT EXAMINATION

By Mr. Osterhoudt:

Q. Mr. Henderson would you state your name and address for the Court please?

A. Charles E. Henderson, 3303 Bandy Road S. E.

page 35] Mr. Mann: Your Honor, I have a question. Did you testify in the original trial?

A. Yes, sir.

Mr. Mann: I am objecting to this man's testimony in the *Habeas Corpus* proceeding.

Judge Edwards: Why do you offer him, Mr. Osterhoudt?

Mr. Osterhoudt: The question for which we have offered the purposes goes to the man's complaint and the probable cause in this situation.

Judge Edwards: Well, we had a trial and the man was found guilty used testimony of the detective who you questioned as your witness that there was probable cause so I now contend you can't go into that.

Mr. Osterhoudt: Now, if your Honor please, we will except to the Court's ruling and excuse Mr. Henderson.

Mr. Osterhoudt: Call Mr. Swaggerty, Your Honor, please, the same situation is going to apply in the Swaggerty case.

Judge Edwards: Mr. Swaggerty?

Mr. Osterhoudt: Yes, sir, this is the next witness.

Mr. Mann: How do you spell it?

Mr. Osterhoudt: Swaggerty.

Judge Edwards: Is he one of the witnesses

page 36] or what?

Mr. Osterhoudt: Yes, Sir.

Mr. Mann: I am going to object to that Your Honor.

Charles E. Henderson

Judge Edwards: I am going to sustain the objection because I don't see any sense in going into this.

Mr. Osterhoudt: Mr. Swaggerty's testimony would be in the nature of the relation to the alleged entrapment in this case, your Honor.

Mr. Mann: Your Honor, *its* a *Habeas Corpus* proceeding not an appeal.

Judge Edwards: That's right the question of entrapment doesn't come up at all, as I see it, as a matter of fact it isn't alleged. The nine grounds which you could rely on are false arrest, illegal search, procedure, self incrimination, preliminary examination, witness for the defense, no cruel or unusual punishment, right of appeal, no law suspended, now where is the entrapment in that.

The entrapment is a matter of appeal anyhow.

Mr. Osterhoudt: I believe the further allegations is illegal arrest through entrapment.

page 36-A] Judge Edwards: The grounds of your illegal arrest are that *it* he didn't have a search warrant, or what?

Mr. Osterhoudt: Yes, Sir.

Mr. Mann: I am going to object to that Your Honor.

Judge Edwards: I am going to sustain the objection because I don't see any sense in going into this.

Mr. Osterhoudt: Mr. Swaggerty's testimony would be in the nature of the relation to the alleged entrapment in this case, your Honor.

Mr. Mann: Your Honor, *its* a *Habeas Corpus* proceeding not an appeal.

Judge Edwards: That's right the question of entrapment doesn't come up at all, as I see it, as a matter of fact it isn't alleged. The nine grounds which you could rely on are false arrest, illegal search, procedure, Self incrimination, preliminary examination, witness for the defense, cruel or unusual punishment, right of appeal, no loss of suspended counsel, now where is the entrapment in that. The entrapment is a matter of appeal anyhow.

Mr. Osterhoudt: I believe the further allegation is illegal arrest through entrapment.

Judge K. A. Pate

Judge Edwards: The grounds of your illegal arrest are that it he didn't have a search warrant, *didn't*
page 37] didn't have a warrant of arrest, that is what you have alleged and there wasn't any probable cause to arrest him that's the only grounds.

Mr. Osterhoudt: I take it, then, the court's ruling is that we will not be allowed to question Mr. Swaggerty in relation to the entrapment which we contend occurred on the night of December the 5th?

Judge Edwards: I don't see any reason whatsoever to go into that phase of it at all.

Mr. Osterhoudt: We will *than* excuse Mr. Swaggerty and we will respectively except to the Court's ruling.

Judge Edwards: How do you spell his name?

Mr. Osterhoudt: Swaggerty. Your Honor please the only other witness we intend to call is the defense Counsel and I think he will take a little time and *I'll be,* I'll attempt to be back here about 1:30 or a quarter till 2:00 and start right on at that time.

Judge Edwards: *Alright,* you rather adjourn for lunch now?

Mr. Osterhoudt: Yes sir.

Judge Edwards: *Alright.*

Mr. Osterhoudt: If possible because I think Mr. Pate will take *will take* some little time and I doubt if we could finish either side of his testimony.

Judge Edwards: *Alright,* now, what time did you want to come back?
page 38] Mr. Osterhoudt: I'll be back here at 1:30 Judge.
Judge Edwards: *Alright,* shall we start then not later than a quarter till two.

Mr. Mann: 1:30 suits me.

Judge Edwards: 1:30 suits me *alright.*

Mr. Osterhoudt: Judge Pate.

Judge Edwards: Judge Pate is in the Assistant Commonwealth Attorney's office I believe.

JUDGE K. A. PATE,

a witness of lawful age, who having been first duly sworn testified as follows:

Judge K. A. Pate

DIRECT EXAMINATION

By Mr. Osterhoudt:

Q. Would you state your name, please, sir?

A. K. A. Pate, Attorney at Law.

Q. Mr. Pate were you appointed by the Hustings Court as the Counsel to represent the Petitioner herein Mr. Robert Lee Clark?

A. I was.

Q. Do you recall when that appointment was made?

A. I don't recall the date, I was notified by the Clerk of this Court that I had been appointed and I came up to see Mr. Clark in jail immediately after that.

page 39] Q. Do you recall the date that the trial took place?

A. Sometime in June, I don't remember.

Q. June of what year?

A. 1963.

Q. Can you make any estimate of how many days before the trial you were appointed as Mr. Clark's Counsel?

A. No it was at least two or three weeks because I went to see Mr. Clark in jail not once but many times. Several times when he had had the jailor call me to come see him I would go up to see him and I went on my own accord several times so I can't remember the exact number of times, but a number of times.

Q. By Jail, I take it you mean the Roanoke City Jail?

A. That's right.

Q. Did you represent Mr. Clark at his Preliminary hearing in the Roanoke City Municipal Court?

A. No, I did not.

Q. Were you present at the time of his preliminary hearing?

page 40] A. No, I was not.

Q. Are you advised as to whether or not he was represented by counsel?

A. Yes I am. I discussed the case with Mr. Robert W. Spessard, his Attorney at the preliminary hearing.

Q. Prior to the time of trial, did you interview any witnesses who subsequently testified at the trial?

Judge K. A. Pate

A. No.

Q. You did not?

A. No.

Q. Were you given the names of any witnesses that the defendant, at that time Mr. Clark, wished to have summonsed for the trial?

A. Yes.

Q. Did you summons these witnesses?

A. I ask the Clerk of the Court to summons them.

Q. Did they attend the trial?

A. Some of them did, I don't remember how many, but at least two attended the trial in the Hustings Court.

Q. Did they testify on that day?

A. As I recall, they did.

Q. Do you remember who they were?

page 41] A. One of the boys name was Swaggerty. I don't remember the other boy's name.

Q. Had you talked to any of these boys prior to the trial?

A. No.

Q. You did not know then to what they would testify at the time you called them?

A. No.

Q. At the time of the trial were you aware of a *Habeas Corpus* petition pending in the Circuit Court of Smyth County, Virginia which had been filed by Mr. Clark?

A. I had *had* been so informed by Mr. Clark and I wrote the Clerk of the Court in Abingdon and also Marion and there was no record of any such proceeding on file in either of the Courts.

Q. Now you say that you went to see Mr. Clark in jail several times?

A. That's right.

Q. Would you be able to fix a numerical amount to these to how often you went?

A. I didn't keep track of the number of times, it was several times, though and on numerous occasions I went to see him in jail.

Q. Did you discuss with Mr. Clark prior to the trial the plea that he should enter at the time of the trial?

page 42] A. I advised Mr. Clark of his rights to trial by jury and that he could enter a plea of guilty

or not guilty whichever he chose to enter and informed him of his constitutional rights of trial by jury.

Q. Did he request a trial by jury?

A. Yes, he did.

Q. Now, at the time of the trial did you make any inquiry of Mr. Clark while you were selecting the jury as to whether or not he knew any of these people or would like to have any of them struck from the jury?

A. We went over the cards together. I don't recall that he requested any. I struck the names of the ones that I thought should be struck. I don't know if Mr. Clark made any comment about it.

Q. Did Mr. Clark ever request of you that a verbatim record of the—the case be made?

A. No, he did not.

Q. At no time?

A. No.

Q. Did you request a verbatim record from the Court?

A. I did not.

page 43] Q. At the trial was there any attempt made by the Commonwealth to introduce a tape recorder in evidence?

A. There was a tape recorder present at the jury box — I mean at the witness stand—at the time of the trial and I objected to the tape recorder being entered into the trial and that objection was sustained by Judge Kuyk.

Q. Was this tape recorder subsequently used at the trial by the Commonwealth's Attorney in any fashion?

A. No, it was not played if that's what you mean.

Q. Did he use it in his closing argument as an instrument of emphasis in his closing argument? Did he refer to it or did he display it in any way?

A. I don't recall that he did.

Q. At the conclusion of the evidence did you submit any instructions to the Court for presentation to the jury?

A. No, the Judge instructed the jury with my knowledge and consent and the Commonwealth Attorney's knowledge and consent.

Judge K. A. Pate

page 44] Q. Was any discussion of the instructions to be given to the jury told between you and the Judge and the Commonwealth's Attorney?

A. What do you mean?

Q. Well was there any discussion made of what would be the proper instructions and the proper form of such instructions in this case?

A. Well, certainly, we went over the instructions and agreed on the instructions the Court would give to the jury.

Q. Did you submit any instructions?

A. I did not.

Q. That you requested to be given on behalf of the defendant?

A. I did not.

Q. After the jury returned its verdict did you move the Court to set aside the verdict?

A. No, I did not.

Q. Did you note an appeal in the case on behalf of Mr. Clark?

A. I didn't note an appeal at the time. I informed Mr. Clark of his right to appeal.

Q. Did Mr. Clark subsequently contact you relative to the taking an appeal in this case?

page 45] A. No.

Q. He never contacted you subsequently to it?

A. No.

Q. Never wrote you any letters?

A. Oh, yes, he wrote me letters in regard to the case after he had been sent to Richmond.

Q. When would this have been?

A. In July as I recall it. That was after the time had expired for the appeal to be submitted.

Q. July 1963, this would have been?

A. The latter part of July or August I don't remember the exact dates.

Judge Edwards: Q. Walker — Bob — Can you hold the questions about two minutes?

Mr. Osterhoudt: Yes, sir, certainly.

Q. (Mr. Osterhoudt continuing) Relative to Mr. Clark's request for an appeal did you communicate with him at the time that he asked for it or at the time he requested it of you?

A. I answered all the letters that Mr. Clark wrote me until I wrote him the final letter and told him that I

page 46] didn't want to have anything else to do with the case.

Q. Do you remember when it was you wrote him the final letter and told him that you didn't want to have anything else to do with the case?

A. I don't recall the exact date. No, I have the copy of that in his file. He had written me several letters prior to that date even from South Hampton.

Q. Did you communicate to him whether or not you would represent him on appeal?

A. I told him that I couldn't represent him on an appeal unless the fee was paid and finally I told him I wouldn't represent him any further.

Q. But he did request that you do represent him on an appeal.

A. No, he didn't request me to represent him. He wanted to note an appeal.

Q. But you had correspondence with him relative to the taking of an appeal?

A. He mentioned the appeal in correspondence we had back in Court.

Q. Did you advise him that he had a right to make such an appeal.

A. I advised him of that as soon as the trial was

page 47] over within that time given for taking the appeal.

Q. And you say that this correspondence with him relative to the appeal was begun sometime in July of 1963.

A. July or August I don't recall the exact date.

Q. Now at the trial did you conduct cross examination of witnesses for the Commonwealth?

A. I did.

Q. No verbatim record was made of the case?

A. None to my knowledge.

Judge K. A. Pate

Q. Fine. Now, subsequent to Mr. Clark's conviction in the case of *Commonwealth* vs. *himself* arising out of the complainant, Mr. Henderson, did you represent him on the same day in a case involving a complaint, Mr. Neal?

Mr. Mann: I object to that Your Honor.

Judge Edwards· There were two indictments pending.

Mr. Osterhoudt: There were two indictments pending Your Honor, apparently both to be tried on the same day. The Henderson case was handled first.

Judge Edwards: A trial by jury?

Mr. Osterhoudt: Yes, sir.

Judge Edwards: Neal case shows that a plea of
page 48] guilty —

Mr. Osterhoudt: Sir, but the Neal case was handled, of course, subsequent to the Henderson case.

Mr. Pate: Immediately following the first jury trial case the other was on a plea of guilty was entered at the same time.

Judge Edwards: The question was did you advise him to enter a plea of guilty?

Mr. Pate: We discussed it and I told him since he had been convicted of the first offense if he wanted to enter a plea of guilty on the 2nd offense why we could dispose of it at the same time.

Q. (Mr. Osterhoudt continuing) What did he tell you?

A. Enter a plea of not — of guilty on the 2nd offense.

Q. Did you advise him that this might require of him extra sentence?

A. Yes, both cases could be disposed of at the same time if he entered a guilty plea.

Q. Was this guilty plea entered in accordance with an agreement with the Court and the Commonwealth as to what his sentence would be?

A. No, the Court imposed sentence as soon as
page 49] the guilty pleas was entered. Additional sentence was entered at the same time.

Q. But the sentence was not by any prior arrangement or discussion with the Commonwealth or the Court?

A. No, the Court allowed the 2nd sentence to run concurrently with the first sentence.

Q. And indicated that they would do this prior to the entry of your plea?

A. Not to my knowledge.

Q. You say that some of the witnesses which you called to testify for the defendant did appear and did testify?

A. As I recall it, counselor, two of the witnesses that were summoned in Mr. Clark's behalf appeared in Court and testified in the hearing.

Q. Did you make any effort to call to the Court's attention the fact that witnesses that he had summonsed had not appeared?

A. No.

Q. Two further questions Mr. Pate. These things have been alleged in the Petition. At the time that the trial was conducted, were you under the influence of any intoxicant or drug?

A. I was not.

page 50 Q. You recall whether or not you were taking any drug that might have affected your ability to conduct the law suit?

A. No, I had not taken anything.

Q. Prior to the time of trial were you ever advised by — that the defendant was going to — that Mr. Clark was going to enter a plea of guilty in either of the cases?

A. No, I informed Mr. Clark of his rights under the law to a trial by jury and that if he wanted to submit a plea to the Court without a jury he had a right to do it or if he wanted a jury he could have it, and he said he wanted a jury so we had a jury in the first case and then he entered a plea of guilty in the second case and the sentence was given to run concurrently with the sentence of the first trial.

Q. Do you know that during the time of his confinement in the Roanoke City jail that the defendant, Mr. Clark, was placed in solitary confinement?

A. I don't know that of my own knowledge.

Q. Was there ever —

Judge K. A. Pate

Judge Edwards: What's that got to do with the Writ of *Habeas Corpus.* I mean if he's such a character
page 51] that has to be placed in solitary confinement, has that got anything to do with the right of his trial.

Mr. Osterhoudt: Well, Mr. Clark informs me that one of the issues that he raised in his Petition was for the Court to rule whether or not it was proper for our consideration at this time.

Judge Edwards: You don't contend it's part of the — the Court's decision that he be placed in solitary confinement?

Mr. Osterhoudt: Well, Your Honor, it's Mr. Clark's contention it was done to him in order that he would be persuaded to enter a plea of guilty to both cases.

Judge Edwards: In other words, ask — ask Judge Pate if that took place.

Q. (Mr. Osterhoudt continuing) Was Mr. Clark placed in solitary confinement in an effort to solicit from him a guilty plea?

A. Not with my knowledge or consent.

Q. Was it ever communicated to you that he was in solitary confinement and that he would plead guilty?

A. Never did.

Mr. Mann: You have already answered that question.

Judge Edwards: Yes, you sure have, I don't
page 52] think the question was fairly put. First it hasn't been established that he was put in solitary confinement, if it has, you are entitled to go into the reasons why and if we do all that we will be here all week.

Mr. Osterhoudt: Alright, Your Honor.

Mr. Osterhoudt: (Continuing)

Q. One further question. Did you examine the indictment against Mr. Clark at time he was tried?

Mr. Mann: I object to your reference to the indictment.

Mr. Osterhoudt: I was trying to establish

Judge Edwards: I don't think that has anything to do with it. Do you contend anythings wrong with the indictment?

Mr. Osteroudt: Well, he contends there's defective indictment.

Mr. Mann: He can't raise that question.

Judge Edwards: He sure can't — you can amend it you can do a lot of things. It can't be raised at this time.

Mr. Osterhoudt: We will respectfully except to the Court's ruling. *Alright* thank you Mr. Pate. Any questions the Commonwealth may have?

page 53] Mr. Mann: I have no questions at this time your Honor, but I like to reserve the right to recall Judge Pate.

Judge Edwards: *Alright,* Thank You, Judge Pate.

ROBERT LEE CLARK,

a witness of lawful age, who having been first duly sworn testified as follows:

DIRECT EXAMINATION

By Mr. Osterhoudt:

Q. State your name, please.

A. Robert Lee Clark.

Q. Mr. Clark were you the defendant in two cases that were tried on June 13th, 1963 in Hustings Court of the City of Roanoke?

A. Yes sir.

Q. You are the Petitioner in this proceeding for *Habeas Corpus* — right?

A. Yes sir.

Q. Mr. Clark when were you first arrested for the charges which were tried on June 13, '63?

A. December 5th, at 8:15, approximately 8:15, 1962.

Q. Now, at the time you were apprehended were you advised of the reason for your apprehension?

A. No sir.

page 54] Q. Were you — was your person searched by persons apprehending?

A. Yes, sir, with pistols stuck in my stomach and my back and the sides and chucking me in the middle of my back.

Q. And you did not know why this was done?

A. No sir.

Q. You were *now* advised why?

A. No sir.

Q. Subsequent to your apprehension were you brought to the City Police Department?

A. Yes sir.

Q. Were you questioned by the Roanoke City police on the night of December 5th extensively?

A. Yes sir.

Q. Were you advised of your constitutional rights at the time this questioning took place?

A. No sir.

Q. Were you advised that you had a right to call an Attorney?

page 55] A. No sir, as a matter of fact, I was denied the right to call an attorney. I asked Mr. Carter when he took me upstairs, or it was a man that took me upstairs I assume that his name is Mr. Carter, If I could contact an attorney. He said, "do you know a lawyers' name in town." I said, "no, sir, I don't." He said, "then I can't call *any body.*"

Q. At the time you were questioned, on the night of December 5th, were you advised that anything that you might say could be used against you in criminal proceeding?

A. No, sir, not to my knowledge. I was excited, but I am pretty sure that there was no mention of constitutional rights of any type.

Q. Now, do you recall, Mr. Clark, the first time that you were advised of the nature of the charges for which you had been arrested on the night of December 5th?

A. The next morning, the following morning at approximately 11:00 or 1:00 P. M. I'm not sure between 11:00 and 1:30 of the next day I was taken into a court in — *thats* after they had taken away all of my clothes — now they've taken away all of *all* these clothes from me and I was in this blue jail uniform with six . . .

page 56] Q. Mr. Clark, just *just* follow my question if you will please.

A. I was informed by the judge the next day in the open

court, that I was being charged with attempted extortion and that was the first knowledge that of any type of extortion or anything that I even knew I was being charged with extortion.

Q. Did they advise you at that time who the person was who was bringing this complaint against you?

A. No, Sir, they did not. He said I would be told of that later.

Q. All right, now was a preliminary hearing held in the Municipal Court in the City of Roanoke?

Mr. Mann: I object.

Mr. Osterhoudt: With witnesses?

A. Yes sir.

Q. Appearing do you remember when that was?

Judge Edwards: He alleges that there was none held or at least something. Go ahead.

Mr. Osterhoudt:

Q. Do you recall when that was?

page 57] A. No, sir, I don't. I don't recall the exact date.

Judge Edwards: But you had one?

A. The hearing was assembled according to procedure but the procedure was not according to the legal aspects of the law.

Judge Edwards: In what respect?

A. In respect that in admissible evidence was presented.

Judge Edwards: Did you have a lawyer there?

A. The lawyer was there but he seemed to be . . .

Judge Edwards: Who was your lawyer? Who was your lawyer?

A. Mr. Spessard.

Judge Edwards: He is a competent lawyer.

A. Well I — they say he is.

Judge Edwards: Well that's as far as we can go.

Robert Lee Clark

Mr. Osterhoudt:

Q. And now Mr. Clark were any subsequent charges placed against you while you were in custody in the City jail?

A. Yes sir.

Q. When were you first advised of the nature of these charges?

page 58] A. I don't remember the exact date but it was sometime in December.

Q. All right was the preliminary hearing held before the Municipal Court Judge in that case?

A. No, sir.

Q. You were already in custody at the time, is that right?

A. Yes, sir.

Q. How were you advised of the nature of the charges against you in that subsequent charge?

A. Never advised, never, I was never taken again before any Judge or anything to advise me that I had been . . . .

Q. How did you learn that you had been charged with another crime?

A. By the indictments that were presented at the trial. He said I had two indictments. One for a Charles Neal and one for a Charles Henderson. This was at the trial.

Q. And which one had you not heard about until you got to the trial?

A. Charles Neal.

page 59] Q. Were you, after you were taken into custody, kept in the Roanoke City Jail until the time of trial?

A. Yes, I was placed the night that I was arrested in a black box upstairs. It's a tank affair.

Q. Please respond to the question, were you kept in the Roanoke City Jail continuously from the time you were apprehended till the time you were tried?

A. No, sir.

Q. Now, where else were you kept in custody?

A. I was sent to the Southwestern Institute for observation.

Q. Was a hearing of any kind held prior to the time you were sent there?

A. Yes, sir.

Q. Were you represented by counsel at that hearing?

Robert Lee Clark

A. Yes, sir.
Q. Who?
A. Arthur Crush.

Judge Edwards: Now what kind of a hearing is this, just a hearing on the competency?

Mr. Osterhoudt: Yes, sir.

page 60] Judge Edwards: That's at your choice?

Mr. Clark: A. Mr. Spessard claims that Mr. Crush was not his assistant but he — Mr. Crush represented me at the hearing. Now I intended to use Mr. Crush as my lawyer, but unfortunately I ran out of money, and they wouldn't take it any further.

Mr. Osterhoudt: Q. I take it then you had employed Mr. Spessard?
A. Mr. Spessard and Mr. Crush.
Q. And you had employed with your own funds Mr. Crush?
A. Right, sir.
Q. Now when you were sent to the State mental hospital, Southwestern State Mental Hospital, at Marion, did you file any Court proceedings while you were there confined?
A. Yes sir, I wrote a *Habeas Corpus* and alleging the — practically the same things I had alleged in this petition with the exceptions of the denial of appeal, and I submitted it to the *Smythe* County Circuit Court, Judge Hutton presiding, and I have a receipt for that letter that was presented to Mr. Hutton.

page 61] Q. Was this still pending at the time you were brought back to Roanoke and tried?

A. Yes, sir I had never been given a response nor had I been informed that other than the receipt that I had that it had been accepted.

Mr. Osterhoudt: Your Honor, the Court please I have in my possession a letter under the seal of the Clerk of the *Smythe* County Court a letter from the Clerk relative to this that I would like to present as evidence in the case.

Judge Edwards: What's that got to do with this case?

Mr. Osterhoudt: Well, I think Judge it's an unusual point of the primacy of *Habeas Corpus* proceedings, you already have one on file, when this case was tried here in Roanoke, and we would like to get that into the record.

Judge Edwards: Has it ever been acted on? Had he ever been granted a preliminary *Habeas Corpus* writ?

Mr. Osterhoudt: Judge, the letter speaks for itself and it says that a date was set for trial.

Judge Edwards: Would you like to see this?

page 62] Mr. Mann: Your Honor, I object to this letter, because I don't see where it has any bearing on this case.

Judge Edwards: O. K. A simple outstanding application be made, to be one going to Marion, *Habeas Corpus* pending down there. He had two lawyers and he didn't follow through on his own application.

Mr. Osterhoudt: He filed a petition, without the benefit of counsel and —

Judge Edwards: Well, he was capable of filing a petition of *habeas corpus ad subjiciendum.* He's certainly capable of filing a Petition of *Habeas Corpus Ad Subjiciendum.* Nothing pending in the *Smythe* County Court.

Mr. Osterhoudt: Your Honor, please, Your Honor, we will—

Judge Edwards: I'm going to rule it is not admissible simply because of the record. You might put into the record exactly what it is so that you may take exceptions.

Mr. Osterhoudt: Your Honor, please, then I would like to state for the purposes of the record that it is a letter from the Clerk of *Smythe* County Circuit Court that Mr. Clark filed a Petition for a Writ of *Habeas Corpus* on the 12th of February, 1963 with that Court and that subsequently a hearing date was set for the 29th day of July, 1963. We would respectfully except to the Court's ruling in excluding this from the evidence in this proceeding and that we

page 63] feel that it's material to the rights of Mr. Clark to show that there was a previous proceeding pending at the time of his trial and naturally the case which should have been disposed of.

Judge Edwards: The Court rules that it's not admissible. Defendant Clark sent to Marion for his own benefit by order

of this Court to determine whether or not he was efficiently sane to stand trial. While he was down there he saw fit to file an application with the *Smythe* County Court and apparently he didn't follow through with it and is back here and there is no sense bringing that up. It's like old bones. Picking of old bones and dry at that.

Q. Mr. Osterhoudt: (Continuing) Mr. Clark do you recall when you had your first conference with your Court appointed attorney, Mr. Pate?

A. Was approximately three or four days. He never came up and so I ask one of the jailors to call him.

Q. Do you remember what day — date it was?

A. I don't remember the date.

Q. Do you remember how long it was before the trial?

A. Before the first or second trial?

Q. Before the thirteenth of June.

page 64] A. Thirteenth of June, you see I went down one time on the 26th of May. Approximately two weeks — a week I believe it was a week instead of two weeks — a week — approximately one week.

Q. Before when?

A. Before he came up to talk with me.

Q. Well, I am trying for you to fix the date Mr. Clark. Now what I want to know is was it sometime in April, sometime in February, sometime in May, sometime in June?

A. It was in April I believe if I'm not mistaken. No, it was in May because I know exactly the day. I was indicted May 6th, I was indicted May the 6th and it was about May the 10th I believe it was. It was on a Monday.

Q. He came to visit you of his own volition?

A. No, sir, I ask — I requested him to come up and talk with me.

Q. Did he ever come to visit you without such a request from you?

A. No, sir.

Q. Now prior to the — the commencement of the trial on June 13th did you request of Mr. Pate that a verbatim record

of the proceedings be made?

page 65] A. Yes, sir. You want me to tell you what he said?

Q. I want you to tell me what he said.

A. He said that it would cost too much. Said he didn't get that much as Court appointed counsel to have a reporter in Court and I suggested that 1730-1.

Q. There's no need to go into that —

A. I'm telling you just exactly what I told him and I ask him about that and he said while he still couldn't get a — still wouldn't have a reporter because it costs too much. He didn't check into it even.

Q. You did protest to him about your privilege to do so?

A. Yes, sir.

Q. Now, did you participate in any way with the selection of the jury that was going to try you in this matter?

A. No, sir, I did not. I was setting over there — as a matter of fact at that time it was the first time I had ever been in a Court room in my life and I didn't actually know what he was doing. I frankly didn't.

Q. Were there any members of the jury that you requested to him that should have been struck at this time?

A. Yes, sir. I recognized two of the members on that jury and I ask him should they be on there like

page 66] it were and he said don't worry about it he said don't worry about it that's all right — too late any way now we have already struck the jury and said everything's in the bag or words to that effect.

Q. Did you inquire of your counsel at the time of the trial why certain witnesses which you had ask him to subpoena did not appear?

A. Yes, sir. At the table that morning after I had told him my name, he ask me said however — I ask him where are my witnesses and he said I guess they are in the Courtroom here so the Court ask the witnesses to stand up and two of the witnesses were missing and he ask the Clerk in a half-hearted way — said two witnesses missing and the Clerk never answered him and nobody else said anything so he just let it ride.

Q. Did you make any protest to him about proceeding with

the trial without these witnesses?

A. Well, yes I told him look I need these witnesses to establish a point and he said well everything is *alright.* He said it again the same thing he said about the jury — the two men on the jury — he said that's *alright* — everything *alright* — you will come out alright and so went ahead with the trial.

Q. Now after the jury had returned *it's* verdict did you request your counsel to make any motion at that
page 67] time on your behalf to the Court?

A. Yes, sir. I ask him — I told him that I didn't see where they had sufficient evidence to convict me and I thought that he should make a try. I didn't know about the setting aside verdict of course I ask him to get me a new trial and he said I can't get you a new trial now.

Q. Did you ask him about an appeal?

A. Yes, sir, I did he said it cost too much — said the fee is too much said good gracious man that cost too much — said I — we can't talk about an appeal.

Q. You subsequently talked to him after the trial about an appeal?

A. Yes, sir. I ask him again at the table and he said it cost too much — said the fee is too much said now you told me upstairs that you don't have that kind of money said —

Q. Did you correspond with him about an appeal?

A. Yes, sir.

Q. Do you remember when this correspondence was initiated?

A. Immediately after the trial I wrote — I didn't know the formal procedure or anything, but I wrote Judge
page 68] Kuyk and noted an appeal due to the fact that I couldn't get in touch with Judge Kuyk and he refused to come upstairs one of the jailors called down and ask him to come up and the jailor told me that he said that he didn't have time to come up.

Judge Edwards: Who are you referring to?

A. Judge Pate, Judge Pate told the jailor that he didn't have time to come up and that's what the jailor told me. Of

couse, it's hearsay that's what the jailor told me, and so I wrote Judge Kuyk a letter and requested an appeal and I never did get an answer from that so they took me away the next day, immediately after I had written the letter they took me down to Richmond and seemed to be a little discussion down there about it.

Q. Did you ever obtain record of the trial from the Court so that you could perfect your own appeal?

A. Immediately after I was in Richmond I had the Chaplain of the State Penitentiary, Reverend Cecil Gunn, to note an appeal for me because I didn't know the procedure of that and then immediately after — when I was transferred to State Farm I put out a 14-180, that's in the Section you know that can get the records. Well, I never received any answer and I wrote again and I never did receive any answer and so finally —

page 69] Q. When did you write?

A. This was in July — July or August.

Q. To whom did you write?

A. To Mr. Carter, the Clerk of Court, but it was directed — it was a petition to the court through whom was to be filed with Mr. Carter.

Q. Did you ever receive the record?

A. Finally, in 1964, that's of this year, I received the two indictments and an order of judgment, two subsequent orders, and also the composition of the Special Grand Jury and then, of course, the two Court of judgments. And then I filed back again and ask them to — would they send me the — any exceptions made or any objections or exceptions made by the Court appointed attorney. I also ask for the charge to the jury, ask for a copy of the charges to the jury, I ask them also to send me a copy of where I had enlisted in the Army in Roanoke.

Q. Did they send you these things you then requested?

A. No, sir. They did not. Mr. Carter wrote me and also — warrant, warrant of arrest and warrant of search and seizure, I wanted those too, and he wrote me back that none of these items were on file and that he could not send me

page 70] anything that was not on file. I have those letters.

Robert Lee Clark

Q. *Alright* Mr. Clark I have no more questions right now.

CROSS EXAMINATION

By Mr. Mann:

Q. Mr. Clark, you state that you were never in a Court before.

A. I was never in the Hustings Court before, no, sir. Other than just a traffic violate, I mean — I was speaking of felony charge like that, actually to be a defendant in a case.

Q. But you have been in a Court in another State?

A. I have been in a traffic Court and that's about the total of it — all misdemeanor — all misdemeanor charge.

Q. I have no further questions.

Mr. Osterhoudt: That's the evidence for the Petitioner, Your Honor.

Judge Edwards: Sure you've done everything you want to do?

Mr. Osterhoudt: Let me confer with him.

Judge Edwards: Be sure now he knows exactly what you're doing and we are listening to everything he says and making notes of all the citations he refers to.

page 71] Mr. Osterhoudt: Judge, I'm going to put him back on the stand for some questions in relation to the Neal case.

Judge Edwards: All right.

Mr. Osterhoudt:

Q. Mr. Clark, you were first tried on 13th June in the case — on the complain of Mr. Henderson, is that correct?

A. Yes, sir.

Q. And to that case you entered a plea of guilty and had a jury trial.

A. Plea of what?

Q. Plea of not guilty, excuse me, and had a jury trial.

A. Yes, sir.

Q. *Alright.* Now, subsequent to your conviction in that case on that day did you also plead guilty on the charge of the complaint of Charles Neal?

A. Yes sir ———

Robert Lee Clark

Mr. Mann: Let the records speak for themselves.

A. (Mr. Clark continuing) There is an unrecorded matter of fact though before that plea. Now since we are here is it *alright* if I go into that, sir?

Q. I want to know why you entered the plea? Was it on the advise of counsel which you entered the plea?

A. It was on the — Mr. Moran came over to my
page 72] counsel over at the tables and he told me said
now look said I've got more evidence than we had at this trial, said now I think we can work out a deal here where is that we can run this sentence concurrently — this other sentence if you want to plead guilty, and my, Mr. Pate, chucked me in the ribs and said go ahead and plead guilty — said you'll get this five years run concurrently. Then he said I wished you would hurry-up because I got another trial— another Court docket over here to take care of so I told him I don't feel I'm guilty of this thing and I shouldn't plead and he said go ahead the man's giving you five years concurrently you better take it. So I took it, and I'm still not guilty of it.

Q. *Alright,* I don't have any other questions — ask you in relations —

Judge Edwards: Nobody twisted your arm, did they?

Mr. Clark: A. Well, I was at a blank. It hit me in a psychological view point. It's very true that nobody twisted my arm. But it's also very true I was under big psychologically *presure* due to the fact that the jury had come in and returned a verdict of guilty with insufficient evidence and with something that they ask ten years for. I was under great psychologically strain and I figured to myself, well, good *graceous,*
if they can return a verdict like this of guilty
page 73] against a man that's not guilty then with evidence
like they had this tape recorder they were shaking before the jury to emphasize the fact that it might have been used but it never was proven it was — had been shaken by Mr. Moran before the jury to emphasize the fact that I was a thief and what not.

Judge Edwards: Your witness testified that it was not presented before the jury.

Mr. Clark: A. My witness was mistaken, sir, because it was.

Mr. Moran shook the tape recorder before the jury and emphasized the fact that, tape recorder which had nothing to do with the proceedings whatsoever, and it was done in such a manner to emphasize my guilt, nothing more and I have — I'm not guilty then and I'm not guilty now of what I was charged with. And then due to the fact that I had become rather shaken up at that time and nervous and tension, and I thought if they could convict me on the type of evidence and testimony that was presented at the other trial and I was found guilty of — what could they do with me at this other one which they didn't have any evidence at all. Certainly, I mean — there were certain admissions made but that wasn't enough to convict anybody walking across the street against the red light.

page 74] Judge Edwards: Anything else?

Mr. Osterhoudt: Q. When did Mr. Moran shake the tape recorder, Mr. Clark?

A. Mr. Moran shook the tape recorder before the jury — emphasized — he said this man, during the course of the argument to the jury — would be the argument before the jury — when he picked up the tape—it had already be sustained — the tape recorder had been objected to and sustained by the Judge, and *than* Mr. Moran reached over on the table and picked the tape recorder up and shook it before the jury and emphasized the point that I possibly could be the Fagan. That I had come down here to Roanoke and tried to punish this great City and I entered the Army from here to fight for this great City too, but I wasn't given my due process of law — here.

Q. Alright, Mr. Clark, that's all, Judge that I have here

Mr. Mann: May I ask him one question

Judge Edwards: Yes.

Mr. Mann: Why were you discharged from the Army?

Mr. Clark: A. I was discharged from the Army for nervous tension I was told, and I, at my own request, I was severed from the Army at my own request, I could

page 75] have gotten a complete retirement from the Army if I had so chosen, but due to the fact that it was a

case of payment involved I received $6,000.00 for getting a severance from the Army and I figured with the $6,000.00 that I received from the Army that I — that I could get — that I could get — I could get much better start back in civilian life by buying into a business, which I did, and I bought a business in machinery over on Ninth Street, and there was my objective for coming here to Roanoke to dispose of that machinery, also to take my father to North Carolina, which I did.

Mr. Mann: Q. Were you discharged from the Army for homosexuality?

Mr. Clark: A. No, sir, I was not my records will speak for themselves and I will gladly sign a slip this time and it doesn't have to be any substitute entered to get me to sign it like it was last time I can — I'll sign a slip of my own volition that you can walk over and check my records and find out that I have never been discharged from the Army for any type of homosexual tendencies whatsoever and it's also in my discharges. I have four Honorable discharges upstairs and also the one that specifies that I was serving with approximately $6,000.00 payment from the Army.

page 76] Mr. Mann: You weren't charged with Homosexuality on October 20th 1956 by the Fourth Military Police, Ft. Myers, Arlington, Virginia?

A. There was no charge no sir.

Mr. Osterhoudt: I object I don't see what bearing that has on this case whatsoever it's not a question of the man's presence or lack of Homosexuality of Homosexual tendencies in this proceeding at all.

Judge Edwards: Well the man brought out that he was Honorably discharged with reasons and went into great detail of his own volition I think he is entitled to be cross-examined, oughtn't he, on anything to show that's true.

Mr. Mann: I have no more questions.

Judge Edwards: All right, sir.

DIRECT EXAMINATION

By Mr. Mann: I would like to recall Detective J. D. Smith.

J. D. SMITH,

having heretofore testified, was recalled and examined and testified further as follows:

J. D. Smith

Mr. Mann: Detective Smith, I believe you testified that you arrested Robert Lee Clark.

A. Yes, sir.

Q. In the process of the arrest did Robert Lee Clark attempt to escape from you?

A. Yes, sir.

Q. And what did you do?

page 77] A. I pursued him on foot, fired one round from my service revolver, he stopped about sixty or seventy five yards from me that's when I first come into contact with him.

Q. Then did you search him?

A. Yes, sir.

Q. That's all I have your Honor.

REDIRECT EXAMINATION

Mr. Osterhoudt:

Q. Detective Smith, had you already apprehended the man before he tried to run away from You?

A. I told him that I was a police officer he was under arrest and there was this scuffle between he and Mr. Henderson and myself which at the time he *alluded* Henderson and I got out of the car and began to run.

Q. You were in the car with Mr. Henderson?

A. Yes, sir.

Q. Mr. Clark was in the car with you?

A. Yes, sir.

Q. And where were you in the car?

A. In the back seat floorboard.

Q. Then you set upon Mr. Clark did you at some

page 78] point during the interchange between he and Mr. Henderson and yourself?

A. Yes, sir.

Q. Did you advise him why you were laying your hands upon him?

A. Yes, sir.

Q. What did you say to him when you first laid your hands on him when he was in the car?

A. I told him that I was a police officer and that he was under arrest.

Q. And that was all?

A. Yes, sir.

Q. All right, sir.

Mr. Mann: That's all.

Judge Edwards: Unless these gentlemen want you Mr. Smith you may go.

Mr. Mann: I don't require him again.

Mr. Osterhoudt: I can't see that we'll need him any further.

Judge Edwards: Thank you very much you can go.

Mr. Mann: I would like to call Judge Pate.

JUDGE K. A. PATE,

having heretofore testified was recalled and examined and testified further as follows:

DIRECT EXAMINATION

By Mr. Mann:

Q. Judge, how long have you been engaged in the practice of law?

page 79] A. I passed the bar in December 1926 and qualified before the Supreme Court in January 27 graduated from law school in June the same year, I have been in Roanoke since 1933 I went back in the practice of law in the early part of 1948 and was elected Judge of the Juvenile and Domestic Relations Court, Roanoke City, starting October 1st 1948 and served two six year terms to September 1960.

Q. When you were appointed by this Court to represent Robert Lee Clark had your practice in civil, criminal or had you had a lot in Criminal cases?

A. General practice, a number of criminal cases appointed by this court in a number of incidences before being appointed to defend Mr. Clark.

Q. I believe you testified that Mr. Clark did not ask you to take an appeal for him, is that correct?

A. We had correspondence in regard to that after he went

to Richmond and even after he had gone to Southampton but he never did ask me to perfect an appeal for him.

Q. Well, did he ask you for information what was he asking?

page 80] A. Well he wanted to know what his rights were and I told him, that he would have to not an appeal and perfect his appeal before the Supreme Court if he took the appeal from the Hustings Court.

Q. I believe you testified that you did cross examine the Commonwealth's witnesses?

A. I did.

Q. Did you try to procure all of the witnesses that Mr. Clark ask you to get?

A. I turned that list over to the clerk for Subpoenas to be issued as witnesses in the case.

Q. Do you know why the others were not present?

A. No.

Q. Did the petitioner complain to you at the time because the others were not present?

A. He mentioned the fact that some of the witnesses that we had summoned were not in the court room.

Q. Did you put the ones on that were in the Court room?

A. The Commonwealth put the witnesses on and I cross examined them.

page 81] Q. The Commonwealth also subpoenaed the same witnesses which you had?

A. I presume so, because the Commonwealth called them and I cross examined them.

Q. Has Mr. Clark ever complained to you about the way you handled his case?

A. Never.

Q. I have no more questions.

REDIRECT EXAMINATION

By Mr. Osterhoudt:

Q. When Mr. Clark inquired of you about taking an appeal and you advised him about his rights to take an appeal, did you advise him whether or not he was entitled to counsel on his appeal?

Judge K. A. Pate

A. I told him would have to procure counsel to perfect the appeal before the Supreme Court.

Q. Say to him that he would have to employ counsel for himself?

A. Yes, sir. It would be necessary for him to.

Q. Were you, at the time you advised him, aware of the case of United States Supreme Court of *Douglas*
page 82] vs. *State of California* 353 U. S. 357 U. S. 353.

A. I don't recall that case.

Q. And you state that Mr. Clark never wrote you or indicated to you he was dissatisfied with your services?

A. No, sir.

Q. Did you ever write him a letter indicating that you were sorry that he felt about you the way that he did and was dissatisfied?

A. I did and discontinued my services to him.

Q. Well, what caused you to write that letter? Had he expressed his dissatisfaction to you prior to the time that you wrote him a letter and told him you were sorry he felt that way?

A. No, I saw a letter from him to Judge Kuyk in the file accusing me of some very damaging things that were untrue and I didn't want to have anything further to do with the case.

Q. All right, that's all.

Mr. Mann: That's all.

Judge Edwards: May I ask you a question Judge?

A. Yes your Honor.

Judge Edwards: Was there in your opinion any justification or grounds for a appeal?

page 83] A. No sir. I consider that he had a fair and impartial trial at the time your honor.

Mr. Mann: I would like to call Mr. Moran, please.

Judge Edwards: You need Judge Pate any more?

Mr. Osterhoudt: No, your Honor.

Mr. Mann: No sir.

Judge Edwards: Thank you.

LEROY MORAN,
having heretofore testified was recalled and examined and testified further as follows:

DIRECT EXAMINATION

By Mr. Mann:

Q. Mr. Moran did you or did you not in arguing the case to the jury shake the tape recorder at the jury?

A. I don't recall that I did. I don't recall that I did. As I remember it was a pretty good size contraption I can't visualize myself shaking it at the jury.

Q. Do you recall whether or not there was any agreement between you and the petitioner as to whether or not he should plead guilty to the second charge and he would receive a concurrent sentence.

A. I don't recall talking to the *to the* defendant. I did have a little conference with Judge Pate after the trial and indicated to him that in view of the verdict of the
page 84] jury that I would be willing to — since this somewhat part partial of the same *same* matter — that I would be willing to ask the judge to let the sentence run concurrent with the jury verdict. Now as I recall Judge Pate *than* had a conference with the defendant over that.

Mr. Mann: That's all.

REDIRECT EXAMINATION

By Mr. Osterhoudt:

A. You don't recall that you did but you don't recall that you didn't use this instrument in your closing argument.

A. No, sir.

Q. All right that's all.

Mr. Mann: We rest your honor.

Judge Edwards: Do you all want to make oral arguments or submit briefs or what?

Mr. Mann: I would rather make oral arguments, your Honor.

Judge Edwards: How do you want to proceed? Do you want oral arguments or do you want to submit memorandums or what? It's got a right substantial memorandum here to read now you know.

Mr. Osterhoudt: I'm aware that the Court does — I would like to say though that *that* of course this record page 85] has been rather substantial and I'm sure that oral argument *whould* be able to be adjusted to all the points which have been raised by the petitioner. There are after all nine points that I think should be discussed.

Judge Edwards: You've got as much time as you want.

Mr. Osterhoudt: Does the Court *than* want us to proceed on the basis of oral argument I would prefer within the Court's discretion to proceed on the basis of written memorandum.

Judge Edwards: You would prefer to proceed on written memorandum?

Mr. Osterhoudt: Yes, sir. I would.

Judge Edwards: *Alright* with you, Mr. Mann?

Mr. Mann: Yes, sir.

Judge Edwards: I'm certainly not ready to decide this case today. You want to get your memorandum in by the 1st of December? Is that too much or too little time?

Mr. Osterhoudt: First of December? Let me ask you about the record in the case will the

Judge Edwards: Oh my goodness.

Mr. Osterhoudt: The record *wont* be available? I wonder if we could listen to portions of it, will it be avail- page 86] able to listen to. But this be unfair to Mr. Mann, however.

Judge Edwards: Yes — we can make the record available.

Mr. Osterhoudt: I don't want to prejudice Mr. Mann on it either.

Mr. Mann: Your Honor I don't see how I could possibly prepare a memorandum between now and December 1st.

Judge Edwards: Well, I wanted him to get his in first and yours second.

Mr. Mann: *Allright.*

Judge Edwards: How about the 15th of December for you (indicating Mr. O.) and 15th January for you (indicating Mr. Mann)

Mr. Mann: *Allright.*

Mr. Osterhoudt: Be satisfactory with me, your Honor.

Judge Edwards: You raised some pretty delicate questions

you know and we will have to listen to this record. It may be — just have it typed up now, what do you think?

Mr. Osterhoudt: Your Honor please I imagine that it would save every body a lot of time if you go ahead and type up now in view of the circumstances.

page 87] Judge Edwards: You think so?

Mr. Mann: Judge, I would like to have a copy.

Mr. Osterhoudt: And I think it would only be fair to Mr. Mann. Now I can come up here and listen to it, but I think it would be only fair to the Commonwealth that they have a record available.

Judge Edwards: *Allright* we will see if we can't get the record out some way or another and then we will hold up the decision until after we get all the memorandums. Now gentlemen let me ask you this you know what the crucial questions are here, what you're dealing with, and don't waste your argument on matters which are really no concern. Anything which may have come up at the trial — you know what they are. Questions of search and seizure are certainly applicable. The questions of self incrimination are certainly applicable. I don't see that there's anything about the preliminary hearing that's got anything to do with it. He's had two lawyers. I don't see that there's anything about this Marion *Habeas Corpus* got anything to do with it. Question of whether or not the guarantee right of appeal, counsel, that's applic-

page 88] able. That's about it, don't you think so? The question of arrest without a warrant is not applicable, unless he can show — certainly there's no showing that it *effected* his right of defense. That was decided in the last 204 Virginia. So put *you're* emphasis on the things you think are important, then it won't take too long.

Mr. Mann: Your Honor, it won't be necessary for the Petitioner to remain here will it?

Judge Edwards: No, I don't see any sense in his staying here. He doesn't like us anyhow.

Mr. Clark: No, I didn't say that, I didn't say that.

Judge Edwards: I was just joking.

Mr. Osterhoudt: Sergeant, do you have any idea when he would be returned to the penitentiary?

Judge Edwards: Mr. Mann will take care of that.

Mr. Osterhoudt: I mean it won't be today or necessarily tomorrow.

Mr. Mann: I won't be back in Richmond before Friday.

Mr. Osterhoudt: *Alright* I'd like to have an opportunity to talk with him.

Judge Edwards: Oh sure.

CERTIFICATE

I, Lorraine W. Krull, Court Reporter, designated and appointed to report and transcribe the case of *Robert Lee Clark* vs. *C. C. Peyton, Superintendent of the Virginia State Penitentiary,* Respondent, do hereby certify that the foregoing is a true and correct transcript of the proceedings had and the evidence introduced in said trial of the aforesaid case

Witness the Following signature and seal this 9th day of December, 1964.

LORRAINE W. KRULL
Court Reporter

CERTIFICATE

I, Richard T. Edwards, Judge of the Hustings Court of the City of Roanoke, Virginia, who presided over the foregoing trial of *ROBERT LEE CLARK* versus *C. C. PEYTON, Superintendent of the Virginia State Penitentiary,* in said Court, at Roanoke, Virginia, on November 17, 1964, do hereby certify that the foregoing is a true and correct copy and report of the evidence, the objections and exceptions of the respective parties as therein set forth, motions of the respective parties, and other incidents of the trial of the said cause. As to the original exhibits introduced in evidence, as shown by the foregoing report which have been initialed by me for the purpose of identification, they shall be transmitted to the Supreme Court of Appeals as a part of the record in this cause in lieu of certifying to said Court copies of said exhibits, and the same applies to all papers, petitions, briefs and other material filed with the Court in this cause.

I do further certify that the attorney for the defendant had reasonable notice, in writing, given by counsel for the petitioner, Robert Lee Clark, of the time and place when the foregoing report of the testimony, exhibits, motions, objections and exceptions, and other incidents of the trial would be tendered and presented to the undersigned for signature

and authentication, and was received within sixty days from the date of the final judgment.

GIVEN under my hand this 28 day of April, 1965, within seventy days after the entry of the final judgment in this cause.

RICHARD T. EDWARDS,
Judge of the Hustings Court of the
City of Roanoke, Virginia.

I, Walker R. Carter, Jr., Clerk of the Hustings Court of the City of Roanoke, Virginia, do certify that the foregoing report of the testimony, exhibits, motions, objections and exceptions and other incidents of the trial in the cause of *ROBERT LEE CLARK* versus *C. C. PEYTON, Superintendent of the Virginia State Penitentiary,* together with the original exhibits therein referred to, all of which have been duly authenticated by the Judge of said Court, were lodged and filed with me as Clerk of the said Court on the 28th day of April, 1965.

WALKER R. CARTER, JR.,
Clerk of the Hustings Court of the
City of Roanoke, Virginia.

page 1]

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Received Apr 22 1965 and filed

PATSY TESTERMAN,
Deputy Clerk

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Hustings Court of the City of Roanoke:

Counsel for the petitioner in the above styled cause in the Hustings Court of the City of Roanoke, Virginia, hereby gives notice pursuant to the provisions of § 4, Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia, of his appeal of the final judgment order of the Court herein entered in this

cause on the 1st day of March, 1965, and sets forth the following assignments of error:

1. That the Court erred in denying petitioner's petition for writ of *habeas corpus* on the following grounds:

(1) That the law and the evidence is that the petitioner was denied an effective right of appeal in the previous criminal proceedings which resulted in the filing of this petition.

(2) That the law and the evidence is that the petitioner was illegally arrested in the course of the previous criminal proceedings which resulted in the filing of this petition.

page 2] (3) That the law and the evidence is that the trial of the criminal cases which resulted in the filing of this petition involved the presentation of the testimony and other evidence which was obtained through illegal search and seizure.

(4) That the law and the evidence is that in the previous criminal proceedings which resulted in the filing of the petition herein, the petitioner was denied his constitutional rights in that he was not advised as to his protection from self-incrimination.

(5) That the law and the evidence is that in the previous criminal proceedings which resulted in the filing of the petition herein, that your petitioner was denied a proper preliminary hearing.

(6) That the law and the evidence is that at the time of the criminal proceedings which resulted in the filing of the petition herein, your petitioner was denied his legal and constitutional rights in that witnesses which he requested to be present did not attend the proceedings and were not in Court to testify by reason of which his case was prejudiced.

(7) That the law and the evidence is that in the previous criminal proceedings which resulted in the filing of the petition herein, your petitioner was subjected to cruel and unusual punishment at the hands of the law enforcement authorities of the City of Roanoke.

(8) That the law and the evidence is that the previous criminal proceedings which resulted in the filing

page 3] of the petition herein were held without regard to a writ of *habeas corpus* previously filed by the petitioner in said case, which, under the law, should have been

disposed of before undertaking the trial of the criminal cases.

(9) That the law and the evidence is that in the previous criminal proceedings which resulted in the filing of the petition herein, that your petitioner was denied the effective assistance of counsel and that he did not have the same.

By reason of all the above, the petitioner was denied his constitutional rights as guaranteed under the constitutions of the United States and the State of Virginia, in the previous criminal proceedings which resulted in the filing of the petition herein, by reason of which his petition for a writ of *habeas corpus* shold have been granted.

2. That the court erred in denying the petitioner the right to call certain witnesses to testify for him in the hearing held herein on his petition for a writ of *habeas corpus*.

3. That the Court erred in denying the petitioner the right to present in evidence at the hearing held herein the complaint filed against him in the previous criminal proceedings.

4. That the Court erred in refusing to allow the petitioner to question the grounds of reasonable belief that a crime had been committed which reasonable belief was expressed by the arresting police officer.

5. That the Court erred in refusing to allow the petitioner the right to establish specifically the names of witnesses in previous criminal proceedings which were
page 4] obtained by the police officers through what is contended to be an illegal search and seizure.

Respectfully,
ROBERT LEE CLARK

By CHARLES H. OSTERHOUDT
Counsel

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A Copy—Teste:

H. G. TURNER, Clerk.

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