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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

RECORD NO. 6916

DAVID LEON BROOKS,

Plaintiff in error,

v.

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

Defendant in error.

APPENDIX OF COMMONWEALTH

ROBERT Y. BUTTON
Attorney General of Virginia

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Supreme Court Building
Richmond, Virginia 23219

EXCERPTS OF REPORTER'S TRANSCRIPT

2/1/65
page 2 } * * *

THE CLERK: How do you plead?

THE DEFENDANT: Not Guilty.

THE COURT: The plea of not guilty is entered on behalf of the Defendant. Have a seat, sir.

MR. COWHIG: If your Honor please, there is also a pending indictment which was returned in September against the Defendant. I would like to move at this time that that indictment be dismissed. One ground is the fact that he has not been tried within three terms of this Court; secondly, that this indictment would in
2/1/65 essence take the place of a previous indictment
page 3 } since it is the same charge.

I do not think the Commonwealth can indict him twice on the same charge, and then proceed to go forward at this time on one of those indictments.

THE COURT: What is your position on that, Mr. Wagner?

MR. WAGNER: Your Honor, he was not indicted on the same charge twice. I believe the previous ruling of the Court held it to be a larceny, so one is armed robbery and one is larceny.

THE COURT: You are proceeding on which indictment this morning?

MR. WAGNER: On the latter, your Honor, armed robbery, the one on which he was arraigned.

THE COURT: Is that a separate file, Mr. Clerk?

THE CLERK: Yes, sir.

THE COURT: Mr. Cowhig, your motion is to the indictment under Criminal Case No. 11,235. It is not the one under consideration here this morning.

Therefore, I will take that under advisement for future disposition.

* * *

2/1/65
page 5 } THE DEFENDANT: December 3.

MR. ROSEBERRY: The third of December.

THE COURT: May I have the file, please.

December 3, 1964, the Defendant did not appear. All of the witnesses were here. Twenty jurors were summonsed at a basic cost of $100 to the Commonwealth of Virginia, plus the overhead cost involved in selection of a jury, which involved at least ten more employees, and Mr. Brooks' counsel, a Mr. Dwyer, appeared before the Court and made a very simple statement: "My client is not here," and promptly indicated his desire to leave the courtroom.

You can imagine what this very simple statement caused in the way of consternation to all concerned, all except for two people, the Defendant and the Bondsman, because neither one of them was here, although the Defendant had agreed to be here on that date and the bondsman had assured his presence by saying, "If he is not here I will forfeit the $2,000."

Therefore, it was only just and proper on behalf of the Commonwealth and on behalf of the people of this State

that the Commonwealth made a motion promptly to forfeit the $2,000, and the Court took this under advisement.

The Court took it under advisement because
2/1/65 it could not believe such callous treatment on
page 6 } behalf of, first, the bondsman, who has professional experience in these matters and, second, the Defendant, whose life is at stake here.

I want to hear from each of you. I have heard from Mr. Dwyer. I asked that he be here, but I notice that he is not here, but first I want to know from the Defendant why he was not here on that date.

THE DEFENDANT: As I explained before, I never knew that I was scheduled to go to trial on that date. I did not know until later on that evening, when I called Mr. Roseberry, the bondsman.

Mr. Dwyer never told me that I was scheduled for trial because when I went to Court in September, in October, I was the only one in Court. All the witnesses were dismissed, but there were no witnesses there. I was there alone, and they set the case backwards. They set it backwards indefinitely, and I did not have any way of knowing when I was scheduled to go to trial unless I found out from either Mr. Roseberry or Mr. Dwyer, and I called—

THE COURT: Tell me why you did not find out. This is October.

THE DEFENDANT: Because Mr. Dwyer never told me.

THE COURT: Just a minute, now. This was October that you were last here and the case was set
2/1/65 for trial on December 3. There is October,

page 7 } November and December, a period of at least 60 days.

THE DEFENDANT: I had no way of knowing when the case was set for trial.

THE COURT: Except by asking either your bondsman or your lawyer.

THE DEFENDANT: Yes, sir.

THE COURT: Tell me when you asked them.

THE DEFENDANT: I called Mr. Roseberry frequently and I called Mr. Dwyer frequently. Neither one of them told me. Neither one of them knew.

THE COURT: Neither one of them knew? All right. I am going to find out from Mr. Roseberry why he did not know.

Mr. Roseberry, did you know when this case was set for trial?

MR. ROSEBERRY: No, sir, I did not.

THE COURT: Why didn't you know?

MR. ROSEBERRY: Lack of communication between myself and the Clerk's Office. It was my fault. When the case had come up previously David at that time told me his attorney would let me know and he would contact me from time to time. I didn't hear.

THE COURT: He just got through saying he called you frequently.

2/1/65 page 8 } MR. ROSEBERRY: I don't want to contradict him. He did not contact me at any time during

that period from the time he was in Court in October until the day I contacted him stating that the case had been due that day, and that was the late afternoon when I found out about it from Mr. Dwyer.

THE COURT: Mr. Brooks, let me ask you this. When was the last time you talked to your attorney before December 3?

THE DEFENDANT: Approximately three weeks.

THE COURT: Approximately three weeks, and he did not tell you at that time your case was set for trial?

THE DEFENDANT: No, he did not. He told me he did not know.

THE COURT: Of course, he told me out of your presence that he did and, unfortunately, I wanted him to face you because you just got through telling me you called Mr. Roseberry and Mr. Roseberry, who is sitting next to you, said you did not call him.

THE DEFENDANT: But I called him on December 3. I called him on that day and he called me back later on. This is the day I called him, but I found out that day when the trial was scheduled. It was too late then. It was about, I guess, about 2:30 or 3:00 o'clock in the evening then.

MR. ROSEBERRY: It was later than that.

THE DEFENDANT: Yes, probably later than that.

2/1/65

page 9 } MR. ROSEBERRY: Because I did not get a communication from Mr. Dwyer until about 3:30.

THE DEFENDANT: The first time I had any idea I was scheduled to go to trial on December 3, the wife of one of my co-defendants told me.

THE COURT: Neither one of you has given me any good reason why either you were not here or you did not know this case was set for trial.

It is a substantial bond. It is a capital punishment case, and I am at a loss to know why one or the other of you was not here.

I am not going to forfeit this bond, but it is only out of judicial discretion that I not forfeit it, but in not forfeiting the bond, Mr. Roseberry, I am placing you on notice and on terms, and the reason I am not doing it is because it is the first time you have not appeared in my Court and I think you are entitled to one warning, and the next time, under these very aggravated circumstances, the bond will be promptly forfeited.

So the bondsman is dismissed from further participation.

MR. ROSEBERRY: Thank you very much, your Honor.

(This hearing was resumed in the courtroom before the jury.)

Testimony of Ray H. Norton, Sr.

2/1/65 * * *

page 14 } BY MR. WAGNER:

Q Will you state your full name and address, please, sir?

A Ray H. Norton, Sr., 13,113 River Road, Rockville,

* * *

2/1/65 * * *

page 17 } Q Who came in with a gun?
A Two boys.

Q Was this Defendant here one of them?
A That was one of them.

Q Did they both have guns?
A Both had guns.

Q Will you tell us in detail, Mr. Norton, what happened?

A From that point on, one of them held me up against the door and this one went over and told my brother to get over and line up with me, which he did, and my brother hesitated a little bit, and went back to lock the safe, and I says, "Al, come on. Come over here," and this boy says, "If you don't get over there I am going to do you some harm."

So we went over and lined up against the door and the other boy said, "You get the money"—I forget what he called him, Brooksie, or somebody—"You get the money," and this boy got the money and put it in the satchel and at that time the telephone rang and they went out.

2/1/65 * * *

Testimony of Albert G. Norton

page 38 } By Mr. Wagner:

Q Mr. Norton, will you state your full name and address, please?

A Albert G. Norton, 3806 East-West Highway, Chevy Chase, Maryland.

Q What is your business, Mr. Norton?

A We are in the rendering business. That is—well, that is a broad term. We are manufacturers of inedible fats and meat scraps, inedible fats used in the manufacture of soap.

Q Where is your plant located?

A 127 Madison Street, Alexandria.

Q What is your official capacity?

A I am President of the Corporation.

Q Mr. Norton, directing your attention to the 24th day of April 1964, were you at your office on that day?

A Yes, sir.

Q And I believe that was a Friday?

A Friday morning, yes, sir.

2/1/65 * * *

page 40 } My Brother told him he wasn't there at that time. The door was pushed open or pulled open, and my brother was backed up against the wall of the office, and at that moment another man stepped in. Brooks stepped in behind him and came over to me and told me to get behind my desk and proceeded to gather up the money.

Q Will you tell us in detail whether they had guns?

A Yes, sir. Both of them had guns.

Q Tell us what Brooks did and what he made you do, if anything?

A He made me get up there behind my desk, which is in close proximity to where this little safe is located, and he picked up the money box, a plain metal box about twelve inches long and eight inches deep, put that into a little satchel, proceeded to take the pay envelopes out of the safe, put them in the satchel, went over to another cabinet that had a metal box with some rolled coins in it, and put that in the satchel, took another money bag, a canvas bag that you get from the bank with other rolls, change of various types, and put that in the satchel, and at that time he ordered us all to stand over on the other side of the room and we were backed into the little rest room there and he asked for our wallets.

2/1/65 * * *

page 48 } Q After this did you go down to police headquarters on Friday, April 24?

A Yes.

Q Approximately what time?

A I would say between 2:00 and 3:00 o'clock in the afternoon.

Q Did someone from police headquarters call you?

A I couldn't remember.

Q How did you get up there?

A We were called there. Somebody told us to come down.

Q Do you know who that was?

A No, I do not.

Q Weren't you told at that time that the persons who had taken your money had been apprehended?

A Yes.

Q And you were also told that the police had them, right?

2/1/65
page 49 } A Right.

Q You went to police headquarters. Do you remember a boy by the name of Wallace?

A Yes.

Q You testified at his trial, did you not?

A Yes.

Q Did you see Wallace at police headquarters?

A Yes.

Q Where was he?

A In a line-up.

Q What kind of room was this?

A Well, a small room. I won't say very large.

Q How many people were in the line-up?

A To the best of my recollection, four.

Q Were you told prior to looking at that line-up that the boys that took your money were in the line-up?

A No.

Q What did the police tell you?

A Just told us to come down and identify these men, if we could.

Q Would you describe the two men that took your money as far as height, age, and weight?

A That is a right hard thing to do. I would say they were men possibly five feet eight to ten, weighed maybe 160, 165 pounds.

2/1/65
page 50 }

Q And their age?

A That is right hard to figure, too.

Q Were they 20 or 50?
A I would say in their 30's.

Q These men in the line-up, would you describe them as far as the age, color, height and weight?
A What do you mean, the rest of the men?

Q Yes.
A No. The other two men were entirely different.

Q There was no comparison as far as the line-up as to the boys that took your money and the men in the line-up?
A No.

Q Besides the ones that took your money, there was no comparison, was there?
A No.

Q In fact, they were both in their 50's, they were short and weighed 200 pounds, did they not?
A No. There wasn't anybody in the line-up weighed 200 pounds.

Q Would you describe them? They were in their 50's, at least, the other men that you did not identify?
A I wouldn't say so.

2/1/65 page 51

Q How many men did you identify in the line-up?
A I identified three.

Q And two of them took your money?
A Yes. The other man identified—

Q I did not ask you what the other man did.
Did you report this to the police?
A I did.

Q At that time did you tell them that over $6,000 had been taken?
A I do not recall if I did or not.

Q You did not tell them $4,613 was taken, did you?
A No. At that time we did not know what was taken.

Q Do you know how much money has been recovered?
A No, I do not.

Q When you went down to police headquarters, did you ever look through a two-way mirror and discuss this case with the police before you identified them in the line-up?
A No.

Q You did not discuss it with the police at all?
A No.

Q Whom did you talk to when you got to police headquarters?
A I do not know that I talked to anyone. We went in this room. The young lady took my name and address and we were asked to got into the other room and identify the men, * * *

Testimony of David Leon Brooks

2/1/65 * * *
page 109 } Q You are the David Leon Brooks—

MR. COWHIG: If your Honor please, I am going to object to this. He has asked him three times.

THE COURT: Objection sustained.

MR. WAGNER: I have no further questions.

THE COURT: Any more questions, Mr. Cowhig?

MR. COWHIG: No, sir.

THE WITNESS: I would like to say something on my own.

THE COURT: He wants to say something on his own, Mr. Cowhig.

MR. COWHIG: I have no objection.

THE COURT: All right.

THE WITNESS: On the morning that I was arrested—

MR. WAGNER: Your Honor, I object. He has counsel.

MR. COWHIG: If your Honor please—

THE COURT: Just a minute. You consult with your attorney and tell your attorney what you want to say and he will ask you the questions. I will give you time. Go there and talk to him.

MR. WAGNER: Your Honor, may we have a recess while he confers with him?

THE COURT: All right. * * *

2/1/65 * * *
page 110 } (The Court, counsel and the Defendant retired to chambers.)

THE COURT: Mr. Wagner, the Defendant wants a picture that was taken.

MR. WAGNER: I don't know anything about any picture.

THE COURT: They are not under subpoena; of course, he can issue a subpoena, and I have told him if the picture was available I was going to require that the picture be produced.

MR. WAGNER: Very well, sir. I will get certified copies of the convictions in Washington. What is sauce for the goose is sauce for the gander.

THE COURT: How much time will you require?

MR. WAGNER: I don't know, sir. In twelve years this is the first time I have experienced this.

MR. COWHIG: Judge, all I know is during the recess I went over to the police headquarters, spoke to the Lieutenant, saw the pictures. They told me they would have the pictures here at 2:00 o'clock.

THE COURT: I will give you both time to do what you have to do. Keep in touch with me. * * *

2/1/65
page 117 } * * *

RECROSS EXAMINATION

BY MR. WAGNER:

2/1/65
page 118 } Q Let me ask you this, Brooks. Where are Stephens and Wallace now? Why don't you have them here to testify for you today?

A You know why I don't have them here.

Q I asked you a question. Why don't—
A You know why.

THE COURT: Objection sustained.

MR. WAGNER: Your Honor, he has testified the police hindered him in getting witnesses.

THE WITNESS: They did.

MR. WAGNER: He has counsel. He has a perfect right to summons witnesses. I want to know why he did not tell his lawyer to summons witnesses.

THE WITNESS: I didn't have witnesses.

MR. COWHIG: Wait a minute.

MR. WAGNER: That is a perfectly proper question to ask, your Honor.

THE COURT: You asked him where Wallace and Stephens are, and I am sustaining the objection to that.

MR. WAGNER: All right I will withdraw that.

BY MR. WAGNER:
Q Why didn't you summons Wallace and Stephens here today?
A Well, for one thing,—

2/1/65 page 119 } MR. COWHIG: Your Honor, I am going to object to it, because I do not know what the testimony is, what their testimony would be, whether or not they as defendants would testify, anyway, even though both of them have been tried and found guilty of grand larceny and are in the Penitentiary.

If Mr. Wagner wants to get it before the jury—

MR. WAGNER: I did not want any such thing, your Honor. He testified he went around to Stephens' house, was training for the Olympics, testified Stephens knew he was coming in there for boxing equipment, when he went in there Stephens said, "Wait a minute."

He said the police have hindered him in trying to get his own evidence in this trial. I want to know why he did not summons Stephens. Certainly Mr. Cowhig would know what he would say here.

THE WITNESS: I know why he didn't testify, too.

THE COURT: Do you want to answer that question? You don't have to.

THE WITNESS: Because the day I came in the jail when my bond was revoked, Stephens left the jail approximately three days later and we have been kept separate ever since the beginning of the trial, ever since the beginning of the case, and the purpose for this was to keep anybody from discussing the case in any way, but yet no one was doing anything to help me.

2/1/65
page 120 } At the time I was arrested I didn't have an attorney to help me in this and every letter I sent out of the jail was scratched out of the letter by the police department. All of my mail was sent to the police department going out and coming in.

BY MR. WAGNER:

Q Do you have those letters?
A Yes, I do.

Q Scratched out?
A Yes, they are.

Q Do you have them with you?
A They are at home.

Q In answer to my question why didn't you summons Stephens and Wallace or these seven people that knew what you were wearing—

A I couldn't. It had been twelve months since this actual crime happened. This case has been scheduled a number of times for Court, and I have been in Court every time except the time in December. December I did not know I was supposed to go to trial, and the only reason I didn't know was because the lawyer didn't tell me.

Each time I came to Court there were no witnesses.

2/1/65 page 121 } One time I came to Court. All the witnesses in the case were dismissed and there were no witnesses in the case. There was no one in the Court but you, myself and the Judge. All the witnesses were dismissed and there were no witnesses there.

Q Can you understand my question and know what I am saying? Why didn't you summons Stephens and Wallace and the seven people here today?

A Why didn't you summons them?

Q Do you understand my question?
A I understood what you said.

Q Why didn't you tell your attorney to summons those witnesses here today?

A They get summonses, but they didn't make any effort to summons the other people that I tried to summons to Court.

Q Did you give your attorney the names of those seven people?

A I gave him the name of five, and this is what happened. When I went out on bond I talked to some of the people. Some of them I saw and I talked to about the things that happened on the day that I was arrested.

They live in Washington. One thing they say, they don't summons anybody over here out of the State for the defense, and that was in Washington.

These people have jobs and things. I have been scheduled to come to Court about five or six times, I am not sure, but each time that I came to Court I had those people with me when I came to Court, and I was prepared for trial.

2/1/65
page 122

When I was scheduled to go to Court on December 3 I came to Court on the 7th because I did not know that I was scheduled to go on the 3rd. If I had known on the 3rd that I was scheduled to go to Court I would have had those people with me at that time.

I do not know all of them exact addresses, but I know they will testify in my behalf because even though ten months has passed since the thing happened and I know their memories might be dim, but I know that I could get them.

If I had gone to trial when I was originally scheduled to go to trial, they was up there and I know they would testify in my behalf.

Q You knew you were going to trial today?

A Yes. I knowed I was going to trial today and I am not going to be in Alexandria City Jail 24 hours a day.

MR. WAGNER: I have no further questions.

MR. COWHIG: I have no questions.

That is the Defendant's case.

2/1/65 * * *

page 129 } MR. COWHIG: Do you want that instruction, Brooks, or do you want to go on the theory that you are either guilty of robbery or nothing, or do you want me to present an instruction

2/1/65 that they can find you guilty of robbery,

page 130 } housebreaking, larceny, or which?

THE DEFENDANT: Robbery or nothing.

THE COURT: All right. I take it from counsel, then, from the Defendant himself, that he does not want an instruction on a lesser included offense.

I want to make it very clear here that you are, Mr. Brooks, entitled to an instruction which tells the jury that you can be found guilty of a lesser included offense than robbery.

THE DEFENDANT: You say that I can be found guilty of a lesser included offense than robbery, but you told me earlier that today I was indicted on another charge.

Now, first, I would like to know what this other charge is and if this is still pending and if this is a lesser and included offense.

THE COURT: All right. This morning, earlier this morning, your counsel made a motion to quash an indictment that is pending against you for grand larceny. That indictment is still pending and the Court has taken the motion under advisement.

Grand larceny is an offense, a lesser offense than robbery, of which you could be possibly found guilty

by this jury and the Court is perfectly willing to instruct this jury to that effect upon your
2/1/65 request.

page 131 } THE DEFENDANT: But if this indictment is pending against me, then that means that even if the jury does acquit me of this charge I still have a case pending.

THE COURT: If the jury acquits you here, that indictment is still pending, but I think on propor motion that your counsel could probably dispose of that indictment if you were acquitted here, although I am not dealing with that other indictment now. I am dealing with this indictment in this trial.

THE DEFENDANT: Well, when you instruct the jury on the lesser and included offense, you are instructing the jury that they could find me guilty of grand larceny or and.

THE COURT: They can find you guilty of robbery or any of the lesser included offenses on the indictment for robbery.

THE DEFENDANT: On any one of the lesser offenses?

THE COURT: Yes.

THE DEFENDANT: But if they find me guilty of grand larceny I already been indicted again on grand larceny and it stems out of the same charge.

MR. COWHIG: What you want to know, if they found you guilty of grand larceny here could you be prosecuted again for grand larceny, and the answer to
2/1/65 that is no, you could not be.

page 132 } THE DEFENDANT: That is the main thing I wanted to know, but I have two, three different indictments for the same charge.

MR. COWHIG: There are two pending, one for robbery and one for grand larceny.

THE DEFENDANT: But I have been indicted three times.

MR. COWHIG: Twice.

THE DEFENDANT: The first indictment was on robbery.

MR. COWHIG: That was grand larceny. The Court held that the indictment, the form of the indictment, only intended grand larceny, did not include robbery.

THE DEFENDANT: But at the time I was arrested I was given a warrant for robbery, and that is when I was charged with it at the time, what was on the warrant, robbery, and if I was indicted for the robbery, which I did go up on the indictment on that, I have not been up for indictment any time since then, and I have been indicted twice since then without my knowledge, once again for robbery and once again for grand larceny.

MR. COWHIG: There were two indictments returned.

THE DEFENDANT: As it is now, I do not
2/1/65 even understand what I am on trial for.

page 133 } MR. COWHIG: You are on trial for robbery.

THE DEFENDANT: What was the first indictment against me?

MR. COWHIG: It was for robbery, but the Court held that the form of the indictment only constituted grand larceny.

THE DEFENDANT: So I was indicted again, for robbery?

MR. COWHIG: For robbery.

THE DEFENDANT: Then I was indicted again for grand larceny?

MR. COWHIG: No, you were not indicted again.

THE DEFENDANT: I never was indicted for grand larceny?

MR. COWHIG: You were indicted on the charge of robbery, but the form of the indictment does not include robbery. It is a deficiency in the form of the robbery indictment.

THE DEFENDANT: I am indicted for grand larceny as it is now, but I am on trial for robbery; that is what it is, and if I am acquitted on the robbery charge I still have to go to trial for grand larceny.

MR. COWHIG: I don't think you would be tried on that. That is my opinion.

2/1/65

page 134 } THE DEFENDANT: It seems to me that that would be the reason why my case has been set off for ten months, now.

Could I have the docket of the Court subpoenaed to show that I could have been tried a number of times before now and that I could prove that I had my witnesses in Court?

MR. COWHIG: You have already testified to that.

THE DEFENDANT: But could I subpoena the docket of the Court to show that I could have been tried a number of times before now and the time that was spent with this new indictment and things that I don't quite understand, could I have that subpoenaed and brought out in Court so it would be there in the record?

THE COURT: I will answer that, Mr. Brooks. The Court has been very patient and been very understanding and you have been a very astute Defendant. The Court has noted that you have assisted counsel throughout this trial. The Court has noted that you have prepared your own questions. The Court notes that you are above average in intelligence.

THE DEFENDANT: That is not true.

THE COURT: The Court received many letters from you while in jail. The Court at your request appointed you counsel, because for reasons unknown to the Court you were having difficulty with your retained counsel.

2/1/65 page 135 } The Court undertook to appoint one of the best defense counsel available, a former prosecutor, and a man of considerable experience in this field of the law. He has up until the present time represented you well.

You took the stand and testified against his advice and counsel, but you have been given every opportunity for a fair and impartial trial.

The Commonwealth has closed its case. The Defendant has closed his case. There will be no further evidence, nor will there be any further delay, and the Court at this point is considering instructions, has passed on the

instructions, and the Court some 20 minutes ago requested of you and of counsel, because of your joint collaboration in this matter, whether or not you wanted an instruction that you are entitled to, that this jury can find you guilty of a lesser and included offense, and I want a direct answer from you.

If you do not understand the question, we will start over again, but I think you do understand and I will give you time to consider whether you want the instruction or you do not want it.

THE DEFENDANT: I think I understand the question, but I am not sure. That is actually what I am trying to clarify. I am not sure that I understand. I understand that I am on trial for robbery.

2/1/65

page 136 } THE COURT: There is no doubt about that. You are on trial for robbery. You were arraigned this morning. I took the precaution of asking you whether or not you wanted to be arraigned out of the presence of the jury. You were arraigned out of the presence of the jury. You were arraigned for robbery. You did enter a plea of not guilty.

The other indictment that you continuously inject in this discussion is irrelevant and immaterial. It is not a part of this trial, but your counsel has said to you three times, now, that that is an indictment for grand larceny by virtue of a ruling of the Court.

The Commonwealth attempted in that indictment to indict you for robbery, but the Court held that there was a deficiency in the indictment and you were, therefore, by virtue of the Court's ruling, held in that indictment for grand larceny.

THE DEFENDANT: Well, I would like to leave it up to Mr. Cowhig to instruct the jury whichever he thinks is best.

THE COURT: All right.

Mr. Cowhig, if you want the instruction, I will give you time to prepare it.

MR. COWHIG: All right, sir. I think I had better do it.

3/1/67 * * *

page 24 } THE COURT: "I would like to move at this time that that indictment be dismissed. Now, one ground is the fact that he has not been tried within three terms of this Court."

MR. COWHIG: He should have said four terms, but there was only one indictment in September.

THE COURT: On which he was convicted.

MR. COWHIG: Yes, sir.

THE COURT: And that is not the one where he was held for three terms?

MR. COWHIG: That is right. If you don't consider the statute, if you don't apply the facts in the case, then by every grand jury you will get an indictment, if he is already on bond, and that certainly is not the legislative intent.

I think if we do not come in and make the objection, and make a motion, then we would have waived it, according to the cases, but there is no case that I have been able to find where the Court did not rule on it and if you don't go down to the Court of Appeals and get a

mandamus to waive it, and that was the only thing I could have done.

THE COURT: If you are talking about moving that the indictment under 13381 be dismissed, the Court overruled you and the fact it went to trial. If you are talking about the other indictment 11235, then that is the one the judge still has under indictment.

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page 25 } MR. COWHIG: Of course, the only indictment I could have been talking about is the one in the April term. Even though the record says, "September," the only one I could have been talking about is the pending indictment.

THE COURT: I may have said September, but the record wasn't referring to that. If you waive that, that is it. I only think you could have done it ahead of time.

MR. COWHIG: I couldn't except to the Court's taking it under advisement, and there wasn't anything I could do to attack the second indictment. If the Court had dismissed the first indictment, I certainly would have attacked it on the second.

THE COURT: Anything you want to say?

MR. HART: I think you used the terms interchangeably. We are not talking about this man's constitutional right to a speedy trial. We are talking about a statutory right to a trial within four terms, and there is a great difference between these two, an entirely different conception.

The constitutional right to a speedy trial is based on an entirely different principal from what we are talking

about here this morning. Here we are talking about the four-term rule applicable to the Corporation Court. That is the first thing.

3/1/67 page 26

The second thing, if Your Honor please, if we are getting into the transcript, it is a question of whether or not it was waived by counsel's action. Certainly from the record, it isn't clear, but certainly a motion was made with regard to the pending indictment and if he used the word, "September," and he probably was referring to the May indictment, but that I don't think is of particular importance. I think it is a question of whether or not it is a jurisdictional matter, and it isn't a jurisdictional matter. It is really a statutory right, and there is a great, great deal of difference in that connection and that is why we cited to the Court the Hayes Case, which we think exemplifies and is analogous to this situation.

THE COURT: Anything you would like to say, Mr. Cowhig? We all agree we are at the alleged point of error in this case. I understand the defendant's petition, not the defendant's, the petitioner's petition in substance is that the indictment upon which he was tried and convicted includes a lesser included offense of grand larceny, for which there was a pending indictment against him at the time he was tried on the second indictment, and if the Commonwealth is forever precluded under 19.1-191 from prosecuting him on the grand larceny, then they could not prosecute him for robbery, because the grand larceny was included in the robbery indictment. That brings us back to the point of whether or not the code sec-

tion 19.1-191 is a self-operating statute.

3/1/67 page 27 } MR. COWHIG: I don't want to interrupt the Court, but I do not think there is any question it was self-operative. The self-operative is where the defendant doesn't have to do anything. The court does everything.

THE COURT: Then you agree it isn't a self-operative statute?

MR. COWHIG: Yes, sir.

THE COURT: Then that is the question involved. If it isn't a self-operative statute, it isn't a matter of the jurisdiction of the Court. In other words, it isn't a constitutional right which can not be waived and precludes the Court from having jurisdiction on the second indictment. It is a right that has to be claimed, so that brings us to the point, was his right claimed in this case, and that brings us to the very narrow point of whether or not his right was claimed, is a matter that can now be heard on a habeas corpus hearing.

Then going back to the Hayes Case, since it isn't jurisdictional, it seems to the Court that that is a point that will have to be raised at the trial on the second indictment, and would have to be a matter of appeal as to the effects under the statute, and not a matter that can be heard in a habeas corpus proceeding.

The Court being of that opinion, I am going to dismiss the petition and remand Mr. Brooks to the custody of Mr. Bastian.

9/22/67 * * *

page 54 } By Mr. Harp:

Q Please state your name, address and occupation, sir.

A William L. Cowhig. Office address is 115 South Fairfax Street, Alexandria, Virginia. I am an attorney at law practicing in the State of Virginia.

Q When were you admitted to practice, sir, what year?

A 1942, I believe.

Q And you have been practicing since 9/22/67 that time?

page 55 } A Yes, sir.

Q You were appointed by the Court to represent Brooks, is that correct?

A Yes.

Q At the time of your appointment had his bond already been revoked?

A At that time Mr. Brooks was incarcerated in the City Jail. I do know he was in confinement. At no time did I know that he was on bond after I was appointed.

Q Did you see him prior to the date that he was tried, which was the first of February?

A Yes, sir.

Q About how many times, do you recall?

A At least two or three times; at least twice I know of; in all probability three times.

Q Did you discuss with him whether or not he wanted to plead guilty or not guilty?

A I can only assume, Mr. Harp, that if he decided to plead not guilty I am sure it is my practice to always

check the Code to see what he is charged with and what the penalties are, and I read that out of the Code in all cases and obviously he decided to plead not guilty because we did try it.

9/22/67 page 56 } Q Did you discuss with him or did he suggest to you that he might have any witnesses that he wanted you to subpoena?

A He was emphatic about that, the fact that he had no witnesses other than his wife.

Q Did she testify?

A She did testify.

Q Did he ever give you the names of any other persons he wanted you to subpoena?

A None whatsoever.

Q Did he ever give you the names of any persons who resided in Washington who could testify in his behalf?

A No, sir.

Q Have you ever told him that you could get witnesses from Washington?

A No, because his wife came from Washington.

Q Do you recall whether there were any Negroes on the jury panel?

A No, I do not.

Q Did he discuss with you any questions relative to the manner his mail was censored in the jail?

A There were complaints that his mail had been censored by the jail and by the Detective Bureau.

9/22/67 Q Did you investigate those complaints?

page 57 } A I did, and, Mr. Harp, I am not really sure whether this was before or after the trial itself.

Q Did he make any complaints to you during the course of the proceedings about the manner in which you were proceeding?

A Yes, sir.

Q What were his complaints?

A He disagreed entirely about the manner in which I was trying the case. We disagreed on practically every point in the whole proceedings.

Q Did he take the witness stand?

A He took the witness stand against my advice.

Q Before the date of the trial, which was February 1, did you tell him he was going to be tried on that day?

A Yes, sir.

Q Was he aware of the fact he was going to trial that day?

A Yes, sir. We discussed the facts of the case, the Commonwealth's evidence, his alibi, his lack of witnesses, the reason he was where he was at the time he was arrested, which was his defense.

MR. HARP: Your witness, sir.

Testimony of Raymond Fogle

9/22/67 * * *

page 64 } BY MR. HARP:

Q Mr. Fogle, immediately after the trial of David Leon Brooks, did you take from Mr. Brooks a spiral notebook that contained any notes of his?

A No, sir.

Q Did you know he had such a notebook?
A No, sir.

Q While he was in your custody, were any special instructions issued relative to the censorship of his mail?
A No, sir.

Q Was his mail censored by the Police Department?
A Not that I know of, not on my orders, no, sir.

Q So far as you were concerned as a City Sergeant, his mail was censored under normal circumstances, is that correct?
A Yes, sir.

Q Did you give any instructions his mail was to be censored and any portions thereof obliterated?
A No, sir.

MR. HARP: Your witness.

9/22/67 * * *
page 73 } BY MR. HARP:

Q Are these records kept in your Department?
A Yes, sir.

Q Are these records normally kept in the course of your duties as a member of the Department?
A Yes, sir.

Q Were you present at this lineup?
A Yes, sir.

Q Do you remember exclusive of these notes who was present?
A Yes, sir.

tember," and he probable was referring to the May there was only one indictment in September.

Q If you will close up your file, then we will start all over again.

A Yes, sir.

Q Can you tell us who was present?

A Yes. Herbert Wallace, he was in No. 1 position. Lee was in No. 2, David Brooks three and a man named Pearson four, and Stephens was in No. 5.

9/22/67
page 74 } Q Were any of these persons dressed in prison clothing?

A No, sir.

Q Were they all dressed in civilian clothing?

A Yes, sir.

Q Was any identification made of David Leon Brooks?

A Yes, sir.

Q By whom?

A Mr. Albert Norton.

Q Who was he?

A He is the owner and the man that was held up at at Norton's Company in Alexandria, Virginia, at 127 Madison Street in Alexandria, Virginia.

Q Prior to the lineup were you present in the Police Station?

A Yes, sir.

Q Were you working in connection with this particular case, Sergeant?

A Yes, sir. I was working on the co-defendant Wallace.

Q At any time that you know of were Brooks and Wallace placed in a room where there was a two-way window through the door?

9/22/67 page 75 } A No, sir. I was with Wallace in a room next to—there is two rooms together and I was—and the mirror is in between the two rooms. I was in one of the rooms with Wallace from the time I apprehended Wallace to almost the time of the lineup in the big room.

Q Was Brooks in there with you?

A No, sir, not in that room with Wallace and I.

9/22/67 page 87 } * * *

THE COURT: Whether I am right or whether I am wrong, I decided in my judgment that section of the Code is not a self-executing statute, and that it was a matter that had to be raised by an appeal.

You did have an appeal of your case and the Supreme Court of Appeals did not grant you a Writ of Error.

What I am saying today is as far as the record is concerned, you are on record insofar as your two indictments are concerned. That is saying that you feel you should be dismissed under Section 19.1—whatever the section is.

Then you are clear on your 27 or 28 points made by Mr. Colby here today. I again say that I do not claim to be a person that does not make mistakes. Everybody makes mistakes, but in my opinion you are not entitled to your writ on your petition. That is about all I can say in the matter. I have given you the best opportunity I know how to state your position. I think you have stated your position and you have stated it clearly.

9/22/67 page 88 }

THE PETITIONER: Well, I appreciate the opportunity of being heard by the Court and at this time on March 1, too, the Court decided on March 1 that the matter that was brought up at that time was a matter of appeal.

One of the allegations in my Petition, I had ineffective assistance of counsel. The effect of this matter was a matter of appeal and wasn't brought up on appeal. This showed that I did have ineffective assistance of counsel and this is one of the grounds that has been argued before the Court.

I can't see why a writ wasn't issued on this basis.

THE COURT: Well, I am going to deny your writ, Mr. Brooks.

* * *

CRIMINAL NO. 13,381 ASSIGNMENTS OF ERROR

Defendant respectfully alleges the following errors:

1. Defendant was denied a fair trial due to conduct of Attorney for the Commonwealth in repeatedly asking a question which was objected to and sustained by the trial Court.

2. The Court erred in addressing the Jury in that he commented on the evidence and commented on the veracity of a witness.

3. The Court erred in denying the motion for a new trial.

4. The Court erred in refusing to admit into evidence portions of the transcript of evidence given at the preliminary hearing.

Respectfully submitted,

DAVID LEON BROOKS
By Counsel

GRAND JURY INDICTMENT
Dated May 4, 1964

#11235

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Alexandria, and now attending said court at the April, 1964 term thereof, upon their oaths present that DAVID LEON BROOKS, on, to-wit the 24th day of April, 1964, in said city, feloniously and violently did make an assault upon one Albert G. Norton by the presenting of a deadly weapon and instrumentality, to-wit: a gun, and did then and there put the said Albert G. Norton in bodily fear and danger of his life, and Four Thousand, Six Hundred and Thirty-four Dollars in currency of the United States of the value of $4,634.00 of the goods and chattels of Norton & Company, Inc., a corporation, then and there feloniously and violently did steal, take and carry away, against the peace and dignity of the Commonwealth.

Witnesses sworn and sent to the Grand Jury by the court to give evidence this 4th day of May, 1964:

Det. Sgt. Marshall Reid
Alexandria Police Dept.
Alexandria, Virginia

TESTE: Alvin W. Frinks, Clerk