

Record No. 6870

In the
Supreme Court of Appeals of Virginia
at Richmond

WILLIAM HENRY ANDERSON

v.

C. C. PEYTON, SUPT., ETC.

FROM THE CIRCUIT COURT OF HANOVER COUNTY

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6870

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 12th day of January, 1968.

WILLIAM HENRY ANDERSON, Plaintiff in error,

against

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

From the Circuit Court of Hanover County
Ernest P. Gates, Judge Designate

Upon the petition of William Henry Anderson a writ of error is awarded him to a judgment rendered by the Circuit Court of Hanover County on the 5th day of May, 1967, 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 1 }

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PETITION FOR WRIT OF *HABEAS CORPUS*
AD SUBJICIENDUM

TO THE HONORABLE EDWARD P. SIMPKINS, JR.,
JUDGE OF THE AFORESAID COURT:

Your petitioner, William Henry Anderson, exhibits this his petition, verified by affidavit against C. C. Peyton, and respectfully represents as follows:

1. On February 13, 1966 a warrant was issued in Hanover County, Virginia for the arrest of your petitioner charging him with breaking and entering on February 7 or 8, 1966 the store of J. R. Mills located in Hanover County, Virginia.

2. Subsequent to the issuance of the aforesaid warrant the petitioner was arrested and did appear March 17, 1966 in the Hanover County Court and made request for Court Appointed counsel which was granted and James C. Kent, Esquire, a member of the Hanover County Bar was appointed to represent the petitioner.

3. On March 31, 1966 the matter was heard in the Hanover County Court and the Judge of that Court entered an Order of probable cause and certified same to the Grand Jury which returned a true bill and the indictment charging petitioner with statutory burglary was filed May 16, 1966 in this Court and on the same date James C. Kent, Esquire was designated and he did accept the appointment as court appointed counsel for petitioner.

page 2 } 4. On June 1, 1966, petitioner was represented by his court appointed counsel, James C. Kent, and the jury found petitioner guilty of Statutory Burglary as charged in the indictment and fixed his punishment at five years confinement in the penitentiary and the final Order of Conviction was entered the same day by this Honorable Court in Common Law Order Book 30 at page 197.

5. On July 13, 1966 this Court at the request of your petitioner entered an Order relieving James C. Kent as petitioner's court appointed counsel and substituted Robert P. Beaver in his stead for purposes of an appeal.

6. Notice of Appeal and Assignments of Error were filed July 29, 1966 and on November 30, 1966 the Supreme Court of Appeals of Virginia entered an Order refusing to grant petitioner a writ of error and *supersedeas*, the effect of which was to affirm the judgment of conviction entered by this Court on June 1, 1966.

7. That since his trial your petitioner has been confined in the Hanover County Jail awaiting transfer to the permanent custody of the respondent and that he is now illegally detained by the respondent pursuant to the final judgment Order of this Court entered June 1, 1966.

8. Your petitioner alleges that this is the only time that he has attacked by *habeas corpus* proceeding the conviction of June 1, 1966 as set forth herein.

9. Your petitioner alleges that he was denied his constitutional right of due process of law in that he was denied a fair and impartial trial in this Court on June 1, 1966 and was convicted because of his ineffective and incompetent court appointed counsel and that the final judgment order of conviction ought to be set aside as void or voidable.

10. Your petitioner further alleges that his court appointed counsel at his trial on June 1, 1966 in this Court committed numerous errors of commission and omission to wit: failed in his *prefunctorary* duty in the selection of the jury; failed to refraining from cross examination of the investigating State Trooper who failed on direct examination to prove petitioner was identified in any manner with the crime alleged; failed to make proper procedural motions, solicited the introduction of hearsay evidence which was prejudicial to the
page 3 } petitioner; failed to object to inadmissible evidence; failed to object to leading questions by the Commonwealth attorney with the latter being argumentative with the Commonwealth's witness; failed to require the Commonwealth to lay the proper foundation by questioning of a witness for the Commonwealth who allegedly was adverse prior to attempting to impeach the witness for the Commonwealth; failed to object to remarks made by the Commonwealth attorney in his closing argument on matters which were not in the evidence; and failed to offer any instructions on behalf of the petitioner for the court and jury to consider. Your petitioner further alleges that the foregoing delinquencies of his court appointed counsel were not a risk and he voluntarily assumed and that the representation he received on June 1, 1966 in this Court was so transparently inadequate as to make his trial a farce and a mockery of justice.

WHEREFORE, petitioner prays that this Petition be filed by leave of Court; that he be granted permission to proceed

in forma pauperis; that this Court appoint an attorney to represent him; that this Court order that the respondent appear before the Bar of this Court within a reasonable time hereafter to show cause why a writ should not issue from this Court setting aside the petitioner's conviction of June 1, 1966 in this Court and why he ought not to be discharged from the respondent's custody and either granted a new trial or released from confinement.

WILLIAM HENRY ANDERSON
Petitioner

Filed Dec. 9, 1966.

Teste:

LYNDIA L. FULTON, Deputy Clerk

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page 5 }

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ORDER

The Court having received from the Petitioner a Petition for a Writ of *Habeas Corpus*, the Court doth ORDER the same filed, and the Petitioner is permitted to proceed *in forma pauperis*.

The Court doth hereby appoint Robert P. Beaver to represent the Petitioner in this matter.

And it appearing proper, the Court doth ORDER that the Respondent file an answer to said Petition on or before January 13, 1967 and show cause, if any he can, why a Writ of *Habeas Corpus* should not issue.

It is further ORDERED that a copy of this Order be forwarded to the Respondent and a copy forwarded to the Attorney General of Virginia.

EDWARD P. SIMPKINS, JR., Judge

December 13, 1966.

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page 8 }

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ANSWER

Now comes the respondent, by counsel, and files his answer to the petition for a writ of *habeas corpus* and says as follows:

1. On February 10, 1966, a warrant was issued, charging the petitioner with statutory burglary. (See exhibit I)

2. At the May, 1966 term of the grand jury of this Court an indictment was returned charging the petitioner with statutory burglary. (See exhibit II)

3. On May 16, 1966, an order was entered by this Court, appointing J. C. Kent, an able and competent attorney, to represent the petitioner. (See exhibit III)

4. On June 1, 1966, petitioner represented by his attorney who had been previously appointed by the Court, entered a plea of not guilty, was tried by a jury, found guilty as charged in the indictment and sentenced to serve a term of five (5) years in the Virginia State Penitentiary. (See exhibit IV)

5. Respondent is now detaining petitioner pursuant to the aforesaid judgment of this Court.

6. Respondent denies each allegation set forth in the petition for a writ of *habeas corpus* which is not expressly admitted, and says the petitioner was not denied any of his constitutional rights in connection with his trial in this Court.

page 9 } Wherefore, respondent prays that the petition for a writ of *habeas corpus* be denied and dismissed.

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

By: CURTIS R. MANN
Counsel

Filed Feb. 14.

Teste:

* * *, Deputy Clerk

* * * * *

June 1, 1966

Commonwealth of Virginia

vs. Upon an Indictment for a Felony, to-wit: Breaking and Entering

William Henry Anderson

This day came the Attorney for the Commonwealth and William Henry Anderson who stands indicted of a felony, to-wit: Breaking and Entering, as charged in the indictment, was led to the bar in the custody of the Sheriff of this County and also came James C. Kent, Counsel for the defendant.

Whereupon the accused was arraigned and after private consultation with James C. Kent, his counsel, pleaded not guilty to the indictment, which plea was tendered by the accused in person, and the Sheriff of this County having returned the writ of *venire facias* issued by order of this court entered on the 5th day of May, 1966, together with the names of twenty persons summoned by him in pursuance thereof and taken from the list of twenty four names attached to said writ and drawn by the Clerk of this Court in the presence of the Judge of this Court from the box and in the manner provided for by law and of the veniremen so summoned and attending a panel of twenty qualified jurors, free from exception for the trial of the said defendant, was made up and completed.

And the Attorney for the Commonwealth and the Attorney for the Defendant having alternately, beginning with the Attorney for the Commonwealth, each stricken from the said panel the names of four of the said veniremen, the remaining twelve, to-wit: Stuart C. Thomas, James Baker, Luther Holmes, William R. Shelton, Jr., Floyd T. Ball, A. L. Joyner, L. D. Campbell, Sr., Thomas Mallory, Walter Howard, Harry L. Corker, Leslie A. Bell, Jr., J. Ellis Hughes, constituted the jury for the trial of the defendant, who were sworn the truth of and upon the premises to speak and having heard the evidence of the Commonwealth and the defendant, the instructions of the Court and argument of counsel, were sent to their room to consult upon their verdict and after sometime returned into Court and presented their verdict in the following words to-wit: "We the jury, find the accused guilty of *Statutory* Burglary as charged in the indictment and fix his punishment at five (5) years confinement in the penitentiary. Signed S. C. Thomas, Foreman.

And the jury being discharged, Counsel for the accused moved the Court to set aside the verdict as being contrary

to the law and evidence, which motion was overruled by the Court, to which action objection and exception was noted by the attorney for the defendant.

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 William Henry Anderson be and he is hereby sentenced to confinement in the penitentiary of this Commonwealth for the term of five years, the period by the Jury ascertained as aforesaid, and that the Commonwealth of Virginia do recover against the said William Henry Anderson its costs by it about its prosecution in this behalf expended.

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

The Court orders that the prisoner be allowed credit for the time spent in jail awaiting trial. The Court certifies that at all times during the trial of this case the accused was personally present.

And the prisoner is remanded to jail.

A Copy Teste:

F. A. TAYLOR, Clerk

By RICHARD L. MILTON, D.C.

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page 32 }

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FINAL ORDER

This proceeding came on to be heard on April 26, 1967, upon the petition of William Henry Anderson for a writ of *habeas corpus* and the answer of the respondent, the petitioner appearing in person and by Robert P. Beaver, an attorney previously appointed by this court to represent him, and the respondent being represented by Curtis R. Mann, Assistant Attorney General.

Whereupon, the court heard the evidence and argument of counsel for petitioner and respondent, and for the reasons

stated from the bench at the conclusion of the hearing, the court is of the opinion that the writ should not issue as prayed.

It is, therefore, adjudged and ordered that the writ of *habeas corpus* be 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, excepts, and notes an appeal.

It is further ordered that the Clerk of this court forward a certified copy of this order to the petitioner, his attorney, the respondent, and the Attorney General of Virginia.

Entered this 5 day of May, 1967.

ERNEST P. GATES, Judge Designate

page 33 }

* * * * *

CURTIS R. MANN
Counsel for Respondent

Seen and objected to:
ROBERT P. BEAVER
Counsel for Petitioner

* * * * *

page 38 }

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NOTICE OF APPEAL

TO: F. A. Taylor, Clerk
Circuit Court for the County of Hanover
Hanover Courthouse, Virginia

The Petitioner, William Henry Anderson, by his Court appointed counsel, hereby gives notice pursuant to the provisions of Section 4, Rule 5:1 of the Rules of the Supreme

Court of Appeals of Virginia of his appeal of the final Order of judgment entered May 5, 1967, in the above styled case.

WILLIAM HENRY ANDERSON

By ROBERT P. BEAVER
Court appointed counsel

* * * * *

Teste:

Filed Jun. 2, 1967.

F. A. TAYLOR, Clerk

By VIRGINIA W. JOHNSON, Dep. Clerk

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page 39 }

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ASSIGNMENT OF ERROR

It is respectfully submitted that the Petitioner, William Henry Anderson, will rely upon the following assignment of error in his appeal from the final order of judgment entered May 5, 1967, in the above captioned case:

1. The Court erred in denying the Petitioner a writ of *habeas corpus* on the ground that his conviction was solely due to ineffective and incompetent court appointed counsel.

WILLIAM HENRY ANDERSON

By ROBERT P. BEAVER
Court appointed counsel

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page 44-A } VIRGINIA :

IN THE SUPREME COURT OF APPEALS

* * * * *

AFFIDAVIT OF POVERTY

APPLICATION TO PROCEED *IN FORMA PAUPERIS*
AND TO PRINT RECORD AND BRIEF AT THE
COST OF THE COMMONWEALTH OF
VIRGINIA

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

I, the undersigned, Notary Public in and for the County of Augusta, State of Virginia, do certify that William Henry Anderson personally appeared before me this day and after being duly sworn according to law on oath deposes and says:

1. That he is the plaintiff in error in the case of William Henry Anderson, v. C. C. Peyton, Record No. 6870, now pending in the Supreme Court of Appeals of Virginia.

2. That he is a pauper without sufficient funds to pay for the aid and assistance of counsel to prosecute his case for him nor is he able to secure funds to pay counsel or the cost of printing the record and his brief in the aforementioned Court.

3. That in the trial Court he was permitted to proceed *in forma pauperis* both in his trial for which he was charged and convicted of statutory burglary and at his subsequent *habeas corpus* hearing.

WILLIAM HENRY ANDERSON

Sworn and subscribed to before me this 29
page 44-B } day of January, 1968.

My Commission expires: July 11, 1970.

J. P. JORDAN, Notary Public

* * * * *

William Henry Anderson

page 44-C } VIRGINIA:

IN THE SUPREME COURT OF APPEALS

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CERTIFICATE OF TRIAL JUDGE

This is to certify that I have investigated the abilities of William Henry Anderson to pay the costs of printing the record and his brief in this case and am of the opinion that the plaintiff in error is unable to pay, or secure to be paid, such costs of printing the record and his brief.

ERNEST P. GATES, Judge Designate

Reed 2-8-68.

H. G. T.

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page 1 }

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By The Court: You will call your first witness Mr. Beaver.

WILLIAM HENRY ANDERSON is called as the first witness and duly sworn.

Q. Mr. Anderson, for the purposes for the record will you give your full name sir.

4/26/67 A. William Henry Anderson.

page 2 } Q. At the present time are you confined in the penitentiary as a result of the conviction of June 1, 1966 for statutory burglary from this Court.

A. Yes sir, I am.

Q. On June 1 of 1966 did you have Counsel of your own choosing or did you have Court appointed Counsel.

A. Court Appointed Counsel.

Q. And who was that.

A. Mr. James Kent

Q. Prior to that trial did that same Counsel represent you in the County Court at the Preliminary Hearing.

A. Yes sir.

William Henry Anderson

Q. Can you recall from the time he was appointed in the County Court until you were tried in this Court on the 1st of June in 1966, how many times he conversed with you.

A. One time.

Q. And where was that.

A. Over in the City Jail in a little room on the back side.

Q. Now when you refer to the City Jail you are indicating—

A. Hanover County Jail.

Q. Can you recall approximately how long it was 4/26/67 that he did talk to you.

page 3 } A. Approximately fifteen or twenty minutes.

Q. Do you know of your own knowledge whether or not he talked to anyone else in reference to any witnesses for your trial.

A. I believe this boy Woody that was in this case, he was in the next cell, and he asked me if any of the boys were there that were supposed to identify me in this case. I told him that one of the fellows was in the next cell. He went over and asked the boy "did this fellow have anything to do with the crime" and he said "no sir, he didn't, I don't even know the fellow."

Q. Do you recall being present during all the stages of the trial on the 1st of June.

A. Yes sir.

Q. Can you tell the Court briefly in your own words what are some of the reasons why you are complaining in reference to the representation that Mr. Kent gave to you on that day.

A. I didn't feel that he represented me properly because he didn't question none of the jurors as to why they should be stricken, I thought about that afterwards. Everything the Prosecutor said, he didn't object to anything in the whole case. That was unusual. Not a question did he object to in

the whole case. I wrote Judge Simpkins a letter 4/26/67 and asked him to appoint me another Counsel.

page 4 } Q. When did you write that letter to Judge Simpkins. Was it before or after your conviction.

A. After my conviction. I wrote to Mr. Kent and asked him to come to see me. He come to see me one time after the case, and I wrote to him again and I never could get no reply from him, so I wrote to Judge Simpkins and asked him to appoint me another Counsel as I didn't seem to get no head way out of Mr. Kent at all.

Q. Then subsequent to that I was appointed as your Counsel.

William Henry Anderson

A. Yes sir.

Q. And you appealed your case to the Supreme Court of Appeals of Virginia.

A. Yes sir.

Q. What was the result of that appeal.

A. They upheld the lower Court decision.

Q. Have you at any time filed any other *Habeas Corpus* proceedings attacking your conviction of June 1, 1966.

A. No sir.

Q. This is the first one.

A. Yes sir.

Q. Do you recall Mr. Mills testifying at your trial.

A. I recall him testifying, yes sir.

Q. Who was Mr. Mills.

A. He was the fellow that was supposed to own the store, as far as I know.

4/26/67 Q. To the best of your knowledge from your page 5 } recollection of the evidence at the trial, did Mr. Mills, in his testimony in any way shape or form, connect you with the alleged crime.

A. No Sir, he did not.

Mr. Mann: Your Honor, I think we are getting into the sufficiency of the evidence that took place in the original trial. This is a *Habeas Corpus* hearing and he can not go into the sufficiency of the evidence. This man was tried by a jury.

By The Court: I also understand that a Petition was filed for a Writ of Error with the Supreme Court of Appeals and that was denied.

Mr. Mann: Correct.

Mr. Beaver: The purpose of this testimony is I expect to introduce the whole transcript, if the Court wants me to go into detail with reference to it, I will, if not then I would ask that the original transcript be introduced as Exhibit #1 on behalf of the Petitioner.

By The Court: Do you have any objection to that Mr. Mann.

Mr. Mann: I have no objection to that.

By The Court: The Court will admit this as Exhibit #1 on behalf of the Petitioner. The transcript of the original trial in the Circuit Court of Hanover on June 1, 1966.

Mr. Beaver: While this particular case has been pending have you and I discussed that transcript in detail.

William Henry Anderson

4/26/67 A. No sir.

page 6 } Q. Your answer is No.

A. You came over there and discussed one with me and I imagine that was the one.

Q. Do you recall me reviewing with you the various testimony of the people who testified at your trial.

A. Yes Sir, I do.

Q. Do you recall me asking the question as to whether or not you were present at the time that the Commonwealth Attorney and your Counsel discussed any instructions for the Court to give to the Jury.

A. Yes sir.

Q. Do you know of your own knowledge whether any instructions in your behalf were given to the Jury.

A. No sir, I don't.

Mr. Beaver: Now will you answer Mr. Mann's questions.

CROSS EXAMINATION

By Mr. Mann:

Q. Mr. Anderson, have you ever been convicted of a felony before.

A. Yes sir.

Q. Did you prepare your own Petition or did Mr. Beaver prepare it.

A. Mr. Beaver prepared it.

Q. You signed it, and you *sworn* as to everything in it being correct, is that right.

A. Yes sir.

4/26/67 Q. Do you know of your own knowledge, whether
page 7 } any instructions were prepared.

A. No sir, to my knowledge, I don't know.

Q. Did you have any witnesses.

A. No sir.

Q. So you had no names of any witnesses that you could give your Attorney to appear in Court to testify in your behalf.

A. No sir, I didn't have no witnesses.

Q. What else did Mr. Kent not do, that you thought he should have done besides make some objections.

A. Mr. Beaver he has all that down.

Q. Mr. Beaver can't answer for you.

A. I don't know much about the law, but to the best of my knowledge there were two fellows on the Jury that should have been stricken. If he had been representing me properly

James C. Kent

he would have found out about those men and stricken them from the Jury. He didn't argue my case at all. Everything that the prosecutor said he just went along with it.

Q. You mean to tell me that Mr. Kent did not argue your case to the Jury.

A. He just got up there and said "I think you should find this man not guilty", but everything that the prosecutor said he didn't object to any of it, and it is very unusual in a felony case that the Attorney don't object to some things that the prosecutor say against the man.

Q. Did he cross examine the Commonwealth's 4/26/67 witnesses.

page 8 } A. He just asked them if I was the fellow that went with them on the crime.

Q. And that is all he asked.

A. To the best of my knowledge.

Q. Did Trooper Mitchell testify at your trial.

A. Yes sir.

Q. Do you realize that you are under oath.

A. Yes I do.

Q. And you are going to set there and tell me that your Attorney did not vigorously cross-examine Mr. Mitchell.

A. Yes sir, he questioned Mr. Mitchell, but I am speaking of the three guys that was the Prosecutor's witnesses. He did cross-examine Trooper Mitchell.

Q. Oh, he did.

A. Yes sir. But the three boys that testified in the case the only thing that he asked them was did I carry them up there to commit the crime. Two of the boys testified they didn't know me, and the other boy testified that I didn't have nothing to do with the crime and didn't know anything about it.

Q. Were you present in the Court when they were tried.

A. No sir I was not.

Q. Do you know what they testified to with regard to you when they were tried.

4/26/67 A. No sir, I do not.

page 9 } No further questions.

JAMES C. KENT is called as witness for the Petitioner, and duly sworn.

Q. Mr. Kent, will you give your full name, sir.

A. James C. Kent.

Q. What is your occupation.

A. I am an Attorney at Law.

James C. Kent

Q. How old are you, Mr. Kent.

A. 47.

Q. Where is your office.

A. In Ashland, Virginia.

Q. Primarily you are engaged in the practice of law in Hanover County and surrounding counties and the City of Richmond.

A. That is correct.

Q. How long have you been practicing law, Mr. Kent.

A. Since 1951, I believe I started.

Q. Is that the year that you were admitted to practice in this state.

A. I was admitted in 1950.

Q. During that time has your practice been a general practice, or has it been a specialty in a particular field.

A. It has been general.

Q. Do you recall acting as Counsel for William Henry Anderson.

4/26/67 A. Yes I do.

page 10 } Q. Did you act as his Counsel in both the County Court and the Circuit Court of Hanover County, in reference to his charge of statutory burglary.

A. Yes I did.

Q. When was it that you were first appointed as Counsel for him in the County Court.

A. I received a telephone call on March 17, 1966 from Mrs. Hart in the Clerk's *Ofrice* indicating that the Judge intended or wanted me to serve as Counsel. I wrote the defendant on that same day confirming it.

Q. Was it then on March 31, 1966 that the matter was heard at the County Court on the Preliminary Hearing.

A. That is correct.

Q. All right, from March 17 until March 31 did you at any time talk to the accused.

A. Yes sir, I did. I talked to him on March 30. I interviewed him at the jail.

Q. Then, the result of the Preliminary Hearing was that it was certified for probable cause. Was it not.

A. That is correct.

Q. You were then appointed by Judge Simpkins to represent him in the Circuit Court.

A. That is correct.

4/26/67 Q. Can you recall the date of your appointment for that.

James C. Kent

page 11 } A. I think it was the same date of the trial. I
don't think my notes show the actual date.

Mr. Beaver: Let the record show that Counsel was willing to stipulate that it was May 16, 1966 that you were appointed.

Q. Now, from the time of the Preliminary Hearing until June 1 of 1966 when this matter was tried did you again confer with Mr. Anderson.

A. I did.

Q. How many times.

A. I am not sure. I think I was at the jail twice. I know that I was there once.

Q. On each of these occasions how long were your conferences with Mr. Anderson.

A. I did not time either of them.

Q. During your conversations with him, did you ascertain the names of any witnesses for his behalf.

A. Yes sir, I did.

Q. Who were they.

A. Hammond William Wood, Travis Ray Chisholm, and one more, two brothers. I think he was uncertain as to the name at the time. I got it later on.'

Q. Were these three likewise being charged in Hanover County for an indictment involving Mills' Store.

A. That is correct, to the best of my knowledge they were.

4/26/67 } Q. Do you recall whether or not the two Chis-
page 12 } holm boys and the Wood boy were tried in the
County Court at the same time that Anderson was
at his Preliminary Hearing.

A. I don't recall them being tried, I certainly don't recall them being present.

Q. Did you attend any of their hearings.

A. I did not.

Q. Did you attend the hearing of Travis Ray Chisholm in this Court.

A. No sir, I did not.

Q. Did you attend the trial of Hammond Wood in this Court.

A. No sir.

Q. Did you talk to Trooper L. B. Mitchell of the Virginia State Police with reference to this incident.

A. Yes sir, on several occasions.

James C. Kent

Q. Did you ascertain from him as to whether there were any additional witnesses, in behalf of Anderson.

A. I got no additional information, as I remember, from him, possibly the first name of the Wood boy, but there were three that were given me by the defendant and I did not ascertain any others.

Q. Can you tell the Court how much time was expended by you in the preparation of this trial.

A. If you will give me just a minute I will re-
4/26/67 view what I have here. You mean just the trial in
page 13 } the Circuit Court.

Q. Yes sir, or in the County Court too.

A. Exclusive of Court attendances from my notes I would estimate, and that is the best I can do, about five to six hours.

Q. Those five to six hours were expended in doing what.

A. Interviewing Trooper Mitchell, interviewing the defendant, talking to two of the boys, witnesses, and many phone calls.

Q. And those phone calls were to whom.

A. Actually receiving many phone calls. I received many from the defendant during the week immediately following his trial in this Court.

Q. Can you recall what those phone calls pertained to.

A. Come to see him. I got to see him as quickly as I could. I think there was three or four days delay in there, possibly a week.

Q. Have you from time to time run for political office in Hanover County.

A. On one occasion I actually made a run, I suppose you would call it.

Q. Who was your opposition.

A. Leslie D. Campbell.

Mr. Mann: Your Honor, I don't see the relevancy—

Mr. Beaver: The relevance is to the persons who served on the Jury.

4/26/67 By The Court: I will let it in. I overrule your
page 14 } objection.

Mr. Mann: I note my exception.

Q. Who was your *ossposition*, Mr. Kent.

A. Leslie D. Campbell, Jr.

Q. Are you personally acquainted, or are you aware of Leslie D. Campbell, Jr's. father.

James C. Kent

A. Yes sir.

Q. Do you know him personally.

A. Yes sir.

Q. Did you know him personally on June 1, 1966.

A. Yes sir.

Q. Are you aware that he was one of the members of the Jury in Mr. Anderson's case.

A. Yes sir.

Q. You were likewise aware that Andrew J. Ellis, Jr. was Commonwealth Attorney.

A. That is correct.

Q. You were likewise aware that Senator Campbell and Mr. Ellis are Law Partners.

A. That is correct.

Q. Can you give the Court any reason as to why you did not interrogate Mr. Campbell, Sr. as to whether he could render a fair and impartial trial or not, since he was related to Mr. Campbell, Jr., who is a partner of Mr. Ellis.

A. I saw no reason for so interrogating him. I am pretty well acquainted with him, I knew him well enough 4/26/67 to feel at this point that this had no bearing. I page 15 } couldn't conceive that there was any bearing between the Commonwealth's Attorney and his partner for the purposes of other practice, because after all that is different entirely.

Q. Did you think it appeared unusual in any sense that Mr. Campbell, Sr. was going to be a member of this particular jury.

A. No.

Q. Did you know Floyd T. Ball.

A. No sir, I am not acquainted with him.

Q. Did you question any of the jurors with reference to whether or not they were the owners of a store similar to the Mills store.

A. No sir, I did not.

Q. Were you aware at the trial of this matter that Mr. Ball's father owned a store similar to the Mills store that had been robbed in a similar incident.

A. No sir I was not.

Q. Did you question the jurors in any manner, shape or form, in reference to anything as to why they could not give the defendant a fair trial.

A. I did not.

Q. Do you recall who you struck from the jury.

A. No sir, I do not recall from memory.

James C. Kent

Q. I hand you the list of the jury panel for June 1, 1966 and ask you if you can recall who you struck from 4/26/67 the jury and whether or not you did it for any page 16 } reason, or just for the fact to reduce the jury to the correct number.

A. There were reasons, I am certain, for the striking of the ones that I did. As to which ones they were or the reasons at this time I do not know.

Q. Mr. Kent, I am looking at a certified transcript of the trial and I see that on this list Stuart C. Thomas, James Baker, Luther Holmes, William R. Shelton, Jr. Floyd T. Ball, A. L. Joyner, L. D. Campbell, Sr., Thomas Mallory, Walter Howard, Harry L. Corker, Leslie A. Bell, Jr. and J. Ellis Hughes; now, can you pick out who you struck.

A. No sir, I can not.

Q. Well, do you recall striking Curtis Pilson.

A. No sir.

Q. Do you recall striking T. L. Bourne, Jr.

A. No sir.

Q. Do you recall striking Garland F. Dunn.

A. No sir.

Q. You are telling the Court then, to the best of your recollection, you don't recall striking anyone, but you believe there was cause for striking them.

A. I remember striking, but I don't remember which ones I struck. I am sure that I had reasons for it.

Q. At my request, after you were notified of this proceeding, have you read the transcript of the 4/26/67 trial.

page 17 } A. Yes I have.

Q. Do you recall from the reading of that the details of the trial.

A. Fairly well, I think.

Q. Is it not true that the first witness who testified, Mr. Mills, in no way shape or form connected the defendant, William Henry Anderson, with the commission of the crime.

A. That is correct, it was my opinion that he did not.

Q. And is it not likewise true that on the direct examination by the second Commonwealth's witness, Trooper L. B. Mitchell, that in no way shape or form did he in any manner connect the defendant, William Henry Anderson, with the commission of the crime.

A. That is correct. I did not feel that he did.

Q. Will you tell the Court why you asked any questions on cross-examination knowing this to be a fact. Knowing

James C. Kent

that the State Trooper in no way had connected the defendant with the commission of a crime. Why did you ask any questions on cross-examination.

A. I would like to have the benefit, I think I can answer that, but I think I would have to be reminded of what questions he asked and what questions I asked. I can
4/26/67 tell you why then. (Mr. Kent looks at transcript)
page 18 } Q. Mr. Kent I direct you to Page 9 of the original transcript, starting with Trooper L. B. Mitchell's testimony.

A. The general reason now, from the viewing, I wanted to make sure that his constitutional rights *hadn't* been breached and also wanted to find out, or I wanted to illustrate, because I knew most of this was on information that the Trooper acted, which his answers so indicated.

Q. Looking at Page 9 of the Trooper's testimony, is it not true that merely is a description of the Trooper's saying that he investigated the accident involving Mr. Mills' store, and what the condition of the building was during his investigation.

A. You mean just on page 9.

Q. Yes sir.

A. Just on Page 9 I don't think he did get beyond that.

Q. On Page 10 was not his testimony solely limited to what Mr. Mills reported the value for the stolen goods, and that he visited the home of Travis Ray Chisholm in the City of Richmond along with other police officers, and searched the Chisholm home. Now, is that not all of the testimony.

A. Basically, I think that is all it reduces to.

Q. Is there anything pertaining to Mr. Anderson on Page 9 or 10.

4/26/67 page 19 } A. I see no reference to Mr. Anderson.

Mr. Mann: If Your Honor please, again I want to note an exception to this line of questioning. The Transcript has been admitted as a part of this hearing, and it seems to me that Counsel is just trying to get into all the evidence, the sufficiency of the evidence that took place in the Jury Trial here in this Court. This is not a trial. This is a *Habeas Corpus* hearing. In *Hobson vs. Ewell*, 177 Va. 906 says that you can not go into the sufficiency of the evidence that took place at the original trial. This case has been appealed and it was denied.

Mr. Beaver: Your Honor, I am not going into the sufficiency of the evidence except for purposes of questioning

James C. Kent

the Defense Counsel as to his knowledge of that evidence and then attacking his ability, his effectiveness, knowing that there was no evidence in the direct examination by the Commonwealth Attorney of the State Trooper as to why this Counsel asked the very first question or any questions on cross-examination. This is one point that is alleged in the Petition that ought not to have been done by this Counsel.

By The Court: In a *Habeas Corpus* Proceeding is trial strategy and the burden of cross-examination subject to judicial review.

4/26/67 Mr. Beaver: My position is that it is.

page 20 } And the main thing that I am trying to ascertain from Mr. Kent is why he asked any questions. In the direct examination there is not the first inkling of Mr. Anderson in the commission of this crime. I am trying to find out, because I have the burden in this proceeding to show the ineffectiveness of Counsel.

By The Court: I believe you have the right to examine him as to why he did cross examine him. I overrule the objection.

Mr. Mann: Note my exception.

Mr. Beaver: I don't recall Mr. Kent, have you answered the question, in reference to whether Page 9 or 10 has anything in the transcript attaching Mr. Anderson with the crime as testified by the Trooper.

A. Nothing that I can see. But there is information in there that could have effected the Jury.

Q. In what way affecting Mr. Anderson.

A. In terms of referring to the Police Department, City of Richmond, worked with them getting information, something of that nature. I felt that might bear some reviewing to illustrate that it did not connect Anderson with it.

Q. On Page 11 is there anything in reference to the Police investigation or anything that the Officer testified to connecting Mr. Anderson with the commission of the

4/26/67 crime which he was charged.

page 21 } A. Nothing. In fact I don't think you will find anything.

Q. That being true, previously you said that you were concerned with his constitutional rights, how would that in any way effect the defendant that you were representing when none of the testimony to that point in the trial has connected Anderson with the commission of a crime.

A. The charge had been read, as to whether the Trooper had actually testified to the issuance of the warrant, I don't

James C. Kent

recall, but I think he did, and the investigation and issuance of the warrant would have bearing on it.

Q. Why were you concerned with the issuance of the warrant against Anderson when there wasn't any evidence to this point in the trial.

A. I was mightily concerned. I was trying to defend him.

Q. Why were you concerned with how or why the warrant was issued when there was nothing in the evidence to this point to effect Anderson.

A. That is the reason he was there.

Q. Did you realize that after you asked the question, on Page 12 of the transcript "what was your basis for issuing those warrants" that you then permitted the Trooper to introduce all kinds and types of hearsay evidence.

4/26/67 }
page 22 } A. Yes I did. I realize that this showed on its faith. It was on information and not on actual facts.

Q. And was it not as the result of your questioning from that point on that evidence was introduced by the Trooper which was sufficient to convict Mr. Anderson.

A. May I read on to review my memory.

Q. Yes sir.

A. I realize that he did make statements that were hearsay, that was the purpose really to illustrate that was what he based all of his evidence on, and the cross-examination as to the uncertainty of identification and his answer was pretty long as I remember on that, showed that he had worked with some picture that he didn't have at the trial, for identification purposes, which I felt were beneficial to us.

Q. How, in your opinion, was it beneficial to Mr. Anderson when the Officer testified that on hearsay evidence this man participated in the commission of the crime.

A. You mean as to his identification.

Q. Yes, or in any way, you said you thought this cross-examination was beneficial to Mr. Anderson.

A. It was beneficial in that it indicated that there was no identification. His testimony did not constitute
4/26/67 }
page 23 } that. He testified that he did not have the picture, and that

Q. Well, on Page 12 and on top of Page 13 after you asked the most damaging question, "what was your basis for issuing those warrants", the answer was "I discussed this with James Randolph Chisholm and Hammond William Wood and Travis Ray Chisholm, each one identified a picture of

James C. Kent

William Henry Anderson. Travis Ray Chisholm pointed out to me when he was arrested that a green 1957 Chevrolet pickup Truck bearing Virginia License No. T9-744 which is registered in the name of Leo Jessup, 3724 Rayburn Road, Richmond, was the vehicle which was used and identified Anderson as the Driver". Now, how was that beneficial to Mr. Anderson.

A. I wouldn't say that statement was.

Q. Well, at any time from that point on, did you object to any of the evidence that was introduced from the testimony of Trooper Mitchell.

A. No sir, as I remember I did not.

Q. Was not the majority of it hearsay evidence, and not responsive to your question.

A. It was hearsay.

Q. And you didn't object to any of it.

A. No, because I knew it was confusing and I felt the best basis of defense was based on the identification 4/26/67 and the confusing things that arose both as to page 24 } his statements and to the other.

Q. Is there any better defense to an alleged crime than if there isn't any evidence at all, against the defendant.

A. I felt there was in this particular case.

Q. Point out to me Mr. Kent where it was in those first few pages of the Trooper's testimony.

A. Based on the trial and from what I could gather, the attitude of the Jury, and the people present, I thought that it was beneficial in that it would develop the fact that there was vagueness and confusion in the testimony, and identification.

Q. At this point there wasn't any vagueness in the Officer's testimony and Mr. Mills' testimony was it.

A. You mean prior to my cross.

Q. Yes sir.

A. No, they pretty clearly indicated that I think if we stood on that ground that the jury would have convicted him if we hadn't done something. Though I didn't feel as a technical matter that they had identified him with anything.

Q. Didn't you just testify previously that there was nothing in Mr. Mills' testimony or the Trooper's testimony on direct examination that there was anything to convict this man.

A. That was my feeling. I didn't even feel that 4/26/67 it happened after their testimony.

page 25 } Q. So again I ask the question, why did you

James C. Kent

ask the first question or any question on cross-examination.

A. It was not what I thought but what the jury would have to decide.

Q. What did the jury have to determine or consider if there was not the first word of this man's name mentioned in the commission of the crime.

A. There was reference, I believe, I am not certain on that. At the time I know I felt that more would have to be illicited in the way of statements or they would properly have convicted him on that statement. That was my feeling based on the attitude of the jury, the way things were going and the way the Officer testified. That was a matter of opinion.

Q. Now, you referred that you were particularly interested in protecting the rights of Mr. Anderson in reference to his constitutional rights as to the Police Officer to what he did. Now, is there anything in your questioning to the Trooper pertaining to his constitutional rights. Did you ask that question.

A. I am pretty sure I did as to what he advised him of. That was the purpose to find out if he had or not.

Q. Look on Page 18, sir. That pertains to your question with reference to his constitutional rights, does 4/26/67 it not. On Page 16 Line 8 you asked the question page 26 } in reference to his Constitutional rights. Was this primarily your concern, or was your concern really why the warrant was issued against Anderson.

A. They were both considerations. The examination as to his constitutional rights, it was something that I thought should be done. As to which one would have been most important, I don't know.

Q. Turn to Page 19 of the transcript sir, Line 5 this was Mr. Ellis on redirect examination, asking the question "you were asked on Cross examination of the basis of your issuing the warrant against the defendant in this case, Anderson" and if you read from that point on by your asking that question previously why the warrant was issued, were you not subjecting the introduction of hearsay evidence in reference to anything pertaining to the warrant, as to what others had told others or the Trooper.

A. I think it would have opened the door, as to anything bearing on the issuance of the warrant.

Q. Now, in fact it did open the door to the introduction of hearsay evidence, did it not.

A. Yes it did.

James C. Kent

Q. And on Line 14 of Page 19 where the question was asked "would you relate that to the Court" and the answer was "I believe it was Travis Ray Chisholm, who 4/26/67 said they were in a beer joint together in Rich- page 27 } mond". You didn't make any objection to that on the basis of hearsay evidence.

A. No.

Q. And likewise, as to anything that was said by James Randolph Chisholm on that same page.

A. That is right.

Q. And that was hearsay evidence likewise, was it not. I call your attention to the introduction, or the lack of introduction of photographs. Do you recall during the trial the Trooper indicated that he had shown various photographs or a photograph to Travis Ray Chisholm, to James Chisholm and to Hammond Wood, the other three alleged boys who participated in the crime.

A. Yes I do.

Q. Did you in any way try to ascertain where that photograph was.

A. No, I didn't want to see it. I was glad it wasn't there. I made reference to that later on.

Q. In what way did you make reference to it.

A. I don't remember exactly how it was brought about, whether it was in the closing statement or in some of the statements that were made.

Q. Did you in any way object to any introduction of the evidence pertaining to the photograph when the photograph was not available and introduced in the ex- 4/26/67 hibits.

page 28 } A. No, I did not.

Q. Why.

A. Because as we have so indicated I had opened the door as to this discussion as to how he came to issue the warrant. All this was his testimony as to how he came about doing it.

Q. In the preparation of this trial I believe you testified that you talked to the other boys who were alleged—

A. I talked to two of them.

Q. And those two were whom.

A. I believe I put both of them on as defense witnesses.

Q. You have a copy of the transcript and is it not true that you called Hammond W. Wood, Jr. and William Henry Anderson as your only witnesses.

A. That is probably correct. The Commonwealth had already called the two Chisholm boys.

James C. Kent

Q. In your preparation for this trial in your conversation with the two Chisholm boys did they tell you that the Trooper did not show them any picture.

A. I believe that they did.

Q. You likewise knew of this with the Wood boy because you called him and specifically dwelt on that point, that no picture was shown by Trooper Mitchell to the Wood boy, is that not so.

4/26/67 A. I believe so, I know that I brought it up.

page 29 } Q. Now, if you knew that and if you knew from listening to Mr. Mills and the State Trooper that neither those two or any of the boys were going to connect Mr. Anderson with the commission of the crime, I again ask the question, why did you ask the first question on cross-examination to the State Trooper.

A. Please phrase that again because you are jumping back to—

Q. I asked you in the preparation of this case, you ascertained from the oldest Chisholm boy, Travis Ray, and from the Wood boy that they would testify in this Court that Trooper Mitchell did not show them any photograph

A. I said I believed I had asked that, I am not certain. I know that the boys insisted that the defendant had nothing to do with it and they had not made any statements indicating that he had.

Q. You were aware from all three, the other alleged boys, who had previously been convicted that in no way were they going to connect Anderson with the commission of the crime.

A. I had learned this from two of them. The other boy was the Commonwealth's witness and I did not interrogate him.

4/26/67 Q. You knew that the two Chisholm boys would be called as Commonwealth witnesses, did you not.

page 30 } A. I figured they might call all of them. But from the record I don't remember if I actually checked it out or not. I assume that I did.

Q. So when you came to Court that day on what you had ascertained in the preparation of the trial you felt reasonable sure, did you not, that the boys would all protect Mr. Anderson in their testimony.

A. I felt this would be what they would do because the two had so stated in my interviews. I felt that their statement would be as it was. That he had nothing to do with it.

Q. My question is, knowing that during the course of the trial after Mr. Mills testified and after the State Trooper

James C. Kent

testified on direct examination in which you agree from reading the transcript that in no way was Mr. Anderson connected with the alleged offense, I again ask the question, why did you interrogate the Trooper on cross-examination.

A. Of course, all of this testimony I didn't have the benefit of at that point—

Q. I will ask you in another way, if you hadn't asked any questions, how did you expect the Commonwealth to prove the case against Mr. Anderson.

A. I felt the jury would feel that they had.

Q. On what basis, Mr. Kent.

4/26/67 } A. That was on the basis of the attitude and the
page 31 } status of the circumstances at the trial. This
was my feeling.

Q. What did the jury do to reflect any type of attitude towards you, or towards Anderson, other than that they knew they were trying him for Statutory Burglary.

A. In trying to determine what a jury is thinking, as you and I both know, this is one of our most difficult assignments we interpret by eyebrow movements, shuffling of feet, you can name all sorts of reasons for feeling that a jury was accepting the Commonwealth's line.

Q. While Mr. Mills was testifying or while the Trooper was testifying what, if anything, did you detect from the jury that would implicate or make you think that the jury was implicating this man and his name hadn't even been mentioned.

A. There must have been a lot of it, or I wouldn't have asked the question.

Q. Did you discuss with Mr. Anderson in reference as to whether or not he should take the stand in his own behalf or not.

A. I don't remember whether I discussed it with him or not.

Q. Did you know his past record, that he had been convicted of a felony.

4/26/67 } A. I did.

page 32 } Q. So you don't know whether today whether
it was your decision to put him on the stand or
whether it was his idea.

A. I was conducting the trial and it must have been my decision. As to whether I prediscussed it with him I do not know.

Q. Now, turn to Page 32 of the transcript. At that point you put Mr. Anderson on the stand, and you asked him his

James C. Kent

full name and he gave that. Your second question to him then was "are you sometimes known as Willie". Why did you ask him that question when all the previous testimony was linking up either Anderson or the boys only knew this fourth man as "Willie". Why did you ask that question.

A. My main reason, as I remember, for asking was to illustrate that Willie and William are almost anonymous. I didn't pursue it any further, I don't believe.

Q. Up to that point, was not some of the testimony referring to a fourth man only as "Willie".

A. Only as "Willie", that is correct.

Q. What did you expect to accomplish by asking Anderson if he was known as "Willie".

A. Only to illustrate that Willie and William is synonymous.

4/26/67 Q. How did that help Anderson.

page 33 } A. They hadn't identified him, I didn't feel.

Q. Now, Sir, turn to Page 38 of the transcript.

You recall just previous to that there was testimony in reference to a conversation between Mr. Anderson and the State Trooper in the hallway of the County Court Building. You remember evidence on that.

A. I remember some evidence on that point.

Q. All right, on Line 11 of Page 38 in cross-examination by Mr. Ellis, the question was "you told him at that time also that you were drinking and drove these boys up to Mills' store, but that you didn't know they were going to break in, is that right". Answer, "no sir"—Question "You mean to say that Trooper Mitchell sat on that stand and told something that was false"—Answer "if he told that he did", I don't remember telling him nothing at all like that, the only thing I ever told him was that I didn't know nothing about it". Now, were you aware at that point that the Commonwealth Attorney in his question was asking something that was outside of the evidence presented to this point. In other words, that Trooper Mitchell didn't testify to anything in reference to what Anderson had told him about driving the boys up there.

You understand my question. At that point, was
4/26/67 not Mr. Ellis asking a question of your client that
page 34 } was not in the evidence of any testimony by the
Trooper.

A. I was not aware of it because I thought it was in the evidence.

Q. So that is your reason for not objecting, you were not aware of it. On Page 39 I ask the same question Line 4—

James C. Kent

Question "you didn't tell him you let the boys off at the Intersection of Rt. 33 and Rt. 670," Answer by Mr. Anderson "no sir" Question "Then if he makes that statement he is not telling the truth" Answer "That is right". Now, were you aware at that point that the Trooper had not testified during the course of the trial that Anderson had told the Trooper that he let the boys off at the Intersection of Rt. 33 and Rt. 670.

A. This statement had been made to me by Mitchell. At that time I did not know it, I felt that it had been in the testimony.

Q. So that is your reason for not objecting.

A. Yes.

Q. Do you recall having a luncheon recess and at the termination of the luncheon recess Mr. Ellis came back and asked the Judge to put the State Trooper back on the stand because he was surprised with the testimony of the two Chisholm boys. Do you recall that.

4/26/67 A. Yes.

page 35 } Q. The purpose of calling the Trooper back on the stand was to impeach the two Commonwealth's witnesses, who were the two Chisholm boys.

A. Correct.

Q. Now, didn't you think that was a little unusual.

A. I objected to it, as I remember.

Q. You objected to it, but how strenuous was your objection, Mr. Kent.

A. It was strenuous enough to get it into the record.

Q. I understand that.

A. I made it, and I also, as I remember argued that he had laid no ground work or asked that they be pleaded as adverse witnesses.

Q. This is true, you said they ought to have been adverse witnesses, but I ask the question, when the Trooper got back on the stand you then did not object to anything which was asked by the Commonwealth with reference to the proper foundation, did you.

A. That I did not do anything to lay the proper foundation.

Q. Object to the Commonwealth Attorney laying the proper foundation.

A. I objected to going into it.

Q. All right, turn to Page 45 sir, excuse me the bottom of Page 44, line 20, starting By the Court—I understand that Counsel for the Defendant, that being you, wants

4/26/67 to object and except to this testimony. The testi-

James C. Kent

page 36 } mony being to allow the Trooper to be recalled on
the stand. Mr. Kent—that is correct, Your Honor.
By the Court—now listen carefully, Mr. Kent—“there may be
certain matters that come up that I haven’t ruled on and if
you want objections to those, you better make them to the
specific question because that was a broad ruling I gave, the
specific question you still have to object to if you want to.
I don’t want to mislead you.” Do you understand what the
Court was telling you at that point.

A. It was overruling my motion on the fact that I objected
to his testifying.

Q. Right, and if you wanted to object to anything from that
point on, you had better do it by each specific question. Now,
Your Honor, may we have time for Mr. Kent to read Page
45 in its entirety. (Mr. Kent reads the page). My question
is this, does not that pages relate to the testimony of the
Trooper that he testified in the case of Commonwealth vs.
Hammond Wood and at the trial of Travis Ray Chisholm.

A. Yes it does.

Q. Further that the Officer testified under oath, and who
was with the Chisholm boy at the time of the alleged offense.

The Wood boy, excuse me.

4/26/67 A. I know that the Officer testified that one of
page 37 } the Chisholm boys stated that the two Chisholm
boys were with the boy and that “Willie” Ander-
son was with them.

Q. My question is, you knew that this was for the purpose
of impeaching the Commonwealth’s own witness, why at that
point did you not require the Commonwealth Attorney to lay
down the specific foundation for where, when and under
what circumstances the testimony was given in the Wood case,
and likewise in the Chisholm cases, before you allowed them
to just bluntly go into testifying to who was with who.

A. I thought my general objection would be sufficient to
cover it.

Q. And that you wouldn’t have to object to each specific
question as the Court had just previously told you to do.

A. And indicated that he would want me to do. I felt
that it was broad enough to cover it.

Q. Now, sir, when the evidence was all concluded, did you
have any instructions on behalf of William Henry Anderson
that you submitted to the Trial Judge for the Jury to con-
sider.

A. I had some instructions, but as I remember, I did not
submit them.

James C. Kent

Q. Why sir.

4/26/67 } A. Because the Commonwealth's Instruction was
page 38 } basically the same that I had.

Q. Will you turn to Page 49 of the transcript then, sir. Is it your recollection that there were only two instructions offered in the trial of this case.

A. I can look at my own notes, I am pretty sure that is true. There were just two.

Q. Were both of those instructions that were given offered on behalf of the Commonwealth.

A. That is correct.

Q. Is it likewise true that you didn't have the Jury consider any instruction on behalf of the Defendant, that you prepared.

A. That is correct, I did not. My Instructions were near enough those of the Commonwealth Attorney that I did not ask for specific additional instructions. I felt that it would just confuse the issue.

Q. What was your argument on behalf of Mr. Anderson. That he was not at the scene of the crime.

A. That there had been no identification, that the Commonwealth had presented nothing but confusion in the testimony. I am saying this in a general manner. You can read my words there. If you want me to give my impressions of why I can do that.

Q. Briefly, you recall starting out at the trial of the case that you made the statement that in no way shape or form was this man going to be connected with the crime.

4/26/67 } Basically an alibi. Is that not so.

page 39 } A. I don't remember thinking of any alibi. I just thought they would not connect him with it.

Q. So where are the instructions that were offered to the Court as to anything pertaining to identification of the accused or anything in reference to whether or not he was at the scene of the crime.

A. They were not given.

Q. Why, Mr. Kent. Because you hadn't prepared them you didn't think they were applicable or what.

A. I hadn't prepared some that developed on some parts of the conflicting testimony because I didn't know it was going to be that kind of conflict.

Q. Who made the conflict.

A. The testimony.

Q. And who solicited the testimony that made the conflict. Was it not by your questions, sir.

James C. Kent

A. I have answered that question several times before. I asked the question about the basis of the warrant.

Q. Didn't you feel that it was a little unusual for a jury in Hanover County Circuit Court for a man who was accused of Statutory Burglary not to have one jury instruction submitted for their consideration.

A. In this case, I didn't feel that it was necessary at all. By the time that the testimony was in there was so much evidence of lying that I felt and was firmly convinced that

4/26/67 } the Jury would not convict this man on the basis
page 40 } that there was *no* much evidence of lying that I
could hardly see that it could take the same witnesses that the Commonwealth had impeached and take their statements as related by the Officer to convict the defendant. I saw no basis whatsoever for the conviction. That was my personal opinion. That was the way I sized it up. They didn't agree with me.

Q. It is obvious they didn't or we wouldn't be here today. Please turn to Page 52 of the transcript, Line 21. Does this appear to be a fair question as to the summary of what the jury had to consider in this case "the question and sole issue in this case is was the accused William Anderson the man who accompanied them and drove them to the store and drove them back to Richmond, and did he know at the time of going out there and going back that the store was to be broken into and had been broken into", which was made by Mr. Ellis in his closing argument.

A. Now, what was the question.

Q. The question is, was that not the real issue to be decided in that case.

A. Yes, identification.

Q. Were you pressed at the end of the trial for time whereby you were not allowed by the Trial Court to ask for an instruction or time to prepare an instruction on
4/26/67 } identification.

page 41 } A. No, we had time.

Q. Did you ask the Court to give an instruction along that line.

A. On identification, I did not.'

Q. All right, Sir, turn to Page 54 of the transcript, Line 15, excuse me Line 12. This again is Mr. Ellis in his closing argument "that brings us down to the accused himself, what have been his actions regarding this crime. He is not to be found immediately after the perpetration of the crime and was picked up some time later. He denied any participation

James C. Kent

in the crime." That is true to that point, is it not. Continuing "subsequent outside the Court Room he had a conversation with Mr. Mitchell, apparently he wants to make some kind of a deal. He wants to give some information, and if he can work out a deal whereby he can get out of these charges, but no deal was to be made and he tells Mr. Mitchell at that time, yes I drove the car out there, I let the boys out at Rt. 33 and Rt. 670 at the intersection and I waited a while then I drove them back to Richmond. That I was drunk and I did not know what I was doing. I didn't know they were going to break and enter". Now sir, my question is, was any of that in the evidence of the trial of this case.

4/26/67 } A. I felt it was, I felt it had been induced at
page 42 } some place in the evidence here, if you gave me
time I could go back and search, but I felt it had
been set forth.

Q. You believe it is in this transcript.

A. I think it is.

Q. And you have read the transcript.

A. As I stated to the Court, I didn't review on every specific thing in here.

Q. If it were not in the evidence of the trial of this case, would you have objected to it.

A. Yes.

Q. On the basis that it was not appropriate for the Commonwealth to argue something that wasn't in the evidence. Is that right.

A. That is correct.

Q. But you are not sure whether it is in the evidence or not.

Mr. Beaver: Mr. Mann, you don't have a copy of Mr. Ellis' answer, do you.

A. No, I do not.

Mr. Kent: On Page 35, that is what Anderson said. I better not read you that, that was on my direct. I know I was anticipating the Officer saying that. I know it was in the evidence that he had talked to him in the hall.

Mr. Beaver: This is a copy of the answer that
4/26/67 } was filed by Mr. Ellis on the original appeal. I
page 43 } would like to introduce—

Mr. Mann: Isn't that already a part of the record.

Mr. Beaver: Not in this particular file. I would like to introduce on behalf of the Petitioner, the answer filed on behalf of the Commonwealth of Virginia—

James C. Kent

Mr. Mann: Excuse me for interrupting, but why couldn't we introduce all of this that deals with this man's trial. You have already introduced the transcript. So why not put in all of it.

Mr. Beaver: Let the record show that all the papers in the case Commonwealth of Virginia vs. William Henry Anderson or vice versa be made a part of this record.

By The Court: Any objections, Mr. Mann.

A. No sir.

By The Court: The Court will so admit these into evidence. I will just mark the file No. 88, 1965 Commonwealth of Virginia vs. William Henry Anderson as Exhibit B, on behalf of the Petitioner.

Mr. Beaver: Mr. Kent, have you found anything in the transcript with reference to that point.

A. No, it is not there. Not the way he worded it in his argument, but I was under the impression that it was at the time.

Q. You were under the impression that it was at the time. You made no objection.

4/26/67 } A. I knew there had been testimony of state-
page 44 } ments he had made and something about a deal.
I don't see it in this.

Q. At the conclusion you made a motion to set it aside, did you not.

A. Yes sir.

Q. Did you ask the Court for a specific time for a hearing to argue your motion.

A. No, I did not.

Q. Why.

A. I didn't feel that it would take that much time for him to rule on it.

Q. Well, it didn't take any time, because he overruled your motion immediately afterwards and sentenced the man to five years in the penitentiary. You didn't think, in your opinion, that there was any merit to the motion.

A. Oh, yes I did. I thought it was very honest, I felt that all the testimony bearing on the defendant had been impeached. In the impeachment of them as witnesses, they had used that evidence, I thought, to convict.

Q. Did you argue your motion, or did you just make your motion and the Court overruled it.

A. I made it and the Court overruled it. I don't think there was any argument.

James C. Kent

4/26/67 } Q. You didn't ask, even though you felt the evi-
page 45 } dence was not sufficient, for a hearing on it.

A. I did not ask for a special hearing on it.

Q. I believe, if I understood you correctly, that once you started the trial of this matter you were in charge. Is that correct.

A. I was conducting the trial.

Q. What decisions were made during the course of the trial were your decisions and not Mr. Andersons'.

A. That is essentially correct.

Q. In your opinion, he wasn't qualified to make any decisions on legal points involved, was he.

A. I don't remember him asking anything that wasn't done or vice versa.

Q. Do you know how many objections you made during the course of this trial.

A. Very few.

Q. Having read it, do you believe you should have made more.

A. In the afterlight, I believe there should have been more objections. At the time I felt it was absolutely the best way to try this particular case. I thought it would be thrown out on the conflict in the identification of the testimony of all the witnesses.

Q. Do you believe that if this matter were to be tried again you would again ask any questions on cross-examination based on what Mr. Mills and the Trooper testified to, on direct examination.

4/26/67 } A. I could not answer that Mr. Beaver, because
page 46 } until I saw the Jury and saw the actual conduct, you are not always relying on just written word. The people involved are probably as important part of a trial as the words they utter. I would not be able to say how I would conduct all facets of this trial were it to be tried again. The major decisions would be made under the gun.

Q. Do you believe during your practice that the mere fact that a person is accused of a felony, that that in itself puts into the minds of the jury that he is guilty.

A. In many cases I am convinced that it does, despite the rules to the conflict, that the mere charge does and certainly with any evidence at all, they would so feel.

Q. Do you believe that if a jury did find an accused guilty and there was not sufficient evidence that the Court likewise would not overrule the verdict of the jury.

A. I felt that happened in this case. That was my opinion.

Trooper Mitchell

Q. In your opinion, after now having read the transcript, do you believe that the defendant, William Henry Anderson, received a fair and impartial trial in this matter.

Mr. Mann: Your Honor, I object to that type of
4/26/67 questioning.

page 47 } By The Court: I sustain the objection.

Mr. Beaver: I have no further questions *pf* Mr.
Kent at this time.

Mr. Mann: I have no Questions at this time, but I would like to reserve the right to recall him.

By The Court: All right.

TROOPER MITCHELL is called as the next witness for the Petitioner, and duly sworn.

Q. Mr. Mitchell will you state your full name for the purposes of the record.

A. L. B. Mitchell, Virginia State Police.

Q. You were likewise employed by the State Police on June 1, 1966.

A. Yes sir.

Q. And in that capacity you testified in this Court in the case of William Henry Anderson, the defendant.

A. Yes sir.

Q. Since that time to the present time have you been requested or had an opportunity to look at the trial transcript.

A. No sir.

Q. Can you recall testifying in this matter.

A. Yes sir.

Q. Can you recall in your direct examination by Mr. Ellis that in no way shape or form did you connect the defendant, William Henry Anderson, with the alleged com-
4/26/67 mission of the crime for which he was charged.

page 48 } A. I was under the impression that I did connect him. I have not read the transcript.

Q. Do you recall in your testimony that a tremendous amount of it was hearsay testimony that you had received the information from what other people had told you.

A. The identification of Anderson came from other people involved in the crime. By the nickname of "Willie" and following the use of this name, plus the name of some beer joint, I believe in South Richmond, that he hung around.

Q. Right, but the majority of your testimony was all based on what somebody else told you. Is that not so.

Trooper Mitchell

A. Yes sir, plus Mr. Anderson's confession.

Q. You say Mr. Anderson's confession.

A. Yes sir.

Q. You didn't introduce that in the original trial did you.

A. I am sure I did sir.

Q. Was it a written confession.

A. No sir, it was an oral confession, made outside the County Court Room.

Q. You didn't testify in the previous trial that he had confessed he had taken part in it, did you.

4/26/67 A. He didn't confess to going into the store.

page 49 } Q. And you didn't testify that he was a participant in the trial, did you.

A. I testified, sir, that he admitted driving the truck.

Q. Not from what this man told you.

A. Yes sir. He told me that he was drunk, that he took the boys up Rt. 33.

Q. You are saying that you testified to that in this case.

A. I feel certain I did sir.

Q. Now let me ask you this, how many times involving the breaking and entering of the Mills store did you testify in this Court.

A. I believe three of them were tried as adults—

Q. Now, let me review this with you. Did you testify in the hearing in the Wood case.

A. Yes sir.

Q. Did you likewise testify in the Juvenile and Domestic Relations Court of Hanover County in the case of Jimmy Chisholm.

A. Yes sir.

Q. Did you likewise testify in the Preliminary Hearing for Travis Chisholm.

A. Yes sir.

Q. And likewise for Anderson.

4/26/67 A. Yes sir.

page 50 } Q. Were they all four separate hearings.

A. As best I recall James Rudolph Chisholm and Hammond Wood received Juvenile Hearings at the same time.

Q. Both as Juveniles.

A. Both were actually juveniles, and they had the hearings and the Juvenile Court ruled that Wood would be tried as an adult.

Q. So you had how many hearings in the County Court, three or four.

Trooper Mitchell

A. I believe three. One for Anderson, one for Travis Ray Chisholm, and one for James Chisholm and William Hammond Wood.

Q. They were all certified to the Circuit Court.

A. Yes sir.

Q. How many of those trials did you testify in, in the Circuit Court involving those four names.

A. If Wood was tried in the Circuit Court, and I believe that he was, in three.

Q. And he pleaded guilty, did he not.

A. I don't recall what the plea was.

Q. On Travis Ray Chisholm, you testified in his trial did you not.

A. Yes sir.

Q. He likewise pleaded guilty.

A. I don't remember his plea either.

4/26/67 Q. Do you recall what Jimmy Chisholm's was
page 51 } in the Juvenile and Domestic Relations Court.

A. I don't recall his plea, but I believe he was committed to Beaumont after the hearing.

Q. So all told, out of this one offense involving four accused, you testified three times in the County Court and at last three times in the Circuit Court. Is that not so.

A. I believe that is right, yes sir.

Q. You were rather sick and tried of this case, weren't you.

A. Not particularly, no sir.

Q. Is it possible that some of the evidence in the Anderson case you omitted that you may have testified to in some of the others.

A. Really I remember the Anderson case better because it was before a Jury. The testimony was much more.

Q. You recall there being a question arise in reference to photographs of Mr. Anderson.

A. Yes sir.

Q. Can you tell this Court why those photographs were not present in Court.

A. Yes sir. When the first accused was first arrested in this case he gave the nickname "Willie", I got a photograph of this man William Henry Anderson and I showed it to him

4/26/67 and he said this was the man. I showed it to Ham-
page 52 } mond Wood a short time later and he said this
was the man. Within an hour or two after Travis

Ray Chisholm had been arrested I showed him the photograph and he said it was the man. When I searched the City of Richmond for this man I could not find him.

Trooper Mitchell

Q. You are not answering my question, my question is why were not the photographs available for the trial on June 1, 1966.

A. When I first searched for this man in Richmond on the 13th day of February I could not find him. The next information I had about his whereabouts was on the 11th day of March, 1966,

Q. Again I say you are not responsive to the question that I am asking, I am asking why weren't the photographs here on June 1, 1966.

A. I am trying to answer your question, sir. On March 11th after I had looked for the accused back in February and could not find him, on March 11th I received information from a Detective in Henrico County that this man was in Varina and I took my warrant and the picture to this detective, he was to use this picture to show to Henrico Officers working Varina district, so that they could be on the lookout for this man. On the 12th which was the day after I delivered the photograph and the warrant to the Henrico

Detective I was called to the Henrico Police Department to pick up William Henry Anderson who page 53 } had been arrested. I did not receive the photograph back.

Q. Whose photograph was it.

A. It was a picture of William Henry Anderson.

Q. I didn't ask you that, whose photograph was it, who did the photograph belong to.

A. The City of Richmond had taken the photograph.

Q. And as a State Trooper you have the opportunity to obtain additional copies, do you not.

A. Yes I am sure I do.

Q. Is it not true that of the photographs there are likewise negatives on file.

A. I am sure there is.

Q. Did you make any effort to have the photograph available for the trial on June 1, 1966.

A. No sir.

Q. Did Mr. Kent, during the course of the trial, object to any testimony in reference to you giving pertaining to the photograph.

A. I don't recall before being asked what happened to the photograph.

Q. Are you telling the Court that a copy of the same photograph was available on the 1st of June, 1966 or not.

A. I am sure Richmond Police Department still has a copy.

Travis Ray Chisholm

Q. You don't have any photograph with you today.

4/26/67 A. No sir.

page 54 } Q. Did you ever have the photograph in your possession.

A. Yes sir, from the early morning of the 13th of February to the 11th of March.

Mr. Beaver: I have no further questions.

Mr. Mann: I have no questions at this time.

TRAVIS RAY CHISHOLM is called as the next witness for the Petitioner and duly sworn:

Q. Mr. Chisholm would you give your full name, sir.

A. Travis Ray Chisholm.

Q. How old are you.

A. 20

Q. Travis, I believe you were one of three boys who were tried and convicted in Hanover County for breaking and entering Mills store.

A. Yes sir.

Q. You have served your time and completed that.

A. Yes sir.

Q. Do you recall testifying in the case of Commonwealth vs. William Henry Anderson, on June 1, 1966 in this Court.

A. Yes sir.

Q. Do you further recall testifying that William Henry Anderson was not a participant in the crime to which you had pleaded guilty.

4/26/67 A. Yes sir, I do.

page 55 } Q. Is that still your belief.

A. Yes sir.

Q. Do you recall likewise testifying that no photograph was shown to you by Trooper Mitchell of William Henry Anderson.

A. Yes sir.

Q. Is that still your testimony.

A. Yes sir.

Q. Do you have any interest or in any way are you indebted to William Henry Anderson.

A. No sir, I don't.

Q. Has he in any way threatened you now, or in the future.

A. No sir.

Q. Are you aware of the ramifications in the event that you testify under oath, which you now are, that if you do not tell the truth you are subject to the charge of perjury.

Travis Ray Chisholm

A. Yes sir, I do.

Q. Do you likewise recall testifying in this Court on June 1, 1966 in the Anderson case that you knew William Henry Anderson before you got involved in the offense in Hanover County.

A. Yes sir, I do.

Q. How did you know him.

A. He had come over to a place called Metros, a beer joint, and he and I had had a few beers together.

4/26/67

page 56 }

Q. On the day of the night that the offense happened, were you under the influence of intoxicants.

A. Yes sir, I had had a few beers.

Q. Can you recall everyone who was with you.

A. Yes sir.

Q. Do you recall likewise testifying in this Court on the same and place that you never referred to Mr. Anderson as being with you.

A. Yes sir, I do.

Q. Do you still deny as you did in the trial before that you never told anyone that William Henry Anderson was with you.

A. Yes sir, I still deny that.

Q. Did you tell all of these facts to Mr. Kent, who was the Attorney representing Mr. Anderson, prior to Mr. Anderson's trial.

A. Yes sir.

Q. Do you recall where you told him that.

A. Yes sir, in Hanover Jail.

Q. Did you ever testify in this Court in the case of Commonwealth vs. Hammond Wood that "Willie" Anderson was with you at the break-in at Mills store.

A. No sir, I didn't testify to that.

Q. And that was likewise your testimony in the Anderson case, is that correct.

A. Yes sir.

4/26/67

Q. Other than the Wood case did you testify in any other cases involving the other two boys, your brother or, well your brother was the only other one.

A. That is all I can recall.

Q. Are you in fear of any person whatsoever who may be related or known to William Henry Anderson to cause you to give any testimony today other than what you have given.

A. Absolutely not.

Andrew J. Ellis, Jr.

Will you answer Mr. Mann's questions—

CROSS EXAMINATION

By Mr. Mann:

Q. Your name is Travis Ray Chisholm.

A. Yes sir.

Q. You say that you did testify in the Wood case.

A. Yes sir.

Q. Did you, in testifying in the Wood case, not connect Mr. Anderson with taking you all to the scene.

A. No sir, I did not testify to that.

Q. You are positive of that.

A. Yes sir.

Q. What were you convicted of.

A. I was convicted of breaking and entering Mills General Merchandise Store.

Q. Had you been convicted of a felony prior to that.

A. I am not too sure, I can't recall.

4/26/67 Q. I mean were you sent to the penitentiary.

page 58 } A. Before this, no sir I was not.

No further questions.

MR. ELLIS is called as the next witness for the Petitioner and duly sworn:

Q. Mr. Ellis, for the purpose of the record, will you give your full name and by whom you are employed.

A. Andrew J. Ellis, Jr., I am an Attorney and Commonwealth's Attorney for Hanover County.

Q. How long have you been Commonwealth's Attorney in Hanover County.

A. Since 1963.

Q. Primarily your duties as Commonwealth Attorney are what.

A. They are many and varied. They deal with prosecution of all criminal cases in the Circuit Court, attendance in County Court, attendance at the Board of Supervisors' meetings, various Planning Commission and bodies of the County.

Q. Do you recall acting as prosecuting attorney in the case of William Henry Anderson June 1, 1966.

A. I remember prosecuting the case, I remember it was in May or June of last year.

Q. Do you recall likewise that Mr. Kent was Court ap-

Andrew J. Ellis, Jr.

4/26/67 } pointed Counsel representing the defendant, Mr.
Anderson.
page 59 } A. I do.

Q. Do you recall defendants in similar cases growing out of the same incident.

A. I recall the case. I believe the defendant was charged with breaking and entering J. R. Mills Store, which is located on Rt. 33 in Hanover County. There were three other younger boys charged with the same offense. I don't recall their names, but I believe two of them were Chisholms and they were brothers, and the other boys name I don't recall at this time.

Q. Did you attend the Preliminary Hearing in the other three boys case along with the Anderson case, in the County Court.

A. I made it a practice of attending all preliminary hearings in felony cases and I don't recall specifically these cases in the preliminary hearings but I feel sure that I probably did.

Q. Dealing in particular in the case of Travis Ray Chisholm, did he not plead guilty. That is the older of the two Chisholm boys.

A. I recall that one of the Chisholm boys was represented by Mr. Lynn Owens and if that was Travis Chisholm then he pleaded guilty over the objection of his own attorney as I remember.

Q. The younger Chisholm boy never reached the Circuit Court. He was tried as a Juvenile, is that
4/26/67 } right.

page 60 } A. One of the three younger defendants was treated as a Juvenile, and I believe the younger boy was a Chisholm, and he was treated as a Juvenile and disposed of through the Juvenile and Domestic Relations Court of Hanover County.

Q. Hammond Wood, his case was disposed of in the Circuit Court, on a plea of guilty likewise.

A. I don't recall that he pleaded guilty.

Q. In the Anderson case, you recall that being a Jury trial.

A. I do.

Q. At the inception of the trial, did it appear any way odd to you that your law partners father was one on the panel of the jury, L. D. Campbell, Sr.

A. Did it appear odd to me that he was on the venire; no sir.

Andrew J. Ellis, Jr.

Q. Do you recall whether Mr. Kent in any way questioned the Jury as to their qualifications, or interest or bias in reference to the trial of the case.

A. I do not believe he did.

Q. In your opinion, do you think that he ought to have.

A. I don't believe that I could express an opinion as to the proper way to defend the case, that was up to him.

Q. Were you aware of Mr. Floyd Ball likewise being on the Jury.

4/26/67 A. Yes, I recall that Mr. Ball was on the Jury.

page 61 } Q. Was Mr. Ball the owner of a store similar to the Mills store.

A. I don't know that Mr. Ball is owner of a store that is similar to Mr. Mills' store. Mr. Ball owns a general merchandising store in the lower end of the county, not necessarily as so much general merchandising, more for groceries and things of that nature.

A. That is in the Mechanicsville area.

A. Yes sir, in the lower end of the county.

Q. Prior to the incident involving the Mills store, was not Mr. Ball's store held up and a robbery or breaking and entering charge was involved in Ball's store.

A. Yes, I recall that I prosecuted two men, Herring and Bevins, for the armed robbery of Ball's store which occurred some good while before the incident involving the Mills store for which Anderson was being prosecuted.

Q. Did this receive general publication throughout the county in the newspaper.

A. Not undue publication, no I don't think so.

Q. Do you know whether or not Mr. Kent was aware of this.

A. I have no idea.

4/26/67 Q. Did you ask Mr. Ball any questions in refer-
page 62 } ence to whether or not the incident involving his
store, knowing that the Mills store was of similar
nature would have any effect on his decision.

A. None whatsoever.

Q. Have you looked at the transcript of the case that we are talking about, William Henry Anderson.

A. I scanned through it hurriedly shortly after it was typed and then again when I believe I prepared a response for a Petition for an Appeal, which went to the Court of Appeals and was subsequently denied.

Q. In your scanning through it in your preparation for the Appeal did you notice that in the examination of Mr. Mills

Andrew J. Ellis, Jr.

that in no way shape or form did he connect the defendant, Anderson, with the commission of the alleged crime.

A. I recall that as a fact.

Q. Do you likewise recall as a fact that on direct examination of the State Trooper, L. B. Mitchell, that in no way shape or form did he connect the defendant, Anderson, with the alleged crime.

A. I would say on the initial direct there may be some question about it, but several times on redirect examination he was connected with it.

Q. Limiting yourself to just the original direct examination, is it not a fact that in no way shape or form the defendant, Anderson, was connected with the commission of
4/26/67 the alleged crime.

page 63 } A. I would say that to the best of my memory he did not, but the transcript will speak for itself in that regard.

Q. Were you surprised when cross-examination was conducted or initiated by Mr. Kent at the conclusion of your interrogation on direct examination.

A. What was that again.

Q. Were you surprised when Mr. Kent asked any questions on cross-examination when you concluded your direct examination.

A. I would not say that I was surprised that he asked any questions.

Q. Since you subsequently have reviewed the transcript does it now appear to you that no cross-examination was in order.

A. What I myself may have done and what Mr. Kent did are two entirely different things. Now, are you asking what I would have done if I had represented him, or if I was surprised at what Mr. Kent did.

Q. I am asking you, having now read the transcript are you surprised that Mr. Kent asked the first question on cross-examination, in view of what you asked on direct examination.

A. If I may, I will answer it this way, that if I had been defending him I would not have asked any questions.
4/26/67 Q. And why would you not have asked any
page 64 } questions on cross-examination.

A. As I recall the transcript, the defendant had not been connected up by Mr. Mitchell's direct testimony with the crime and for that reason I would not have asked any.

Q. After cross-examination was commenced by Mr. Kent was not the door opened for a tremendous amount of hearsay evidence to be admitted.

Andrew J. Ellis, Jr.

A. Yes sir.

Q. Didn't you welcome cross-examination at that point.

A. I welcomed re-direct examination.

Q. Your redirect examination was based on soliciting a lot of hearsay evidence at that point.

A. It was based on what had been brought out on cross-examination.

Q. And that was based on hearsay.

A. Not entirely, to some extent I would say.

Q. Do you recall while the Appeal was either being prepared or while it was at least pending, that I discussed with you part of your closing argument.

A. Yes I do.

Q. And in the Appeal did you not admit in your response that some of your closing argument was out of the realm of the evidence.

A. I did.

Q. And that no objection was made while you 4/26/67 were so doing it.

page 65 } A. That is correct.

Q. During the course of the trial was there much objection by Mr. Kent in reference to lead questions, hearsay evidence being admitted in questions which you asked.

A. As I recall the trial went very smoothly. I don't recall asking any particular leading questions or questions that would have solicited hearsay evidence.

Q. When you say it went very smoothly, it went very smoothly for the Commonwealth, did it not.

A. When I say smoothly, I mean there was little objection on either side.

Q. At the conclusion of the case was it your opinion that through questions asked by Mr. Kent it was inevitable that the accused had to be convicted.

A. No necessarily so.

Q. Were there any instructions offered on behalf of Mr. Kent to the Court, or by Mr. Kent on behalf of the defendant.

A. I don't recall any.

Q. Do you know why there were none offered.

A. I have no idea.

Q. Did you see any being tendered and refused.

A. I don't recall any.

Q. Is it the usual practice by Judge Simpkins that if Counsel in a criminal case tenders an instruction

Andrew J. Ellis, Jr.

4/26/67 that he will except to it and refuse it, and mark
page 66 } it so.

A. That is the practice of every Judge that I have practiced before.

Q. On Page 52 of the transcript, in your closing argument you said "the question and sole issue in this case is, was the accused William Anderson the man who accompanied them and drove them to the store and drove them back to Richmond, and did he know at the time of going out there and going back that the store was going to be broken into and had been broken into". Now, was that not the real issue in the case.

A. I believe so. As I recall it the situation was that the boys did the actual breaking and entering. Their contention being that someone accompanied them with a truck, and let them out and then returned them to Richmond with certain goods, and the question which was submitted to the jury as I saw it was whether or not this defendant was that man and if he was the man if he had knowledge of the breaking and entering and the taking of the goods. Which I believe is in essence what I said there.

Q. And in the two instructions that were offered from the Court to the Jury was there anything in reference to identification.

A. I don't recall the exact words of the instructions, but the instructions would have been tailored
4/26/67 } to, if they believed this defendant was the man
page 67 } that drove the truck or assisted in the breaking
and entering. I don't recall at this point how many I tendered.

Q. To your knowledge Mr. Kent was Court appointed, was he not.

A. Yes sir. As I recall.

Q. Can you tell this Court, in reference to questions pertaining to the use of a photograph, why the photograph was not in Court on the day in question.

A. As I recall the questions as regard to the photograph were initiated by Counsel for the defense. I had not planned to introduce the photograph, and for that reason I had not requested the Officer to bring it here. The photograph, as testified to, was the property of the Richmond Police Department, and as I recall was retained in their files after its use for identification of the defendant.

Q. The other question I have Mr. Ellis is, without—or I will ask it this way, in your opinion, as Commonwealth's

Andrew J. Ellis, Jr.

Attorney of Hanover County, if no questions would have been asked on cross-examination and in view of the subsequent testimony of the Chisholm boy and the Wood boy, would there have been enough evidence for a conviction in this case.

4/26/67 } A. I think I would have to answer that, and
page 68 } you are asking purely a question of opinion, I
would say that you can never tell what a jury
will do, and this was a jury case—

Q. All right, I will ask you this question, on evidence which the Commonwealth offered, without any cross-examination of the State Trooper, as you now know the transcript, would there have been enough evidence for the Court to have submitted the matter to a jury to consider a verdict.

A. Let me say this, as I recall the transcript, and I ask you to correct me if I am wrong, that the Chisholm actually went back on his prior testimony and the Court permitted me to cross-examine him. Am I correct in making that statement.

Q. You came back after lunch and indicated to the Court that you were surprised with the testimony of the two Chisholm, Travis Ray and Jimmy, on the basis that they testified to your questions that in no way did the defendant connect with the alleged crime. You then called the Trooper back on the stand to question him in reference to the use of the photograph and likewise conversation which the two Chisholm boys had with the Trooper for the purpose of showing the impeachment of the two Chisholm boys. Now, my question to you is, as you now review the testimony of Mr.

4/26/67 } Mills, who was the first witness, Trooper Mitchell
page 69 } who was the second and the two Chisholm boys,
eliminating any cross-examination by Mr. Kent of
the Trooper, do you believe there was sufficient evidence for
the Court to have submitted the case to a jury, or would the
Court have been compelled to stricken the Commonwealth's
evidence.

A. I can't say that the Court would have been compelled, but you are asking me for my opinion, and I would say that based on your question that there was insufficient evidence.

Q. All right, to ask you the question the other way, from your review of the transcript is it not a fact that as the result of the cross-examination of the State Trooper by Mr. Kent, a case for the Commonwealth was made out.

A. I won't say that that was the sole case but that was a contributing factor.

Andrew J. Ellis, Jr.

Q. What else was contributing to it.

A. I think the evidence as a whole, making out a case involves a lot more than simply naming the defendant as the man.

Q. Do you recall that the only testimony by Mr. Mills was that he was the owner of the store and that the store was broken into, and that he talked to the Police Officer and reported it.

A. If you would limit your question as to whether 4/26/67 or not this defendant was the man, I think I could page 70 } answer it, in the affirmative.

Q. All right, on direct examination could the Commonwealth prove by its evidence that the defendant, Anderson, was the man who participated in this crime.

A. As contained in the record.

Q. Yes.

A. I don't believe so.

Mr. Beaver: I have no further questions.

CROSS EXAMINATION

By Mr. Mann:

Q. Mr. Ellis, was there a confession, from Mr. Anderson used in his trial.

A. No sir.

Q. There was no confession. Did you at any time see any confession.

A. No sir.

Q. Did you prosecute Travis Chisholm.

A. I did, sir.

Q. Did he testify at his trial.

A. Was he the older or the younger of the two Chisholm boys.

Mr. Beaver: Travis was the older, Mr. Ellis.

A. Yes, he testified at his trial.

Q. In his testimony, did he or did he not connect Mr. Anderson with the alleged crime.

4/26/67 A. As I recall his testimony, he did.

page 71 } Mr. Beaver—But in the Anderson case he denied that Mr. Anderson was with them participating in the alleged crime.

Andrew J. Ellis, Jr.

A. He went back on me, yes.

Q. And when you say he went back on you, you did not specifically refer to the time, the date, the place or anything by way of laying the foundation to the exact statement that the man made in his own trial, did you.

A. Yes, I referred to when he testified in this Court in his own trial. There was only one occasion when he did.

Q. Did you not limit your question solely "did you not testify in the case of Commonwealth vs. so and so that Willie Anderson was with you at the time at the scene of the crime?"

A. I may have, but as far as I can recall I have only tried one case of that nature.

Q. Didn't he deny in the Anderson case, no, and that was the surprise to you.

A. That is correct.

Q. And although you were surprised, no additional proceedings of any nature have been brought against the Chisholm boy.

A. No, he served his time for this offense.

Q. What you are testifying to today is to the best of your memory.

4/26/67 page 72 } A. Yes.

Q. And you have not seen the written transcript of the Chisholm case.

A. No.

Q. All through the Anderson case did not Travis Ray Chisholm, the oldest boy, continually deny to you that Anderson was connected with the offense.

A. During the Anderson case he did, you asked me a question a moment ago about the Chisholm case, not having seen the record, I don't know that it has been printed or typed, but I specifically remember asking Chisholm in his trial about Anderson, I make a practice of doing this where there are several defendants for his identification of the man who was with him, and in that trial he specifically said Anderson. Identified Mr. Anderson.

Q. Then subsequently denied it in the Anderson case. And what you are testifying to Jack, is to the best of your memory.

A. Yes.

No further questions of Mr. Ellis

Trooper Mitchell

4/26/67 The Petitioner rests:

page 73 } Mr. Mann calls TROOPER MITCHELL as
 witness for the Respondent

Q. Trooper Mitchell, did you or did you not testify in the Travis Chisholm case.

A. Yes I did.

Q. Were you present during the entire proceedings.

A. Yes.

Q. Did Travis Chisholm testify in his case.

A. Yes sir, he did.

Q. Did he, in his testimony, in any way connect the Petitioner, Mr. Anderson, with the alleged crime.

A. Yes sir, he named him as being a participant in it.

Q. Did you attend any one of the other trials.

A. Yes sir, Hammond Wood.

Q. Do you recall whether Travis Chisholm testified in that case.

A. He did.

Q. Did he, in his testimony in that case, connect this Petitioner with the alleged crime.

A. Yes sir, he did.

Q. And you are positive.

A. Yes sir.

Q. Did you have any occasion at all to take any statement at all from Mr. Anderson.

A. He made an oral statement to me, yes sir.

Q. Was it later reduced to writing.

A. No sir, it never was.

4/26/67 No further questions

page 74 } CROSS EXAMINATION

by Mr. Beaver:

Q. Mr. Mitchell, did you not testify in the Anderson case on at least two occasions that Anderson always denied to you that he was a participant in the alleged offense.

A. I don't believe so, because he confessed to me and I felt such this confession was in the transcript. You tell me today that it is not. But I recall talking with the Commonwealth Attorney about a deal that Mr. Anderson wanted to make.

Q. I didn't ask you that question. I asked you, do you recall testifying during the Anderson case on at least two occasions that Mr. Anderson always denied to you that he was a participant in the crime.

Trooper Mitchell

A. I don't believe so, the day he was turned over to me denied it, which was the 12th of March. On the 17th of March outside the County Court Room he made a statement to me.

Q. Do you recall being asked the question, "you stated when you first arrested the defendant that he denied any knowledge of J. R. Mills Store or any participation in this", and your answer being "I personally didn't arrest him on the warrant, he was arrested by Detective Baker of the Police Department of Henrico County and subsequently 4/26/67 turned over to me at 2:30 p.m. on the 12th day of page 75 } March". Now, to that point it is true, is it not.

A. Yes sir.

Q. And you further testified "he had issued it on the date on the information that he had gotten from the boys" answer "yes sir"—Question—"he denied any knowledge at all" Answer—"he denied having been at or near Mills Store". Do you recall testifying to that.

A. That was the day he was turned over to me, he denied it.

Q. At that time he denied being a participant in the crime. Do you likewise recall being asked the question in reference to were they all together, speaking of the four, of giving the description then as follows: "yes sir, that William Henry Anderson furnished the truck and they went up Rt. 33 and the information they gave me was that Mr. Anderson stopped in front of Mr. Mills store after James Randolph Chisholm pointed it out as the place they were going to break into, that they got out of the truck, that Mr. Anderson drove up and down Rt. 33 while the other three boys went in the store, gathered the Merchandise, set it just outside the front door, and that when Mr. Anderson passed they stopped him, and he 4/26/67 pulled up in front of the door and they put the page 76 } Merchandise into the truck and returned to Richmond". This does not correspond with what Anderson said about it." Now, you recall testifying to that.

A. Yes sir, I do.

Q. Now, that is at least two occasions that you testified in the Anderson case on the 1st of June that Anderson denied being a participant.

A. At that time I don't think I was saying that Anderson denied being a participant, I said that was not what Anderson said about it.

Q. You were present or were you excluded during the trial of Anderson on June 1.

Trooper Mitchell

A. I was excluded.

Q. Were you excluded in the other cases.

A. No sir.

I have no further questions :

RE-DIRECT EXAMINATION

By Mr. Mann :

Q. Trooper Mitchell, did Mr. Kent discuss the Anderson case with you.

A. Several times before the trial.

Q. Was Mr. Anderson tried first or were the other boys tried first.

A. Mr. Anderson was the last one to be tried.

Q. In the course of your discussion of the case with Mr. Kent, did you tell him what Travis Chisholm had testified to at his own trial.

A. Yes sir, I am sure I did.

4/26/67 Q. On the witness stand, did Mr. Kent cross-
page 77 } examine you.

A. Very much.

Q. Did he in any way try to block your testimony.

A. I don't recall that he did, sir.

Q. But he did cross-examine you very much.

A. Both times, originally and redirect.

That is all:

RE-CROSS EXAMINATION

By Mr. Beaver :

Q. When he was cross-examining you a tremendous amount of your testimony was based on what somebody else had told you, is that not so.

A. I believe so, I answered his questions. Some of the answers were based on what the other three accused had told me.

Q. Right, and not of your own personal knowledge.

A. Very little of this case, was my own personal knowledge.

Q. Right, and in addition to that no objection was made to any of the *naswers* that you gave.

A. I don't recall whether there were or were not.

I have no further questions.

4/26/67 The Respondent rests.

page 78 } By The Court: Mr. Beaver do you wish to argue it.

A. Yes sir. May it please the Court, I realize the burden is upon the petitioner as as such I would say right at the inception the law in Virginia Courts on a point like this is that the Petitioner has the burden of going forward and to show that his Court appointed Counsel is not merely successful but that he did much worse by way of defending this in order to sustain the burden. I submit from the beginning of this case to the conclusion of the case of the 1st of June, 1966, in all respect to a brother of the Bar, that Mr. Kent did not conduct the case in the manner which it ought to have been done. In the first place, from the time prior to entering the Court Room he had tried the case over in the County Court, even though he did not know the result of the other cases, by even taking time to listen to the other cases, he knew when he came here on the 1st of June that the two Chisholm boys and the Wood boy, who freely admitted either to the County Judge or Judge Simpkins, who decided the case on their pleas of guilty, recognized that they were participants. Knowing that when he came here on the 1st of June as to what

4/26/67 } their testimony was going to be, which was definitely against Jack Ellis as Commonwealth Attorney and the Commonwealth's case that if the

page 79 } Court and I ask in all seriousness that I can muster that Your Honor read these 54 pages in detail, before it makes its decision, because right at the very beginning if you read the Mills testimony, who was the owner of the store in no way shape or form does Mr. Mills know who broke into his store. I believe I know what happened. I am only speculating. I believe in fairness to the Commonwealth Attorney and to the State Trooper, that they had been through this same evidence in five cases, that they were sick and tired of it, and when they came to the Anderson Case they thought they had a smooth road to haul, and they didn't have it, and if the Court will read the direct examination of Mr. Ellis to Trooper Mitchell it is inconceivable that at that point there would have been any question asked by Mr. Kent. I say it with all seriousness, a layman would have stopped at that point because this man's name was not even mentioned, Judge. It was mentioned in no way shape or form, time, place, or any connection with it. I say if Mr. Kent would have known at that time, and he is bound to know, because he testified that the two Chisholm boys and the Wood boy told

4/26/67 } him that when they got to Court they were going to testify that Anderson wasn't a part of it. So

page 80 } if Kent would have stopped and the Commonwealth which it did put on Travis Ray Chisholm, the older boy, and then the younger boy. They went back as Jack Ellis testified. They went back on the Commonwealth. So there was no way in the world to convict this man. I submit this is not merely an error of judgment. This goes further than that, much further as far as this man's rights are concerned. But, what was the first question that he asked. "Officer, why did you issue the warrant" and the Officer goes on for three pages. It is nothing but hearsay evidence coming in, what the Chisholm boy told me, what the other Chisholm boy told me, what the Wood boy told me. This record of 59 pages, I submit, and I am willing as Counsel in respect to the Court, of the 59 pages there is at least 15 pages of hearsay evidence and that is a minimum. It was all solicited from the part of this man's Court appointed Counsel. I would say that it would be a little bit different if he had had Counsel of his choosing, and say that he assumed the risk by getting whoever he got as his Counsel, but this man had Court appointed Counsel and as Mr. Kent sat and testified when he started this case he was in charge. All the way through he

4/26/67 } was in charge. But there are only two objections in the 59 pages and one of the two objections deals page 81 } with when this man was put on the stand, Mr.

Ellis as Commonwealth Attorney, asked the first question, which I have heard Your Honor ask many a defendant, "have you ever been convicted of a felony", when you were Prosecuting Attorney. Naturally, you were interested in it and so was Mr. Ellis. The man was bound to answer that question, "yes I have". The next question was "are you known as "Willie". No need to ask that question because the whole evidence was either "we only knew this man as "Willie", we didn't know him as Willie Anderson, so from beginning to end he admits the case is on the point of identification. Is there any Instruction to that point. Of the two instructions which were offered, I submit that the man who testified as Counsel didn't tender the first Instruction. He didn't think it was necessary. Yet, he will say that the whole question was a question of identification. It is inconceivable to me that you would allow a man to be tried by his peers and not submit one instruction. If he were not able to have drawn the Instruction, he certainly could have asked the Court to give an Instruction along that point. I think the Court ought to have given an Instruction, but it is not up to me to say what the Court ought to have done,

4/26/67 } there is no evidence along those lines. Of the two page 82 } objections, the one is have you ever been convicted

of a felony. We got to the end of the case and the man is given five years and he says I don't think the evidence was sufficient for five years. I can say honestly to the Court, there is enough evidence in here to convict this man and if he could have gotten more than five years I believe he would have gotten ten. But it all came in as a result of Mr. Kent's questions. This man would have been better off without a Lawyer. They are his own words to me sitting down here in the Jail, "I would have done better without counsel". I submit, sir, that that is a true statement.

This Petitioner is merely asking that this case be tried over again or that he be released and although I don't think Mr. Mann is going to make issue of it, I will say to the Court in case the Court has some question about it, in fairness to all parties concerned, when I was designated by Judge Simpkins to Appeal, of the 60 day period I didn't get the record until some 45 days subsequent. Hurriedly in reading the record, I made an assignment of ineffectiveness of Counsel and at the time that I argued it before the Court of Appeals

4/26/67 } I told the Justices Spratley, Snead and Carrico
page 83 } that this was one of my assignments, but I thought
the proper remedy was by *Habeas Corpus*, and
in the Appeal there was only one real assignment
of error of the four that had any merit and that dealt with
improper argument of the Commonwealth Attorney, which
Mr. Ellis admits was improper because it went outside the
realm of evidence. No objection was made to it, and I submit
that all the way through that Counsel was most lackadaisical
and brought in evidence which was enough to convict this
man and I submit that he didn't receive the trial that he
ought to have received, and solely because of his Counsel. I
ask that the Court give consideration to this Petition and
either release him within due time or grant him a new trial.

By The Court: Did the Court of Appeals deny your Petition, Mr. Beaver.

A. Yes sir.

Q. You did raise the question of ineffective Counsel.

A. I did. But in argument of it, in all fairness to this Court and to that Court, I indicated to them that I made the assignment, I didn't think it was a proper assign-
4/26/67 } ment, although I didn't abandon it.

page 84 } Closing Argument—Mr. Mann

Mr. Mann: If Your Honor please, there is some conflict

in the testimony here between the witnesses. Travis Chisholm has testified that he never testified in any Court connecting Mr. Anderson with this case. Trooper Mitchell has testified that he was connected with the case in the other trial. The Commonwealth Attorney has so stated, because he did not know at this trial that there was going to be any change in that. It is true that Counsel was appointed in this case of William Henry Anderson, but he wasn't appointed without any knowledge of what had gone on because he represented the man in the Preliminary Hearing. In the case of *Peyton vs. Ellerson*, 207 Va. 423 that case held that there is no requirement that Counsel fabricate a defense where in fact none exists. Furthermore, there can be no predetermination of time for Court Appointed Counsel to prepare for a trial, because what might be reasonable in one case could be quite unreasonable in another. Mr. Anderson has testified that he had no witnesses. He came into Court with his Court Appointed Counsel, he tendered a plea of not guilty, he was tried by the Jury, so there must have been sufficient reason for the Jury to believe that Mr. Anderson was connected and they

4/26/67 } found him guilty. This is a *Habeas Corpus* proceeding and it is not a trial. The verdict of the page 85 } Jury or the sufficiency of the evidence can not be gone into in a *Habeas Corpus* proceeding. Mr. Anderson appealed his case, and the judgment of this Court was affirmed. The judgment of this Court is now being collaterally attacked and it carries with it the presumption of regularity. *Johnston vs. Zerps*, 58 S. C. 10-19. We say that Mr. Anderson has failed in his *Habeas Corpus* proceeding to carry the burden of proof. The burden is upon him. If he had been tried by the Court it may be a little bit different, but he was not tried by the Court, he was tried by a Jury. We pray that his Petition for a Writ of *Habeas Corpus* be denied and dismissed, the Writ discharged and the Petitioner remanded to the custody of the Superintendent of the Virginia State Penitentiary.

Mr. Beaver: I agree with everything that Counsel has said in reference to what the Law is on the matter. I don't agree with him that the man ought to be remanded to the Penitentiary because of the mere fact that the Jury has found him guilty. I can agree to all of that and I can agree to what the evidence was in the trial Court, but I submit that the burden here, which this man has presented and which has not been strongly contested as a fact, the only way that 4/26/67 } this man was ever convicted was because of the page 86 } irregularity which may have not only been mistakes, but gross mistakes of inadequacy of counsel.

As I have said before, it is inconceivable on the evidence, if you had been sitting here and listening to it, of what the Trooper and Mr. Mills said that there would have been any need, I know that Mr. Bremner and older members of the Bar have always pounded into my head, don't ask too many questions. Oops! you asked one too many. That is what happened here. He says his reason for it, he wanted to find out about the constitutional rights of the man. I submit, Sir, there wasn't anything to do with the Constitutional rights of this man when he is charged with breaking and entering, and there isn't anything even connecting him with it. He didn't need to ask that question. But after he got the ball rolling he then could have done something to stop the momentum instead of allowing all the hearsay and leading questions to come in. Again I ask the Court in all seriousness to take the time to read the transcript, which has been introduced before making its decision, and although the Supreme Court in numerous cases has said that ordinarily lack of preparation and mistakes and errors of judgment or improper advice or trial strategy in connection with the case are insufficient to

4/26/67 } setting aside a judgment of conviction, which I agree with in the ordinary case; but this is more than just trial strategy to this. There wasn't any strategy to this. This was just asking one too many questions, and once it did it was enough to open the door to convict this man, and I submit that even if this man gets another trial now, on June 1st they wouldn't have convicted him if it had been done in a proper way, and they won't convict him now if he gets a new trial. I submit to the Court in fairness and justice to this man, he ought to be granted a new trial in this matter.

By The Court: I have carefully scanned the transcript, Mr. Beaver during the course of your examinations of Mr. Kent regarding testimony of Mr. Mills and also of the Trooper. The sufficiency of the evidence, has been decided, I believe, by the Supreme Court of Appeals when they denied your Petition for Appeal. Mr. Kent preserved the exception of the sufficiency of the evidence when he moved to set the verdict aside as contrary to law and evidence at the Conclusion of the Jury trial, which gave the Supreme Court of Appeals the opportunity to examine the sufficiency of the evidence. As you have stated, Attorneys in the past and Attorneys in the future will always ask questions too many. This is a trial tactic that an Attorney has to use with a great deal of de-

4/26/67 } liberation. We don't know what was in Mr. Kent's mind. We know that he had interviewed Trooper Mitchell. He was aware of Trooper Mitchell's

conversation with the defendant. He also was aware from the testimony here today that Travis Ray Chisholm was to testify for the Commonwealth. He had been subpoenaed by the Commonwealth. The evidence of Mr. Ellis is that he was surprised by this testimony, anticipating that Mr. Chisholm would testify that this was the man who was with him. It may have been incumbent upon Mr. Kent to cross-examine Mr. Mitchell to show the insignificance of the identification. I don't believe that the trial strategy of an Attorney during the course of a trial, his method of cross-examination, his decision to cross-examine and not to cross-examine is subject to judicial review. In every case that is tried, there will be errors made by attorneys, and I don't believe that these errors during the course of a trial should be grounds to set aside the conviction of the defendant. This man was appointed his Attorney, interviewed him, prepared the case, he interviewed witnesses, the man was aware of his constitutional rights since he demanded a trial by jury, he submitted to a trial by jury, his attorney was present, he argued the case, and he concluded that the Instructions that were presented to the Court were sufficient to frame the issue before the jury. This is a question also 4/26/67 page 89 } that an attorney must make a decision on when he tries a case, whether or not he should encumber the record with a whole lot of instructions or whether the question reasonable doubt is sufficient for a man to present his case to the jury so that the jury would understand that the evidence has to be to that degree that is required by law. The instructions were very fair toward the defendant. The instructions of the Commonwealth clearly framed the issue that the jury should decide and I don't believe that the evidence introduced here today in the record in this case is sufficient to show that a farce was committed, that a trial was just a sham, that the defendant was denied his constitutional rights. So therefore, I am denying the release sought by the Petitioner, I don't believe he has shown the burden of proof, I am discharging the Writ and remanding the defendant to the Virginia State Penitentiary in the custody of the Superintendent.

Mr. Beaver: Your Honor, for the purposes of the record, I would like it to show that the Petitioner so notes an appeal, and excepts to the ruling of the Court.

By The Court: All right.

Mr. Beaver: We would ask the Court to allow the transcript of this hearing to be typed.

By The Court: So granted.

* * * * *

EXHIBIT NO. 1

* * * * *

Exh. #1

6/1/66

page 1 } By The Court: Mr. Kent, are you ready.
Mr. Kent: Have your client come up by you.

Jean C. Harris sworn to record proceedings of trial.

Accused is arraigned. Plea of not guilty entered. Wished to be tried by a Jury.

Jury is called. Stuart C. Thomas, James Baker, Luther Holmes, William R. Shelton, Jr., Floyd T. Ball, A. L. Joyner, L. D. Campbell, Sr., Thomas Mallory, Walter Howard, Harry L. Corker, Ulysses G. Winston, Leslie A. Bell, Jr., J. Ellis Hughes, W. M. Byrd, and M. L. Duling, Jr. and Joseph C. Eanes, Garland F. Dunn, T. L. Bourne, Jr., Curtis Pilson

By The Court: Mr. Kent, we have nineteen and the Commonwealth Attorney has indicated that he is willing to take the 20th one as his strike, is that all right with you, Sir.

Mr. Kent: Yes Sir.

All Jurymen sworn.

By The Court: Gentlemen, are all of you residents of Hanover and have been residents for at least one year preceding this day—this is a charge against William Henry Anderson who is charged with breaking and entering the storehouse of J. R. Mills on the 7th or 8th of February, 1966, with intent to commit larceny and with stealing certain

Exh. #1 merchandise. Are any of you related by blood or 6/1/66 marriage to William Henry Anderson, now if you page 2 } remain quiet I assume that the answer is "no", if the answer is going to be "yes" I expect you to speak up. Do any of you have any interest in the outcome of this case. Have any of you expressed or formed any opinion about the case. Are you sensible of any bias or prejudice either for or against William Henry Anderson or for or against the Commonwealth. Have you discussed the case with anybody, anybody talk to you about the case. Do any of you live within two miles of the storehouse of J. R. Mills—

Ulysses G. Winston states that he does.

By The Court: That disqualifies him, Mr. Ellis.

Mr. Ellis: I will strike him.

By The Court: Hereafter we ought to get 22 in all cases.

By The Court: Let the record show that Winston stands aside and Mr. Ellis waives one of his strikes.

Do any of you know of any reason whatsoever why you should not give a fair and impartial trial to the Commonwealth and to the accused according to the law and evidence.

All right, pass the list down and let it be shown and Mr. Winston is Mr. Ellis' first strike, and the other one as his second strike.

Mr. Ellis: Let the record show that I used Ulysses Winston as my first strike. I will use Albert Cosby as my second strike.

Exh. #1. Jurymen stricken called and asked to step from 6/1/66 Jury Box.

page 3 } Jurymen selected to serve:

Stuart C. Thomas, James Baker, Luther Holmes, William R. Shelton, Jr., Floyd T. Ball, A. L. Joyner, L. D. Campbell, Sr., Thomas Mallory, Walter Howard, Harry L. Corker, Leslie A. Bell, Jr., and J. Ellis Hughes

Jurymen sworn and administered oath:

Indictment read again. Instructions to Jury as to their duties and punishment if the accused is found guilty.

Mr. Ellis: I would like to call all the witnesses, have them sworn and excluded.

By The Court: Call the witnesses.

Following witnesses called by Clerk and sworn:

J. R. Mills, L. B. Mitchell, Travis Ray Chisholm, James Rudolph Chisholm, Hammond Wood, and accused.

OPENING STATEMENT

By Mr. Ellis:

May it please the Court, Gentlemen of the Jury, my name is Andrew J. Ellis, Jr. and I am Commonwealth's Attorney for Hanover County, and as such prosecute all felony cases such as we have here this morning. Mr. James C. Kent, an Attorney from Ashland represents the accused. I am going to make an opening statement to you as to what I expect the evidence to show. What I say is merely a state-

J. R. Mills

Exh. #1 ment, nothing more, and if there is a variation be-
6/1/66 tween the evidence and between what I say, I want
page 4 } to tell you now that you must, of course, believe
the evidence and not what I say. The Common-
wealth expects to show in this case that on the night of
February 7th or 8th, during that night-time, J. R. Mills'
General Merchandise store located on Route 33 in Hanover
County, Virginia was broken into, and certain items among
which was a skill saw and various items of merchandise were
taken from that store. Now, we expect the evidence to further
show that there were four participants in this crime, two
brothers, James Rudolph Chisholm, Travis Ray Chisholm,
Hammond Wood, and the accused in this case. The four of
them met together at a place called "Metros" in Richmond
which is a local beer hall, *gatherine* place in Richmond. There
they discussed what they had in mind and departed in the
defendant's truck for Mills' Store for the purpose of breaking
into the store. When they arrived at the scene the two Chis-
holm boys and the Wood boy got out and did the actual break-
ing in and put the goods and merchandise that they took
in the truck. The accused, knowing the purpose of the trip,
driving them there for this purpose, but not actually taking
part in the breaking and entering drove the truck back to
Richmond. We expect the evidence to confirm what
Exh. #1 I have said and that the accused, by his actions, is
6/1/66 just as guilty as those who actually did the break-
page 5 } ing and entering and ask that you find him guilty
and fix his punishment.

OPENING STATEMENT:

Mr. Kent:

Gentlemen of the Jury, we expect the evidence to show
that the defendant, William Henry Anderson, was not near
the J. R. Mills Store, indeed had no knowledge of this break-
ing and entering, and that he participated in no way shape
or form of either by driving the other three to the scene or
by driving them away from it. I believe that our evidence will
show this. Of course, there may be some confusion and I am
sure that all of you gentlemen will be able to see just as we
have outlined.

J. R. MILLS called as first witness for Commonwealth:

Q. State your name, please.

J. R. Mills

A. J. R. Mills.

(At this point Court instructs Jury to move their chairs around so that they can see witnesses and hear them well.)

Q. Where do you live, Mr. Mills.

A. I live at Rt. 3, Glen Allen.

Q. Do you own and operate J. R. Mills' General Merchandising store.

A. Yes Sir.

Q. Where is the store located.

A. It is located on U. S. Route 33, six miles east Exh. #1 of Montpelier, in Hanover County.

6/1/66 Q. Mr. Mills, directing your attention to the even-
page 6 } ing February 7th or 8th of this year, I ask you
what you found when you returned to the store on
the morning of February 8th of this year.

A. I usually open up right around 6 o'clock and I unlocked the door and walked in and I noticed some merchandise scattered around on the floor and that aroused my suspicion and after investigating I found that somebody had been in and stole quite a bit of merchandise.

Q. How had they gained entrance to your store.

A. They broke a plate glass window, approximately five foot square in the front of the store on the west corner.

Q. Had you closed the store up on the evening of February 7th.

A. Yes sir.

Q. Was anything out of order at that time.

A. No sir.

Q. Were any of the windows broken, and did you lock the door.

A. No windows broken and the door was locked.

Q. What exactly, to the best of your recollection, was taken from the store.

A. Approximately 20 cartons of cigarettes or more, all of the frozen food out of a 16 cubic foot frozen food Exh. #1 box, and all the food was taken out of a 10 foot
6/1/66 display case. I had a display case of 22 bullets.
page 7 } They were taken, and a skill saw was also stolen.

Q. Did you call a police officer at that time.

A. Yes I called the State Police and Mr. Mitchell came out.

Q. Did you go over the store with him and point out what had been taken.

A. Yes and he made an estimate of it.

J. R. Mills

A. He made a list of it.

A. Yes Sir.

Q. Did you estimate the value of the goods at that time.

A. He has a total but I don't remember the total.

Q. Did you give him the values.

A. Yes I gave him the values.

Q. He has a list.

A. Yes Sir. The statement that he has is correct. I do not remember the exact total.

Q. Mr. Mills, I show you a case with a Black & Decker skill saw in the case and ask you if you can identify that saw and case.

A. Yes Sir, it is the same saw that I purchased from Virginia-Carolina Hardware.

Q. Is that your saw.

A. Yes Sir.

Q. When did you miss it.

Exh. #1 Q. I didn't miss it when Mr. Mitchell and I were 6/1/66 investigating, I missed that later on. It was some page 8 } time during that day.

Q. Was the saw in the store the day before.

A. Yes, it was there the day before.

Q. When did you get the saw back.

A. Mr. Mitchell returned it to me after he had gotten it from the boys, I don't remember just when it was.

Q. You can swear that it is your saw.

A. I sure can, I have a bill of sale for it.

Q. How much did you pay for that saw.

A. Approximately \$60.00 and the case was \$7.00 or \$8.00. I don't remember the exact cost of it.

CROSS EXAMINATION

By Mr. Kent:

Q. Mr. Mills, you testified that this is your saw. How did you identify it. By what means, the model number of

A. Well, I have checked the model number, and it is the same identical case and the same saw. It had been used very little. I purchased it probably a year or more before it was stolen, but it had been used a very little, and I also have the bill of sale with the serial number and everything if it is necessary.

Q. Have you ever checked the number against it.

A. No I have it.

Q. Do you know how many Black & Decker saws

Trooper L. B. Mitchell

of this kind were sold in Virginia about the same Exh. #1 time.

6/1/66 A. No Sir, I have no idea.

page 9 } Q. Then actually, by model or serial number, you have never identified it as such.

A. I haven't gone to that trouble yet, but I can.

Q. Mr. Mills, was there snow on the ground at the time that this happened.

A. No, I don't think it was. I can't say definitely.

No further questions.

TROOPER L. B. MITCHELL called as Commonwealth's next witness.

Q. You are Trooper L. B. Mitchell employed by the Virginia State Police Force, are you not.

A. Yes Sir.

Q. Trooper Mitchell, did you investigate a complaint made by Mr. Mills on the morning of February 8, 1966 at his store.

A. Yes Sir.

Q. Did you go to his store.

A. Yes Sir.

Q. What did you find when you arrived.

A. I found that a hole had been knocked in a window in the front of the store. The window was approximately five foot square, and the hole was approximately two by five foot.

Q. What was the condition of the store inside the building.

Exh. #1 A. Some merchandise had been pushed from the 6/1/66 shelves onto the floor just inside this window, in-
page 10 } dicating that the window had been broken from the outside by force. Mr. Mills reported that goods was missing with a retail value of \$257.00, consisting of 20 cartons of cigarettes, all the frozen food from a frozen food box, 22 bullets, and a skill saw.

Q. What did you do after the investigation at the store.

A. At 3 a.m. on the 13th day of February I received information that I was wanted at the Police Department in Richmond in reference to this same case. I proceeded to the Police Department in Richmond where I met a detective Davis who had certain information pertaining this case, and on this information he secured a search warrant for the home of Travis Ray Chisholm at 908 Perry Street in Richmond. Detective Davis, of Richmond and Detective Winters

Trooper L. B. Mitchell

of the Police Department of Henrico County, and Officer Carroll of the Police Department of Richmond and myself went to 908 Perry Street shortly after 5 a.m., woke up Mr. Chisholm and conducted a search of his home. As a result of this search certain property was recovered. This property identified in another case. Detective Winters questioned Mr. Chisholm. I was present, but I did not question him.

Q. I hand you a skill saw and ask if you have seen this saw before.

Exh. #1 A. Yes Sir (after examining saw)

6/1/66 Q. Where did you obtain this saw.

page 11 } A. Chisholm took me to 910 Perry Street,
knocked on the door, announced that he wanted to
get the saw—

By The Court: Who came to the door.

A. A girl, I don't know who she was, a young woman came to the door and he announced that he wanted the saw that he had left there, she opened the door and he walked into a clothes closet and picked up the saw in the case and took it out and put it in the Police car and said that this was—

Mr. Ellis: Don't say what he said. What did you do with the saw after you had obtained possession of it.

A. After Mr. Mills furnished me with the model number Model Number U 3337 I returned the saw to him and I have a receipt for it.

Q. Had Mr. Mills previously given you the Model Number of the saw.

A. I asked him for identification of the saw and he showed me the bill where he had purchased a Black & Decker Electric Skill Saw Model No. U 3337.

Q. Is this the same saw that he showed you the bill for.

A. It is the same model number according to the bill of sale.

Q. Did you give him the saw at that time.

A. I delivered it to him, I don't remember the exact date. Delivery was made approximately a week after the 13th of February.

Exh. #1

6/1/66 Mr. Ellis: I ask that this saw be marked for
page 12 } identification as Commonwealth's Exhibit No. 1,
and introduced into evidence as such.

By The Court: Take those other tags off it and give them to the Clerk and put this one on.

Trooper L. B. Mitchell

No further questions

CROSS EXAMINATION

By Mr. Kent:

Q. Trooper Mitchell, you stated that you investigated this on the 8th of February.

A. I began the investigation on that date.

Q. When did you issue the first warrant in this case.

A. You mean for the first accused in this case.

Q. For anyone

A. I believe the warrants were issued on the 13th day of February. At 11 p.m. on that date I left two warrants at the Richmond lockup on Clay Street for Hammond William Wood and Travis Ray Chisholm and on the 14th at 5 p.m. I left a detainer with the Richmond Juvenile *Dentention* Home for James Rudolph Chisholm, and the warrant for Mr. Anderson was issued at that time.

Q. What was your basis for issuing those warrants.

A. I discussed this with James Rudolph Chisholm and Hammond William Wood and Travis Ray Chisholm, each one identified a picture of William Henry Anderson.

Exh. #1 Travis Ray Chisholm pointed out to me when he 6/1/66 was arrested that a green 1957 Chevrolet Pickup page 13 } truck bearing Virginia License Number T 9 744 which is registered in the name of Leo Jessup 3427 Rayburn Road, Richmond, was the vehicle which was used and identified Anderson as the driver, and said that Anderson had borrowed the truck.

Q. Who gave you this information.

A. Travis Ray Chisholm.

Q. Did they give you the defendant's name.

A. James Rudolph Chisholm described the man as being known to him as "Willie", and taking this name of Willie and his approximate age of 45 that James Gave and the fact that he was known to frequent beer joints in the Southside of Richmond I asked a Richmond Detective if he had ever heard of such a person as Willie who would be about 45 years old and who frequented beer joints in the Southside of Richmond, he immediately went to the Richmond Police Department files and returned with a photograph of William Henry Anderson. He said that this was the subject known as "Willie" that I had described. I immediately took this photograph back down the hall into the Detective Bureau where James Rudolph Chisholm was sitting and displayed the picture to him

Trooper L. B. Mitchell

and he said that was the man known to him as "Willie".

Exh. #1 Travis Ray Chisholm, when I asked him how he
6/1/66 got up there to Mills' Store, said Willie Anderson
page 14 } carried him in this green pickup truck.

Q. He actually gave you the name of William
Henry Anderson.

A. Travis Ray referred to him as Willie Anderson.

Q. James referred to him as what.

A. As "Willie", but after I received the picture of him and
took it down and displayed it to James Rudolph Chisholm
he said this was the man that took him up there.

Q. You said Travis referred to him as something else.

A. Travis referred to him as Willie Anderson.

Q. As Willie Anderson or Willie.

A. Willie Anderson.

Q. Did Wood make any reference as to what other person
might have been involved.

A. He said "Willie" and that the picture I had at that
time was the man.

Q. That it was absolutely the man in the picture or that
it looked like him.

A. He didn't say it looked like him. He said it was him.

Q. How long had you been questioning these boys when
you presented them with this picture.

A. When I was called to the Police Department in Rich-
mond, I arrived at 3:45 and James Rudolph Chisholm was
sitting in the Detective Bureau and he couldn't hardly wait
to confess. I no sooner walked in then he started

Exh. #1 his confession. Hammond Wood was being sepa-
6/1/66 rated from James Rudolph Chisholm and he had
page 15 } been arrested at the same time that James Ru-
dolph Chisholm was for an offense in Richmond

and he was being held in a separate room so they could not
converse. I talked to Wood about ten minutes beginning at
4:15 a.m. on the 13th of February, most of this conversation
pertained to his rights to an attorney, right to remain silent,
and that any statements he gave would be used for or against
him. There was some discussion as to whether or not he
understood these rights and they were discussed rather
thoroughly with him until he agreed that he understood these
rights. During the ten minute conversation there were several
interruptions. Just shortly before 5 a.m. I talked to him in
the Detective Lieutenant's Office, where we could talk without
being interrupted and I again told him of these rights, an
attorney, his right to remain silent, and that any statement

Trooper L. B. Mitchell

could be used for or against him, then he confessed, the two times I would estimate no more than 15 or 16 minutes.

Q. In your interrogation did you lead them to believe that cooperating with you would be to their benefit.

A. I don't believe I did. I tried not to.

Q. You stated that when you first arrested the Defendant that he denied any knowledge of J. R. Mills' Store Exh. #1 or any participation in this.

6/1/66 A. I personally didn't arrest him on the warpage 16 } rant. He was arrested by Detective Baker of the Police Department of Henrico County and subsequently turned over to me at 2:30 p.m. on the 12th day of March.

Q. He had issued it on the date on the information that he had gotten from the boys.

A. Yes Sir.

Q. He denied any knowledge at all.

A. Yes, he denied having ever been at or near Mill's Store.

Q. You advised him of his right at that time and he denied it.

A. Yes.

Q. When did you again talk to him.

A. The next time I talked to him was on the 17th day of March in the hallway just outside the County Court.

Q. At that time you advised him of his rights.

A. Yes Sir.

Q. You said there were some negotiations going on as to him, well preliminary to his changing his statement. I believe you said that at this time his statement was different.

A. At this time he wanted to make a deal, that he either be dismissed or get a suspended sentence on this charge in return for information that he would give to the Police Department of Henrico County. I told him that I could not make a deal, that I would relay the information Exh. #1 to Mr. Ellis, who was Commonwealth At-6/1/66 torney.

page 17 } Q. Was he very much upset at this time.

A. He didn't appear upset.

Q. Had he been in jail.

A. Yes Sir, he had been in jail, since the 12th of March. I didn't think he was any more upset on this occasion then when I first saw him on the 12th of March.

Q. When you saw him on the 12th was there any evidence of him drinking at that time.

A. As best I recall, I could smell some alcoholic beverage

Trooper L. B. Mitchell

on his breath, but he wasn't intoxicated. He knew what was going on. He wasn't staggering or anything.

Q. On the second time you didn't smell anything on him, did you.

A. No Sir.

Q. But you didn't notice him being nervous.

A. I didn't notice him being any more nervous than he was when I first observed him.

Q. Only upset about Henrico and wanted to negotiate to get something.

A. He wanted to negotiate with this charge in return for information that he would give the Police Department of Henrico County.

Q. Did he seem scared.

A. No Sir, I didn't notice that he appeared to be scared.

Q. After he started negotiating with you did you
Exh. #1 remind him again of his rights.

6/1/66 A. I don't believe so. The conversation was very
page 18 } brief. I told him I couldn't negotiate with him.

Q. When did you advise him of his rights. Did you just go up to him in the Hall and advise him that he had the right to an Attorney, of his Constitutional Rights—

A. He was in the Courtroom.

Q. Did you take him out.

A. I took him outside the Courtroom into the hallway and I reminded him that he still had his rights, that he was entitled to an Attorney, he was entitled to remain silent, that anything he said could be used for or against him.

Q. After advising him of that, did you question him again.

A. I asked him if he would tell me about the trip up 33, that is when he said he wanted to make a deal. I told him that I couldn't make any deal—

Q. But you didn't remind him again at that time of his rights.

A. No Sir.

No further questions.

RE-DIRECT EXAMINATION

By Mr. Ellis:

Q. Trooper Mitchell, when he asked for a deal you told him that he would have to communicate with me, I believe.

A. I told him that I wasn't authorized to make
Exh. #1 any deals, that the Court would frown upon it, that
6/1/66 I would relay the message to you.

Trooper L. B. Mitchell

page 19 } Q. Was that request relayed to me.

A. Yes, it was.

Q. What did you reply to Mr. Anderson, as a result of your conversation with me.

A. I told him that no deal would be made.

Q. You were asked on cross-examination of the basis of your issuing the warrant, against the defendant in this case, Anderson. You described certain conversations which took place between you and Travis Ray Chisholm, the Wood boy, and James Rudolph Chisholm. Was there any other information related to you as to where they got together, how they got together, when they got together, and the trip going out 33.

A. Yes sir.

Q. Would you relate that to the Court.

A. I believe it was Travis Ray Chisholm who said they were in a beer joint together in Richmond—

Q. What was the name of that.

A. I believe it was Metros. When the conversation of breaking and entering came up, and that James Rudolph Chisholm said that he knew of a place up on Route 33 that they could break into.

Q. Were they all together at that time.

A. Yes Sir. That William Henry Anderson furnished the truck and they went up Route 33, and the information they gave me was that Mr. Anderson stopped 6/1/66 in front of Mr. Mills' store, after James Rudolph page 20 } Chisholm pointed it out as the place they were going to break into. That they got out of the truck, that Mr. Anderson drove up and down Route 33 while the other three boys went in the store, gathered the merchandise, set it just outside the front door, and that when Mr. Anderson passed they stopped him and he pulled up in front of the door and they put the merchandise into the truck and returned to Richmond. This does not correspond with what Anderson said about it.

Mr. Kent: I didn't want to object your Honor, but I wasn't sure what he was saying, you said who said this.

A. Travis Chisholm.

Q. He said what.

A. That they were in a beer joint in South Richmond. James Rudolph Chisholm, Hammond William Wood, Travis Ray Chisholm, and William Henry Anderson—

Q. Now he told you William Henry Anderson

Travis Ray Chisholm

A. Willie Anderson is how he referred to him

Q. Are you sure that it was Willie Anderson, not just Willie

A. Willie Anderson. And that the subject of Breaking and Entering came up and James Rudolph Chisholm said that he knew a place they could break into on Route 33. Willie Anderson furnished this green pickup truck which he pointed out to me, and that the four of them went up Route 33, that James

Rudolph Chisholm pointed out J. R. Mills General Exh. #1 Merchandise Store, that the pickup truck pulled 6/1/66 up in front of the place, that the two Chisholm page 21 } brothers and Wood got out and that Anderson drove up and down Route 33 while they broke into the store, gathered the merchandise they intended to steal and set it outside the door, and when Anderson passed they stopped him and he pulled up in front of the store, and the merchandise was loaded into the truck and they returned to Richmond.

Question—Kent—What kind of a picture was this that you used for identification.

A. I don't have the picture now, but it was a Police Department of Richmond picture. Profile and straight. Actually two pictures in one.

Q. Actually the identification here was made with the photograph and these boys and that was the basis for your issuing the warrant against this defendant.

A. Yes Sir.

Commonwealth calls TRAVIS RAY CHISHOLM as next witness

Q. Your name is Travis Ray Chisholm, is that right.

A. Yes Sir.

Q. How old are you.

A. 19.

Q. You have been tried and convicted of breaking and entering Mills' Store in Hanover County, is that correct.

A. Yes Sir.

Exh. #1 Q. You are at present confined to the Virginia State Penitentiary. Is that correct.

6/1/66 A. Yes Sir.

page 22 } Q. I am going to ask you about certain events with regard to the breaking and entering of Mills'

Travis Ray Chisholm

Store and I will ask that you answer the questions. First of all, when was the probability of breaking into Mills' Store discussed by you with anyone else.

A. You mean before I got locked up.

Q. Yes.

A. That night.

Q. Where did this discussion take place.

A. I don't exactly recall where it took place.

Q. Who was present.

A. My brother, Jimmy Chisholm, Woody Hammond, and a guy named Willie.

Q. Who was this guy named Willie.

A. He was sort of an old fellow.

Q. Is this defendant sitting here (pointing to Anderson) the man.

A. No Sir, he isn't.

Q. Was it a place called Metros.

A. At 12th & Perry, I can't say for sure where it took place.

Q. After you discussed it where did you go.

A. After we discussed it we come up here on 33 to Mills' Store.

Q. Who came along.

A. My brother, Woody Hammond and this guy named Willie.

Q. What type of automobile or vehicle did you Exh. #1 go in.

6/1/66 } A. It was a green truck. I don't remember what
page 23 } kind it a Ford, GMC or what.

Q. All right, who actually went in the store.

A. Me, my brother and Woody Hammond.

Q. What was taken out of the store.

A. This saw right here, some 22 shells, I believe they were, and—

Q. Did you subsequently give this saw to Trooper Mitchell

A. Yes Sir, I did.

Mr. Ellis: Let the record indicate that the witness is referring to the saw marked for Identification as Commonwealth's Exhibit No. 1, and has been introduced into evidence as such.

Q. I believe you said that this man named Willie drove the truck, is that right.

A. Yes Sir.

Q. What did he do while you all were in the store.

Travis Ray Chisholm

A. Drove up and down the road.

Q. How long were you all in the store.

A. I say approximately 1½ hours or maybe 2 hours.

Q. He waited for you all by riding back and forth up the road.

A. Yes Sir.

Q. What happened when you came out of the store.

A. He pulled the truck up in the driveway of the store on the road—

Exh. #1 Q. And you all loaded in the stuff.

6/1/66 How many packages of stuff did you have.

page 24 } A. I can't say for sure.

Q. Was it a whole lot.

A. It was right many.

Q. Then you all got into the truck and rode back to Richmond.

A. Yes Sir.

Q. Was it discussed freely among you going out and going back.

A. No Sir, we didn't have too much to say.

Q. Did you talk about it at all.

A. Yes Sir

Q. You all had discussed it at Metros,

A. I can't say for sure it was there.

Q. But it had been discussed.

A. Yes Sir.

Q. That was the reason you left the gathering point in Richmond and going out 33.

A. Yes Sir.

Q. After this incident, did you subsequently have a conversation with Trooper Mitchell.

A. Yes Sir.

Q. Did he give or show you a picture to look at with regards to anyone.

A. No Sir, he did not.

Q. He did not.

A. No Sir, he did not.

Exh. #1 Q. Didn't ask you to identify any picture as to who this fellow Willie was.

6/1/66 A. No Sir.

page 25 } Q. Did you know what this fellow Willie last name was.

A. No Sir, all I knew him by was Willie.

Q. No picture was ever presented you by Trooper Mitchell

A. No it wasn't.

James R. Chisholm

Q. And you never made any identification, of a picture.

A. No sir.

Q. And you don't know what has become of this man named Willie.

A. No Sir, I don't.

Q. Do you recall stating under oath at your trial that a man by the name of Willie Anderson took you out there.

A. No Sir I don't.

Q. You don't recall making that statement.

A. No Sir.

Q. Do you recall stating in this witness chair a few days ago in the case Commonwealth vs. Wood that William Anderson was the man that drove the truck.

A. No Sir. I remember saying Willie but I didn't say Anderson.

Q. That is all of my questions.

Exh. #1

6/1/66 No Cross Examination By Mr. Kent

page 26 } Commonwealth Calls JAMES R. CHISHOLM
 as its next witness.

Q. You are James Rudolph Chisholm, is that correct.

A. Yes Sir.

Q. How old are you James.

A. 15

Q. You were tried in the Juvenile and Domestic Relations Court of Hanover County for your involvement in the breaking and entering of Mills' Store, weren't you.

A. Yes Sir.

Q. You are presently confined at Beaumont as a result of this, are you not.

A. Yes Sir.

Q. Do you recall going to Mills Store on the night of February 7-8th.

A. Yes Sir.

Q. Who went with you.

A. It was me, my brother, Woody and some other man.

Q. How many were there.

A. It was four of us.

Q. Do you recall telling me not a half hour ago that there were only three of you.

A. Yes Sir, but I misconcluded then.

Q. But you did tell me not over half an hour ago that only

James R. Chisholm

three of you went, and that this fellow by the name of Willie didn't go, didn't you.

Exh. #1 A. I said Woody went.

6/1/66 Q. But you told me just a little while ago, that page 27 } only three of you went. Is that right.

A. Well, I didn't know the other guy's name.

Q. Didn't I ask you if another guy went.

A. Yes Sir.

Q. And you said no, didn't you.

A. Yes Sir.

Q. Do you recall a conversation with Trooper Mitchell on the night that you were arrested for this offense.

A. Yes Sir.

Q. Down at the Police Headquarters at Richmond.

A. Yes Sir.

Q. Do you recall telling Trooper Mitchell who was with you at the time of the offense.

A. No Sir.

Q. Do you remember your saying that a man by the name of Willie was with you.

A. He asked me if I knew a man named Willie, and I said yes I knew a man named Willie that worked at Metros.

Q. That worked at Metros.

A. Yes Sir.

Q. Did Trooper Mitchell show you a picture that night and ask you—

A. He showed me a bunch of pictures.

Q. A bunch of pictures, how many.

A. I don't know how many.

Exh. #1 Q. Did you identify one as being the person 6/1/66 named Willie that was with you.

page 28 } A. I just picked out any picture.

Q. You just picked out any one. But you did identify a picture of the man who you said was with you, didn't you.

A. I was all shook up that night, so I picked out any picture and said it was him.

Q. But you did pick it out.

A. Yes Sir.

Q. Was that picture a picture of this man right here (pointing to Anderson).

A. No Sir.

Q. It wasn't

A. No Sir.

Q. Are you sure.

James R. Chisholm

A. I am sure.

Q. At whose suggestion was it that you all go to Mills store.

A. Mine.

Q. Where was the suggestion made and who was there.

A. It was made in Metros. I made it.

Q. You made it in Metros. Who was there with you at that time.

A. I don't recall, it was a whole bunch of people in there.

Q. A whole bunch of people.

A. Yes Sir.

Q. Was the Wood boy there.

Exh. #1 A. Yes Sir.

6/1/66 Q. Was your brother there.

page 29 } A. Yes Sir.

Q. Was a fellow named Willie there.

A. Yes Sir. He was running the store.

Q. He was running the store.

A. Yes Sir.

Q. Was it discussed at that time or mentioned that you go out to Mills' Store.

A. I brought it up.

Q. You brought it up, and did all four of you leave.

A. Yes Sir.

Q. Who drove.

A. That other guy.

Q. That other guy

A. Yes Sir.

Q. Do you recall telling me not over half an hour-ago that your brother drove the car.

A. Yes

Q. Now you tell the jury that the fellow drove.

A. I didn't tell you who it was.

Q. Who was it.

A. I don't know his name.

Q. It was not your brother, the one that you told me drove.

No further questions.

No Cross-Examination.

Exh. #1

6/1/66

The Commonwealth rests.

Hammond Wood

page 30 } Counsel for Defendant calls HAMMOND WOOD
as first witness.

Q. Hammond, would you look at the defendant here.

Do you know this man.

A. I have seen him once or twice.

Q. Where have you seen him.

A. Metros, 12th & Perry.

Q. Did he ever accompany you anywhere, or go anywhere with you in Hanover County.

A. No Sir.

Q. Were you one of the participants at J. R. Mills' Store in the breaking and entering.

A. Yes Sir.

Q. Was the defendant in any way connected with your trip.

A. No Sir.

Q. You said you had seen him a few times at Metros, was that prior to the time that the store was broken into. I mean before the store was broken into.

A. I seen him before the store was broken into.

Q. Did you know his name.

A. No Sir.

Q. Have you ever been shown a picture of this man.

A. No Sir.

No further questions.

CROSS EXAMINATION

By Mr. Ellis.

Q. You said that you had seen this man at Metros, I believe, on several occasions, prior to the Mills store

Exh. #1 episode.

6/1/66

A. I seen him before we broke into the store.

page 31 }

Q. And you broke into the store with the two Chisholm boys, is that right.

A. Yes Sir.

Q. Who was with you on that night.

A. Me, Travis Ray Chisholm, Jimmy Chisholm and another guy was driving the truck.

Q. Another guy was driving the truck.

A. Yes Sir.

Q. Do you recall what kind of truck it was.

A. It was a green chevrolet.

William Henry Anderson

- Q. What was this fellow's name that was driving the truck.
 A. I just knew him by Willie.
 Q. Hadn't you all gathered at Metros the night that you went out to Mills' Store before you went out there.
 A. Yes Sir.
 Q. You had a few beers there.
 A. No Sir, I didn't.
 Q. Some of the others did.
 A. Yes Sir, Travis did.
 Q. Then James suggested that Mills' Store would be a good place to break in, is that right.
 A. Yes Sir.
 Q. As a result of that, you, Travis, James and a fellow named Willie went out there to break in the store.
 A. Yes Sir.
 Q. Weren't you in jail down here with this man Exh. #1 waiting trial.
 6/1/66 A. Yes Sir.
 page 32 } Q. You had been locked up there with him for a right good while.
 A. Almost three months.
 Q. So you had seen him then other than at Metros.
 A. I seen him the first time I come to Court here, on the 16th of May.

No further questions:

Counsel for Defendant calls Defendant as next witness.

WILLIAM HENRY ANDERSON

Defendant sworn as he was not sworn with other witnesses.

- Q. Would you state your full name.
 A. William Henry Anderson
 Q. Are you sometimes known as "Willie"
 A. Some people call me Willie.
 Q. Do you know where Metros is on the Southside of Richmond.
 A. Yes Sir, I did. 12th & Perry.
 Q. Had you visited this place.
 A. For the past 20 years probably.
 Q. What kind of a place is this.
 A. It is a restaurant and beer joint together.
 Q. What has been your purpose in visiting it.

William Henry Anderson

A. To get a sandwich, or a pizza, I have been knowing the people for a pretty good while that run the place.

Q. Mr. Anderson, do you do much drinking.

A. Yes, I drink beer and whiskey just about every weekend.

Q. What kind of work do you do.

Exh. #1 A. Silo construction work. Build silos.

6/1/66 Q. Where does this work take you.

page 33 } A. The biggest part is done up in the mountain part of Virginia, and down through the Carolinas.

Q. During the month of February, most particularly on the 7th or 8th of February were you working on any job outside of Richmond.

A. No Sir. The last work I did I worked for the Carolina Silo, I stopped because of my wife's health, and I stayed around Richmond working for a tree surgeon until she died.

Q. Did you do any work in Hanover County.

A. No Sir.

Q. Have you ever lived in Hanover County.

A. No Sir.

Q. Do you know anything about the roads in Hanover County.

A. No Sir.

Q. Do you know where J. R. Mills' store is.

A. No Sir.

Q. Do you know where Route 33 comes out of Richmond.

A. Yes Sir, I do.

Q. Now you have heard the people testify here, did you prior to February know Hammond Wood.

A. No Sir, I didn't.

Q. Travis Ray Chisholm.

A. Yes Sir, I knew him.

Q. How well did you know him.

Exh. #1 A. I had seen him in Metros and he and I had
6/1/66 drank a few beers together.

page 34 } Q. Did you know his name.

A. The only thing I knew him by was Ray.

Q. How about James Chisholm.

A. No Sir, I didn't know him.

Q. Had you ever seen him before this trial started, I don't mean today, I mean in relation to this case.

A. No Sir, I can't say I had.

Q. Did you discuss anything with these boys about going to Hanover County or coming to J. R. Mills' store.

A. No Sir.

William Henry Anderson

Q. On or about the 7th or 8th of February were you working with the tree concern.

A. I wasn't doing any work. I hadn't worked since the big snow, around the first of February we had a snow and then another one on top of it.

Q. In this period what were you doing.

A. Waiting for the weather to break and then I was going back to silo building.

Q. In that waiting period, did you wait a lot at Metros.

A. I hung around there with some of the boys I knew and all.

Q. Were you drinking during this period.

A. Yes Sir.

Q. Would you classify yourself as a fairly heavy drinker.

A. I drink quite a bit, yes sir.

Q. Now, you have heard Trooper Mitchell state Exh. #1 that when he first talked to you that you denied 6/1/66 knowing anything about J. R. Mills' store and any- page 35 } thing about this episode of breaking and entering.

A. Yes Sir.

Q. Now, you also heard him testify that subsequent to that date, I believe on the 17th of March that he talked to you again and your story had changed a little bit. Can you give us any reason why or just what the situation was.

A. That day that I went to Court he called me out in the Hall and he asked me "why don't you come on and tell us about it". I told him I didn't know anything. He said to come on and tell him and make it a little easier on myself. I told him I wanted to get out but that I didn't know anything about it. Before that Detective Baker wanted some information that he thought I knew about and I told him I would like to get out and go back and help Mr. Baker if I could.

Q. In the process of this discussion, did you make any statement as to the possibility of your even being in on this J. R. Mills' breaking and entering.

A. No Sir.

Q. Or on driving the boys out here.

A. No Sir.

Q. But you did discuss the matter again with him. I mean the whole matter.

A. He called me out in the hall and asked me about it.

Q. Did you ask him what the penalty would be Exh. #1 if you had driven them out there, and had done 6/1/66 these things. Did you discuss that with him. page 36 } A. No Sir.

William Henry Anderson

Q. You didn't discuss anything along that line.

A. No Sir.

Q. In the investigation of this case, has anybody ever shown you a picture of anybody.

A. No Sir.

Q. I believe you had been in jail at the time he talked to you on the 17th.

A. Yes Sir.

Q. How long had you been in jail.

A. About a week or something like that.

Q. Were you in any way upset that day.

A. A little nervous from drinking. Takes some time to get over it.

Q. You are not too shaky today, how long have you been in jail.

A. About three months or a little better.

Q. Have you ever taken treatment for alcoholism at any place.

A. No Sir.

Q. Do you very often have the shakes from drinking.

A. Whenever I drink too much.

Exh. #1

6/1/66 No further questions

page 37 } By Mr. Ellis:

Q. Mr. Anderson, have you ever been convicted of a felony.

A. I have.

Mr. Kent: I object, Your honor. I don't see where that is material to this case.

By The Court: It is allowed Mr. Kent. If you put your man on the stand it is a perfectly proper question.

Q. You say you don't know anything about this offense at Mills' Store, is that right.

A. No Sir, I don't know anything about it.

Q. Mr. Anderson, when you talked with Mr. Mitchell on that occasion over in the Court Room, Mr. Mitchell didn't promise you anything, did he.

A. Not to my knowing.

Q. You approached him and wanted to make some sort of deal, isn't that correct.

A. No Sir, I haven't approached Mr. Mitchell.

William Henry Anderson

Q. As a result of your conversation with Mr. Mitchell, didn't Mr. Mitchell come and talk to me.

A. I was in the Court Room and he called me out in the hall.

Q. Did you tell him, I believe you testified a minute ago that Detective Baker wanted some information, and you were interested in getting rid of these things.

A. I told Mr. Mitchell that I would like to get this straightened up so I could go on back down to Richmond and try to help Detective Baker out. That is exactly what I said.

Exh. #1 Q. You asked if some kind of deal could be
6/1/66 worked out.

page 38 } A. I didn't say nothing about no deal.

Q. Well why, as a result of the conversation with you, did Mr. Mitchell tell you that he would have and come to talk with me.

A. I didn't say nothing about no deal. He could have come and asked you about it. But as far as me making a deal, I didn't make a deal with nobody.

Q. Didn't he come back and tell you that I said there wouldn't be any deal made.

A. He came back and told me that if I was guilty I would be found guilty and if I wasn't I would be innocent.

Q. You told him at that time also that you were drinking and drove these boys up to Mills' Store, but that you didn't know they were going to break in. Is that right.

A. No Sir.

Q. You mean to say that Trooper Mitchell sat on that stand and told something that was false.

A. If he told that he did. I don't remember telling him nothing at all like that. The only thing I ever told him was that I didn't know nothing about it.

Q. Didn't know anything about it.

A. That is right. When they brought me to the Police Station I told them right there in front of everybody. He asked me to make a statement, and I told him that was the only statement that I could make, that I didn't know

Exh. #1 nothing at all about it.

6/1/66 Q. Now, when you had this conversation with
page 39 } him over in the Court Room, you didn't tell him
that you drove the boys up there, and that you
drove them back, but that you didn't know that they were
going to break in.

A. No Sir.

William Henry Anderson

Q. You didn't tell him that you let the boys off at the intersection of Route 33 and Route 670.

A. No Sir.

Q. Then if he makes that statement he is not telling the truth.

A. That is right.

Q. How long had you known Travis Chisholm.

A. The only thing I know him by is Ray, before I come here I might have seen him for a month or two months, something like that off and on on weekends and we would have a couple of beers together.

Q. You all have all been locked up together down here in jail waiting trial, is that right.

A. Yes Sir. They had Wood downstairs, had Ray upstairs in the front and they had me upstairs in the back. All have been separated.

RE-DIRECT

By Mr. Kent:

Q. Mr. Anderson. Had your Counsel been appointed in the Court on the 17th when Mr. Mitchell carried you out in the hallway.

A. No Sir.

Exh. #1 Q. So you did not have Counsel at that time.

6/1/66

A. No Sir.

page 40 } Q. Did Mr. Mitchell, did he tell you anything about your rights at that time.

A. Nothing but what he told me when he first picked me up. Coming up here in the car.

Q. He did not give you any statement at all as to your rights on that particular day in the hallway.

A. No Sir.

Q. Did you know whether or not you would have Counsel at that time. Had there been any discussion about it.

A. No he hadn't said anything about it.

Q. How long did you discuss this matter in the hallway with Trooper Mitchell.

A. I don't know. I got a coca-cola and smoked a cigarette, and he asked me about it and I told him I didn't know nothing about it. He brought me back in, he went off somewhere and come back.

Q. How many times did he talk to you altogether, prior to the 17th.

A. He hasn't talked to me but twice.

William Henry Anderson

No further questions.

The Defense rests.

Adjournment for lunch at 1 p.m. Court instructs Jury not to discuss case to anybody or allow anybody to discuss it with them or have it discussed in their presence. If that rule is violated come back and report it to the Court. Court reconvenes at 2 p.m.

Mr. Ellis makes statement to Court—Jury is outside Court-room.

Mr. Ellis: As it became apparent several of the witnesses made certain statements to me prior to the trial, their testimony varied in some respects from the testimony offered by Trooper Mitchell. Now the variation in the testimony of the two, that is the Chisholm boys and Wood developed as a result of cross examination which was not put on as evidence in chief of the Commonwealth. I submit to the Court that it would be proper for me to recall Trooper Mitchell to rebut or impeach the testimony of the two Chisholm boys as to regards to identification of the picture and certain other matters which have developed discrepancies here in the course of the trial.

By The Court: You asked Ray Chisholm and James whether they were shown pictures.

Mr. Ellis: Travis Ray Chisholm said he wasn't shown any pictures and made no identification.

By The Court: The other one said he was shown a lot of pictures and he picked out any one and said that was the man.

Mr. Ellis: That is right. But that the one he picked out was not this man here.

By The Court: Also, one of them said that the man "Willie" the one he knew was operating the Metros.

Exh. #1 Mr. Ellis: That is right.

6/1/66 By The Court: Now, what do you want to do.

page 42 } Mr. Kent: May it please the Court, this was the Commonwealth's witness.

By The Court: Well, let him finish. I understand what he wants to do. Now what did you say, Mr. Ellis.

Mr. Ellis: First, the witnesses have testified differently than what I anticipated they would. As a result of prior sworn testimony in this Court and prior to statements made

to me personally. That was admitted to by James Rudolph Chisholm on the stand. Now, the purpose of my calling Mitchell back is to impeach the testimony of those witnesses as to the identification of the pictures that were submitted to them by Mitchell,

By The Court: Also prior inconsistent statements.

Mr. Ellis: That is correct.

By The Court: What do you have to say, Mr. Kent. It is impeaching the Commonwealth's witness. I realize it.

Mr. Kent: It is a little unusual, I grant that technically he should have asked that he be treated as an adverse witness if he is going to turn around and impeach him, which he did not do. He cross-examined him, and was rather rough with him.

By The Court: I was wondering why you didn't object to him cross-examining his own witness and you didn't object. So he went ahead. I couldn't stop him and make a comment.

Mr. Kent: The cross examination was highly Exh. #1 beneficial to the Defense and there wasn't any 6/1/66 need for me to interrupt him at that point and I page 43 } did not. As to the matter of calling the Trooper back as to the pictures, he has already made his statement about showing the picture to the boys.

By The Court: The Trooper has made statements on the picture.

Mr. Kent: They are already contradicted. As to statements made elsewhere, That is something else again—

By The Court: The Commonwealth Attorney states that he is taken by surprise, which I think certainly has great merit in it if he talked to the man ten minutes before he came in here, and it was apparent that he didn't expect the testimony that he got. Under those conditions I don't think he had to ask permission to cross-examine if you didn't make any objection as long as he went ahead and did it he was treating him as an adverse witness, and I think that being true, the Court is going to rule that he can contradict them, to rebut the evidence. Now how far he can go on the pictures, I have some doubt, but I am not sure what Mitchell has said to showing the picture to both men. I am going to let him recall Mr. Mitchell and if he gets to something you think is not a proper question you can make your objection again at that time.

Mr. Kent: Yes Sir, I will.

By The Court: Now is there anything else, Mr. Ellis.

Mr. Ellis: I would like only to say that had objections been made to the cross-examination of my own witness, I of course, would have requested permission of the

Mr. Mitchell

Exh. #1 Court to cross-examine him, because of their prior
6/1/66 statements.

page 44 } Mr. Kent: Judge, I would like to ask one question now. With reference to this witness that Mr. Ellis is attempting to impeach, particularly since it started out being the Commonwealth's witness, now Mr. Ellis has not yet so far, of course, by asking to impeach him he is treating him as an adverse witness. It is my understanding that he would either have to be adverse witness, he could be named so by him or by the Court, but in the absence of that, I don't know if it is too material, but nevertheless he has not been made an adverse witness.

By The Court: I am going to rule that he can recall Mr. Mitchell to contradict those boys that proved to be adverse when they were put on the stand. How far he goes, we rule on when we get there.

All witnesses excused except Mr. Mitchell.

By The Court: Let the record show that the Jury is in the box. Do you want the jury polled gentlemen.

Both Counsel said they did not wish jury polled.

MR. MITCHELL is recalled as a witness:

By The Court: I understand that the Counsel for the Defendant wants object and except to this testimony.

Mr. Kent: That is correct, Your Honor.

Exh. #1 By The Court: There may be certain matters
6/1/66 that come up that I haven't ruled on, and if you
page 45 } want objections to those you better make them to
the specific question, because that was a broad
ruling I gave. The specific questions you still have
to object to if you want to. I don't want to mislead you.

Q. Trooper Mitchell, were you present in the Courtroom at the trial of Travis Ray Chisholm for breaking and entering the store of J. R. Mills.

A. Yes Sir, I was.

Q. Were you also present at the trial of the case of Commonwealth vs. Hammond Wood, in which case Travis Ray Chisholm testified.

A. Yes I was.

Q. In both cases you testified under oath, is that correct.

A. Yes Sir.

Mr. Mitchell

Q. At the time did he testify as to who was with him at the time the store was broken into.

A. Yes Sir.

Q. Wh did he say was with him at the time.

A. His brother, James Rudolph Chisholm, Hammond Wood, and Willie Anderson.

Q. During your investigation and conferences with Travis Ray Chisholm did you show him any pictures.

A. Yes I did.

Q. How many pictures did you show him.

A. One.

Q. Did you ask him to identify that picture, or Exh. #1 if he could identify that picture.

6/1/66

A. Yes Sir.

page 46 } Q. Did he identify the picture.

A. Yes Sir.

Q. Whose picture did he say it was.

A. William Henry Anderson.

Q. Was that a picture of the defendant in this case.

A. Yes Sir.

Q. Did you show any pictures to James Chisholm.

A. Yes Sir.

Mr. Kent: I object to any testimony as to what James may or may not have said. Any testimony pertaining to him I object to. He was the Commonwealth's witness.

By The Court: Objection overruled.

Mr. Kent: Objection and exception noted.

Q. How many pictures did you show James Chisholm.

A. One.

Q. Whose picture was that.

A. William Henry Anderson.

Q. Was that a picture of the defendant in this case.

A. Yes Sir.

Q. How many pictures did you use in the course of your investigation.

A. Only the one.

By The Court: Now Mr. Kent, do you have any questions you want to ask him about this phase of it, we have covered everything else.

Questions By Mr. Kent:

Exh. #1

Q. This picture, where did you say you procured it.

6/1/66

Mr. Mitchell

page 47 } A. When I first talked to James Rudolph Chisholm, he mentioned a man known to him as "Willie" who frequented beer joints in South Richmond who he described as about 45 years old. I went down the hallway to the Record Section of the Police Department of the City of Richmond and asked the Detective there whose name I didn't know, if he had ever known a *gentlemen* named Willie about 45 years old who frequented beer joints in the Southside of Richmond. He went to their files and returned with a picture of William Henry Anderson and gave it to me.

Q. Do you know when that picture was taken.

A. No Sir.

Q. Was it a smiling picture, or grim or—

A. No Sir, it wasn't smiling, it was just a police photograph. I have a similar picture, not of him, but it shows what type of photo it is.

Q. I wouldn't want to see it unless it is the same picture that you had. So you don't know when the picture was taken or if it was taken of this man.

A. It was taken of him, it had numbers on the face of it—

Q. I know that, but you are just relying on records that were created somewhere else, you don't know who it was a picture of. Is that correct.

A. Since I seen Mr. Anderson, I am positive it was a picture of him.

Exh. #1 Q. Are you positive beyond any reasonable
6/1/66 doubt.

page 48 } A. Yes Sir, I am positive that the picture I had was of Mr. Anderson. At the time I had it I had never seen Mr. Anderson.

Q. In your prior dealing with pictures have you ever been fooled by pictures and the people when you stacked them up against each other.

Mr. Ellis: Your Honor, Please, I object to that. He said in this particular picture, he was positive of this.

By The Court: He can now cross-examine on whether his statement of positiveness is reasonable or not.

A. I don't recall that I have ever had any difficulty in that way.

Q. From this picture, without now looking at the defendant, how many teeth would have been shown in the picture.

A. It would not have shown any teeth, because his mouth was closed.

No further questions:

Mr. Ellis states that this is all of the Commonwealth's Rebuttal. Jury is excused while the Court takes up the Instructions with Counsel.

By The Court: Let the record show that there are no objections to the Instructions offered which the Court has stated it will grant. Now, is that a correct statement, Gentlemen;

Both Counsel state that this is a correct statement.

Exh. #1

6/1/66 Jury is brought back into box.

page 49 } By The Court: Let the record show that the Jury is present and in the box, 12 men. Counsel is asked if they want Jury polled. Each answers "no".

INSTRUCTION NO. 1

The Court instructs the jury that the accused is presumed to be innocent and that such presumption goes with him through all states of the trial until the Commonwealth, upon which the burden of proof rests, has shown beyond a reasonable doubt that the accused is guilty. A doubt engendered by sympathy or by a dislike to accept the responsibility of convicting the accused is not a reasonable doubt. The law does not require proof amounting to absolute certainty, nor proof beyond all possibility of mistake. If, after having carefully and impartially heard and weighed all the evidence, you reach the conclusion that the accused is guilty with such degree of certainty that you would act upon the faith of it in your own most important and critical affairs, then the evidence is sufficient to warrant a verdict of guilty.

INSTRUCTION NO. 2

The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the accused, on the evening of February 7 and 8, 1966 drove James Rudolph Chisholm, Hammond William Wood, Jr. and Travis Ray Exh. #1 Chisholm from Richmond to J. R. Mills' Store for 6/1/66 the purpose of breaking and entering the same, page 50 } That J. R. Mills' Store was broken into and certain merchandise taken therefrom, and upon completion of the crime, drove the three above named persons back to Richmond with the articles that had been stolen, and that the accused knew that the purpose of the trip was to break and

enter J. R. Mills' Store, then you shall find the accused guilty as charged in the indictment and fix his punishment by confinement in the penitentiary for not less than one nor more than twenty years or by confinement in jail not exceeding twelve months, or by a fine not exceeding one thousand dollars, either or both.

Mr. Ellis: May it please the Court, and Gentlemen of the Jury, as I told you when we started the case this morning there were certain things that we expected the evidence to show. Right now I have an opportunity to make an argument to you and then Mr. Kent will have an opportunity to reply and sum up what he considers to be the saving features of the case and then I will have an opportunity to rebut or reply to anything that he has to say. I would like to say this first, that the Court has given you certain instructions, and the first instruction deals with the presumption of innocence. The

Court tells you this, the Court instructs the jury Exh. #1 that the accused is presumed to be innocent and 6/1/66 that such presumption goes with him through all page 51 } stages of the trial until the Commonwealth, upon whom the burden rests, has shown beyond a reasonable doubt that the accused is guilty. So it is encumbered upon the Commonwealth to present evidence which is satisfactory so that in your minds you will believe beyond any reasonable doubt that the accused is guilty. Now, what is a reasonable doubt. The Court goes on further and defines that. It says, a doubt engendered by sympathy or by a dislike to accept the responsibility of convicting the accused is not a reasonable doubt. The law does not require proof amounting to absolute certainty, nor proof beyond all possibility of mistake. If, after having carefully and impartially heard and weighed all the evidence, you reach the conclusion that the accused is guilty with such a degree of certainty that you would act upon the faith of it in your own most important and critical affairs, then the evidence is sufficient to warrant a verdict of guilty. So Gentlemen, the Commonwealth is not required, under this instruction beyond all possibility of mistake that the accused is guilty. If you believe the evidence and would act upon that as you would in your own most critical affairs, then that is sufficient.

Now what do we have to show to your satisfaction, in order to prove the accused guilty. This is covered in Exh. #1 Instruction No. 2. The Court instructs the Jury 6/1/66 that if they believe from the evidence beyond a page 52 } reasonable doubt that the accused on the evening of February 7 and 8, 1966 drove James Rudolph

Chisholm, Hammond William Wood, Jr. and Travis Ray Chisholm from Richmond to J. R. Mills' Store for the purpose of breaking and entering the same, that J. R. Mills' Store was broken into and certain merchandise taken therefrom and upon completion of the crime drove the three above named persons back to Richmond with the articles that had been stolen and that the accused knew that the purpose of the trip was to break and enter J. R. Mills' Store then you shall find the accused guilty as charged in the indictment.

They are the Court's Instructions. Now, what is it that you have to determine. I submit to you that there is absolutely no question in this case that J. R. Mills' Store was broken into. That there is absolutely no questions that certain articles were taken from J. R. Mills' Store. This is not denied. There is absolutely no question that Travis Chisholm, James Rudolph Chisholm and Hammond Wood went to the Store and broke and entered the store and got certain articles which they took back to Richmond. You do not have to resolve those questions. The question and the sole issue in this case is was the accused, William Anderson, the man who accompanied them and drove them to the store and drove them

Exh. #1 back to Richmond, and did he know at the time of 6/1/66 going out there and going back that the store was page 53 } to be broken into and had been broken into. That is the question which you gentlemen have to determine. Now, let us look at the evidence that has been presented to you on this question. Again I will not go through the evidence of Mr. Mills, I will confine this to identification of the accused.

Trooper Mitchell took the stand and he testified that after having arrested these other boys he showed Travis Chisholm a picture, he showed James Rudolph Chisholm a picture. A picture which he had obtained after getting certain information from James Chisholm. The picture was of the accused, and it was identified by both as the man who drove them out there. Now it is true that the Commonwealth called James Chisholm. The Commonwealth also called Travis Chisholm as a witness. In both instances I think it was apparent that their testimony would be something other than what it was. They denied on direct examination that William Anderson, the accused sitting before you, was the man that drove them out there, or was the man that brought them back. They denied that he had any part in the crime. It was at this point that it was undertaken to impeach those witnesses and we have put Trooper Mitchell back on the stand in rebuttal and he has testified to you that he was present in Court when Travis Chisholm, on two prior occasions, under

Exh. #1 oath, sitting in the same witness chair, testified
 6/1/66 that William Anderson was the man who drove
 page 54 } them out there and drove them back. Trooper
 Mitchell also testified that he only showed one
 picture to James Chisholm, that was the picture of this man,
 and that was identified by James Chisholm. He further
 testified that he only showed one picture to Travis Chisholm,
 that was the picture of this man, and that was the picture
 that was identified. So it is interesting to see how these wit-
 nesses changed their story. Not only that but James Chis-
 holm took the stand on first testimony this morning and said
 that four people went with them out to the store, and then
 admitted that he told me not thirty minutes earlier that only
 three people went and that his brother drove the car.

That brings us down to the accused himself. What have
 been his actions regarding this crime. He was not to be
 found immediately after the perpetuation of the crime, but
 was picked up some time later. He denied any participation
 in the crime. Subsequent, outside the Court Room he had a
 conversation with Mr. Mitchell apparently, he wants to make
 some kind of a deal. He wants to give some information, if he
 can work out a deal whereby he can get out of these charges.
 But no deal was to be made and he tells Mr. Mitchell at that
 time "yes" I drove the car out there, I let the boys out at
 Route 33 and Route 670 at the intersection, and I
 Exh. #1 waited a while then I drove them back to Richmond.
 6/1/66 That I was drunk and I did not know what I was
 page 55 } doing. I didn't know they were going to break and
 enter. This is the accused' own statement after
 he had been repeatedly advised of his rights under the Con-
 stitution, and now he takes the stand and says "no" I never
 told Trooper Mitchell that. I want you to believe me now.
 He would have you believe that Trooper Mitchell took this
 stand and lied. I think you gentlemen can see through that.
 I think the evidence conclusively shows that the accused is
 guilty as charged in the indictment. I ask that you return
 a verdict as such.

Closing Argument By Mr. Kent:

Gentlemen of the Jury, I don't think it need be that I should
 repeat all that the Commonwealth's Attorney has told you
 about the Instructions as the Judge has instructed you about
 reasonable doubt. I do feel, however, that we here have an
 unusual case and very much conflicting testimony as to
 identification of "Willie", or William Henry Anderson and
 the other man. They referred to him by those terms and

definitely conflict as to just who this fourth party was that accompanied the three boys to the J. R. Mills Store. As the Commonwealth Attorney has told you he has put the Officer back on to show that there is conflict, and there is conflict.

While there is definitely conflict about it, in fact Exh. #1 there is so much conflict about all of the identifica-
6/1/66 tion of this defendant hinges on a picture that the
page 56 } conflict in the testimony of the three witnesses who
are the sole ones who would have known about
what happened is of such a nature as to make it difficult for
us to tell anything about what happened. Trooper Mitchell
was relying on the same persons to make identification from
a picture and remember this picture is a real key item. It is
around this picture that the Commonwealth must rest its
identification of this defendant, due to the so called impeach-
ment or showing of conflict in the testimony of the other
witnesses, and the Trooper's lack of knowledge of anything
except the statements of these same witnesses and therefore,
we are in the position of being asked to take this identifica-
tion made from a picture which, so far as this Jury is con-
cerned, or as far as this Court is concerned, is an utterly
blank picture because we do not have the picture, and we do
not have anything with which to gauge the identification of
this defendant as being the person who the same three wit-
nesses talked about to this same Officer. As to any statements
that were made on the second interrogation of the defendant
the testimony has shown that the defendant was upset, shaky,
had been in jail for five or six days, from the 13th to the 17th,
that there was negotiations with Mitchell bargaining back and
forth, so it certainly shows some element of fear

Exh. #1 there. We have no statement from the Trooper,
6/1/66 in fact, he said he warned him of his Constitutional
page 57 } rights when he first talked to him but when he
came to this so called confession, that he warned
him, or did not warn him of his Constitutional rights. The
evidence shows that he was not represented by an Attorney
at the time, and it is also conflicting as to just what specifically
all of the conversation was in the hallway of the County
Court. I do feel that in order to identify this "Willie" as
"The Willie" or the fourth man based on this identification
from a picture that we do not have here before us is really
testing reasonable doubt, and I ask that the Jury take this
into consideration in their deliberation.

Rebuttal—Mr. Ellis:

Gentlemen of the Jury, there is really only one point that

I would like to leave with you because I think your decision will rest on the witnesses as you have heard them and how you place credence in what those individual witnesses said. As I said, Trooper Mitchell took the stand. He has no ax to grind with anyone. It was shown by the other witnesses that the identification was made. But now the defense asks that you believe the testimony of the defendant, in which he denied making such a statement that he participated in the crime and in effect told you gentlemen that if Trooper Mitchell said that he said those things that he was, Exh. #1 in effect, not telling the truth. I want to remind 6/1/66 you gentlemen that the first thing the witness said page 58 } in response to the first question on cross-examination and that was "have you ever been convicted of a felony before", the answer was "Yes". So the defense is asking that you take the word of a felon. I ask that you find the defendant guilty.

Sheriff is instructed by the Court to take the Jury and Instructions into Jury room at 2:50 p.m. with instructions from the Court to elect a foreman who will sign the verdict.

Jury returns at 3:10 P.M. and states that they find the defendant guilty and fix his punishment at five years.

The Court instructs the Jury to return to the Jury room and write the verdict and that it be signed by the foreman.

Jury returns with following verdict:

"We the Jury, find the accused guilty of Statutory Burglary as charged in the indictment and fix his punishment at 5 years confinement in the penitentiary."

(Signed) S. C. Thomas, Foreman

Court asks Jury if that is the verdict of each one. All say that it is.

Exh. #1 Mr. Kent: I would like to move that the Court set aside the verdict of the Jury as being contrary 6/1/66 to the law and the facts in the case.

page 59 } Motion is overruled by the Court.

Mr. Kent notes his objection and excepts to the motion.

Mr. Kent: I have been instructed by my client to note an appeal.

By The Court: He has 60 days from the time of the judgment of the Court to note an appeal.

Mr. Kent: I want to make sure the Court was aware of it.

By The Court: I am aware of it, but that is your duty and not mine. When I get through here today this will pass out of my mind and another one will pass in. I will pronounce sentence on him and then you have 60 days to note your appeal and then there are many other things you have to do. I will not try to tell you, you know.

Do you know any reason why I shouldn't pass sentence on you now, Mr. Anderson.

Defendant: I don't know of any.

By The Court: Stand up. The Jury having found you guilty of Statutory Burglary as charged in the Indictment the Court finds you guilty of Statutory Burglary and in accordance with the verdict of the Jury sentences you to five years confinement in the State Penitentiary. The Sheriff will take charge.

If you want to note an appeal Mr. Kent will visit you in the jail and do what is necessary.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	<i>Page</i>
Writ of Error Awarded.....	1
Record	2
Petition for Writ of <i>Habeas Corpus ad subjiciendum</i>	2
Order—December 13, 1966.....	4
Answer of Respondent with Exhibit IV.....	5
Judgment—May 5, 1967.....	7
Notice of Appeal.....	8
Assignment of Error.....	9
Affidavit of Poverty.....	10
Certificate of Judge.....	11
Witnesses:	
William Henry Anderson.....	11
James C. Kent.....	15
Trooper Mitchell	37, 52
Travis Ray Chisholm.....	41
Andrew J. Ellis, Jr.....	43
Proceedings	55
Exhibit 1—Transcript of proceedings on Indictment for Breaking and Entering the Storehouse of J. R. Mills	
Proceedings	61, 86, 92
Witnesses:	
J. R. Mills.....	63
Trooper L. B. Mitchell.....	66, 68
Travis Ray Chisholm.....	73
James R. Chisholm.....	76
Hammond Wood	79
William Henry Anderson.....	80
Instructions	91
Verdict of Jury.....	96