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Record No. 6319

In the
Supreme Court of Appeals of Virginia
at Richmond

DANIEL PETTUS

v.

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

FROM THE CIRCUIT COURT OF MECKLENBURG COUNTY

RULE 5:12 BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

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Record No. 6319

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 12th day of January, 1966.

DANIEL PETTUS, Plaintiff in error,

against

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

From the Circuit Court of Mecklenburg County
Gus E. Mitchell, Jr., Judge

Upon the petition of Daniel Pettus a writ of error is awarded him to a judgment rendered by the Circuit Court of Mecklenburg County on the 6th day of May, 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

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page 4]

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PETITION FOR WRIT OF HABEAS CORPUS

The petition of Daniel Pettus respectfully shows that he was illegally restrained of his liberty by the Superintendent of the Virginia State Penitentiary. Your petitioner, therefore, prays that a writ of *habeas corpus* issue, under Virginia Code Sections: 8-598 and 17-7(2), (as amended); said writ to be made returnable to the Circuit Court of Mecklenburg County, Virginia, to wit: on the first day of its next term thereof; to produce before that said Honorable Court the body of your petitioner, together with the true cause of

page 5] detention; to abide such directions as may be given in the premises; and to have then and there said writ.

DANIEL PETTUS
Petitioner in *Propria Persona.*

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12/20/57
page 45]

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NOTICE OF APPEAL
and
ASSIGNMENT OF ERROR

To: The Honorable N. G. Hutcheson, Clerk of the Circuit Court of Mecklenburg County

Counsel for Daniel Pettus, the petitioner in the above styled *habeas corpus* proceeding in the Circuit Court of Mecklenburg County, Virginia, hereby gives notice of appeal from the order entered in this proceeding on May 6, 1965, and sets forth the following assignments of error:

(1)

That the Court erred in refusing to grant the petitioner's

writ, since the evidence showed that the defendant committed only one overt act, that of escaping, but was convicted of two felonies.

(2)

That the Court erred in refusing to grant the petitioner's writ, since the record indicates that the petitioner was convicted of two felonies in one count of one indictment, and therefore said indictment was void.

(3)

That the Court erred in refusing to grant the petitioner's writ, since the record indicates that no intent to steal or permanently deprive the owner was alleged in the indictment or shown by the evidence.

12/20/57
page 46]

(4)

The Court erred in refusing the *petitioners* writ, since the record indicates that the petitioner was convicted and is being held for the crime of assault and larceny, when, in fact and in law, no such crime exists in Virginia.

(5)

The Court erred in refusing to grant the petitioner's *write,* since the evidence indicated that there could be no conviction for forceful or strongarmed robbery, since the taking of the shotgun occurred prior to the assault upon the guard.

(6)

The Court erred in refusing to grant the petitioner's writ, since the record and evidence clearly indicates that the petitioner was ineffectively represented by counsel, since the petitioner was not advised of the charges placed against him and the invalidity of said charges and indictments upon which he was convicted.

FALCON HODGES,
Counsel for Daniel Pettus,
Petitioner

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12/20/57
page 48A]

EXHIBIT I

STATE OF VIRGINIA, COUNTY OF MECKLENBURG, to-wit:

In the Circuit Court of the said County

Thirty-Fourth Judicial Circuit

The jurors of the Commonwealth of Virginia, in and for the body of the County of Mecklenburg, and now attending the Circuit Court, at its December term, 1957, upon their oath present that Frank Dales, Harold O. Murry, Melvin F. Scruggs, Jimmie Upton and Daniel Pettus, heretofore, to-wit, on the 15th day of November, in the year one thousand nine hundred and fifty-seven, in the County of Mecklenburg, and within the jurisdiction of the said Circuit Court of the County of Mecklenburg,

In and upon one W. F. Harris, feloniously did make an *assult*, and the said W. F. Harris, in bodily fear, feloniously did put, and one shotgun of the value of One Hundred ($100.00) Dollars, being the property of the Commonwealth of Virginia, in lawful possession and custody of the said W. F. Harris, from the person and against the will of the said W. F. Harris, then and there, on the day and year aforesaid, in the county aforesaid, feloniously and violently did steal, take and carry away, against the peace and dignity of the Commonwealth.

Upon the evidence of J. L. Ebbert, W. F. Harris, R. E. Smiley, John Carter witnesses sworn in open court and sent to the Grand Jury to give evidence.

True Copy, Teste:
N. G. HUTCHESON, Clerk
Circuit Court County of
Mecklenburg, State of Virginia

EXHIBIT II

12/20/57
page 48B] Circuit Court for the County of Mecklenburg at the Courthouse thereof on Friday the 20th day of December in the year of our Lord one thousand nine

hundred and fifty seven and the one hundred and eighty second year of the Commonwealth.

Present: The Honorable G. E. Mitchell, Jr., Judge

COMMONWEALTH OF VIRGINIA

VS) FELONY—Larceny and Assault

DANIEL PETTUS

This day came the Attorney for the Commonwealth and Daniel Pettus, who stands indicted of a felony, to-wit: Larceny and Assault; was led to the bar in the custody of the Sheriff. And it appearing to the court that the accused is not represented by counsel, the court, before accepting any plea of the accused, doth appoint J. R. Overstreet, Jr., an able and competent attorney at law, practicing before the bar of this court, to defend him.

Thereupon the accused was duly arraigned and after being advised by his counsel pleaded guilty to the indictment, which plea was tendered by the accused in person, and the court being of the opinion that the accused fully understood the nature and effect of his plea, proceeded to hear and determine the case without the intervention of a jury provided by law, and having heard the evidence doth find the accused guilty of a felony (larceny and assault) as charged in the indictment, and ascertain his punishment to be confinement in the penitentiary of this Commonwealth for the term of eight (8) years.

And it being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this court that the said Daniel Pettus be and he is hereby sentenced to confinement in the penitentiary of this Commonwealth for the term of eight (8) years, the period by the court ascertained as aforesaid, and that the Commonwealth of Virginia do recover against the said Jimmie Upton its costs by it about its prosecution in this behalf expended.

The sentence herein imposed is to run consecutively with any sentence imposed by this or any other court of this Commonwealth.

And it is further ordered that as soon as possible after the entry of this order the prisoner be removed and safely conveyed according to law from the jail of this court to the said

penitentiary, therein to be kept, confined and treated in the manner provided by law.

And the prisoner is remanded to jail.

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12/20/57
page 49]

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ORDER

This matter came on for hearing on April 23, 1965, pursuant to a petition for a writ of *habeas corpus* filed by the petitioner in this matter, which petitioner appeared in person and by counsel, Falcon Hodges, heretofore appointed by this Court to represent the petitioner in this matter; and the respondent appeared by counsel, W. Luke Witt, Assistant Attorney General for the State of Virginia.

After hearing evidence presented on behalf of the petitioner and the respondent and after hearing arguments thereon and after mature consideration thereon, the Court doth find that the petitioner is currently detained pursuant to a judgment of the Circuit Court of Mecklenburg County of December 20, 1957, wherein the petitioner was convicted of a felony for which he received a sentence of eight (8) years in the Virginia State Penitentiary; and the Court doth further find that the petitioner was ably and effectively assisted by his court appointed counsel, J. R. Overstreet, Jr., who represented the petitioner during the course of his trial in the Circuit Court of Mecklenburg County; and the Court doth further find that the petitioner was not prejudiced by any defect in the indictment which was presented to the grand jury by which he was convicted inasmuch as the petitioner and his counsel as well as other officers of the Court and the Court itself was aware of the charge that the petitioner was to be tried for; and the Court doth further find that the petitioner had ample opportunity to assist in the defense of his case prior to the time his trial was held; and the Court doth further find that at no time prior to or during the course of his trial was the petitioner denied any constitutional rights.

12/20/57
page 50]

Now, therefore, after mature consideration of the facts as stated above, the Court doth adjudge, order and decree that the petition for a writ of *habeas corpus* shall be denied and dismissed and the petitioner shall be remanded forthwith to

the custody of the Virginia State Penitentiary, to all of which action of the Court, the petitioner objects and excepts; and the Court doth further order that the Clerk of this Court shall certify copies of this order to the petitioner, the respondent and the Attorney General for the State of Virginia.

I ask for this:
W. LUKE WITT
Counsel for respondent

Seen and objected to:

FALCON HODGES
Counsel for petitioner

Enter 5/6/65
G.E.M., Jr., Judge

* * * * *

12/20/57 page 1] Transcript of the evidence taken from Audograph disc, recorded by Judge G. E. Mitchell, Jr., in the Circuit Court of Mecklenburg County, Virginia on December 20, 1957, in the hearing of *Commonwealth of Virginia* vs. *Frank Dale etals.*

Present: The Honorable G. E. Mitchell, Jr., Judge Presiding
Meredith R. Overstreet, Jr., Attorney for the defendant.
Jesse R. Overstreet, Jr., Attorney for the defendant

W. F. HARRIS,
witness duly sworn and called in behalf of the Commonwealth

Direct Examination by Mr. Dortch, Commonwealth's Attorney

Q. You are W. F. Harris?
A. Yes, Sir.
Q. You are a guard employed at State Convict Camp No. 4?
A. Yes, Sir.
Q. Were you on duty the day of November 15, 1957?
A. Yes, Sir.
Q. Did you have the defendant in your charge?
A. Yes, Sir.
Q. Where was that detail working?
A. I can't remember the road. The Sergeant can tell you.

W. F. Harris

Q. In what neighborhood was it?
A.
Q. How many did you have under your charge?
A. I had eleven
Q. Is that the usual detail?
A. Yes, Sir.
Q. Eleven in one detail?
A. Yes, Sir.
Q. Any of them a trusty?
12/20/57 A. One
page 2] Q. Which one of these boys?
A. That fellow sitting right there with the curly hair—Pettus
Q. Next to the end?
A. Yes, Sir.
Q. You had eleven men under your charge—one of which was a trusty?
A. Yes, Sir.
Q. I believe it is a practice that only a trusty is permitted to come to you?
A. That is right.
Q. Just about what time during the day did this thing occur?
A. About a quarter past twelve.
Q. Tell the Judge what happened.
A. I was sitting there—we were eating lunch—I had the shot gun laying across my lap, and I was eating. He was sitting over there to the side of me.
Q. That is the trusty?
A. The trusty was sitting to the side of me, the gang was then down in front of me, and of course, I was watching them. The gun went out of my lap and I looked back and he had it. He jumped back, threw the gun on me and told me not to move. I jumped up and grabbed the gun and before I could get it away from him—Scruggs took the service gun and went to the truck and forced the truck driver and foreman out, and Frank Dale went to the other side of the truck, got in, and all five of them left.
Q. Got in the truck?
A. That is right.
Q. And left peaceably?
A. Yes, Sir.
Q. Were you present when they were apprehended?
A. Yes, Sir.
Q. You were present when they were apprehended?
A. Well, you mean when they brought them back to camp?

W. F. Harris

Q. No, I am talking about when they were actually arrested.

12/20/57
page 3]

A. Out from the camp? No, *S*ir.

Q. Judge, would you like to question him? (Mr. Overstreet)

Q. That is all you know about it?

12/20/57
page 4]

A. Yes, sir.

Mr. Dortch: That involves the basic charge. The rest would be the matter of apprehending them. We have the men who did pick them up, but I can't see where it is relevant.

Judge Mitchell: I wouldn't think so, it doesn't make any difference unless there were some extraordinary circumstances connected with that. They didn't resist arrest?

Mr. Dortch: —

Mr. Dortch: All right, then, thank you, *S*ir.

Mr. Dortch: I recommend eight years for the armed robbery and two years for escape, or a total of ten years. These two charges to run consecutively rather than concurrently.

Judge Mitchell: Now, let's see—You have a charge of escape and you have a charge of robbery—taking the truck—and larceny.

Mr. Dortch: He was not arraigned on larceny.

Judge Mitchell: You arraigned him on stealing the gun?

Mr. Dortch: The gun—that's armed robbery.

Judge Mitchell: But he was charged with larceny. Wasn't that one indictment?

Mr. Dortch: It was two indictments against him, but I marked one of them out.

Judge Mitchell: Look at the indictment and see if you arraigned him on the right one.

Mr. Dortch: We arraigned him on armed robbery. We left the larceny out.

Judge Mitchell: You left the larceny out?

Mr. Dortch: Yes *S*ir.

Judge Mitchell: Does the defense have any evidence?

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A stenographic report of all evidence adduced in the trial of the above matter in the Circuit Court of Mecklenburg County, Virginia, on April 23, 1965, before Honorable G. E. Mitchell, Jr., Judge.

Daniel Pettus

Appearances:

Mr. Falcon Y. Hodges, counsel for the plaintiff.
Mr. W. Luke Witt, Assistant Attorney General of Virginia, counsel for the defendant.

4/23/65
page 1] Mr. Overstreet: If Your Honor pleases, before we start the case, I would like to make a motion Mr. Witt be qualified to practice before this Court.

(Whereupon, Mr. Witt was qualified before said Court, and the following proceedings were had:)

Mr. Hodges: May it please the Court, I would like to make a preliminary motion here that we exclude all witnesses for the Commonwealth. I think that would include Mr. Overstreet. I anticipate he would testify. I would like to have all of the Commonwealth's witnesses excluded.

(Whereupon, all witnesses were called and duly sworn and excluded from the Courtroom.

(Brief opening statements were offered by Mr. Hodges and Mr. Witt and the following proceedings were had:)

DANIEL PETTUS,
a witness for the petitioner, testifies as follows:

4/23/65 DIRECT EXAMINATION

page 2] By Mr. Hodges:

Q. Would you state your name?

A. Daniel Pettus.

Q. How old are you?

A. 34 years old.

Q. I direct your attention to the date of November 15, 1957. Where were you at that time?

A. I was a trustee in a road gang on Camp 4.

Q. Was that here in Mecklenburg County?

A. Yes, sir.

Q. For what reason were you being confined at Camp 4?

A. Attempted robbery and attempted murder.

Q. Do you recall the incidents that occurred on November 15?

A. Yes, sir.

Q. They gave rise to an indictment for escape, assault, and larceny of a shotgun?

A. Yes, sir.

Daniel Pettus

Q. Were you in fact charged with these crimes?
A. I was charged with robbery.
Q. Do you know when the charge was made
4/23/65 against you?
page 3] A. We escaped on a Friday. It was about 20 minutes past 12:00 and they caught us about Sunday morning and I didn't see the warrant until Mr. Overstreet showed it to me when he come to Camp 23; when he come up there to tell me I was charged with robbery and that the Commonwealth Attorney told him that he didn't think I would get over 5 years.
Q. Did Mr. Overstreet at that time indicate to you that he had been appointed by the Court to represent you?
A. Yes, sir.
Q. And that was your understanding?
A. Yes, sir.
Q. And at that time he indicated to you the Commonwealth's recommendation of 5 years?
Mr. Witt: Your Honor, I think that's a leading question. I am not concerned so much about the question as I am the conclusion the petitioner has already stated for the record that his attorney told him he wouldn't get over 5 years. In response to the question of counsel for the petitioner, he says that he told him definitely that he would not. I
4/23/65 think the record should be clear as to what the
page 4] testimony actually is as opposed to what may have been suggested.
Mr. Hodges: I think we should clarify that.

By Mr. Hodges:
Q. What exactly did Mr. Overstreet tell you as to the recommendation or his feelings on the case?
A. This has been a long time, but I believe it's my recollection he said I wouldn't get over 5 years or he believed I wouldn't get over 5 years.

The Court: If that's as definite as he can make it, I reckon it's all right.

By Mr. Hodges:
Q. When was the next time you had any meeting or dealings with Mr. Overstreet?
A. It was in the Courtroom on December 20, 1957.
Q. What day of the week was that, do you remember?

A. No, sir, I do not.
Q. Was that when the Court opened?
A. Yes.
Q. At that time, did Mr. Overstreet discuss with you what proceeding was being had and what were the conversations and recommendations?
4/23/65 page 5 A. I don't exactly think so, because I don't believe he talked to us when he come in. All 5 of us were sitting on that bench. The prosecuting attorney and him went in the back room. To the best of my recollection, he didn't discuss it with us.
Q. To the best of your recollection he didn't discuss it with you?
A. No, sir.
Q. At the time he discussed it with you at Camp 23, how long did he talk with you?
A. I say he talked to me about 10 minutes.
Q. And told you you were charged with armed robbery?
A. Yes, sir.
Q. Did you understand the nature and the consequence of the charge made against you?

Mr. Witt: That's a leading question, Your Honor. I think he can ask him what he understood.

By Mr. Hodges:
Q. What understanding did you have of the charge made against you?
A. I didn't have any understanding of the charge I had against me at that time, but I do now.
6/23/65 page 6] Q. What did you think you were being charged with?
A. Well, he told me I was charged with robbery. So, that's what I thought I was charged with.
Q. Did Mr. Overstreet mention to you the fact you were charged with 2 felonies in one count of one indictment?
A. No, sir, he did not.
Q. I believe it's in the record here that you did plead guilty to these charges?
A. Yes, sir.
Q. Was that based upon his recommendation or his conversations with you?
A. Yes, sir.
Q. And I believe it's in the record here that you received two years on escape and 8 years on assault and larceny, the

two terms to run consecutively, is that correct?

A. Yes, sir.

Q. And your understanding was you were charged with armed robbery or force of robbery?

A. Yes, sir.

Q. What were the facts surrounding your escape on November 15, 1957?

6/23/65 page 7] Mr. Witt: Your Honor, just for the purpose of getting into the facts themselves, I would have to object unless there is some basis on which the facts would be related.

The Court: Why would you need to show those particular facts. You see, we have tried the case, so the facts are out. It's a question of whether it's an error in the proceeding.

Mr. Hodges: It was my intention to except to the Court's ruling that we couldn't show any facts surrounding the alleged offenses here and to stipulate for purposes of the record by way of exception what these facts would be to show further that there was ineffective representation by counsel.

The Court: Anything that relates to ineffective representation, I suppose you would be entitled to show, because that's a part of your allegations. As to the facts, he has been tried on, you would have to appeal those.

Mr. Hodges: We except to the Court's Ruling. No further questions.

CROSS EXAMINATION

By Mr. Witt:

6/23/65 page 8] Q. Mr. Pettus, it's my understanding you said you were being held on Camp 23 at the time this event occurred for the crime of attempted robbery, is that correct, sir?

A. Yes, sir.

Q. I assume there was attempted armed robbery, is that right?

A. I mean, the way I found out, a armed robbery is by way of force with a gun and strong armed robbery is like you grab somebody's gun —

Q. My question is directed to the crime you were serving time for at the time your escape occurred.

A. That was attempted robbery.

Q. Was it robbery by violence?

Daniel Pettus

A. Yes, sir.

Q. When Mr. Overstreet came to talk to you concerning the charges that had been brought against you resulting from this escape, he told you were charged with armed robbery, isn't that right?

A. Yes, sir.

Q. As I understood your testimony in response to direct examination, you didn't understand the nature of the charge that was against you at that time, is that right?

A. Yes, sir.

Q. You didn't understand what armed robbery

4/23/65 was?

page 9] A. No, sir.

Q. You were serving a charge at the time for attempted armed robbery?

A. Yes, sir, I got 4 years from that.

Q. You knew then what you were serving time for, didn't you?

A. Yes, sir.

Q. You had been tried on that and convicted, had you not? Did you plead guilty at that time or not guilty?

A. I plead guilty.

Q. Did you understand the charge against you at that time?

A. Yes, sir, the Judge himself explained it.

Q. What reason do you think an armed robbery would be different, attempted armed robbery would be different here from attempted armed robbery in *Pettersburg*.

Q. You knew what armed robbery was, didn't you?

A. Yes, sir.

Q. When Mr. Overstreet told you you were charged with armed robbery you knew what he was talking about, didn't you?

A. Yes, sir.

4/23/65 Q. That was the charge you expected to be tried

page 10] on when you came into this Court, isn't that true?

A. Yes, sir.

Q. Isn't it true that Mr. Overstreet discussed with you the fact that he had talked to the Commonwealth Attorney about this matter?

A. Yes, sir.

Q. And that the Commonwealth Attorney was willing to make a recommendation, isn't that what he told you?

A. Yes, sir.

Q. He didn't tell you specifically how much time you were going to get as a result, did he?

A. He told me he didn't think I would get over 5 *over 5* years.

Q. Didn't he tell you the Commonwealth would recommend 2 years on the escape and 8 years on the robbery?

A. No, sir, not until I got in here.

Q. In other words, any way, you knew the Commonwealth Attorney was going to make a recommendation if certain contingencies occurred, isn't that right?

A. Yes, sir.

4/23/65 page 11] Q. Isn't it also a fact, Mr. Pettus, you told Mr. Overstreet you knew what you had done and you wanted to go ahead and plead guilty?

A. Yes, sir.

Q. You told him that, didn't you?

A. Yes, Sir.

Q. The decision to plead guilty was yours, wasn't it?

A. Yes, sir.

Q. It was a voluntary decision, was it not?

A. Yes, sir.

Q. You knew at that time what your charge was and you knew what that charge meant, didn't you?

A. Yes, sir.

Q. Now, were there any other witnesses to have been called in your behalf other than the people who participated with you in this occurrence?

A. No, sir.

Q. There were witnesses called on behalf of the Commonwealth, were there not?

A. Yes, sir.

Q. Mr. Harris testified as I recall?

A. Yes, sir, I believe he was the only one.

4/23/65 page 12] Q. You told Mr. Overstreet when you talked to him that you — I believe I have already asked this question — but for clarification of the record, that you had done the things that you had been charged with, didn't you?

A. Yes, sir.

Q. Now, what is it you feel your attorney should have done he didn't do? You say there were no witnesses. You say you admitted you did it and wanted to plead guilty and you understood the charge. What else do you think your attorney should have done he didn't do?

A. What he should have told me, when he wrote the indictment up —

Daniel Pettus

Mr. Hodges: Your Honor, I think here we are dealing with a technical question of law. The fact of two felonies —

The Court: He is entitled to testify what he knew about it.

Mr. Hodges: It certainly wouldn't be in his knowledge to know what his attorney should do.

The Court: He can testify as to what he thinks the attorney could have done that he didn't do.

4/23/65 page 13] Mr. Witt: That's all I am asking. He has made the allegation. I am curious what facts he knows he wanted to put before the Court, things which should substantiate this allegation. I am not asking for any conclusion at all. Whatever he says should have been done, I am interested in getting in the record.

The Court: That's right. You are entitled to state that.

Witness:

A. If I were charged with strong armed robbery, the indictment should have read strong armed robbery, not assault and larceny.

The Court: That, of course, is coming back to a question of law.

By the Court:

Q. Did the attorney fail to do anything you requested him to do or anything of that nature?

A. No, sir, he did not.

RE-DIRECT EXAMINATION

By Mr. Hodges:

Q. Your Court-appointed attorney advised you you were charged with strong armed or armed robbery?

A. Yes, sir.

4/23/65 page 14] Q. How much education do you have?

A. Actually, I quit in the 5th grade, but I have been working since I have been in the penitentiary. I've got two more years on that, which would make a 7th grade education.

Mr. Hodges: That's all.

The Witness Stands Aside.

Mr. Hodges: The petitioner would like to reserve a time after the Commonwealth has put on any evidence to state for the

purposes of the record the exception to the Court's ruling not allowing any facts to come in here. We feel this is definitely material to the proceeding here and we reserve the right to later show what these facts would be to further show that the petitioner wasn't effectively represented by counsel.

The Court: Any fact that shows he wasn't effectively represented by counsel, you would be entitled to show those, but I don't know what you want to offer. The facts as to the case are not admissible. Anything that shows he wasn't properly represented, since he made *than* an allegation of the *peition* would be proper.

4/23/65 page 15] Mr. Hodges: As we have indicated, we feel that among other things and there are several of them, the fact that the petitioner's counsel made no objection to two felonies being charged in one count of indictment or did not require the Commonwealth to make an election on the felony —

The Court: The record speaks for itself and I suppose from your standpoint you would be entitled to argue that without any evidence. I don't know of any evidence you could offer in regard to that, except maybe the Commonwealth Attorney could bring out something when he testifies.

Mr. Hodges: We would like to reserve the time to later stipulate what our evidence would show.

The Court: I don't know whether the Commonwealth is going to offer any evidence or not, if they do, you can cross-examine their witnesses.

JESSIE R. OVERSTREET,

a witness for the respondent, being first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Witt:

Q. State your name for the record, please, sir?

4/23/65 page 16] A. Jessie R. Overstreet, Jr.

Q. What is your occupation, Mr. Overstreet?

A. Attorney at Law.

Q. What is your age, please, sir?

A. 40.

Q. How long have you been practicing law?

Jessie R. Overstreet

A. Since 1952.

Q. I direct your attention to a trial which was conducted before the Circuit Court of Mecklenburg County on December 20, 1957, involving one Daniel Pettus. Do you have any knowledge of that trial, sir?

A. Yes, I remember it.

Q. Did you represent Mr. Pettus?

A. Yes, sir.

Q. Do you recall having any conversation with Mr. Pettus prior to the time the trial was conducted?

A. Yes, I remember going to the convict camp in Halifax County, Virginia.

Q. How far is that from here, sir?

A. It's approximately 35 miles from Boydton.

Q. All right, sir. What was the purpose of that visit?

A. I had been appointed by the Court to repre-
4/23/65 sent Mr. Pettus and several other defendants.
page 17] Q. What crime was Mr. Pettus charged with?
A. I don't remember what all of the counts were.

Q. Do you remember what he was convicted of?

A. I believe it was escape from the convict camp and armed robbery.

Q. All right, sir. Do you recall what the substance of your conversation with Mr. Pettus was?

A. I can't recall the words that were said, but I remember that I had talked to the Commonwealth's Attorney before I went up there. I knew what his recommendation was going to be. I talked to these people; and I want to make it plain it wasn't just Mr. Pettus. There were several of these people together. All of them were charged wih the same thing. I don't recall what was said up there, but the substance of it was that they wanted to plead guilty. They knew what they were charged with and what the punishment would be; and they wanted to plead guilty. They told me they wanted to get out of there and go back to Richmond. I recall that because it was snowing that day and I believe they had them in there without shoes on or something to keep them from running, they said.

Q. Whose decision was it to plead guilty?
4/23/65 A. Each one of the defendants'.
page 18] Q. Did you encourage it or recommend that decision in any way?

A. I can't recall the conversation, but I can tell you the way I always handle these cases; and I believe I handled this one the same way, is to advise the defendants of their right to trial;

what my opinion of the law is; what the maximum punishment is; and what the Commonwealth is recommending on a guilty plea.

Q. All right, sir. Did the petitioner in this matter offer any defense that you know of during the course of your conversation?

A. I don't remember any.

Q. You don't remember any?

A. No.

Q. Did he offer any witnesses that could have appeared on his behalf?

A. No, sir. I don't remember any. Let me make it clear this was 7 years or so ago and I don't recall what was said exactly.

Q. Do you recall what plea was actually entered by the petitioner during the course of the trial?

A. A plea of guilty.

Q. Now, did you have any conversation with the
4/23/65 petitioner subsequent to the trial?
page 19] A. I don't believe so.

Q. He didn't say anything to you about being dissatisfied or wanting an appeal or anything, did he?

A. No, sir.

Q. Have you heard anything from the petitioner since?

A. I don't think so, not directly; but Rainey the State Investigator, talked to me about it.

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

CROSS EXAMINATION

By Mr. Hodges:

Q. Mr. Overstreet, you are a member of the bar?

A. Yes, sir.

Q. And you have been practicing how long?

A. Since 1952.

Q. So, at the time you were appointed to represent the petitioner here and the other 4 felons you had been practicing about 5 years?

A. Approximately, yes, sir.

Q. All right, sir. Now, you tell this Court that you
4/23/65 went to Camp 23 in Halifax County and talked to
page 20] the petitioner here and the other 4 felons?

A. I don't know if there were 4 others, but I

remember going up there and talking to several of them. I don't even recall how many there were.

Q. How long did you talk to the petitioner here up at Camp 23?

A. I don't remember.

Q. At that time the petitioner had been indicted, is that correct?

A. I believe so.

Q. Did you see the indictments against the petitioner?

A. There again, I don't remember, but I would say yes, because I think I looked at them the day I was appointed down here in the Circuit Court.

Q. You examined the indictments against the petitioner and then went and talked to him?

A. I believe that's right.

Q. How long did you talk to him? Was it an hour?

A. I doubt that I talked to him that long. I don't remember.

4/23/65 page 21] Q. At the time that you talked to the petitioner, you advised him that he was charged with escape and in one indictment and armed robbery in the other indictment?

A. I can't say exactly what I told the petitioner. I don't remember the conversation. I told Mr. Witt here that I believe I did because that's the way I always handle these cases.

Q. But I believe you testified that you told the petitioner that he was charged with armed robbery?

A. I think I testified that I told them what he was charged with.

Q. And that he was convicted of armed robbery. When the matter came up for trial before the Circuit Court, did you again examine the indictment against the petitioner?

A. I don't remember.

Q. Did you again discuss this matter with the petitioner?

A. I don't remember that either.

Q. Did you at any time advise the petitioner that he was charged in one count of one indictment with assault and larceny of a shotgun?

A. I don't know.

Q. Did you at any time advise the petitioner that the law of our Commonwealth doesn't allow the charging of two felonies in one count of an indictment?

4/23/65 page 22] A. I don't remember what I told him.

Q. Do you know what the punishment is for felonious assault?

A. Not without checking the statute.

Jessie R. Overstreet

Q. Do you know what the penalty is for grand larceny?

Mr. Witt: Your Honor, I would object to any question regarding penalties for crimes that are not necessarily considered here.

Mr. Hodges: That's what he is indicted with.

Mr. Witt: I don't know that any review of offhand knowledge by the witness at this point concerning maximum punishment is relative as to whether he advised this man of anything like that at all.

Mr. Hodges: I think I can clarify this point. What I am attempting to show by *thiswitness* is the fact Mr. Overstreet is a member of the bar; that he advised this man he was charged with armed robbery, which is a right much more serious offense than assault and larceny.

4/23/65 page 23] The Court: These are matters for argument to the Court, not for questioning a witness. Those penalties are prescribed in the statute. That's a matter for the Court.

Mr. Hodges: I think the Court knows armed robbery is a capital crime whereas —

The Court: The Court will take cognizance of the fact it's provided in the statute.

By Mr. Hodges:

Q. Mr. Overstreet, you did in fact advise him he was charged with armed robbery?

A. Mr. Hodges, I believe I have already testified I don't recall my conversation with these people, but I believe I advised them what they were charged with and what the maximum punishment would be; that they had a right to be tried before the Judge or Jury and that I knew what the Commonwealth was going to recommend on a plea of guilty, because they had indicated to me they were going to plead guilty.

Q. What recommendation did the Commonwealth Attorney convey to you on their plea of guilty?

A. A total of 10 years, I believe.

Q. Didn't you advise the petitioner that the Commonwealth would recommend 5 years?

A. I don't remember doing that.

4/23/65 page 24] Q. You don't remember it? Do you deny it?

A. Yes, I do, because I remember the total was — I think that the total was 10 years — and I can't remember everything I said that long ago, but I know what the

procedure is in this Court, that the Court follows the Commonwealth's recommendation.

Q. And you didn't advise the petitioner he was charged with two felonies in one count in an indictment?

A. I would say I did. I don't remember what I told him.

Q. Did the petitioner indicate to you there was no violent taking of the shotgun?

A. I don't remember.

Q. The petitioner did not indicate to you the desire to take an appeal?

A. No, he did not.

Q. Nor did you recommend to him the possibility of an appeal?

A. I don't remember talking to him about an appeal at all, but if he had told me he wanted to appeal —

Q. You don't expect for a man not versed in the law to advise you of the law, do you?

Mr. Witt: Your Honor, that's argumentative.

4/23/65 The Court: That's argumentative.

page 25] By Mr. Hodges:

Q. You testified on direct examination when you talked to these 5 felons and advised them they were charged with armed robbery they wanted to plead guilty based on the Commonwealth's recommendation.

A. State your question again, please?

Q. When you advised the petitioner that he was charged with armed robbery and advised him of the Commonwealth's recommendation, they wanted to plead guilty?

A. I would say that's right.

Mr. Hodges: That's all.

Witness stands aside

M. C. DORTCH,

a witness for the respondent, testifies as follows, after being first duly sworn:

DIRECT EXAMINATION

By Mr. Witt:

Q. State your name, please, sir?

A. M. C. Dortch.

Q. Mr. Dortch, what is your occupation, please?

M. C. Dortch

A. Commonwealth's Attorney for Mecklenburg County.

4/23/65 page 26] Q. Were you Commonwealth's Attorney for Mecklenburg County in 1957?

A. I was, sir.

Q. How long have you been practicing law, Mr. Dortch?

A. 25 years, I suppose.

Q. How long have you been Commonwealth's Attorney?

A. I became Commonwealth's Attorney in 1948.

Q. So, in 1957 you had been Commonwealth's Attorney nearly 10 years then?

A. Yes, sir.

Q. I direct your attention to a trial that occurred in this Court on December 20, 1957, involving one Daniel Pettus. Do you have any recollection of that trial at all?

A. Well, I recall it in a very general kind of way.

Q. Do you recall what the petitioner, who is Mr. Pettus in this case, was charged with?

A. As I recall it, he was charged with two counts: One was larceny and the other was armed robbery.

Q. Do you know which one he was convicted of?

A. He was tried and convicted on the account charging armed robbery.

Q. Do you recall whether you talked to Mr. Overstreet or not about this case prior to the time it was tried?

4/23/65 page 27] A. I recall Mr. Overstreet was appointed, I believe as counsel for the defendant, and that I discussed it with him on several occasions prior to the trial.

Q. And what was the charge that you all discussed at that time?

A. Armed robbery, nothing else.

Q. Do you recall whether any recommendation was made by you on behalf of the Commonwealth during the course of the trial as to the sentence that was to be imposed?

A. Well, I have seen the record, of course, and it would be difficult for me to say whether I remember it or whether I recall from the record. I do in a very general way recall that I recommended 8 years.

Q. That was on armed robbery?

A. That was on the armed robbery charge.

Q. Now, Mr. Dortch, it's in the record that the petitioner was convicted for the crime of assault and larceny. Do you have any recollection of what transpired as far as these

charged were concerned during the time the trial was going on?

Mr. Hodges: I don't know that that's material. I think the record here speaks for itself. If they are going into all of that, I think we are entitled certainly to go into the facts behind these indictments.

4/23/65 page 28]

Mr. Witt: There is the record. It speaks for itself.

The Court: I reckon we would be bound by the record. We do have the record that was taken at that time as to Mr. Harris' testimony and the discussion that was had. The record would have to be written up. If it's necessary, we can get that done.

Mr. Witt: I think for purposes of answering the allegations that have been made by the petitioner concerning the questions that it is necessary that we have before the Court for consideration in this case what transpired during the course of that trial. That is what we are talking about. Not as to the merits, but the actual events that occurred on the day the petitioner stood trial before this Court is what we are talking about.

The Court: Suppose we get one of the ladies to write that up and put that in the record.

Mr. Witt: Very well, sir. The question I asked had to do with what is going to appear from the transcription of that record. May I pursue that?

4/23/65 page 29]

The Court: It certainly couldn't do any harm as long as it appears from the record. Go ahead.

By Mr. Witt:

Q. I believe my question was directed, Mr. Dortch, to a discussion which was between you and the Court as to the disposition of the charges that were brought before the Court at that time. Do you recall such a discussion?

A. Yes, sir.

Q. Tell the Court, please, sir, what your recollection of the discussion was?

A. My recollection is he had been indicted on two counts, one, larceny and one armed robbery. In my discussion with counsel for the accused I agreed to *nolle prosequi* the larceny warrant and proceed on the armed robbery charge. Our discussion, or any discussion with counsel for the defendant was all premised on a charge of armed robbery. My recommendation was based on a charge of armed robbery. My discussions with the Court were based on a charge of armed robbery.

M. C. Dortch

Q. Did you discuss that matter before the actual trial date with the attorney for the defendant at that time
4/23/65 with reference to the charge of armed robbery?
page 30] A. I did; and made a recommendation on that basis and none other.

Q. Now, Mr. Dortch, do you know of your own knowledge the crime Mr. Pettus thought he was being charged with and tried for?

Mr. Hodges: I object. I don't think he can tell what the man was thinking.

Mr. Witt: Your Honor, if he doesn't know of his own knowledge, he can say he doesn't.

The Court: If he does know, he can answer, of course.

Mr. Witt: I am asking if he does know.

Witness:

A. I can't recall whether the defendant was present when I discussed the matter with counsel. I know he was present in the Courtroom during any remarks I directed to the Court. I do know that particular situation was discussed and the Court was advised in open Court in the presence of everybody that we were *proceedings* on the basis of armed robbery.

Q. Very well, sir.

Mr. Witt: I have no further questions.

4/23/65
page 31] CROSS EXAMINATION

By Mr. Hodges:

Q. Mr. Dortch, your intention as Commonwealth's Attorney was to draft an indictment against the petitioner, Daniel Pettus, for armed robbery, wasn't it?

A. That's correct. We don't have anything to do with the escape. We are not concerned with that.

Q. And in your indictment you charge the petitioner with assault upon a guard and larceny of a shotgun, do you recall that?

A. I only recall my purpose was to charge him with larceny.

Q. It's in the record?

A. I know. You have asked me and I said my purpose was to charge him with larceny in one count and armed robbery in the other.

Q. But in fact, you charged him with assault and larceny in one count of one indictment?

M. C. Dortch

A. I don't interpret it that way, but you are asking for interpretation. I told you what I intended to do.

Q. We think it's in the record and want to bring
4/23/65 it out later. Do you know what the term or what
page 32] the conviction was on this charge?

A. Now, I prepared the indictment and the man was tried on that indictment and as I have stated was tried on the premise that we charged him with armed robbery. As to the order, I did not examine it at the time and I have seen it this morning. I feel that the identification of the charge wasn't made by me, but probably made in the Clerk's Office and it's not a part of the indictment, it's my idea. The assault and larceny wasn't a part of the trial. On the back of each one of these indictments there is an identification of the type of charge that is contained within the indictment. My secretary prepares those and sometimes they identify them on the outside here and I notice she did put assault and larceny on the back of it. I feel the Clerk then put it up in the order. It has nothing to do with the realities of what happened. It was simply a typographical error.

Q. You know what you intended to do and it wasn't done?

A. I know what we did do.

Q. You did charge assault and larceny in one indictment?

4/23/65 A. I haven't interpreted the indictment. We tried
page 33] him on a charge of armed robbery.

Q. It's your impression he was convicted of armed robbery?

A. He was convicted of armed robbery.

Q. If that's so, the indictment and order of the Court should say armed robbery?

A. That's a matter for the Judge to decide. I know what we did in the courtroom. We tried and convicted him of armed robbery. You have the record. The interpretation of the record is for the Court. I am saying regardless of the record, we tried him for armed robbery in the Courtroom.

Q. Are you familiar with the law in Virginia that doesn't allow the charging of two felonies in one account.

The Court: That would have been a matter at the time he was arraigned on it.

Q. Mr. Dortch, in your prosecution under the indictment here, at any time did Mr. Overstreet request you to make an election upon which felony you would proceed?

M. C. Dortch

A. I can't recall that. I do recall before we had two possible charges, one was armed robbery and one was
4/23/65 larceny. I did agree to *nolle prosequi* and did
page 34] strike the larceny from the indictment and we proceeded on the theory of armed robbery and the defendant and everybody in the courtroom knew that.

Q. And the recommendation of the Commonwealth was 8 years on that indictment?

A. Yes, sir.

Q. You conveyed that idea to Mr. Overstreet?

A. Conveyed it to Mr. Overstreet.

Q. And he conveyed to the petitioner he would get 8 years on armed robbery?

A. I assume he did, but I conveyed it to the Court in the defendant's presence.

Q. Do you know of any crime in Virginia that is known as assault and larceny?

A. Well, there are two misdemeanors: One is assault and one is larceny. I don't know I have ever known of a combination of the two.

Q. Do you know of any single crime of felonious assault and grand larceny?

A. I don't know of anything you would identify in such a manner as that, Mr. Hodges.

4/23/65 Q. If the record indicates the petitioner is being
page 35] held on a felony of assault and larceny, would you say that's a valid holding on him?

A. ——

Mr. Witt: Objection, Your Honor.

The Court: I will sustain that objection.

By Mr. Hodges:

Q. You don't know of any crime of assault and larceny?

A. I know of the crimes as a distinct crime.

The Witness Stands Aside.

Mr. Witt: If My understanding is correct, you are going to transcribe the whole disk and have it typed into the evidence as part of the evidence which was taken today.

The Court: Yes.

Mr. Witt: Then the respondent has no further evidence.

transcript of the oral evidence and incidents of trial of the case of *Daniel Pettus* -vs- *C. C. Peyton, etc.,* was received on this the — day of May 21, 1965.

N. G. HUTCHESON
Clerk of the Circuit Court of
Mecklenburg County.

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A Copy—Teste:

H. G. TURNER, Clerk

INDEX TO RECORD

	page
Writ of Error Awarded	1
Record	2
Petition for Writ of *Habeas Corpus*	2
Notice of Appeal and Assignments of Error	2
Exhibit I attached to Answer of Respondent	4
Exhibit II attached to Answer of Respondent	4
Judgment — May 6, 1965	6
Proceedings	7, 9, 16, 27
Witnesses:	
W. F. Harris	7
Daniel Pettus	10
Jessie R. Overstreet	17
M. C. Dortch	22
Certificates	29