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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 730511

SUPERINTENDENT OF THE VIRGINIA
STATE PENITENTIARY,

Appellant,

v.

JOHN WILLIAM JACKSON, JR.,

Appellee.

APPENDIX

ANDREW P. MILLER
Attorney General of Virginia

GILBERT W. HAITH
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

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* * *

PETITION FOR WRIT OF HABEAS CORPUS

Filed May 31, 1972

* * *

Place of detention: Virginia State Farm, Va.

A. Criminal Trial

1. Name and location of court which imposed the sentence from which you seek relief:
Fairfax County Circuit Court, Fairfax County, Va.

2. The offense or offenses for which sentence was imposed (include indictment number or numbers if known):
a. they said, I sold CoCaine, distrib

3. The date upon which sentence was imposed and the terms of the sentence:
a. June 22/71 thirty years

4. Check which plea you made and whether trial was by jury:
Plea of Guilty: ....; Plea of not guilty: √; Trial by jury: √; Trial by judge without jury: .....

5. The name and address of each attorney, if any, who represented you at your criminal trial:
Thomas J. Morris, The Dixie Building, 2060 N. 14th Street, Arlington, Va. 22201.

6. Did you appeal the conviction? Yes

7. If you answered "yes" to 6, state:
the result and the date in your appeal or petition for certiorari:
a. don't know the date, But I was denied.
citations of the appellate court opinions or orders:
a. .....

8. List the name and address of each attorney, if any, who represented you on your appeal:
Thomas J. Morris, The Dixie Building, 2060 N. 14th Street, Arlington, Va. 22201.

B. Habeas corpus

9. Before this petition did you file with respect to this conviction any other petition for habeas corpus in either a State or federal court? Yes

10. If you answered "yes" to 9, list with respect to each petition:
the name and location of the court in which each was filed:
a. Alexandria Federal Court
the disposition and the date:
a. still pening
the name and address of each attorney, if any, who represented you on your habeas corpus:
a. none

11. Did you appeal from the disposition of your petition for habeas corpus? no

12. If you answered "yes" to 11, state:
the result and the date of each petition:
a. Still pening
citations of court opinions or orders on your habeas corpus petition:
a. Still pening
the name and address of each attorney, if any, who represented you on appeal of your habeas corpus:
a. None

C. Other Petitions, Motions or Applications

13. List all other petitions, motions or applications filed with any court following a final order of conviction and not set out in A or B. Include the nature of the motion, the name and location of the court, the result, the date, and citations to opinions or orders. Give the name and address of each attorney, if any, who represened you:
a. None

D. Present Petition

14. State the grounds which make your detention unlawful, including the facts on which you intend to rely:
a. I was tryed on hearsay evidence, and false information was used to convict me. My attorney didn't subpoena one of my witness to my trial, I ask the Commonwealth to set my trial back, but he denied me

that right, to have all my witness present, and then he has the nerves to ask me, why my witness wasn't presented. Mr. Rodway Threaten the witness, in order for them to lie under Oath Lenard said, he was force to lie under Oath by the Commonwealth. I have seventeen witness to prove that I am illegal detain. I am asking the Court to grant me a new trial, on my newly discovered evidence, and I will prove that Judge John A. Rothsack, send my Case to the Jury because of prejudice.

15. List each ground set forth in 14, which has been presented in any other proceeding:

a. .....

List the proceedings in which each ground was raised:

a. .....

16. If any ground set forth in 14 has not been presented to a court, list each ground and the reason why it was not:

a. because the truth came after my Conviction.

b. Now I have seventeen witness.

(the common witness) got be charge

18.1-273, because I didn't have a transcript for proof.

/s/ John William Jackson, Jr.
State Farm, Va.

State Of Virginia
City/County Of State Farm, Va.

The above named petitioner being first duly sworn, says:

1. He signed the foregoing petition;

2. The facts stated in the petition are true to the best of his information and belief.

/s/ John William Jackson, Jr.

Subscribed and sworn to before me this 25 day of May, 1972
/s/ James W. May
Notary Public

My commission expires 1-27-74.

The petition will not be filed without payment of court costs unless the petitioner is entitled to proceed in forma pauperis and has executed the attached.

Forma Pauperis Affidavit

State Of Virginia
City/County Of State Farm, Va.

The petitioner being duly sworn, says:

1. He is unable to pay the costs of this action or give security therefor;

2. His assets amount to a total of $None.

/s/ John William Jackson, Jr.

Subscribed and sworn to before me this 25 day of May, 1972.

/s/ James W. May
Notary Public

My commission expires 1-27-74.

* * *

Affidavit in support of motion for a new trial,
Newly discovered Evidence And prejudicial error Committed.

Petitioner John Jackson, Is asking the Court to set aside my Conviction, that was imposed upon him on false information, and hearsay evidence. The petitioner, is saying with a burden of proof, that the Commonwealth intimidate the witness to comit prejury in his trial, and the petitioner is saying that the Commonwealth, obstruct Justice, by forcing the witness to prejury themself in the trial. by doing this the Commonwealth denied, the petitioner, the equal protection of the law, and the due process of the law. The petitioner have seventeen witness, to present to the Court, to prove that his Conviction is illegal as said. We can't keep using blind Justice, we must share, the truth with the blacks generation for equally and their family to come. The petitioner have discover new evidence in his case, with a burden of proof. I will ask the Court for an attorney to represent me at a hearing, because I am illegal detain. My allegations will be as following.

(1) officer Quintin Robinson, Committed prejury intentional please read his testimony on pages (17-18-19) in my preliminary hear-

ing transcript, where he told the Court, that he met me at a school recreation Center, and said we discuss drugs a large amount, a half t spoon. And then Mr. Robinson, come back to the petitioner regular trial, and told Court, and Jury that Dec. 3rd was the first time, we actually met me, and it was the first time we had a face to face confrontation, now please read page (26) in my regular trial transcript. this is not an error, this is a common bear faced lie. I am asking the Court to surpress, Mr. Robinson testimony from the petitioner Court record, because of prejury.

(2) Mr. Robinson prejudice Judge John A. Rothrock, along with my appearance.

(3) The petitioner will tell the Court with confidents that the only reason, Judge John A. Rothrock sent his case to the grand jury, because he was prejudice, he Judge a blackman by his appearance, not evidence please read page (55) in my preliminary hearing transcript. a question for the Court, Is this Justice or prejudiceness:

(4) The petitioner is saying with a burden of proof that the Commonwealth, Mr. Iran Rodway force the witness to lie, under Oath for an Conviction, one of the Commonwealth, witness have said that he lie under Oath, because of threats and various promised, made by the Commonwealth.

(5) The petitioner have seventeen witness to present to the Court, and the petitioner also have witness to prove that Commonwealth obstruct Justice, along with Conspiracy.

(6) on page (25) in my regular trial transcript officer Quintin Robinson told the Court, that he handed me twenty dollars, and then turn around and said I pick the money up. This is a question for the Court to decide up from where?

please read Daniel Lenard testimony on pages (122-123) in my regular trial transcript, where Mr. Lenard said officer Quintin Robinson laid the money on the table, and he said I slid officer Robinson two bags on the table, please contemplate, on Mr. Lenard testimony. Now the petitioner will ask the ask the Court, to read Mr. Eugene Jones testimony on page (141) in the same transcript, Mr. Jones said officer Robinson laid the money on the table, and he said I handed Mr. Lenard two bags of cocaine, which prove Mr. Lenard sold the Cocaine. Mr. Lenard admitted in a notary statement to the Court that he was

force to lie. Mr. Lenard also Confess to Mr. Jack Hall that he sold the Cocaine, what kind of Court are you all running, please tell me? why is you all still holding me. I am not asking for an highway to the sky, I am only begging and asking for Justice. The dope pusher is free and I am doing time. how can Justice be use so blindly?

(7) The records will show that honorable Arthur Sinclair dismiss a charge against the petitioner similar to the charge, back in October of last year. he said, any body who pick money off a table is not a crime, The Honorable Judge Arthur Sinclair, dismiss that case on the same ground, about somebody saying I pick the money off the table. If I were in the house, how can I be picked out as a big dealer when, the witness said five others was present at the table at the time, Mr. Robinson laid the money on the table. I am telling the Court with prove, that no one person, can be Charge, and five said to be present at the table, the house don't belong to me, how can you all Charge me, without the owner being Charge? The reason is the Court is lieing. I will prove that my conviction, was base on false evidence, and prejury. The Court have fail to prove that I was a big dealer, and that I actually the cocaine, on Dec. 3rd 1970, to Mr. Robinson, because Mr. Robinson have prejury himself, to the Court, with out reason of a doubt. The Commonwealth won this case, on lie, and intimidation, and false publicity which is slanted.

(8) The petitioner will not name is seventeen, in his petition, until he talk to an attorney, and we ask the Court after, his witness have been submitted to the Court, he will ask the Court to subpoena all seventeen of them, and a news man. I pray that the Court, will do away with prejudiceness and hate and show Justice to every one. I pray that petition will be granted in thirty days. I don't have any money in my account.

/s/ John William Jackson, Jr.
Petitioner Signature

Subscribed and Sworn To Before me
This 25 day of May, 1972.

/s/ James W. May
Notary Public

My Commission Expires 1-27-74.

ANSWER

Filed July 27, 1972

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

1. Petitioner is now being detained pursuant to a judgment of this Court of June 22, 1971, wherein the petitioner was convicted of distributing controlled drug and sentenced to a term of thirty (30) years in the Virginia State Penitentiary. (See Exhibit I, Copy of Prison Record).

2. The petition herein appears to be alleging the following matters:

(1) Insufficiency of the evidence.

(2) Inability to have witnesses on defendant's behalf.

(3) Perjured testimony by witnesses deliberately obtained by by the prosecution.

3. As to the allegation of insufficiency of the evidence, respondent says that said allegation is not a proper subject for habeas corpus proceeding absent a showing that the conviction was totally devoid of evidentiary support. *Pettus* v. *Peyton,* 207 Va. 906, 153 S.E.2d 278 (1967). Respondent says that the records of petitioner's state court trial show conclusively that his conviction was not so devoid of evidentiary support. As to the remaining allegations of the petition herein, respondent says that said allegations raise unrecorded matters of fact and that therefore a plenary hearing is necessary to determine the merits of these allegations.

4. Respondent denies each and every allegation of the petition not specifically admitted herein.

Wherefore, respondent prays that a plenary hearing be granted for the petitioner and that pursuant to said plenary hearing the entire petition be denied and dismissed.

* * *

ORDER

Entered August 23, 1972

It appearing from the affidavit filed by the Petitioner that he is without sufficient means to employ counsel of his own choosing to represent him in the prosecution of his petition for Writ of Habeas Corpus, it is hereby

Ordered that Robert T. Hall, 10560 Main Street, Fairfax, Virginia, an able and experienced attorney at law practicing before this Court, be appointed to represent Petitioner, and the Clerk of this Court is directed to certify a copy of this order to the Petitioner and to the Deputy Attorney General.

Enter: August 23rd, 1972

/s/ James Keith, Judge

* * *

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

Filed February 16, 1973

Comes Now the Petitioner and assets as additional grounds for the granting of a Writ of Habeas Corpus that he was denied due process of law and the equal protection of the laws in that:

1. He was indicted by a grand jury which did not represent a cross-section of his community, which had as its foreman, as agent of the State, the former Clerk of the Court before which he was tried and which had before it no competent evidence upon which to make a finding of probable cause.

2. He was put twice in jeopardy for the same offense in that the Commonwealth put him twice in jeopardy for violation of § 54-524.101(a) distribution and possession with intent to distribute cocaine and was not put to an election by the Court. Possession with intent to distribute was subsumed in the charge of distribution and should not have been presented to the jury as a separate and independent charge. Your Petitioner asserts that joinder of those two Courts of the same offense was prejudicial and gave the Commonwealth the opportunity to introduce into evidence otherwise inadmissible but clearly inflammatory matters which inter alia contributed to the length of your Petitioner's sentence and unduly influence the jury to find your Petitioner guilty.

3. The petit jury did not represent nor was it selected from a cross-section of the community. Additionally, one juror seated was not qualified to sit in that a member of his immediate family was, by his own subsequent admission, "deep in drugs" at the time he was sitting in judgment on your Petitioner.

4. The suspected drug in question, Cocaine, was offered in evidence but not admitted because the chain of custody was not established. Therefore the State's expert witness gave an opinion based upon a fact which never came into evidence and accordingly, his opinion was inadmissible and your Petitioner was denied his constitutional right to confront the witnesses against him.

5. Your Petitioner was denied his right to appeal his conviction.

All of which individually and collectively served to deny your Petitioner due process of law and equal protection of the laws.

* * *

ORDER

Entered May 4, 1973

This proceeding came on to be heard on April 17, 1973, upon the petition of John William Jackson, Jr. for a writ of habeas corpus, the supplementary petition thereto, and the answer of the respondent, the petitioner appearing in person and by his attorney, Robert T. Hall, previously appointed by this Court, and the respondent appearing by Gilbert W. Haith, Assistant Attorney General.

Upon consideration thereof, after hearing the evidence of the parties and the argument of counsel, and after a review of the record and transcripts of the petitioner's original criminal trial, and for the reasons and findings stated by the Court from the bench at the conclusion of the hearing, it appearing that the writ should issue as prayed; now, therefore, it is,

Adjudged and Ordered that the petition for a writ of habeas corpus is hereby granted to the petitioner, to which action of the Court the respondent objects and excepts.

It is Ordered that this Order shall be stayed for a period of sixty days from and after April 17, 1973, to permit the respondent to appeal this Order if it be so advised, and the petitioner is therefore remanded to the custody of the respondent.

It is further Ordered that Robert T. Hall, Esquire, be allowed a fee of $300.00 for services rendered in this matter.

Let the Clerk of this Court certify copies of this Order to the petitioner, petitioner's counsel, the respondent, and Gilbert W. Haith, Assistant Attorney General.

Enter this 4th day of May, 1973

/s/ Perry Thornton, Jr.
Judge

* * *

NOTICE OF APPEAL

Now comes the respondent, R. M. Oliver, Superintendent of the Virginia State Farm, by counsel, pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, and files his Notice of Appeal to the judgment of the Circuit Court of Fairfax County of May 4, 1973, wherein the petition for a writ of habeas corpus filed by the petitioner was granted.

* * *

ASSIGNMENTS OF ERROR

Now comes the respondent, R. M. Oliver, Superintendent of the Virginia State Farm, by counsel, and files the following assignments of error in conjunction with his Notice of Appeal to the judgment of the Circuit Court of Fairfax County, Virginia, of May 4, 1973:

1. The Court erred in granting the petition for a writ of habeas corpus on the grounds that petitioner had been denied due process of law by the combining of two separate charges and indictments in his criminal trial, namely distribution of controlled drugs and possession of controlled drugs with the intent to distribute.

The transcript of the plenary hearing held on April 17, 1973, in the Circuit Court of Fairfax County, as well as all the pertinent court records of both the petitioner's habeas corpus proceeding and of the petitioner's original trial, will be filed as a part of the record in this appeal.

* * *

INDICTMENT FOR POSSESSION OF A CONTROLLED DRUG WITH INTENT TO DISTRIBUTE

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its March Term, 1971, upon their oaths present that John W. Jackson, Jr., a/k/a Fly Jack, on the 3rd day of December, 1970, in the Courty of Fairfax, did unlawfully and feloniously, knowingly or intentionally possess with intent to distribute, a controlled drug, to-wit: cocaine, in violation of Section 54-524.101(a) of the 1950 Code of Virginia, as amended, against the peace and dignity of the Commonwealth.

Witnesses called by the Court, sworn and sent to testify before the Grand Jury:

Inv. Luzi, Fairfax County Police Dept.

* * *

INDICTMENT FOR DISTRIBUTING A CONTROLLED DRUG

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its March Term, 1971, upon their oaths present that John W. Jackson, Jr., a/k/a Fly Jack, on the 3rd day of December, 1970, in the County of Fairfax, did unlawfully and feloniously, knowingly or intentionally distribute a controlled drug, to-wit: cocaine, in violation of Section 54-524.101(a) of the 1950 Code of Virginia, as amended, against the peace and dignity of the Commonwealth.

Witnesses called by the Court, sworn and sent to testify before the Grand Jury:

Inv. Luzi, Fairfax County Police Dept.

* * *

MOTION TO REQUIRE AN ELECTION

Filed May 2, 1971

Comes Now the defendant, by counsel, and moves to require the Commonwealth Attorney to elect which indictment it intends to rely on to secure a conviction for the following grounds, to-wit:

1. That the Grand Jury at the Court's March Term 1971 returned two true bills alleging in one of the two indictments that on the 3rd day of December, 1970 the defendant knowingly or intentionally distributed a controlled drug, to-wit: cocaine.

2. That at the same time and place the Grand Jury in the second indictment alleged that the defendant on the exact same facts knowingly or intentionally possessed with intent to distribute a controlled drug, to-wit: cocaine.

3. That both indictments allege a violation of one specific criminal statute.

4. That a conviction of one of said indictments would necessarily dismiss the other.

5. That requiring the defendant to defend both indictments would necessarily prejudice him before a jury.

Wherefore the defendant prays that the Court require the Commonwealth to make an election.

* * *

MOTION FOR A SEVERANCE

Filed May 19, 1971

Comes Now the defendant, by counsel, and moves the Court to grant a severance for the following grounds, to-wit:

1. That the defendant was indicted for distribution of a controlled drug alleging that he did on the 2nd day of December 1970, in the County of Fairfax, did unlawfully and feloniously, knowingly or intentionally distribute a controlled drug, to-wit: heroin.

2. That the defendant was indicted for possession of a controlled drug alleging that on the 3rd day of December, 1970 in the County of Fairfax, did unlawfully and feloniously, knowingly or intentionally possess with intent to distribute a controlled drug, to-wit: cocaine.

3. That the defendant was indicted for distribution of a controlled drug alleging that he did on the 3rd day of December, 1970, in

the County of Fairfax, did unlawfully and feloniously, knowingly or intentionally distribute a controlled drug, to-wit: cocaine.

Wherefore your defendant prays that the Court grant a severance of the three indictments in that he be granted separate trials on each charge for the reasons as stated herein and for further reasons to be given at oral argument.

* * *

INDICTMENTS—DISTRIBUTE A CONTROLLED DRUG AND POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED DRUG

This 2nd day of June, 1971, came the Commonwealth, by her Attorney, and the defendant, John W. Jackson, Jr., who stands indicted for felonies, to-wit: distribute a controlled drug and possession with intent to distribute a controlled drug, appeared agreeably in accordance with his recognizance of bail, and also appeared Thomas J. Morris, Counsel for the defendant.

Thereupon, the Court Reporter was sworn.

And these cases having been consolidated for trial, the defendant was arraigned upon the indictments returned herein, to which indictments the defendant, in person, entered pleas of not guilty.

Whereupon, came a jury of twenty veniremen who were sworn on their voir dire, and the Attorney for the Commonwealth and Counsel for the defendant having each alternately, beginning with the Attorney for the Commonwealth, stricken from the said panel the names of four of the said veniremen, the remaining twelve, to-wit: Ardee Ames, Harold E. Bonney, Jr., Katherine C. Creane, Charles F. Darcey, Daniel F. Dumm, Kenneth N. Mason, Bernard B. Fulk, Jr., Merle A. Whitmoyer, Amy Zlotkick, Ruby Weinbrecht, Dickson A. Spencer and James A. Rennie constituted the jury for the trial of the defendant, and were sworn the truth of and upon the premises to speak and who heard opening statement of the Attorney for the Commonwealth and opening statement of the Attorney for the defendant and all the evidence on behalf of the Commonwealth, and upon conclusion of the evidence presented on behalf of the Commonwealth, counsel for the defendant, out of the presence of the jury but in the presence of the defendant, made a motion to strike the evidence presented, which motion the Court after hearing argument thereon, denied.

Thereupon the jury was recalled and heard all the evidence on behalf of the defendant. Whereupon, Counsel for the defendant, out of the presence of the jury but in the presence of the defendant, renewed his motion to strike the evidence presented on behalf of the Commonwealth, which motion the Court again denied.

The Court being of the opinion that the offense charged in the indictment in cr. no. 16609 is included in the offense charged in the indictment in cr. no. 16610, doth direct that the defendant can only be convicted of one such offense.

The jury then received instructions of the Court, heard argument of Counsel and were sent to their room to consult upon their verdict and after some time returned into Court and rendered the following verdict, to-wit:

> "We, the jury, on the issue joined in the case of Commonwealth of Virginia vs. John W. Jackson, Jr., find the defendant guilty of distribution of the controlled drug cocaine and fix his punishment at 30 years imprisonment without fine.
>
> /s/ Merle A. Whitmoyer
> Foreman."

Whereupon, the jury was discharged.

Thereupon, the Attorney for the defendant made a motion to continue this case for imposition of sentence to permit the defendant to file motions, which motion the Court granted.

It is further Ordered that the bond in this case be increased to $20,000.00.

And the defendant is remanded to jail.

/s/ James Keith
Judge

* * *

MOTION FOR A NEW TRIAL

Filed June 16, 1971

Comes Now the defendant, by counsel, and moves the Court to set aside the verdict and grant a new trial on the following grounds:

1. That the Court erred in permitting both indictments No. 16609 and No. 16610 to go to the jury which prejudiced the accused.

2. That the Court erred in restricting the cross-examination of the Commonwealth's witnesses, Lenard and Jones, in that they were permitted to exert the privilege of the Fifth Amendment of the United States Constitution, which privilege should not have been granted under the circumstances.

3. For other reasons and errors apparent on the face of the record and exceptions taken thereto.

* * *

ORDER

Entered June 22, 1971

This 22nd day of June, 1971, came the Commonwealth, by her Attorney, and the defendant, John W. Jackson, Jr., who stands convicted of a felony, to-wit: distributing a controlled drug, being confined in jail, was brought into Court and put to the bar of the Court in custody of a Deputy Sheriff, and also appeared Thomas J. Morris, Counsel for the defendant.

Thereupon, the Court Reporter was sworn.

Thereupon, counsel for the defendant made a motion for a new trial, which motion the Court after hearing argument thereon, denied. Counsel for the defendant then made a motion to reduce the bond in this case, which motion the Court denied.

Thereupon, it was demanded of him, John W. Jackson, Jr., if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is Adjudged and Ordered that John W. Jackson, Jr., do serve thirty (30) years in the Penitentiary House of this Commonwealth, at hard labor.

The defendant shall be given credit for twenty-nine (29) days served in jail.

The Court proceeded to advise the defendant of his right to appeal from the sentence heretofore imposed, including the right to have an attorney appointed for him and to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay the same.

And the defendant having noted his intention to apply to the Supreme Court of Appeals for a writ of error, it is therefore Ordered that Thomas J. Morris be appointed as Counsel for the defendant, on his appeal to the Supreme Court of Appeals of Virginia.

The Court doth certify, pursuant to Sec. 17-30.2 of the Code of Virginia, as amended, that the defendant is financially unable to pay his attorney's fees, costs and expenses incident to an appeal.

Whereupon, Counsel for the defendant made a motion to continue this case for argument of motions, which motion the Court granted, and this case is hereby continued to July 2, 1971, at 2:00 P.M.

And the defendant is remanded to jail.

/s/ James Keith
Judge

* * *

EXCERPTS FROM THE TRANSCRIPT OF THE PRE-TRIAL HEARING OF MAY 25, 1971, IN THE CIRCUIT COURT OF FAIRFAX COUNTY

[17] * * *

Mr. Rodway: This case, or the first of these three cases, comes to trial the 2nd of June. They have been severed by agreement with Mr. Morris.

Mr. Morris: They have been?

Mr. Rodway: It is my understanding they were.

The Court: That's one of the motions.

Mr. Morris. That's one of the motions; that's right.

The Court: All right, June 2, and today is the 25th—

Mr. Rodway: Yes, sir.

[18] The Court: What is to keep you from doing it in a day or two?

Mr. Rodway: Well, will the Court indulge me until Friday? I will turn them over to Mr. Morris on Friday, sir.

The Court: All right, Mr. Morris?

Mr. Morris: Will they be in my office by Friday?

Mr. Rodway: I will mail them to you—

Mr. Morris: Monday is a holiday and I may want to investigate the statements, and I would like to have them before Friday.

The Court: I think he ought to have them by Friday. Exculpatory —what do you call it? Evidence, statement or what?

Mr. Morris: I would move for any disclosure of any favorable and material evidence—

Mr. Rodway: If the Commonwealth has it, I am obliged to give it to you.

Mr. Morris: Your Honor please, I was not aware that there would be no argument on a severance, so I ask that that motion, then, be withdrawn if the Commonwealth is going to—

The Court: All right.

Which one are you going to try on the 2nd?

Mr. Rodway: Could I have the Court's indulgence for just a moment.

[19] The Court: Yes.

Mr. Rodway: The Commonwealth would go to trial on the 2nd with number 16610, which is the 3rd day of December, 1970; unlawfully and feloniously, knowingly or intentionally a drug, to wit, cocaine—

Mr. Morris: May I ask the Court to try, the Commonwealth to try the case that occurred on the 1st?

The Court: I think he has the right to try them the way he wants to.

Mr. Morris: I think he has if they arise out of the same facts and circumstances.

My suggestion to the Court would be that the case that is on the 2nd day of December, which is the oldest case, if I can use that terminology, would not affect the Commonwealth adversely and that the exact same witnesses will testify in that case that I presume will testify in the 3rd.

But my request is, I have a witness coming in on the 2nd that is very material to our defense, the owner of the property, if I may suggest to the Court.

Mr. Rodway: As Your Honor indicated, it is the Commonwealth's prerogative which case he chooses to try first, Your Honor. And I think under the circumstances, a motion is made to sever—

The Court: Where is he coming from?

[20] Mr. Morris: He lives in Bailey's Crossroads. He has made arrangement to appear on this date and—

The Court: Your motion is denied.

The Commonwealth can elect and has elected to try 16610 on June 2nd.

Mr. Morris: Your Honor, would you note my exception on the grounds previously stated, that I have a witness—

The Court: I don't think you made any showing—I thought he was coming from Saigon.

Mr. Morris: No, sir, Your Honor. Sometimes I wish I were going there, however.

Then, Your Honor, would it be proper at this time to ask the Commonwealth what they intend to do with the two remaining charges? Are they going to continue those to next term or are they going to set them down in this term for trial?

Mr. Rodway: I would like to have them set down for trial, Your Honor.

Mr. Morris: I have no objection as lang as they are not handled by the same jury that heard the first one.

Mr. Rodway: Just as a little historical background, these cases were continued once; were set down at last term date. Mr. Morris filed his motion for severance after Term Day and that is why they were not set down individually at that time.

[21] But these cases have been, well, this is going on past second term that they have been in the Fairfax Circuit Court. I would ask that they be set down for trial within this term, sir.

Mr. Morris: I have no objection—

The Court: Are you going to try them together or separately?

Mr. Morris; No, sir; try them separately. I have a motion with reference to the two remaining—

The Court: Are you going to try them separately?

Mr. Rodway: The Commonwealth would try them separately.

The Court: All right.

[26] * * *

The Court: All right, anything further?

Mr. Morris: Yes, Your Honor; I have an additional motion here which is a motion to require election which Commonwealth has already granted but there is additionally a request in that motion, and the motion goes to the effect that both indictments allege a violation of one specific statute, that a conviction of one set of indictments would necessarily dismiss the other; I think that is the law.

The Court: That is my understanding, Mr. Rodway.

Mr. Rodway: The Commonwealth's position is, Your Honor, that these two indictments involve separate acts.

The Court: The 2nd and the 3rd?

Mr. Rodway: Well, the 3rd there is no question about.

What Mr. Morris is talking about, that the first indictment, the one we are going to try first, 16610 and 16609; one alleges distribution of cocaine on the 3rd day of December, and the other one alleges the defendant did unlawfully and feloniously knowingly and intentionally possess with intent to distribute cocaine on the 3rd day of December.

It is the Commonwealth's position that based upon the [27] factual pattern which will emerge only at trial, Your Honor, that the Commonwealth can show that they are separate acts and separate transactions, etc., that make this defendant guilty of both offenses, Your Honor.

It is not simply a case—sometimes the Commonwealth, as Your Honor knows, does charge a defendant or goes to the Grand Jury with two indictments where an individual just makes a simple transfer of narcotics. The Commonwealth's position is that the jury could, if it so desired, find him guilty of the temporary possession of those narcotics.

But the factual pattern that the Commonwealth feels is evident in this case is much different than that, Your Honor. And of course I don't think the Commonwealth is put to arguing that.

The Court: Well, I don't want to hear the evidence on it now, either. It is certainly my feeling, generally, that possession with intent to distribute is one crime and he can be found guilty of one, but not both. But I don't know.

You say the facts are going to show that there were two crimes here, and these cases are set for trial when?

Mr. Rodway: Separately, Your Honor. And I think Mr. Morris will agree with me; it's a little premature because it presupposes that Mr. Jackson will be convicted on the 2nd of June, on the first one of these.

[28] The Court: Why don't you try those two together?

Mr. Morris: Because of the two different dates.

The Court: Well, if you say there is one crime only, let's try them together, the possession with intent to distribute—

Mr. Morris: I have a motion to that effect. I appreciate Your Honor requesting that; I normally would. But it is our position that the Commonwealth here, by having two specific indictments, not a two-count indictment but two specific indictments, alleging two specific acts that Mr. Rodway proffers to the Court that the facts in these two cases are not going to be identical, then I would make this comment, then he is right, and he is proffering to the Court, not I, that there are different facts and circumstances with reference to the 3rd day of December activity.

My investigation and my preliminary hearing would negate that comment; but Mr. Rodway makes it and I certainly don't question his veracity in making it to the Court.

The reason I don't want to try them together is that we have to recognize that when jurors hear two specific charges they have to be prejudiced by one or the other. The mere fact that there are two charges involving the same facts would indicate, at least in our judgment, Your Honor, that the jury could very easily be prejudiced, and as I understand the law, why take the risk that they may or may not be prejudiced. If it is there, let's not have [29] it.

The Court: Well, I mean, I don't think you can have it both ways, Mr. Morris. If you think there is only one crime being charged and that he can only be found guilty on one or the other, or neither, of course, then the Court is willing, since I think that it is probably true, I would be willing to go ahead with your motion if you will agree to try them together.

If you won't try them together, then the Court won't grant your motion.

Mr. Morris: All right, Your Honor, if that is the case, I will try them together, and I ask the Court to consider the motion at this point.

The Court: Well, I can't hear it; the jury will decide that.

Mr. Morris: Then I still would try them together.

May I ask this, if Your Honor please, are you going to sit on the trial?

The Court: We haven't been assigned yet, so I can't help you.

Mr. Morris: The reason I ask you, sometimes matters change at the time of trial.

The Court: I can't help you, Mr. Morris. I would ordinarily think that having handled the preliminary motions that I [30] would be the trial judge, but I can't guarantee it.

Mr. Morris: All right, sir.

The Court: All right, what two of those—

Mr. Rodway: 16609, in addition to 16610, to be tried on the 2nd, Your Honor.

The Court: That takes the one off in September.

Mr. Morris: May I inquire, are those the alleged offenses that occurred on the 3rd?

Mr. Rodway: Yes.

Mr. Morris: And 16611 is the one that allegedly occurred on the 2nd?

Mr. Rodway: Yes.

The Court: All right, now, I want to be careful. Give them to me again.

Mr. Rodway: Yes, sir.

The ones to be tried on the 2nd day of June, Your Honor, would be 16609 and 16610.

The Court: And 16611 comes off?

Mr. Rodway: Well, that is just scheduled for the 29th of June, Your Honor. We just moved up September to the 2nd of June.

The Court: All right, that stays on and September 9 comes off.

Now, do you have anything further, Mr. Morris?

[31] Mr. Morris: No, Your Honor, but may I have your indulgence?

16609 and 16610 are to be tried on the 2nd day of June?

The Court: Together.

Mr. Morris: 16611 is continued to the 29th day of June?

The Court: Yes.

Mr. Morris: And, Your Honor, am I under the impression on your ruling that at time of trial I can make the motion as to the—

The Court: I am not an expert on criminal law. My understanding is two indictments, or two counts to one indictment; they will be tried together, proper instructions would be given to the jury, and—I don't know how it is going to work out, but my feeling is it will probably work out so that he can only be found guilty of one offense.

Now, Mr. Rodway thinks that there are two offenses and he will offer instructions and they will be passed on at the proper time that the jury can find him guilty of both offenses.

I think that will depend on the facts as to whether or not there is one offense or two offenses. Ordinarily, it would be my judgment that it is one offense; possession or possession with intent to distribute, but not both.

If he can establish two offenses, then you will just [32] have to present instructions, and you will have your opportunity then to raise the questions.

Mr. Morris: The only comment I would make, I completely agree with Your Honor's rationale on that, if I may be so bold to say, because to my mind if he presents the same facts and not a different set of facts, then I would take the position that a mistrial would be warranted. I would ask the Court to grant a mistrial based on presenting two distinct violations and one set of facts as such. I think that would prejudice the defendant.

But if he says there are two separate facts over all on the proffer of the Commonwealth Attorney's office that they are separate and distinct acts—he knows more about it as far as this case is concerned—

Mr. Rodway: The Commonwealth doesn't want to be put in the position that Mr. Morris is trying to put Your Honor in.

It is my position, based on the reading of the case, based on the evidence I have seen and looked into, that the Commonwealth can prove two separate and distinct offenses.

Now if the judge, whoever he may be, sitting on the bench that day, does not decide that, Your Honor, I don't think that that should result in a mistrial.

I think Mr. Morris in essence has gotten himself into the position

that he has, and I think Your Honor is trying to [33] remedy it to his satisfaction; and, as I said, the Commonwealth doesn't want to be held, as Your Honor doesn't want to be held I don't believe, to whatever may happen on the 2nd of June.

The Court: That is the only thing I know, Mr. Morris, is that if the evidence as it is developed at the trial shows that there were two offenses, then I think the jury will be instructed that there were two offenses, and that they can find him guilty of either or both.

If, as you believe, and it has certainly been my experience, that there is really only one offense, then the jury will be instructed that they can find him guilty of only one offense.

But I don't see how I can pass on this until I have heard the evidence.

Mr. Morris: Well, that is why I suggested to Your Honor, I am not really asking you to pass on it now, based on the Commonwealth proffer, that is the only thing I am going by and if he says he is going to proffer two distinct and separate acts of this alleged crime, then I certainly acquiesce to his—but if it is in fact but one specific unrestricted act, then at that time, Your Honor, I would make a motion, and I know you can't rule on it now and I really didn't ask you to—

The Court: I thought this is what you wanted, to show that there was only one offense. Why would you ask for a mistrial?

[34] Mr. Morris: Because the Commonwealth should also know there is only offense and why prejudice the defendant with two different indictments?

I think we have to be rational—

The Court: Oh, I'd be willing to take a chance on that motion.

Mr. Morris, All right, Your Honor.

The Court: All right.

We will let it stand the way it is.

Mr. Morris: Thank you, Your Honor.

(Whereupon, at 11:20 o'clock a.m. the hearing in the above-entitled matter was concluded.)

* * *

EXCERPTS FROM THE TRANSCRIPT OF THE TRIAL ON JUNE 2, 1971, IN THE CIRCUIT COURT OF FAIRFAX COUNTY

[12] * * *

Opening Statement On Behalf Of The Commonwealth
By Ian Rodway, Esq.

Mr. Rodway: If it please the Court, ladies and gentlemen of the jury. My name in Ian Rodway, Assistant Commonwealth Attorney, and I will be prosecuting this case this morning.

As you have heard by the indictment, Mr. Jackson is charged with two separate counts—two separate indictments, excuse me. One allege —both allege the offenses took place on the 3rd day of December, 1970, last year.

The evidence will disclose to you that they both occurred at 5801 Fairfax Drive in the County of Fairfax, which [13] is in Bailey's Crossroads area. They took place in Apartment number 10, an apartment owned or rented by the name—by the gentleman by the name of James Wilkerson. They took place later in the evening, sometime before twelve o'clock.

The indictment—one of them alleges that Mr. Jackson distributed cocaine. The evidence will disclose that, in fact, he sold two decks of cocaine for twenty dollars to Officer Quentin T. Robinson, Jr. of the Metropolitan Police Department, an individual who at that time was working with the Fairfax County Police Department in the role of an undercover agent.

Very frankly, he is, quite obviously, black, and for various reasons, the Fairfax County Police deemed it necessary at this time—

Mr. Morris: Your Honor, I object to that.

What relevancy does it have the color of the alleged witnesses? Already he's interjected an issue that should not be injected.

The Court: I don't think—objection overruled. I don't think it's—

Mr. Morris: I take exception, Your Honor. The jury can see the witness.

Mr. Rodway: At this time he was working with the [14] Fairfax County Police Department.

The evidence will also disclose that the same time when officer Robinson was in the apartment in question, Mr. Jackson was seated around that table, and on that table were various paraphernalia and tools in narcotic controlled drugs. One of these drugs, Commonwealth contends, was cocaine.

Those are really the basis—bases for the two charges.

Ladies and Gentlemen, today you swore to be injected into another world, so to speak. You will hear some terms, perhaps, in the course of the testimony, that you will not be familiar with. You will hear such terms as the word coke, which I think you'll find to mean cocaine. You will hear the term deck, which I think you'll find to be a little container or a container for putting up cocaine. Of course, you will hear the name Fly Jack. Fly, which Commonwealth will show you is another name—or at least at this time was the name used, which Mr. Jackson was known by.

The Commonwealth will also call other witnesses to show you the chain of custody which was carried out in the course of the transfer of the narcotic. After Officer Robinson bought them from Mr. Jackson on the 3rd day of December to the time he turned it over to Investigator William Luzi of [15] the Fairfax County Police Department. Then Investigator Luzi then turned them over to Mr. Thaddeus Tomczak, who's a United States chemist, who, in the course of his official duties in employment, analyzed the controlled drug in question, which I believe will indicate to you was cocaine.

I will ask you, and I'm sure you will listen very attentatively to the witnesses and the testimony which will be enlisted from them. This, I would submit to you, is not a complicated case. There won't be a whole lot of witnesses. There shouldn't—not be too much controversy as to exactly what took place, at least not with the Commonwealth witnesses. Between the Defense witnesses and the Commonwealth witnesses, I imagine there would be. Such is the nature of a trial.

I will have a chance to address you later. Once again, I thank you for the opportunity to talk to you now. I just ask that you pay attention—close attention to the testimony and evidence presented today.

Thank you very much.

[18] * * *

The Court: Call your first witness.

Witnesses On Behalf Of The Commonwealth

Mr. Rodway: Officer Robinson, please.

Mr. Morris: Your Honor, I would have a motion at this time. May I approach the Court at the bench, please?

If your Honor please, at the pre-trial motion on the 25th of May which—in which your Honor sat, Mr. Rodway informed the Court that he would produce separate and distinct case for the two counts. I respectfully remind the Court of that promise by the prosecution, and if he does not produce separate and distinct facts to secure the convictions, I will raise that motion at the pre-trial hearing for a mistrial for prejudicial indictments.

The Court: All right.

[20] * * *

Testimony of Officer Quentin T. Robinson, Jr.

Direct Examination

By Mr. Rodway:

Q Tell the Court and the members of the jury your name, sir, and by whom you are employed. A My name is Quentin T. Robinson, Jr. I'm employed by the Metropolitan Police Department.

Q Officer Robinson, directing your attention to the 3rd day of December, 1970, by whom were you employed on that day, sir? A I was employed by the Metropolitan Police Department on that day.

Q Did you on that day have occasion to be in the County of Fairfax? A Yes, I did.

Q Was there any particular reason you happened to be in the County of Fairfax on the 3rd day of December in the course of your duties? A Yes, I had been given a special assignment to work with the Fairfax County Police Department as an undercover police officer.

[21] Q Officer Robinson, do you know the defendant in this case, John W. Jackson, Jr.? A Yes, I do.

Q Do you know him by any other name or nickname, sir? A Fly Jack.

Q Did you have occasion on the third day of December, 1970 to see Mr. Jackson in the County of Fairfax? A Yes, I did.

Q Would you tell the members of the jury and His Honor where and under what circumstancees you saw Mr. Jackson? A On the 3rd of December, at approximately 10:30 p.m. I entered an apartment building, 5801, Apartment number 10. The Southfax Apartment complex.

Mr. Jackson was inside the apartment. He and several others were seated around a dining room table which was covered with suspected narcotics.

Mr. Morris: Your Honor, I object. As to what suspects. Let him testify as to what he knows, and not what he suspects. I would ask the Commonwealth to suggest to his witnesses not to testify as to the direct questions.

The Court: Just tell us what you found.

The Witness: Yes, sir.

By Mr. Rodway: (Resuming.)

[22] Q Officer Robinson, would you tell the members of the jury what you saw physically on the table at that time, sir. A Physically, I saw cellophane bags containing white powder, numerous pieces of tin foil cut up in approximately the same size squares, spoons, measuring spoon, or spoons used for measuring.

Q What else? A Screen, and a record cover, I believe.

Q Now, Officer Robinson, how long had you been a member of the Metropolitan or any other police department prior to the 3rd day of December, sir? A I have been a police officer for approximately seven months.

Q In the course of this seven months had you occasion to investigate or be involved in the investigation of other narcotic cases, sir? A Yes, I did.

Q Had you had occasion to come into contact with either cocaine or the paraphernalia used to package cocaine? A Yes, sir.

Q Now, in the 3rd day of December did you see anything on the table which, in your opinion, appeared to be cocaine or paraphernalia used for the—

[23] Mr. Morris: Objection.

The Court: State your objection.

Mr. Morris: Your Honor, I don't think the prosecutor has established that an officer of the Metropolitan Police Department with seven months experience is an expert in the field of drug. He hasn't had any special schooling or any special training, but the mere fact he'd been a policeman for seven months does not make him an expert under Virginia law.

The Court: Objection overruled. The jury may accept anything it feels—

Mr. Morris: I take exception to the objection.
Exception noted.

Mr. Rodway: (Resuming.)
Q Officer Robinson, do you understand my last question to you? A Yes, sir.

Q Would you please, if you can, give an answer to that question? A In my opinion, it was paraphernalia used for cutting up suspected narcotics and packaging it.

Q When in this apartment, do you know who owned this apartment in the sense of who rented the apartment or leased the apartment? A It was a fellow introduced to me only as James. He [24] was introduced as the representative of the apartment.

Q When you entered the apartment sir, who was there, if you can remember? A Mr. Jackson was there, Mr. Heinz, Daniel Lenard, Eugene Jones, who accompanied me into the apartment, and James.

Q Do you know Mr. Foster Heinz by any other name? A Boo.

Q Boo. How about Danny Lenard? Do you know him? A Donny, Danny Wells.

Q About Eugene Jones? Do you know him by any other name? A Genie.

Q Seated around this table that you previously described was Mr. Jackson and anybody else? A Mr. Jackson and Mr. Heinz were seated at the table.

Q What, if anything, was Mr. Jackson doing at the table, sir? A He was sitting there with several tin foil packets in front of him. He wasn't doing anythting.

Q Did there come a time when you had conversation with Mr. Jackson? A Yes. After I entered the apartment I approached the table they were sitting at, and I asked if I could purchase [25] two decks of cocaine.

The Court: Two what of cocaine?

The Witness: Two decks of cocaine.

By Mr. Rodway: (Resuming.)

Q Officer Robinson, what is a deck? What are you referring to? A One tin foil package containing cocaine.

Q Did anyone respond to your request to purchase two decks of cocaine? A Yes, Mr. Jackson responded that I could. Then he picked up two tin foil packets from the pile that was in front of him and handed them to me.

Q All right sir. Did you at that time give him anything? A Yes, I did. I gave him twenty dollars in County funds. One ten dollar bill and two five dollar bills, to be exact.

Q Did you observe what happened to the money, sir? A Mr. Jackson picked the money up.

Q Then what happened, if anything? A I don't know what he did with it. Whether he placed it in his pocket or what, I don't know.

Q Then what happened, Officer Robinson? Did you have [26] any further conversation with Mr. Jackson? Or anybody else at that table in that room at that time? A We talked a little about narcotics, and the sale, and discussed the prices. Then I left.

[43] * * *

Cross Examination

Q Mr. Robinson, as I recall from your testimony, you had met Mr. Jones at your apartment. A That's correct.

Q Then you had left and gone to somebody by the name of James, their apartment. A That's correct.

Q How were you admitted into this apartment? A Genie knocked on the door. Someone inside said who is it? Genie replied, it's Genie and Robbie. And the door was opened.

Q Then you proceeded to go in? A Yes.

Q Genie Jones went in first? A Yes.

Q Then, who made the first comment, do you recall? Once you were inside the apartment? A As to who spoke the first word, no, I don't remember.

[44] Q Did you, then, make a response to the people there that you wished to buy some coke? A Yes, I did.

Q Is that the way you did—said it? A Yes.

Q Would you, to the best you recollect, tell the jury exactly what you said? A I believe I said, can I buy two bags of coke?

Q Now, Mr. Robinson, my question is, if you're there with Genie Jones and this is your purpose for going there, why would you ask to do it? A The people there didn't know what I was there for.

Q You said—you say when you said Genie and Robbie there was no problem there. A That's right.

Q Then, my question is, you were there to purchase narcotics, according to you. A According to me, yes.

Q Why would you have to make that statement, can I buy some coke? A That's just the way I do things.

Q Just the way you do things. Is that your answer? A Yes.

[45] Q At that time, one of these five people that were there said you could buy some. Is that correct? A Mr. Jackson said I could.

Q Mr. Jackson said.

Where was he sitting at that time? A He was sitting at the table.

Q There were five people there. Where were the other four sitting A Foster Heinz—Your Honor, if the jury can picture a table, and the defense attorney.

Q If you wish, you can go ahead—

The Court: Just describe it.

The Witness: I can draw it. Maybe you and the Court can get a better picture.

The Court: Go ahead.

Mr. Morris: Go ahead, Mr. Robinson.

(The witness goes to the blackboard and draws a diagram.)

The Witness: As I recall, you can picture this as the table against the wall. Mr. Jackson was sitting here on the table. Foster Heinz was sitting on the end of the table toward the back of the apartment. The Kitchen would be up here.

By Mr. Morris: (Resuming.)

[46] Q Where were the other people located? A Eugene Jones was sitting on the couch. Daniel Lenard was just sort of milling around the apartment.

Q Eugene Jones was sitting on the couch?

Where would that be located, Officer. A I believe the couch was sitting up at the back of the room. I believe, right here.

Q Was that table in the dining room or living room. A It's a dining area.

Q Adjacent? A Yes.

Q You may be seated. A Thank you.

Q So, as we understand it, Officer Robinson, it's your testimony that Mr. Jackson was his back to you? A Coming in the apartment I could see his profile.

Q Would his back be toward you? A Yes, I guess you would say that.

Q Mr. Robinson, then you proceeded to purchase two decks. Is that correct? A Yes.

Q And you transferred twenty dollars at that point? A Yes, sir.

[47] Q Did you identify these in any fashion? A No, I did not put my mark on it.

Q No mark on them at all by you? A No.

Q Can you tell the Court whether that's the same coke that you bought on the 3rd of December, or the jury? A Yes, I can, to the best of my knowledge.

[57] * * *

Q Let me ask you this question.

Who ever told you his name is Fly Jack? A Genie Jones introduced me to him as Fly Jack.

Q At the apartment that night? A That's correct.

Q Mr. Robinson, the material that you had seen on the table when you went in that apartment, do you know whether or not that material belonged to Mr. Heinz? A No, I don't know who it belong to.

Q You don't know, do you? A No, I don't.

Redirect Examination

By Mr. Rodway:

Q Officer, how far was this material from Mr. Jackson? Fly Jack. A All of the material was on the table. Some of it was right in front of him.

Q How large a table are we talking about? A A regular dinette.

Q Could you give the jury indi—any indication in [58] feet, inches, how long? How wide? A How long is a regular dinette set? Maybe five feet long three and a half feet wide.

Q Mr. Jackson was seated close at the table? A Yes, he was.

Mr. Rodway: I have no further questions.

Recross Examination

By Mr. Morris:

Q Whose table was it? A It was in the apartment.

Q Belonging to the person named James? A I imagine so.

[111] * * *

Testimony of Daniel Lenard

was called as a witness for and on behalf of the Commonwealth, and, having first been duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Rodway:

Q Sir, would you state your name, where you're living at the present time? A My name is Daniel Lenard and I'm a resident of Fairfax County Jail at the moment.

Q Mr. Lenard, do you know the defendant in this case, John W. Jackson, Jr.? A Yes, I do.

Q Would you point to him if he's in the courtroom, sir?

(Witness points to Defendant.)

Mr. Rodway: Let the record indicate the witness pointed to the Defendant.

Mr. Rodway: (Resuming.)

Q Mr. Lenard, do you know Mr. Jackson by any other [112] name besides John W. Jackson, Jr.? A Yes, I do.

Q What's that, sir? A Fly Jack.

Q Mr. Lenard, directing your attention to the 3rd day of December, 1970, did you have occasion to see Mr. Jackson on that day in the County of Fairfax? A Yes, I did.

Q Would you tell the members of the jury and His Honor where and under what circumstances you saw Mr. Jackson? A First I saw

Mr. Jackson earlier that evening, about four o'clock in the evening. Then, I didn't see him any more until about ten forty-five that night.

Q Where was that that you saw him about ten or ten forty-five? A It was at apartment ten in the Cifax Apartments.

Q Whose apartment was that, Mr. Lenard?

Did you live there? Did Mr. Jackson live there? A No. It was a guy named James.

Q Do you know his last name? A No. I forgot it.

Q Do you—how long did you know him, Mr. Lenard. A I knew James about a month.

[113] Q You only knew him as James? A Right.

Q Now, when you saw Mr. Jackson at James' apartment, number 10, what was there? Did you see anything else besides Mr. Jackson? A Yes. I saw some cocaine and heroin.

Q Now, the cocaine. Where did you first see it. Where did it come from, if you know? A Where I saw the cocaine come from. It came from Mr. Jackson.

Q He brought it in the apartment? A I guess so.

Mr. Morris: Don't lead the witness.

The Court: Don't lead.

By Mr. Rodway: (Resuming.)

Q Now—

Mr. Morris: I object. The only evidence before this particular Court is two decks. I object to that type of questioning, as prejudicial. It would have an adverse effect on the Defendant.

The Court: Overruled.

By Mr. Rodway: (Resuming.)

Q How much cocaine did you see Mr. Jackson with? [114] A I saw—I saw Mr. Jackson with four—four halves of cocaine.

Q What's a half, Mr. Lenard? A A half consists of a—a half a spoon—a half a spoon of cocaine.

Q Are you familiar with cocaine? Have you ever used cocaine, Mr. Lenard? A Yes, I have.

Q Are you familiar how it's put up for street sales and distribution? A Yes, I do.

Q How do you know this? How do you know how it's put up for sale and distribution? A The only way I know is how it was showed by other people and whatnot.

Q Did you ever do it yourself? A Yes.

Q How about on the 3rd of December, did you put it up for street use? A Yes.

Q Tell the members of the jury and His Honor how many hits, how many uses, how many decks could you get from the amount of cocaine Mr. Jackson brought in this apartment? [115] A There's four half spoons. You can get anywhere from one hundred and fifty decks out of it.

Q That would be out of the total four and a half spoons, you could get about a hundred and fifty decks. A Yes.

Q Now, on this third day of December did you participate in putting this cocaine in decks? A Yes, I did.

Q How about Mr. Jackson, where was he when this was going on? A He was sitting at the table.

Q Would you tell the members of the jury how you procedeed along with Mr. Jackson, was there anybody else that helped you put this stuff up? A Yes.

Q Who? A "Bo" Heinz, Fly Jack and myself and this other guy. I forgot his name.

Q Would you tell the members of the jury how you, Mr. Jackson and Bo Heinz proceeded to put this cocaine up in decks? A When you're putting it up on for, you use a common little spoon, those coffee spoons that you see in McDonald's [116]—we dip into the container of cocaine, brush the top off. That would be half a spoon of cocaine. Put two spoons—put two spoons on the aluminum foil for a two dollar —six dollar pack, and for a ten dollar pack we put four spoons.

Q So, in this particular occasion, the third day of December, putting it not only in ten dollar packs, but also six dollar decks. A Yes.

Q Did this cocaine belong to you? Was it yours? A No.

Q Whose was it? A Mr. Jackson.

Q What was Mr. Jackson going to do with this cocaine after you put it up in these bags, do you know? A He gave it to me.

Q What was your job, Mr. Lenard.

Mr. Morris: Your Honor, may I approach the bench at this point?

(Whereupon, the attorney for the Defense approached the Bench, and the following was had outside the hearing of the jury.)

Mr. Morris: If Your Honor please, I'm going to object to the entire testimony of this witness and ask that [117] it be stricken. It's obviously that most prejudicial type in any case I've been involved in. This man is allegedly not convicted of any crime on the 3rd. Mr. Rodway says the 2nd. He said he should not be able to testify with the victim on the 3rd. He's already testified as to develop the entire evidence, which is certainly prejudicial to my client.

I mean, it's so blatant it's pathetic.

The Court: I told him he didn't have to do it.

Mr. Morris: I think at this time it would not be improper to move for mistrial based on that.

The Court: Motion denied.

Will Your Honor please note my exception to that?

[Exception noted.]

(Whereupon, the following is within the hearing of the jury.)

By Mr. Rodway: (Resuming.)

Q Mr. Lenard, I believe my last question to you was why would Mr. Jackson give it to you or turn it over to you? What was your role in this distribution of cocaine? A My part in all this was to—whenever we bagged up the cocaine—

Mr. Morris: Your Honor, may we keep our testimony [118] restricted, at least, to the third day of December. I would ask the Court to

direct the prosecutor to keep his witness from—with one day, as I understand it.

The Court: Do you understand that question? You asked him what he was going to do it, they were bagging up on the third day of December.

By Mr. Rodway: (Resuming.)

Q See if you could, Mr. Lenard. Just finish answering the question I started. A My job was to sell the cocaine.

Q Sell the cocaine? A Yes.

Q What did you do with the money you received from the sale of the coke? What was your understanding between Mr. Jackson? A After I had sold the cocaine—that I sold you, I then returned—returned to Mr. Fly Jack—

Mr. Morris: There isn't any evidence at all in this trial. The evidence was, according to what Mr. Robinson testified what he had seen. We're getting into a complete area far afield from the indictment.

I would respectfully suggest that the prosecutor—

The Court: I think he just admitted—limited it to what he was going to do with this.

[119] Mr. Rodway: If Your—the Defendant is charged with possession with intent to distribute. I think under the law in Virginia I will—I can show motives being planned.

Mr. Morris: Your Honor, I have some law in argument to that.

He's gone far afield of the indictment, even to the point where we're not even talking about the same indictment.

Mr. Rodway: Obviously I have to show this gentleman's intent. I think this all goes to his intent. It's a circumstance to show his intent.

The Court: Seems to me it does. Mr. Williams, why doesn't it?

Mr. Morris: Sir?

The Court: I say, who's to meet this to show the intent to distribute?

Mr. Morris: The third of December, Your Honor. There's no evidence that I heard what happened after—if you take it at the Commonwealth's best evidence that this, in fact, happened, was this person cooperating with the police officer, or what?

The Court: He's telling what was happening to this cocaine. I'll overrule the objection.

Mr. Morris: Note my exception, Your Honor.

[Exception noted.]

[120] By Mr. Rodway: (Resuming.)
Q Mr. Lenard, your understanding—

The Court: You're asking the questions. Don't repeat his testimony.

By Mr. Rodway: (Resuming.)
Q For the distribution of this cocaine, what were you to receive, if anything? You, yourself, what was your benefit to be derived from the distribution of this cocaine?

Mr. Morris: I object to this type of question, too.

The Court: Overruled.
It was what he did. Not what—as to what the Defendant did.

By Mr. Rodway: (Resuming.)
Q Did you understand my question, Mr. Lenard? A Repeat it please.

Q What was the benefit you were to get from distributing this cocaine from Mr. Jackson? A A straight salary a week.

Q A straight salary? A Yes.

Q How much? A A hundred dollars a week.

Q At this time, Mr. Lenard, on the third day of December [121] did you use half of these drugs? A Yes, I did.

Q What kind of drugs did you use? A I used, at that time, heroin and cocaine.

Q Heroin and cocaine. Did you have an understanding with Mr. Jackson—

The Court: Just ask the question, please. You're leading the witness.

Mr. Rodway: I don't mean to be, Your Honor. I apologize to the Court.

By Mr. Rodway: (Resuming.)

Q Did you and Mr. Jackson talk about narcotics as far as you were concerned?

Mr. Morris: May we restrict this to the night in question?

Mr. Rodway: Your Honor, I don't want to belabor the point. I don't think I'm leading the witness. I go back to my last question, Your Honor.

The Court: He was working for him a hundred dollars a week.

By Mr. Rodway: (Resuming.)

Q Did you receive anything else besides a hundred dollars for this distribution? [122] A No.

Q You did not?

How long had you known Mr. Jackson prior to the third day of December? A I'd been knowing him—Mr. Jackson—for about eight years.

Q Eight years? A Yes.

Q Now, on the third day of December, Mr. Lenard, did you see an individual known to you as Robinson, or Robbie? A Yes.

Q When did you see him, sir? A I saw him—that night Mr. Jackson, Bo Heinz, myself in the apartment. Mr. Robinson came in and asked for two—ten dollar baggies of cocaine.

Q Who did he ask, if you know, sir? A He didn't ask anyone in particular because we were all at the table at the time.

Q What happened in response to his question? A Then it was some six dollar bags of cocaine in a pile, and then there were some ten dollar bags. He wanted two ten dollar bags of cocaine. Then he returned for that twenty dollars—two ten dollar bills. Put them on the table. Mr. Jackson [123] slid him two ten dollar bags, then took the money off the table and gave it to me.

Q Gave it to me? A Gave it to me.

Q Do you know why he gave it to you? A Because the fact that when I do sell all the ten dollar bags—when I would turn in the money it wouldn't come out twenty dollars short or anything.

Q Did you, subsequent to that time, turn that money over to Mr. Jackson? A Yes, I did.

[134] * * *

Testimony of Eugene M. Jones

Direct Examination

By Mr. Rodway:

Q Tell the Court your name and where you're presently living. A My full name is Eugene M. Jones. I'm presently incarcerated in Fairfax County Jail.

Q Mr. Jones, do you have a nickname? Does anybody call you anything besides Eugene? A Yes, sir.

Q What's that A Genie Jones.

Q Mr. Jones, do you know the defendant in this case, one John W. Jackson, Jr.? A Yes, sir.

Q If you see him in the Courtroom would you point him out? A Sitting right beside Mr. Morris, defending attorney.

Mr. Rodway: Let the record indicate the witness pointed out the defendant.

(Witness points to defendant.)

By Mr. Rodway: (resuming.)

Q Do you know him by any other name besides John W. Jackson, Jr.? [135] A Yes, sir, I do.

Q What's that, Mr. Jones? A Fly Jack.

Q Mr. Jones, directing your attention to the third day of December, 1970, did you have occasion at that time to see Mr. Jackson? A Yes, sir, I did.

Q Would you tell the members of the jury where you had occasion on the third day of December to see Mr. Jackson? A In the parking lot at Cifax, right near Bailey's Crossroads.

Q What time of day or night was that, Mr. Jones? A Approximately eight o'clock a.m.

Q What took place, if anything, after you saw Mr. Jackson? A Mr. Jackson asked me to ride to Washington with him. Q Did you, in fact, drive to Washington with him? A Yes, sir, I did.

Q What, if anything, took place in Washington? A We went to—the purpose was to purchase drugs.

Q To your knowledge, did Mr. Jackson purchase any cocaine? A Yes, sir, he did.

Q Do you know how much he purchased? [136] A Yes, sir, I do.

Q How much, Mr. Jones? A He made quite a deal. It'd be four spoons.

Q Tell the jury how much a spoon of cocaine is. A You could get approximately forty-five to fifty pills on a spoon of cocaine.

Q Do you know of your own knowledge how much Mr. Jackson paid for this four spoons of cocaine? A Yes, sir, I do.

Q How much? A Forty dollars a spoon.

Q After purchasing that cocaine, what did you then do? Where did you then go? A We returned to Bailey's Crossroads, to the Cifax Apartments. At that time we were looking for a place to go to. Fix it—so we could fix it so it could be sold on the street.

Q Did there come a time when you went somewhere in the Cifax area? A Yes, sir.

Q Where was that? A 5801, apartment 10.

Q Do you know who occupied that apartment? A I know him by his first name only.

[137] Q What's that? A James.

Q How long had you known this individual by the name of James? A Approximately four months.

Q Do you know what his last name is? A No, sir, I don't.

Q After you and Mr. Jackson arrived at James' apartment, what, if anything, happened? A Jackson, Lenard, Heinz, myself went in and they started to sit at the table, put the drugs together so it could be distributed and sold on the street. At that time Mr. Jackson gave me some drugs to sample.

Q What kind of drugs did he give you to sample? A Cocaine.

Q Why did he give you the cocaine to sample? A Because Mr. Jackson doesn't use drugs himself.

Mr. Jackson doesn't use drugs himself.

Q If you don't use drugs, what would be your purpose in sampling them? A To let him know the quality of the drugs.

Q Did you, in fact, at that time, at 5801 Cifax Drive, sample that cocaine? [138] A Not at that particular apartment, no, sir.

Q What did you then do, if anything, Mr. Jones? A I returned to Officer Robinson's house, where I'd been earlier that evening.

Q Did you know him as Officer Robinson at that time? A No, sir, I didn't.

Q How long had you known him? A Approximately two weeks.

Q What was your purpose in going over to Officer Robinson's —Mr. Robinson's apartment? A I went there, Mr. Jackson asked me to give Mr. Robinson some drugs to see if he would like it, because he'd purchased some drugs from Mr. Jackson at other times.

Mr. Morris: Your honor, may I approach the bench?

(Whereupon, the counsel for the defense approached the bench and the following was had outside the hearing of the jury.)

Mr. Morris: Your Honor, please, I now move and renew my motion for a mistrial. If it please the Court, I thought the Court had instructed Mr. Rodway to restrict his witness's testimony to the 3rd day

of December. I was anticipating during this trial that these witnesses could talk without being informed of what they would say.

[139] Mr. Jones has brought before the jury that Mr. Jackson has sold drugs before. I would ask the Court to grant a mistrial on highly prejudicial information that just came out.

Mr. Rodway: Your Honor, number one, I don't think it's prejudicial. Number two, I have controlled my witnesses. I don't think this is response. I did not expect—I did not expect him to go into whether he had sold Officer Robinson any drugs in the past.

I think the Court can ask the jury to disregard it.

Mr. Morris: In the circuit case that came out of this Circuit Court, the Court said they might dismiss the tesimony upon—

The Court: I won't do anything to overcome it.

Motion denied.

Mr. Morris: Note my exception.

[Exception noted]

Mr. Rodway: (Resuming.)

Q Mr. Jones, just so—maybe I've lost the context. You took some cocaine over to Officer, Mr. Robinson's house for him to use or sample or buy or what? A Yes, sir.

The Court: Go on from there.

[140] By Mr. Rodway: (Resuming.)

Q You arrived at Officer Robinson's house. How long did you stay there at Officer Robinson's apartment? A Approximately half an hour.

Q Where did you go then? Where did you go after that? A Officer Robinson and myself went down to 5801, Apartment 10.

Q What, if anything, happened after you and Officer Robinson arrived at 5801, Apartment 10. A When we returned to the apartment, Jackson, Lenard and Heinz had finished bagging the dope.

Q Excuse me. You want to move up a little closer? A Yes, sir. When we returned to 5801, apartment 10, Jackson, Heinz and Lenard had finished bagging the dope—the cocaine.

Q Mr. Jones, first of all, what would you say would be the street price of that? Strike. Let me restate it.

How much cocaine was bagged up when you arrived at the apartment? A Approximately thirty ten dollar bags and approximately thirty-five six dollar bags of cocaine.

Q As far as you could see, was all the cocaine that had been originally bagged up? [141] A Yes, sir.

Q What then happened after you and Officer Robinson arrived there? A Officer Robinson went there to purchase some cocaine, which he did, from Mr. Jackson. He asked for two ten dollar bags of cocaine, laid the money on the table. Mr. Jackson gave two ten dollar bags of cocaine out of the bags on the edge of the table, took the money, handed the bags across the table to Mr. Lenard, told him to turn in all the money at one time.

Q And then what happened? What did you do, Mr. Jones? A Officer Robinson and myself left at that time.

Q Prior to the third day of December, how long had you known Mr. Jackson? A Approximately fifteen years.

Q Fifteen years. A Yes, sir.

[144] * * *

Cross Examination

Q ... When you had gone to the apartment of Mr. Robinson, the under cover agent for the Metropolitan Police Department, you said you took some drugs to him. A Yes, sir.

Q And gave them to him? Did you sell them to him there? A No, sir. I didn't sell them.

Q Did he use them while you were there? A I couldn't say for sure, sir.

Q You were there Mr. Jones. Did you see Mr. Robinson use drugs in that apartment when you took them to him? A No, sir, I didn't.

Q What'd he do with them? A I don't know.

Q Did you observe him when he took them from you? A Yes, sir, I did.

Q You can't tell the Court and jury what he did with those drugs you gave him? A No, sir. It was because I had my back toward him after I passed him the drugs because I was using drugs myself at the time.

Q How long were you at the apartment, Mr. Robinson's? A Approximately half an hour.

Q What did you do while you were there, Mr. Jones? [145] A Beg your pardon, sir.

Q What did you do while you were there at Mr. Robinson's apartment?

Mr. Rodway: Your honor, I object. It's not Mr. Johnson's apartment.

Mr. Morris: Pardon me. I didn't say that.

By Mr. Morris: (Resuming.)

Q What did you do at Mr. Robinson's apartment for half an hour you were there? A I was using drugs.

Q What was Mr. Robinson? A He was talking to me.

Q You didn't observe him use any? A No, sir, I didn't.

Q All right, Mr. Jones, you'd been there to Mr. Robinson's apartment, came back to, as you said, 5801 Cifax Drive? A Yes, sir.

Q How did you get from Mr. Robinson's apartment to that address? A We walked.

Q How long did it take you to walk? A Approximately three minutes.

Q Do you recall the time you left Mr. Robinson's apartment [146] to go there? A It was later than ten o'clock. That's all I can say.

Q Later than ten o'clock is your best recollection? A Yes, sir.

Q When you got to the apartment at 5801, who was in the apartment, Mr. Jones? A At that time it was Lenard, Jackson, Foster

Heinz, and the fellow I know as James, the owner of the apartment.

Q Where was the fellow you know as James, where was he sitting? A I'm not sure sir. I believe it was at the table. I couldn't answer that.

Q Where was Danny Lenard sitting? A At the table.

Q Where was the other, you don't know his name. Where was he sitting? A I didn't say I didn't know anyone's name, sir.

Q You didn't?
Was Danny Lenard there? A Yes, sir.

Q James was there? A Yes, sir.

Q Who else? [147] A Foster Heinz.

Q Foster Heinz? A Yes, sir. And Mr. Jackson.

Q Mr. Jackson? A Yes, sir.

Q Where was Mr. Jackson sitting? A At the table.

Q So, we've got at least three or four people sitting at the table. Is that right? A Yes, sir.

Q Do you know James, the fellow who rents that apartment? Do you know his wife? A No, sir, I don't.

Q Did you see her there? A No, sir, I didn't.

Q Did you see a little baby they have there? A No, sir, I didn't.

Q Didn't see anybody? A No, sir.

Q Where's that table they were sitting? Where's that located in the apartment? A The dining room.

Q Dining room? [148] A Yes, sir.

Q Is this a separate dining room? A No, sir.

Q Is that combined with another room? A The living room. Yes.

Q Is that an ell shaped dining room? A Yes, sir.

Q Is the sofa in the dining room? A Yes, sir. In the living room. Yes.

Q Who was sitting on the sofa, if anyone? A I couldn't say. There was no one sitting there to my knowledge.

* * *

[154] Re-direct Examination

Q Mr. Jones, I believe you responded to Mr. Morris's question concerning when you first went to Mr. Robinson's apartment on the third day of December. You shot or used some cocaine? A Yes, sir.

Q Where did you get that cocaine? A From Mr. Jackson.

Q Had you ever used cocaine before that day, sir? A Yes, sir.

Q Did that particular short of cocaine give you the same or different or unusually low reaction?

Mr. Morris: Your Honor, I object to that. What does that have to do with the issue here?

Mr. Rodway: Your Honor, the Commonwealth has a circumstantial case here. I believe goes to circumstances of what the narcotics—

The Court: Go ahead.

Mr. Morris: Note my objection.

(Exception noted.)

By Mr. Rodway: (Resuming.)

A Yes, sir. The drugs were better than the average drugs on the street.

[155] The Court: You may step down.

[Witness excused.]

Mr. Rodway: Your Honor, the Commonwealth has no further evidence.

The Commonwealth rests.

The Court: The Commonwealth rests.

Mr. Morris: Your Honor, I would have a motion.

The Court: You do?

Mr. Morris: Yes.

The Court: Members of the jury, retire to the chambers. You will be called. Don't discuss the case.

(Whereupon the jury retired to the jury room.)

The Court: All right, Mr. Morris.

Mr. Morris: If Your Honor please, I would ask the Court at this time to strike the Commonwealth's evidence as to one of the two indictments. I would ask the Court—the Court to strike the Commonwealth's evidence as to possession of the controlled drugs, to-wit: cocaine, on the third day of December as alleged in the indictment, that he did unlawfully, feloniously and knowingly, with intention to distribute cocaine, which brings it back to the second indictment, which we—unlawfully, feloniously and knowingly, distribute the drug cocaine.

[156] Your Honor, I have a group of cases that are from Virginia and other jurisdictions with reference to possession and the intent to distribute, with reference to possession with intent to sell. As I understand the law in Virginia, would like to suggest it to the Court in Virginia, where a defendant is charged with possession and possession with intent to distribute, the Commonwealth has not had, as I understand, has not had a presumption where under the Federal—the rule of the Federal Courts that do give you the presumption that if a person has it on his possession with a certain amount, then it's presumed that he'll go ahead and sell it or distribute it.

Excuse me a moment, Your Honor.

I would now, if your Honor please, argue that the Court strike one or the other indictment, as argued at a pretrial motion and as the Commonwealth will elect at that time, which they were going to proceed on.

As I understand the law in this Commonwealth and in most of the jurisdictions, that the Commonwealth can prove one or the other, but one does not stand alone. One merges, as I understand it, to the other. Possession with intent to sell and the actual sale is one kind.

Commonwealth has not elected to proceed under both. They lose one or the other. The law in this Commonwealth is [157] possession and sale is one continuous act, one continuity, so to speak. There's no

evidence before the Court on the indictment, the possession charge other than Officer Robinson. He couldn't tell whose it was at that time because the two accomplices, that they now testify that they sold it.

There's no testimony that Jackson sold it. They sold it.

As Your Honor said, possibly one is the agent for the other. I don't think we can have an agency relationship.

The Court: I agree with that. But I think he was—as far as the law is concerned that they were principals.

Mr. Morris: Yes, sir.

I have one case here I wanted to call the Court's attention. Your Honor, the case I'm referring to is, very frankly, one that came out of the Circuit Corporation Court of Alexandria before Judge Wright, in which a plea was entered on one of two indictments exactly as before the Court today. I think the prosecutor, I think received a conviction on the second indictment.

The Court: We're not going to have any trouble on that. I moved the other day, I submit nothing is said to change the guilty, that he can only defend on one of these indictments.

[158] Mr. Morris: Your Honor, I'm glad to hear. I wasn't aware of that.

The Court: I realize you're saying because Mr. Rodway wouldn't agree to that we'd have to have a mistrial. I don't think that follows. I mean, it seems to me I've ruled the way you asked the Court to rule, and that is that they shouldn't be tried separately. They should be tried together, and he should only be guilty of one or the other, and not both.

Mr. Morris: Your Honor, I am terribly sorry. I wasn't completely aware of your ruling. I was under that impression, and, may I understand the Court that both indictments are going to the jury. Is that your ruling?

The Court: I assume.

Mr. Morris: But you'll instruct the jury?

The Court: The charge, I will. I'll say you can find him guilty on one but not both.

Mr. Morris: I—well, I am wasting your time and I beg your indulgence.

The Court: No, you're not wasting my time. I just didn't think you understood—we understood one another.

Mr. Morris: Then, Your Honor, at this stage in the proceeding, I have no question that the Commonwealth made a prima facie case.

[159] The Court: I'm going to deny your motion to strike because I think that is correct.

Both indictments will go to the jury. They will find him guilty of one or the other.

* * *

[186] (Whereupon, the jury retired to the jury room and the following was had outside the hearing of the jury.)

The Court: All right sir. Anything further before we take the instructions?

Mr. Morris: Yes, sir. I want to move the right to move for a mistrial. Should for any reason, if the jury does hang up on one thing or another I would, for the record, at this point, move to strike the Commonwealth's evidence based on the witness's—When there are two theories involved, one of innocence and one of guilt, where the Defense, Defendant's theory is just as acceptable as the Commonwealth's theory, then as a matter of law the Court ought not to give it to a jury. The Court would want to strike the evidence.

The Court: You're trying to take it from the—you're trying to take it from the jury. We have a jury question here. I don't mind giving in the instruction.

All right, motion's denied.

[189] * * *

The Court: Six and seven are two findings—findings instructions in a criminal case.

Mr. Morris: Yes, Your Honor.

The Court: Now, they would not be given in the present way because the Court will rule now that he can only be found guilty on one of these charges.

Do you want to be heard on that?

Mr. Rodway: Yes, sir, I'd like to.

Yes, Your Honor, I think I indicated to you the other day that Commonwealth's position that there are two separate distinct offenses here. The Commonwealth felt that when Officer Robinson purchased the two decks of cocaine, and we sometimes do that, we would have double counted an indictment. We would have charged Mr. Jackson with the possession with intent to distribute at that point, or possession of a narcotic drug at that point, and distribution of a narcotic drug at that [190] point.

When he passed it to Officer Robinson and accepted the ten—twenty dollars, it's the Court's contention this particular point at this particular time there are two separate offenses. You have this matter both from Mr. Jones and Mr. Lenard what was to be done with these particular narcotics, cocaine on the table. There were some hundred—think there were some—testimony there were many decks of cocaine already packaged up on that table. That is the substance of the possession with intent to distribute.

Those decks, which Mr. Fly Jack—testimony of the Commonwealth revealed he purchased. He intended for Mr. Lenard to distribute them. He was going to suffer or gain the proceeds of that distribution.

Your Honor, I would submit to the Court that is a separate and distinct offense.

The Court: I may be wrong, but it's my understanding of the law that he can be found guilty of one but not both. And I will even up with six and seven.

The Court further instructs the jury, now, that the Defendant cannot be found guilty of both offenses. If the jury finds him guilty of distribution, this eliminates the other charge of possession with intent to distribute.

[191] Mr. Morris: I think that would be proper. As I understand the law, combining six and seven.

The Court: Six and seven. This is working up to me. I'll take any help I can get.

The Court further instructs the jury now, that the Defendant cannot be found guilty of both offenses. If the jury finds him guilty of distribution, this eliminates the other charge of possession with intent to distribute.

There's not one charge, really, in the other. They all carry the same. Do you have any objection to that addition?

Mr. Morris: No, sir. No, sir, I have none.

The Court: Now, let's take up—I'll have to wait till they argue the case to get to that.

[197] * * *

(Whereupon, the Court reconvened and the jury returned to the Courtroom.)

The Court: All right, members of the jury, these are the Court's instructions as to the law in this case.

Number one, the Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant possessed the controlled drug cocaine with the intent to distribute, then you shall find the defendant guilty and fix his punishment by imprisonment in the penitentiary for a period not less than one nor more than forty years, or by a fine not more than twenty-five thousand dollars, or both.

The Court instructs the jury that if you believe from [198] the evidence beyond a reasonable doubt that the Defendant distributed the controlled drug cocaine, then you shall find the defendant guilty and fix his punishment by imprisonment in the penitentiary for a period not less than one nor more than forty years or fine not more than twenty-five thousand dollars, or both.

The Court further instructs the jury, however, that the Defendant cannot be found guilty of both offenses. If the jury finds him guilty of distribution, this eliminates the other charge of possession with intent to distribute.

[204] * * *

Closing Argument of Commonwealth Attorney

I don't think there could be much question in the jury's mind that the substance involved is, in fact, cocaine. Mr. Tomczak told you, in fact, he analyzed it chemically, and it was, in fact, cocaine. Officer Robinson said on the third day of December he went to 5801 Cifax Drive Apartment 10, and there he saw Mr. Jackson, Fly Jack. And at that time he purchased from him for twenty dollars, a ten dollar bill

and, I believe he said, two fives, two ten dollar decks of cocaine. He then took that cocaine, took it home where he kept it in a locked box where no one else had a key to it. And the next day, December 4th at about 6:30 in the Culmore area in Fairfax County he turned it over to Investigator Luzi.

Investigator Luzi's told you he subsequently transported it to U.S. chemist, Mr. Tomczak, who of course analyzed it.

Now, Judge Keith has instructed you that you cannot find Mr. Jackson guilty of both charges. You have to find him guilty of just one. I would submit to you, ladies and gentlemen [205] that there is ample evidence of find—to find him guilty of either one. I have just very briefly discussed the distribution.

I think the defense counsel will point out to you that here's an officer, undercover officer who didn't even remember what the defendant was wearing, didn't remember what Mr. Jones was wearing, didn't remember what Mr. Lenard was wearing. Commonwealth would submit to you, under the circumstances, on the third of December, Ladies and gentlemen, that's probably the last thing an undercover agent dealing with narcotics is concerned with. He's concerned about remembering the transaction, where the narcotics were, and who he bought them from. Commonwealth would submit to you he did remember where those narcotics came from, who he paid, who accepted the money, what he received for that.

Then we turn to the other charge, the charge of possession with intent to distribute. The evidence the Commonwealth has before you is on this night in question Mr. Jackson was at a table. On it—on that table were some four, four and a half spoons of cocaine. Where did this four and a half spoons of cocaine come from. Genie Jones testified that earlier that night he and Mr. Jackson had gone over to Washington. Over there Mr. Jackson purchased those. Mr. Jackson brought them back. Why did Mr. Jackson bring it back? To use, himself? Mr. Jones said Mr. Jackson did not use narcotics.

[206] On the third day of December Mr. Jackson, Mr. Lenard, and the individual by the name of Foster Heinz sat there at a table in James Wilkerson's apartment and bagged, decked it, put it up. Took those spoons and with a McDonald's coffee spoon, something you may or may not be familiar with, and measured out cocaine into six dollar and ten dollar packs.

For what? I think you're entitled to ask yourself that. To eat, to mix in their coffee? I think the obvious is quite answer—quite obvious, to distribute.

Mr. Lenard told you his job was to distribute narcotics for Mr. Jackson. That was his understanding. For that he got paid a hundred dollars. After he distributed all those narcotics, Mr. Jackson provided for him, he turned his money over to Mr. Jackson. You heard Mr. Jones testify Mr. Jackson did not use narcotics. I was the taster, if you will.

In olden days, if you remember, I believe it was, in England the king always had a taster because the King was afraid someone would poison him. So the king never took his food directly, but had someone else taste it. If that fellow keeled over, of course the king knew the food was no good.

Commonwealth would submit to you in this particular case Mr. Jones was the taster, because Mr. Jackson didn't know whether it was good, bad, or indifferent stuff. So he had Mr. [207] Jones taste it to see if he got a flush, if he got a reaction. You heard Mr. Jones testify that he did. It was as good, if not a little better than most of the cocaine he had ever used.

Now, obviously the Commonwealth cannot bring before you each individual—each and every one of those individual decks that were on that table that night. We don't have them. They're out in the community someplace, where I don't know.

Mr. Morris: Your Honor, I would object to that. He can't guess. The jury can't guess.

The Court: I think he's entitled to explain.

Mr. Morris: He doesn't know.

Mr. Rodway: Commonwealth will say of this stuff that Mr. Lenard distributed it. Mr. Jackson reaped the benefits. Mr. Jones told you what it was. He took a shot of this same stuff, made himself a fix. It was represented to him to be cocaine. We have Officer Robinson testifying that out of that same batch he received two decks of cocaine or some substance which he later turned over to Investigator Luzi, who later turned it over to Mr. Tomczak, who analyzed the stuff as cocaine.

Ladies and gentlemen of the jury, the evidence has been—the evidence is clear. Commonwealth will submit to you there is no question what John W. Jackson, Jr., was doing on the 3rd day of December —either he was distributing or he possessed with intent to distribute. The choice is yours, but [208] the evidence is there.

Mr. Jackson says there's no question in my mind on the third day of December I was home. I had been sick. I was playing whisk, and I was playing poker. I was playing poker with a fellow by the name, whisk with him, by the name of Skeet and Hubcap, and my sister-in-law, and my brother-in-law. Where was his sister-in-law today? Where's his brother-in-law today? Where's Skeet and where's Hubcap? Commonwealth would submit to you we don't know.

James Wilkerson for some strange reason believed the third day of December was on a Friday. It was pretty hard to convince him that it was actually on a Thursday. I would submit to you, based upon his testimony, the third day of December was the same as the first—probably the same as the day before that. Four days a week he came home. His wife wasn't there and his babies weren't there. They were at his mother-in-law's.

So the third day of December, I would submit to you, makes no difference whatsoever to James Wilkerson. All the days were the same to him. Mr. Jackson happened to be a friend.

Mrs. Jackson, there's no question in her mind, on the third of December her sister was there. Commonwealth would submit to you Mrs. Jackson is very hard pressed to remember any other day except the third day of December.

EXCERPTS FROM THE TRANSCRIPT OF THE HABEAS CORPUS HEARING ON APRIL 17, 1973, IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Proceedings

(The Court Reporter, Sharon Filipour, was sworn by the Clerk of the Court.)

The Court: This is the case of John William Jackson, Jr. versus R. M. Oliver, Superintendent of the State Farm, Virginia Law 27133.

Is Counsel ready to proceed?

Mr. Hall: All ready for the Plaintiff, Your Honor.

Mr. Haith: Ready for the Respondent, Your Honor.

The Court: Let's swear all Witnesses who will testify in this cause.

(All prospective Witnesses then in Court were sworn.)

Mr. Haith: Your Honor, I have a possible Witness who is not in the room now. I don't think I will be calling him but if we do, we can swear him at that time.

Mr. Hall: Your Honor, I request that a subpoena for Investigator James Riddle of the Fairfax County Police Department and don't see him present.

The Court: We will see if we can't determine his whereabouts.

Is there to be a rule on Witnesses?

Mr. Hall: Yes, if your Honor please.

The Court: All witnesses shall remain outside the [3] hearing of this Court until you are called to testify. May I also admonish you that after you have testified in this Courtroom, you will not relate your testimony given herein to Witnesses awaiting to testify.

Thank you very much and the Bailiff will show you where to go.

(Those persons sworn as Witnesses were excluded from the Courtroom.)

Mr. Hall: Mr. Chapel will be my first Witness, Your Honor, so he can remain in the Court.

Mr. Haith: I do have another Witness, Mr. E. M. Rodway who, as you know, is an attorney and has a case in another Court but he will be available later.

The Court: All right.

Mr. Haith: Your Honor, I have a preliminary motion. I would like to move that the records of the originial trial of the Petitioner, Mr. John W. Jackson, in this Court, be admitted as part of the record in this proceeding. I would also state that the record would include at least two pre-trial hearings—excuse me, one pretrial hearing and two post-trial hearings. I believe they are all a part of the record.

The Court: Is there any objection to his motion?

[4] Mr. Hall: Your Honor, so long as the transcript of the preliminary hearing is included with those transcripts, I have no objection.

Mr. Haith: I have no objection. I am not sure that it is in the Court file of the orginial trial.

The Court: Well, can the Counsel stipulate on that and make it part of the record?

Mr. Haith: Certainly.

The Court: All right

The motion is granted. As I understand it, the original record of the trial, one pre-trial hearing and two post-trial hearings are also made a part of the record of this hearing. They will all be considered as a part of the original record of the trial.

Mr. Hall: Your Honor, this matter had come on before this Court on prior occasion and was heard for about one half a day by Judge Jennings at which time he withdrew. At that time, the files of the companions, Daniel Lenard and Eugene Jones had been admitted by agreement of Counsel to the record in this case.

I have had them brought here today, Your Honor. They are Criminal Nos. 16614, 615—

The Court: Let's get this identified properly. This [5] trial, the originial record of this trial, what number was that?

Mr. Hall: 16609, 10 and 11.

Mr. Haith: Excuse me. Excuse. 11, if I am not mistaken, was the one that was a separate trial so that is just 9 and 10.

Mr. Hall: All right.

The Court: What is the number again?

Mr. Hall: 16609 and 16610.

The Court: All right.
And these other records, now, you are referring to—

Mr. Hall: Are the criminal files of Eugene M. Jones Commonwealth v. Jones, 16614 and 615 and Commonwealth v. Daniel Lenard, 16618, 619 and 620.

Mr. Haith: No objection, Your Honor.

The Court: All right. They will be so received then and made a part of this record.

Mr. Hall: Your Honor, I have one further preliminary matter and that is a motion or a request of the Defendant that he produce anything exculpatory of the Defendant, the Petitioner in this case in his possession and I believe he does have in his possession a statement taken from the accomplice, Daniel Lenard, by Investigator James Riddle. And I would ask [6] that that statement be produced at this time.

Mr. Haith: Your Honor. I do formally object to this motion. This is not a criminal hearing but is a civil proceeding and we do not feel that the Commonwealth or the Respondent is under any duty in the civil proceeding to produce such a statement.

The Court: Well, has Lenard been subpoenaed? Is he going to appear in this Court?

Mr. Hall: He has been subpoenaed. He has not been found. He is avoiding service of process and I would like to array for the record, if I might, the efforts that we have undertaken to procure his presence.

Mr. Lenard at the conclusion of his cases, 16618, 9 and 20, was sentenced to two years, I believe it was in the State penitentiary. He was released, put on probation thereafter. His probation officer was Mr. Lipsner of the Virginia Department of Probation and Parole.

Some time last year, Mr. Lipsner released him to probation under

supervision of Mr. Allmann of the Probation and Parole Department of Prince George's County, Maryland. Mr. Allman had an address for Mr. Lenard living with either step-relatives or aunt and uncle, Thornton Smith and a phone call was placed to the Smiths and we were advised that Mr. [7] Lenard was not present, was not living there, but they would get a message to him.

Thereafter, Mr. Lenard called on a Friday morning while I was in Court and said that he would contact me. No further contact occurred. Therefore, I recontacted Mr. Allman and asked him to use good officers to get Mr. Lenard to contact us.

Mr. Allman discovered that Mr. Lenard was in violation of his probation and that he was not living with the Smiths and gave us an address in Bailey's Crossroads where he had information that Mr. Lenard was residing. We had a subpoena issued for service at that address and the subpoena was returned not found.

The woman present representing that she was Danny Lenard's grandmother said that he was living in Seat Pleasant, Maryland. We then requested the assistance of Mr. Lipsner of the Virginia State Department of Probation and Parole to have Mr. Lenard returned.

We were advised that there was no grounds within his office to have him returned to this state. We asked Mr. Allmann's assistance and he said that he would do what he could but could not locate Mr. Lenard.

Thereafter, we interviewed the Petitioner, Mr. Jackson's wife, Lenette Jackson and she said she had a conversation with Mr. Lenard where he said that he was going to North Carolina, that the Government was sending him there to school.

When the case was last continued by Judge Jennings, we had the subpoena reissued for the only address we had in Virginia and again, requested the assistance of the probation and parole officers of the two jurisdictions to effect his return. The subpoena, as my information has it, was returned again not found.

At the last hearing of this case before Judge Jennings, he suggested that Mr. Haith, the Assistant Attorney General and our office endeavor to get Mr. Lenard returned for this trial. I gather from Mr. Haith that his office has likewise been unable to procure the person of Mr. Lenard for this hearing

One of the assertions in the petition for a writ of habeas corpus is that Mr. Lenard committed perjury at the trial of John William

Jackson and has prepared, filed an affidavit with this Court to that effect. We also have approximately five to six witnesses who will testify that they have engaged in conversations with Lenard wherein he had admitted that he had committed perjury in the trial of John William [9] Jackson.

The request for production of the statement, Your Honor, is not offered in evidence at this time but we request the Government to make that available to us for inspection and at the appropriate time, I will move for its introduction.

The Court: Let me understand. I am trying to—in the file of this, there is a letter in here signed and sworn to by Daniel Lenard.

Is this the letter you are talking about?

Mr. Hall: That is not the one I requested produced, Your Honor. There is another statement given to Investigator James Riddle of Fairfax County Police Department—

Mr. Haith: May I continue, Your Honor, to clarify this a little bit further?

The letter you have in front of you is in fact a part of the record and we have been contending from the beginning that the information sought is in fact in the record through that letter. And that anything else would be merely accumulative of that letter.

Now, the particular statement that is under question or the particular information that he is requesting with his motion is a report that was made that I have that was made by State Police Investigator Mr. Jack Hall, a confidential report [10] at the request of Judge Sinclair of this Court but it is a confidential report of the Department of State Police and that is why we object to the use or release of it in any way.

Furthermore, the information—I can state to the Court—the information in that report that is being sought is in fact cumulative of that letter that you had just referred to which is already in the file.

The Court: Well, can this statement that was given to Mr. Hall purported to be given by Mr. Lenard to Mr. Hall, can that be extracted from this report?

Mr. Haith: Yes, sir, it can. However, of course, when the time comes, I would object to the admissibility of it in evidence. It could be extracted from the report for the purposes of viewing by Petitioner's

Counsel but I would object to the admissibility of it in evidence at the appropriate time on the grounds of hearsay.

The Court: I am going to direct at this point that you can make it available to him and he can determine himself as to whether there is merit to the statement.

Mr. Haith: We except to that ruling, Your Honor.

(The exception was noted.)

The Court: Any other preliminary matters?

Mr. Haith: No other preliminary matters, Your Honor. I do have a brief opening statement.

[11] The Court: All right
You may have an opening statement.

Opening Statement On Behalf Of The Plaintiff

Mr. Hall: The Petitioner asked that a writ of habeas corpus be granted to him essentially on six grounds: The first, that at the trial in which he was charged with distribution of two decks of cocaine, the Commonwealth called as a Witness Daniel Lenard who subsequent thereto admitted that he lied on the stand and has admitted under oath, the same to Investigator Riddle of the Fairfax County Police Department and has admitted the same to State Trooper Hall, J. E Hall, Virginia State Police and has admitted the same to Joseph Rollo, then of the Crossroads Program for Fairfax County, has given a sworn statement before Deo Reporting Service in the presence of Mr. Hirschkop, admitting that he committed perjury and has told Stanely Hall, who is in the Fairfax County Jail, that he has committed perjury.

I think the perjury itself requires a new trial for Mr. Jackson. There are several other matters that the Petitioner tends to rely on.

Next, but not in order of importance, is that he was denied due process and equal protection of the law in several particulars. First in that the Grand Jury that indicted him was [12] not constitutionally constituted, that is that its foreman was Thomas Chapman, the retired Clerk of the Court, that before that Grand Jury, there was summoned a Witness who had no direct or personal knowledge of the event for which the Petitioner was indicted, William Luzi, that in his petty jury,

blacks had been excluded from his panel or array; that at the trial, Eugene Jones and Danny Lenard had testified based upon a pre-arrangement with the Commonwealth attorney, that he would at their sentencing speak favorably for them and that under the doctrine of Napue v. Illinois and Giglio v. United States, these Witnesses were obligated under proper cross examination by Mr. Morris who then represented Mr. Jackson to advise the Court and then the jury that they were testifying under the assurance that they would receive a favorable consideration at the sentencing.

And further, under Napur v. Illinois and Giglio v. the United States, that it was incumbent on the Commonwealth Attorney at that time to apprise the Court that in return for the testimony of these two Witnesses, they would be given favorable consideration by the Commonwealth Attorney at their sentencing hearing and that Napue and Giglio required the reversal of the conviction based upon the failure of either the Commonwealth or these Witnesses to [13] disclose the pre-arrangement.

Next, if the Court please, the evidence used to convict Mr. Jackson had one material and fatal defect, that is while he was charged with distribution of cocaine, the cocaine was not admitted into evidence because of a break in the chain of custody.

His Honor, Judge Keith, found that unless Investigator Charles Taylor of the Fairfax County Police Department had been called in to testify, the chain could not be established and that he would not let the cocaine come into evidence but he did permit the opinion of the chemist to be given, that the subject analyzed was cocaine and therefore, Mr. Jackson was convicted by a jury that had before it insufficient and incompetent evidence of guilt.

Lastly, and perhaps most prejudicially the most substantial denial of due process of law to Mr. Jackson that occurred was that the Commonwealth proceeded on two counts: one, distribution of cocaine and two, possession of cocaine with the intent to distribute.

The Defendant moved to put the Commonwealth to an election. The Court permitted the case to go to the jury without such an election being required of the Commonwealth. As a consequence, while the evidence showed if anything only [14] a distribution of two decks of cocaine, the joinder of the two counts permitted the Commonwealth to offer a host of other evidence of other transactions of other dealings of

other narcotics present in that room on that occasion. I think that is the evidence that brought about the 30 year sentence that the Defendant received, inadmissible evidence.

Had these counts been served or had the Commonwealth been put to an election, it would have been bound, number one, on the distribution case, to prove only the distribution of the two decks of cocaine or with the possession with intent to distribute, the identity of the cocaine that was alleged to have been possessed by the Defendant—when we got to that point, I think the transcripts that have been offered in evidence and we give Your Honor about six or seven citations to the transcript, Your Honor can see the deleterious and prejudicial effects that this had at the trial of this Defendant.

I also cite to Your Honor the applicable authorities: United States v. Drew for that proposition.

Thank you, Your Honor.

The Court: All right.

If you have anything you wish to say—

Opening Statement On Behalf Of The Respondent

[15] Mr. Haith: Yes, sir, Your Honor, without relinquishing the right to make further legal argument, when it is appropriate I would like to make a few comments at this point. On the first allegation that was referred to by Petitioner's Counsel, that is the allegation that relates to alleged perjury on the part of the Witness, Daniel Lenard, we have in the record of course, the transcript of the original trial at which time Mr. Lenard under oath testified as he did.

We also have in the record the transcript of the post-trial motion and hearing of July 2nd, 1971 at which time a motion for a new trial was made by the Defendant, Jackson, on this same ground and that is the ground of perjured testimony. At that post-trial hearing on July 2nd, 1971, there were some Witnesses who testified to having overheard discussions of Daniel Lenard concerning perjury and Mr. Lenard himself was called as a Witness and denied this allegation of perjured testimony and in effect reiterated that his testimony at the original trial was in fact correct and not perjured so we have two instances on record in courtroom proceedings where Mr. Lenard has testified to the same effect.

We have no other courtroom testimony of any kind of Mr. Lenard to the contrary. All that is in the record at this point is the letter or letters that have been sent to the [16] Court by Mr. Lenard since that time in which he makes these allegations.

As to any other statements made by Mr. Lenard to other persons, we will object to the admission of those at the appropriate time on the grounds that they are hearsay. It is our contention, of course, that factually, the allegation of perjury is in fact not meritorious.

Furthermore, legally, we also contend that if in fact there was perjured testimony, that it was not within the knowledge of the Commonwealth of the prosecuting attorney or anyone else involved with the prosecution and for that reason alone, it would not be grounds for the reversal of the conviction in a habeas corpus proceeding. In addition, we would submit that even if it was in fact found to have been perjured testimony, that it would not have altered the outcome of the trial inasmuch as there was other complete and substantial evidence on which the petitioner could be convicted and was convicted, that was testimony of both Mr. Robinson and undercover agent and of the Witness Eugene Jones as to the incident that took place.

As to the allegation relating to the Grand Jury proceeding initially, we would take that position that the objection to the service in the Grand Jury of a former Clerk [17] of the Court is barred at this time. Such a motion is a motion that relates to the makeup of the Grand Jury, is waived unless it is raised at the time of the trial.

We cite Bailey versus Commonwealth, 193 Virginia 814, for that proposition, that this motion was not raised at the trial and therefore was waived and can not be raised at this time.

Furthermore, we would state to the Court that the service of Mr. Chapman as a former Clerk of this Court was not prohibited by law anyway and so therefore, there is nothing wrong in his serving on the Grand Jury. Also, the fact that the evidence before the Grand Jury was hearsay evidence of Detective Luzi, we submit that this is not unconstitutional and does not raise a constitutional objection. In fact, there is nothing wrong with the use of hearsay evidence before a Grand Jury and we will cite cases for that when the time comes.

As to the allegation that there was some deal made between the Commonwealth and two Witnesses for their testimony, we reject that allegation on the merits and say that proof today will show to the con-

trary. As to the allegation relating to the chain of custody, we would point out to the Court that the question relating to chain of custody related to the [18] custody of the material, the cocaine itself after its possession by the chemist and its analysis by the chemist. In other words, a chain of custody was established from the moment that it was received by Mr. Robinson, the undercover officer until it was analyzed by the chemist and there is no question in the original record that the material that was analyzed by the chemist was in fact the same material that was taken by Mr. Robinson in the purchase from the Petitioner, Mr. Jackson.

The proof of the chain of custody broke down only after it left the custody of the chemist and for that reason, the trial judge did not admit the cocaine itself into evidence. He did, however, admit into evidence the report of the analysis by the chemist which proved satisfactorily and sufficiently that it was in fact cocaine.

As to the last allegation mentioned by Petitioner's Counsel, relating to the two indictments, the record of the original trial will speak for itself on this. I think all of the evidence relating to this is in the original record because this was objected to prior to the trial. There was a pre-trial motion for this purpose. I would simply like to state for the Court what in fact happened here, was that Defendant's Counsel moved originally to sever the two indictments and have separate [19] trials.

The Court at the time originally granted that motion. Then Defendant's Counsel moved to require the Commonwealth to make an election between the two indictments and proceed on only one of them. The Court took the position that he could not do both. He could not request a severance and then require an election at the same time.

When the Court took that position, the Defendant's Counsel then elected to try them both together and save his point or reserve his point about the double indictment for the trial itself, so that both indictments were in fact tried at the same time. So we submit that the objection that there was no severance is without merit because it was at the election of the Defendant himself until we retract his motion for severance and proceed instead on his motion for an election by the Commonwealth.

The election would not require prior to trial by the trial court. After further motions were made to that effect. In other words, the trial court allowed the trial to proceed under both indictments. One was

for distribution of controlled drugs. The other indictment was for possession of controlled drugs with intent to distribute.

The Commonwealth's position throughout all of this [20] and through the trial was that there was in fact in this case sufficient facts to justify both charges and they were not the identical facts and therefore, there was a legitimate case here for both charges to go to the jury, that there were additional facts that proved the charge of possession with intent to distribute which were not necessary to prove the charge of distribution and we submit that the record will show—

The Court: How can you distribute something without possessing?

Mr. Haith: The evidence will show that there was a sale made to the undercover officer, Mr. Robinson of two decks of cocaine and that the Defendant, Mr. Jackson, made that sale. The evidence also shows that at the same time, there were a large quantity of additional cocaine on the table in the possession of the Defendant, that was not a part of this transaction or the sale and as to that additional drugs, there was the possession with intent to distribute. Now the trial judge after the evidences before the Jury, the trial judge refused to grant instructions on both indictments, the trial judge went along with the Defendant and said that after the facts were in, he did not agree that there were sufficient facts for both indictments but that he could not make that decision until the evidence was in so he did not [21] allow the Commonwealth to actually have both indictments go to the jury for conviction but it was not until after the evidence was in that the trial judge could make that determination.

We submit of course, that there was sufficient evidence and still is on the record today, sufficient evidence to justify both indictments and that there is nothing unconstitutional in the fact that the trial proceeded under both indictments.

The Court: Well, it did proceed under both indictments.

Mr. Haith: Yes, it did, Your Honor.

The Court: And as I understand, the trial judge at the time simply refused to instruct on both indictments.

Mr. Haith: That is correct.

The Court: So the jury had all of the evidence, even though they

only had all the evidence from two indictments but only instructed to really deliberate and render a verdict on one.

Mr. Haith: But they were given a choice as to which one they wanted to render the verdict on. It was simply instructed that they could not come back with two convictions but they were not instructed that they had to render the conviction on just one of the indictments specifically. But they were in effect instructed that they could only give one [22] conviction but they were in fact given the choice as to which indictment they were going to convict on so from that standpoint, they still had—the jury still had the evidence from both indictments and they chose to convict under the indictment of distribution.

The Court: Well, let me say for this record at this point, this area here seems to me to be the area. If he has been denied due process of law, it is going to revolve around this point here and without us sitting here all day and hearing all of this evidence, let's get to that point and I think we can dispose of this case one way or the other right there.

If he has, it seems to me—and I will have to go back and look at it—but I don't believe that it would be proper to let two indictments go forward to the Jury on this question here, one of distribution and one of possession and then tell them that they can make an election when you've presented all of the evidence on both.

It seems to me that you would simply have to possess before you distribute so let's see if you can pinpoint those areas in this record which you feel this and we'll take time out to read it at this point.

[23] Mr. Hall: Your Honor, if I might, I would like to present the case of Drew against the United States to Your Honor, along with the citations. I have a copy for you and it is a case out of United States Court of Appeals for the District of Columbia Circuit. It deals primarily with prejudice inherent in permitting a Jury to have evidence of mixed crimes but only being permitted to return a conviction on one.

The citations to the transcript that the Defendant would rely on to show the prejudicial consequences—and if I might, Your Honor, ask that when these pages are read and maybe it requires a reading of a good portion of the transcript to fit them into context.

The Court: All right.

Mr. Hall: It is apparent from the outset of the case and through

the course of the trial that the Commonwealth only had evidence of either possession or of sale of two decks of cocaine. They had no other cocaine that they had seized or purchased. There were these two decks but in going to trial and to this jury on both counts they offered evidence through other people present in the room that the other material arrayed on the table was supposedly cocaine although there was no chemical testimony, no offering of those substances [24] themselves in evidence, pages 113, 118, 119, 137, 138, 139, 141, these are just the transcript references to the factual areas that we assert were prejudicial if the Court please.

The motion for a severance or an election was made.

Your Honor the transcript of May 25, 1971, contains the motion for severance and/or election. That portion of that transcript dealing with that subject commences approximately page 17, Your Honor.

The Court: Approximately 17, all right.

Mr. Hall: Of the May 25 transcript.

The Court: All right.
Any other—

Mr. Hall: No other citations at this time, Your Honor.

The Court: Do you have any citations you wish the Court to read on this point, Mr. Haith?

Mr. Haith: Well, Your Honor, I do not have specific page numbers as Mr. Hall does because it is our position that the Court would in fact have to read the entire testimony of the Witnesses Robinson, Lenard and Jones in order to be fully apprised of the facts as they were developed concerning the various items of drugs.

It is the testimony, particularly of Lenard and Jones [25] that there was additional cocaine on the table and the room in question.

I would point out to the Court—I am not sure that Mr. Hall did—that the discussions between the trial judge and Counsel on instructions begins on page 189 where the Court makes its ruling that there can only be a conviction on one of the charges and in that discussion, you can see the position that was taken by the Commonwealth and the argument of Mr. Rodway there, but in order to be fully apprised of the position that was taken by the Commonwealth, we would submit that you

would have to in fact read the testimony of all three of the Witnesses that related to the additional cocaine that was on the table.

The Court: All right.

This Court is going to adjourn at this point to read these transcripts, at least a portion of them and I will come back and make a ruling on this point then.

Mr. Hall: Your Honor, I would refer Your Honor to page 207 also in the closing argument that the Commonwealth Attorney which was objected to by Mr. Morris—

The Court: All right.

(Whereupon, a recess was taken.)

[26] The Court: Let the record reflect that the Court has reviewed the files as well as the transcripts as suggested by the Counsel relating to this question here on the two indictments, one of possession with intent to distribute and the other on distribution.

In Case number 16609, charging possession of a controlled drug with intent to distribute on the third day of December, 1970, in violation of Section 54-524.108, and in Criminal Case number 16610, that indictment charged on the same date distribution of a controlled drug in violation of the same Section.

In each case, the two indictments were tried on June 2nd, 1971 and were allowed to go to the jury on the two indictments, really, in effect, a violation of the same statute.

The jury found the Defendant guilty of distribution and gave him 30 years in the penitentiary. The record also reflects that in a motion for a new trial, the issue of this question was raised pertaining to the two indictments, that is possession with intent to distribute and of course, the distribution and this motion was denied by the trial judge and then we come to a notice of appeal on an assignment of error and these issues are not raised.

[27] The only assignment of error was the one denial of the right to fully cross examine co-Defendants and my question to Counsel at this point, and it is somewhat of a procedural aspect, is the Defendant at this point or the Petitioner I should say, not Defendant, is the Petitioner at this point denied the right to raise this issue in the habeas corpus proceeding?

We are going to adjourn for lunch at this time and when we return, I want you to express your argument on that point. I think this is where the crux of this case stands at this time.

(Whereupon the hearing of the above-entitled matter adjourned to reconvene at 2:10 that same day.)

Afternoon Session

The Court: All right, Mr. Hall, do you have any argument you want to make on the issue posed by the Court as to whether the Petitioner was denied the opportunity to raise this point on the writ of habeas corpus when he did not raise it in his appeal?

Mr. Hall: Yes, Your Honor, just briefly.

During the luncheon recess, I endeavored to see if there was any Virginia authority directly on point and in that time, have been unable to uncover any. It is the general precept [28] and thesis of habeas corpus relief that it can review any constitutional or jurisdictional error committed in trial, that it is not a continuation of the criminal proceeding but is a distinctly different and separate proceeding, a civil proceeding to review the legality of the detention of the prisoner.

So rather than examining whether an issue raised at trial but not raised before the Virginia Supreme Court is foreclosed in a collateral proceeding, I find no direct authority. It would be our argument, too, Your Honor, that constitutional questions such as asserted here can be raised by habeas corpus after the time for further State remedy by way of appeal, has been exhausted.

The only requirement is that there be an exhaustion of State remedies, not that each and every allegation that might be taken before that Court be raised, but that the remedies be exhausted. There be no other relief except this form of collateral review. That is the posture we are in now and we assert there was a denial of due process of law through prejudicial misjoinder and I would argue that that can be raised at this time.

The Court: Thank you.

Mr. Haith, do you have any you want to argue on this?

[29] Mr. Haith: Your Honor, the Respondent would admit that if in fact we have a constitutional issue, an issue involving constitu-

tional deprivation of due process, that the Petitioner is not precluded from raising that on habeas corpus if—by the fact that it was not raised on his direct appeal. Therefore, it becomes a matter of arguing whether in fact this is a constitutional issue or not, we would take the position that it is not—that it is a matter of state trial procedure, that it is an evidentiary matter and therefore, is not a violation of constitutional law.

For instance, assuming for the sake of argument, that the prejudice involved to the Petitioner was the admission of evidence that would have otherwise been inadmissible because there was two indictments rather than just one for distribution, that this then was a matter of evidence or admissibility of evidence, and therefore, it is in effect not a constitutional issue but an evidentiary issue.

Furthermore, we would contend that Judge Keith's ruling was in fact an evidentiary ruling and that was that there were not sufficient facts before the Court to submit both indictments before the jury. And that was a ruling on the evidence or the sufficiency of the evidence.

The Court: Well, I think you are correct but I think [30] where the problem is, if there is any prejudice in the case, it is the fact that it was permitted to go to the jury, in a sense was presented to the jury and he in effect had to plead to two separate and distinct offenses. This is the taint, if there is any taint. It seems to me that would prejudice the Petitioner at this point.

I have read and, of course, obviously, I have not exhausted all the transcript and all the file here, but I have read and I am going to make a ruling in this case. It seems to me that a single identical thing, that is the sale of a controlled drug, can not be divided into two separate offenses. That is possession with intent to distribute a controlled drug. That sale under the circumstances of this case obviously and had to in fact mean possession with the intent to distribute and the Commonwealth sought to make two separate offenses out of a single identical offense and it seems to me that it is prejudicial to proceed on them as if they were two separate offenses when in fact they were only one, that is the distribution or sale of the controlled drug.

I reached this conclusion somewhat by supposition an analogy, supposing that there had been a series of sales, one, two, three, four and five, let us say, on the separate days on [31] the first, second, third, fourth and fifth and he was charged with separate and distinct crimes for those five sales. The sixth indictment was possession with intent

to distribute by reason of the five prior sales. It seems to me, then, that could the Commonwealth go forward on the sixth indictment, which charges possession with intent to distribute, there is a fairly recent case on this point, that is the Boyd versus the Commonwealth of Virginia in which the Defendant in that case is charged with the sale of heroin on the 26th of October, 1970.

The officer testified in that case and was allowed to testify of two previous sales of heroin by the Defendant. The Court instructed the jury in that case, that they may consider these other sales as bearing on this issue of whether the prior offense constituted a part of the general scheme of which the crime charged was a part and the Supreme Court reversed that on the basis that its prejudicial effect outweighed its probative value.

It seems to me to charge two separate and distinct crimes out of a single identical offense introduced into evidence, telling the jury then, that you can only convict on one constitutes prejudicial error. I think it goes to the prejudice of the Defendant.

[32] The jury must choose which one they are going to convict when in fact there is only one offense to begin with and it seems to me as I said before, there is the taint that prejudices the Defendant.

Now, it is true the same evidence may be introduced to support one, indictment of—that is distribution. And also, it seems to me that the situation here differs from that where a lesser crime is included in a larger or another crime. In those cases, the jury are properly instructed, they may find one of the lesser crimes, but in this case it was one or the other, not both, that they had to choose from to find a conviction.

So I do find that the Defendant was prejudiced in not granting this motion to elect and allowing it to proceed as it did. I am going to warrant his petition for habeas corpus and grant him a new trial. You can prepare an order on that.

Mr. Haith: Your Honor, this time of course, I would make a motion that this Order be stayed for a period of 60 days to allow the Commonwealth to retry the Petitioner and then meanwhile, he remain in the custody of the Respondent.

The Court: He will. He will remain. I assume we can hold him here in the Fairfax County jail during this pendency.

[33] Mr. Hall: Yes, Your Honor. Would Your Honor set bond for these 60 days?

The Court: Do you have any suggestion on this, Mr. Haith?

Mr. Haith: Your Honor, I'm in a unique situation here because if in fact this is a situation, let me say, first of all, Your Honor, I would like to note my exception on the record to the Court's ruling in this case.

The Court: All right.

(The exception was noted.)

Mr. Haith: If in fact the situation is now that he is presently being held under the indictment under which he was convicted, then it becomes a matter for the Commonwealth's Attorney and therefore, I would prefer the Commonwealth Attorney respond to a motion to bond.

The Court: I am inclined to agree with you on that. I think the best thing to do on that is set down on a motion day, Mr. Hall, and have the Commonwealth's Attorney present to take up the matter.

Mr. Hall: Might that be set forth this Friday?

The Court: Yes, that would be fine.

In the meantime, he will be held in the Fairfax County Jail pending this.

[34] Mr. Hall: Thank you.

(Whereupon, at 1:00 o'clock p.m. the hearing in the above entitled matter was adjourned.)