212 Va. 13

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Clerk Supreme Court of Appeals
Richmond, Va.

Record No. 7495

In the Supreme Court of Appeals of Virginia at Richmond

FRANK JIMMY SNIDER, JR.

v.

JAMES D. COX, SUPT., ETC.

FROM THE HUSTINGS COURT OF THE CITY OF ROANOKE

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7495

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 11th day of June, 1970.

FRANK JIMMY SNIDER, JR., Plaintiff in error,

against

JAMES D. COX, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY, Defendant in error.

From the Hustings Court of the City of Roanoke
William W. Sweeney, Judge Designate

Upon the petition of Frank Jimmy Snider, Jr., a writ of error is awarded him to a judgment rendered by the Hustings Court of the City of Roanoke on the 5th day of December, 1969, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and James D. Cox, Superintendent of the Virginia State Penitentiary, was the substituted defendant; no bond being required.

And it is ordered that a copy of this order be served on the plaintiff in error and on the Superintendent of the Virginia State Penitentiary.

JUDGE'S CERTIFICATE

This day came Frank Jimmy Snider, Jr., by counsel, and presented this affidavit of poverty pursuant to Code of Virginia, §19.1-289, 1950, as amended, making oath that he is unable to pay or secure to be paid the costs of printing the record in the case now pending before the Supreme Court of Appeals of Virginia upon the award of a writ of error heretofore made to the judgment of this Court entered December 5, 1969 in the prosecution of a writ of *habeas corpus*.

And it appearing proper so to do by virtue of said affidavit and the investigation by the Court of the matters, the Court is of the opinion, and does hereby certify, that the said Frank Jimmy Snider, Jr. is unable to pay or secure to be paid the costs of printing the record in the appeal aforesaid.

William W. Sweeney, Judge Designate
of the Hustings Court of the City of
Roanoke, Virginia

Recd 7-13-70 HGT

* * * * *

AFFIDAVIT OF POVERTY

TO: The Honorable William W. Sweeney, Judge Designate of The Aforesaid Court:

Personally appeared before me Frank Jimmy Snider, Jr., plaintiff-in-error in an appeal now pending in the Supreme Court of Appeals of Virginia, record No. 7495, upon a writ of error heretofore awarded and being duly sworn deposes and says as follows:

(1) That he is without funds, is indigent and a pauper and therefore, is unable to pay or secure to be paid the costs of printing the record in the appeal;

(2) That his indigent and pauperous status is the result of incraceration in the Virginia State Penitentiary for a period in excess of fourteen (14) years.

Wherefore, Frank Jimmy Snider, Jr. prays that this Court certify his indigent and pauperous status and further, that the Supreme Court of Appeals of Virginia permit him to pursue and perfect his appeal without prepayment of costs in accordance with Code of Virginia, §19.1-289, 1950, as amended.

Respectfully submitted:
Frank Jimmy Snider, Jr.

Subscribed and sworn to before the undersigned Notary Public in and for the City of Richmond, State of Virginia, this the 9th day of July, 1970, the affiant having heretofore made oath that the facts and statements herein are true and correct.

Edward Lee Booker, Jr.
Notary Public

My commissioner expires: 10/9/73.

Recd. 7-13-70

HGT

* * * * *

RECORD

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* * * * *

PETITION FOR WRIT OF *HABEAS CORPUS AD SUBJICIENDUM*

TO: The Honorable Richard T. Edwards, Judge of said Court:

Your petitioner, Frank Jimmy Snider, Jr., respectfully represents that he is unlawfully imprisoned, detained, confined and restrained of his liberty by C. C. Peyton, Superintendent of the Virginia State Penitentiary, at Richmond; and that the imprisonment, detention, confinement and restraint are illegal and that the illegality thereof constitutes in these, the following allegations, to-wit:

(1) That petitioner is presently under sentence of death for statutory rape, under and by virtue of the Code of Virginia, formerly §18-154, now §18.1-44, a jury having determined his guilt and fixed the punishment aforesaid, on the 25th day of June, 1956, in this Court; and that this
page 2 } Court on the 27th day of June, 1956, entered judgment upon the jury's verdict ascertained.

(2) That upon the said trial of your petitioner in this Court, he having been arraigned and the *voir dire* examination commenced, from the panel of jurors therein constituted several members of said panel were removed for cause who,

without more, were opposed to capital punishment or had conscientious scruples against imposing the death sentence; and that none of the numerous and sundry petitions for a writ of *habeas corpus ad subjiciendum* heretofore filed by your petitioner have suggested the constitutional question raised herein.

(3) That under the facts and circumstances of this case, Frank Jimmy Snider, Jr., was, on June 27, 1956, convicted in this Court as the result of a procedure declared contrary and repugnant to constitutional proscriptions.

(4) That there is herein involved a grave and serious constitutional question and that there is probable cause to believe that your petitioner is detained without lawful authority.

Wherefore, and since your petitioner is remediless, save by the means of this writ, he humbly prays that a writ of *habeas corpus ad subjiciendum* may be granted under and by virtue of the Code of Virginia, §8-596, as amended, directed to C. C. Peyton, Superintendent of the Virginia State Penitentiary, at Richmond, commanding and directing him to bring your petitioner, in proper person, before this Court at such time as may be designated in said writ; that the said page 3 } C. C. Peyton be directed to show cause, if any he can, why your petitioner is detained by him and that this Court determine whether your petitioner is imprisoned, detained, confined and restrained in violation of the Fourteenth Amendment to the Constitution of the United States in that he was therein denied due process of law and equal protection of the laws; and your petitioner further prays that this Court may enter such order and grant such other relief as the nature of his cause may require and as may be meet and proper in the premises.

Frank Jimmy Snider, Jr.
Harvey S. Lutins

By Counsel

* * * * *

Filed 8-27-68
RR

Filed in the Clerk's Office the 27th day of August, 1968
Teste:

Walker R. Carter, Jr. Clerk
Lena Testerman, D. C.

* * * * *

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ORDER

This cause came on this day upon petitioner's motion to commence a petition for writ of *habeas corpus ad subjiciendum* in this Court therein indication that he is indigent and is without funds to pay fees or costs in the commencement and prosecution of his cause.

It is therefore, Adjuged and Ordered that the petitioner be, and he hereby is, permitted to commence and prosecute his petition for writ of *habeas corpus ad subjiciendum* in this Court without payment of fees and costs on account of his poverty and indigency and further, it is Adjudged and Ordered that Harvey S. Lutins, a discreet and competent member of the bar of this Court be, and he hereby is, appointed counsel to represent and aid the petitioner in the commencement and prosecution of his petition herein.

It is further ordered that C. C. Peyton, Superintendent of the Virginia State Penitentiary, show cause within thirty (30) days from the date of this order why a writ of *habeas corpus* should not issue, and that a copy of this order be certified and mailed to Frank Jimmy Snider, Jr., C. C. Peyton, and to the Attorney General of Virginia.

Enter this 27 day of August, 1968.

Richard T. Edwards
Judge

* * * * *

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* * * * *

ANSWER

Now comes the respondent and represents unto this Court as follows:

1. Petitioner is being detained pursuant to a judgment of this Court of June 27, 1956, wherein he was sentenced to death.

2. Respondent denies each allegation in the petition for a writ of *habeas corpus* which is not expressly admitted.

Wherefore, respondent prays that a plenary hearing be granted and that the petition be denied and dismissed.

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

By: Edward J. White
Counsel

* * * * *

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* * * * *

AMENDED PETITION FOR WRIT OF *HABEAS CORPUS AD SUBJICIENDUM*

TO: The Honorable William W. Sweeney, Judge Designate of Said Court:

Your petitioner, Frank Jimmy Snider, Jr., having obtained leave of Court to file this his amended petition for a writ of *habeas corpus ad subjiciendum* and not abandoning each and every allegation in his original petition, but incorporating same by reference to this amended petition and insisting upon same respectfully further represents that he is unlawfully imprisoned, detained, confined and restrained of his liberty by C. C. Peyton, Superintendent of the Virginia State Penitentiary, at Richmond; and that the imprisonment, detention, confinement and restraint are illegal and that the illegality thereof constitutes in these, the following allegations, to-wit:

page 21 } (1) That the sentence of death imposed upon petitioner was unlawfully and improperly rendered in violation of his rights under the Fourteenth Amendment to the Constitution of the United States. The sentence of death was determined by a jury which, pursuant to the law of the State of Virginia, has unlimited discretion, uncontrolled standards or direction of any kind, to impose the death penalty. Thus, the capital sentencing system established under Virginia law permits juries to utilize illegal and unconstitutional factors in sentencing persons to death and results in the imposition of the death penalty arbitrarily and capriciously, in violation of equal

protection of the laws and of the rule of law that is the fundamental principle of the due process clause of the Fourteenth Amendment. The constitutional fairness of that practice is now under review by the Supreme Court of the United States. *Maxwell v. Bishop,* O. T. 1968, No. 622, *cert. granted* 37 U. S. L. W. 3219 (December 16, 1968). Argument was held on March 4, 1969 and that case will be decided this term of Court.

(2) That the jury which determined petitioner's guilt simultaneously sentenced him to death by the single-verdict procedure established in Virginia by statute. The single-verdict procedure violates petitioner's right under the Due Process Clause of the Fourteenth Amendment. Petitioner was able to introduce evidence relating to his background and character for the jury's consideration on the question of penalty only by waiving his constitutional privilege against self-incrimination and prejudicing his trial on the guilt issue. Although the due process clause guarantees petitioner a fair trial on both the issue of guilt and on the issue of punishment, petitioner was forced to give up page 22 } the one or the other. In view of the ready availability of alternative modes of procedure not involving these consequences—for example, the split-verdict procedure now employed in many states—petitioner's single-verdict trial denied him due process of law guaranteed by the Fourteenth Amendment to the Constitution. The constitutional fairness of the single-verdict procedure is now under review by the Supreme Court of the United States. *Maxwell* v. *Bishop,* O. T. 1968, No. 622, *cert. granted* 37 U. S. L. W. 3219 (December 16, 1968).

(3) That under Virginia procedure for trial in capital cases, an accused may (a) plead not guilty and have a jury trial, (b) plead not guilty, waive a jury trial on the issues of guilt and penalty and thereby have the court determine first his guilt and then his penalty after a presentencing hearing or (c) plead guilty and have the court determine penalty after a presentencing hearing (Code of Virginia, 1950, §§19.1-192; 19.1-291; 19.1-292; 53-278.1). This statutory scheme needlessly encourages waiver of the Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial and penalizes the exercise of those constitutional rights in violation of *United States* v. *Jackson,* 390 U. S. 570 (1968). If an accused exercises, as petitioner did, his right to a jury trial, he does not have the opportunity to present evidence in mitigation of his sentence at a presentencing hearing after finding of guilt but before sentencing by the jury. A capital defendant who waives his

Sixth Amendment right to jury trial or one who waives his Fifth Amendment right to plead not guilty gains under Virginia law the opportunity for a presentence hearing before the court on the issue of the death penalty and thus a fairer opportunity for a life sentence. Where the death
page 23 } penalty as administered so needlessly penalizes the exercise of constitutional rights, capital punishment is unconstitutional. *United States* v. *Jackson, supra; Alford* v. *North Carolina,* No. 11,598, F. 2d (4th Cir. November 26, 1968).

(4) That the sentence of death imposed upon petitioner was unlawful and improperly rendered in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution of the United States in that the sentence of death under Virginia law constitutes a cruel and unusual punishment. See *Boykin* v. *Alabama,* O. T. 1968, No. 642 *cert. granted,* 37 U. S. L. W. 3133 (October 14, 1968).

(a) Juries may impose a death sentence wantonly, whimsically and without standards. Such a punishment is cruel because it is arbitrary and irrational. The sentence of death is unusual since its imposition is in no way controlled or limited to circumstances which may reasonably be believed to justify such a sentence.

(b) The death penalty is not constitutionally justifiable in every case of statutory rape since there may be circumstances in extenuation or mitigation which make its application to particular cases cruel and unusual punishment. Therefore it violates the Eighth Amendment for the State of Virginia to apply the death penalty of the circumstances of the crime and the character and background of the defendant are not given a rational consideration as the basis for the sentence. Virginia is constitutionally obligated to provide a procedure whereby the particularizing circumstances which might justify imposition of the death penalty are focused upon and given considered attention by the sen-
page 24 } tencing authority, and whereby that authority is not permitted to act arbitrarily without regard to the circumstances of the crime and to the pertinent factors relating to the defendant.

(c) The death sentence, under the extenuating and mitigating circumstances of this particular case, is so cruel and unusual as to constitute a violation of the Constitution. The penalty would inflict the loss of life without commensurate justification.

(d) The death penalty is rarely, arbitrarily and inequitably applied in Virginia. If applied regularly and evenhandedly, it would violate public standards of decency, dig-

nity and humanity, universally shared, that would brand it as barbarous. It thus avoids public condemnation only by being unusually and arbitrarily applied. In this, it is a cruel and unusual punishment within the Eighth Amendment.

(e) Execution by electrocution imposes physical and psychological torture, and is so cruel and unusual under contemporary standards of decency as to constitute a violation of the Eight Amendment.

Wherefore, and since your petitioner is remediless, save by the means of this writ, he humbly prays that a writ of *habeas corpus ad subjiciendum* may be granted under and by virtue of the Code of Virginia, §8-596, as amended, directed to C. C. Peyton, Superintendent of the Virginia State Penitentiary, at Richmond, commanding and directing him to bring your petitioner, in proper person, before this Court at such time as may be designated in said writ; page 25 } that the said C. C. Peyton be directed to show cause, if any he can, why your petition is detained by him and that this Court determine whether your petitioner is imprisoned, detained, confined and restrained in violation of the Fourteenth Amendment to the Constitution of the United States in that he was therein denied due process of law and equal protection of the laws; and your petitioner further prays that this Court may enter such order and grant such other relief as the nature of his cause may require and as may be meet and proper in the premises.

Frank Jimmy Snider, Jr.
Harvey S. Lutins

By Counsel

Filed by Leave of Court March 12, 1969.
Patsy Testerman, Deputy Clerk.

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FINDINGS OF FACT and CONCLUSIONS OF LAW

I.

PROCEEDINGS

Frank Jimmy Snider, Jr., the petitioner herein, was convicted of statutory rape by a jury in this Court on June 26,

1956, and his punishment was fixed at death. On the next day, judgment was entered on the jury verdict and the petitioner was remanded to jail and later to the State Penitentiary at Richmond, where he has remained under sentence of death since that time. There have been numerous appeals since 1956, both in the State and Federal systems, all unsuccessful.

On August 27, 1968, petitioner, through his attorney filed in this Court a Petition for Writ of *Habeas Corpus ad subjiciendum* under Section 8-596 of the Code of Virginia, 1950, as amended, alleging that the method of jury selection and the *voir dire* examination of the jury panel at his trial on June 25, 1956, violated his Fifth and Fourteenth Amendment constitutional rights under the ruling of the United States Supreme Court decision of *Witherspoon* v. *Illinois,* 391 U. S. 510, 20 L Ed. 2d 776, 88 S. Ct. 1770, decided June 3, 1968. The Witherspoon opinion held (6-3) that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding jurors for cause simply because they voiced general objection to the page 28 } death penalty or expressed conscientious or religious scruples against its infliction. The Court said that "no defendant can constitutionally be put to death at the hands of a tribunal so selected". By the oath of office which I took, I am bound by the decisions of the United States Supreme Court.

Because of the disability of the then presiding judge of this Court, I was designated to hear this case by the Supreme Court of Appeals of Virginia. A general answer maturing the case was filed by the State Attorney General. Pre-trial hearings were conducted by this Court on January 10, 1969, and March 5, 1969. On the morning of the plenary hearing of this petition, counsel for Snider, without objection, was allowed to filed an amended petition alleging, in effect, that a death sentence is unconstitutional *per se;* that the Virginia procedure whereby the jury fixes both the guilt or innocence and the punishment in one hearing without any pre-sentence information about the accused violated petitioner's constitutional rights under the Fourteenth Amendment; and that a death sentence constitutes "cruel and inhuman punishment" incontravention of federal and state constitutions.

The hearing on the petition was conducted on March 12, 1969, at which time the Court heard evidence as to the issues raised in the petitions. Both sides agreed that the court records of the 1956 trial were silent as to the exact procedure employed in selecting and excluding jurors on the morning of trial, there being no transcript of same. (See

Tr. pp. 8, 9). The only reference I find is a recital is an order of June 25, 1956, which states—"... and the Court having examined said persons (jurors) and finding them free from all legal exceptions and qualified to serve as jurors according to law...". There is nothing in the record of the original trial to show what, if any, questions were asked the jurors or whether any were excluded for cause and for what
page 29 } reasons. Furthermore, it is not clear whether the Court order referred to the jury panel as a *whole* or just to the *twenty* jurors finally empaneled. At the conclusion of the hearing on March 12th, 1969, this Court delayed its ruling until such time as counsel had prepared and filed memoranda of law.

II.

ISSUES

As I view this case, there are two main issues to be decided.

(A.) Whether the death penalty as imposed under Virginia procedure is constitutional; and

(B.) Whether the method of jury selection at the opening of Snider's 1956 trial violated the ruling of *Witherspoon* v. *Illinois,* as decided by the United States Supreme Court.

III.

FINDINGS OF FACT

A *habeas corpus* proceeding is civil, rather than criminal in nature, and the petitioner, in order to prevail, need only prove his case by a preponderance of the evidence. He is not required to prove his allegations beyond reasonable doubt or to the absolute satisfaction of the Court. See *Darnell* v. *Peyton,* 208 Va. 675, 160 S. E. 2d 749 (1968). Findings of fact by the trial court on conflicting factual evidence have the force and effect of jury verdict and should be upheld unless plainly wrong or without evidence to support them. See *Meekings* v. *Peyton,* 208 Va. 114, 155 S. E. 2d 52, (1968). With these two principles in mind, based upon the record and the testimony at the March 12, 1969, hearing, I find the facts to be briefly as stated.

Approximately thirty jurors were summoned for the trial of the statutory rape case against Snider on June
page 30 } 25, 1956, (Tr. p. 16). Under Virginia law, a twelve

man jury is required in felony cases and the verdict must be unanimous. The jury, in one trial, decides the issue of guilt or innocence and fixes the penalty, in its discretion, within limits prescribed by law. The judge may suspend or reduce jury verdicts. (See Va. Code §18.1-22, 19.1-291), but the *Witherspoon* decision does not turn on whether the trial judge must accept the jury verdict. (Id., f.n.12). The accused was arraigned and plead not guilty. Prior to qualifying the jury, the Commonwealth's Attorney advised the Court that he was seeking the death penalty. Twenty jurors (Tr. p. 36) were called to come forward and stand in front of the bench to be examined on *voir dire* as to their qualifications to try the case at bar, they having previously been examined generally by the Court as to their general qualifications to serve on a petit jury in this Commonwealth. After explaining the nature of the case and the fact that such offense carried a death penalty in Virginia, and after asking the jurors other necessary and proper questions about their relationship to the accused or the prosecutrix and their ability to render a fair and impartial verdict, the presiding judge asked the jurors standing before him if any of them were opposed to capital punishment. At least one and possibly two jurors raised their hands indicating that they were opposed to capital punishment whereupon they were excluded for cause from the panel by the Court without any additional questions being asked of them either by the Court or counsel. The jurors so excused were replaced by other jurors from the panel summoned. Neither the Commonwealth nor the accused, through counsel, objected to the *voir dire* procedure and neither asked the jurors any questions relating to the death penalty or their feelings and opinions in respect thereto. From a panel of twenty jurors
page 31 } so selected, counsel for each side took four pre-emptory strikes thus reducing the number of jurors to the twelve who sat in the case.

Testimony at the March 12, 1969, hearing from Frank P. Hancock, Jr., a news reporter who attended the 1956 trial and testified from notes he had made at the trial and a news clipping written by him, and testimony of Arthur B. Crush, Jr., a Roanoke Attorney, who participated in the 1956 trial as Assistant Commonwealth's Attorney is entitled to considerable weight. Hancock testified that the jurors were asked as a group if they had any conscientious objections or religious scruples against capital punishment. One man so stated and was excused. When asked whether the Court explored if the juror could disregard his personal feelings and still find the death penalty if the case warranted it, Hancock

replied "No sir" (relying on his notes of the trial). His news clipping stated that "the jury selection moved quickly." (Tr. p.p. 21-26).

Crush testified that he had no specific recollection of questions asked, but in speaking of the usual custom of the Court in such cases he said, "When the veniremen were impaneled, they were asked if any of them were opposed to capital punishment; and, if they answered in the affirmative, they were asked to stand aside". He stated that while the jurors were asked if they could give a fair trial, there were no additional inquiries as to the death penalty. (Tr. p. 34).

The presiding judge at the 1956 trial, now retired, testified, but had no independent recollection of the events bearing On jury selection. He said that his usual custom in death cases was to ask the jury if they had any religious or conscientious scruples against sentencing a person to death if the evidence justified such a conclusion after which page 32 } he gave counsel an opportunity to ask questions. He doesn't recall whether he read from or referred to Section 19.1-210 of the Virginia Code (then Section 19-195, hereafter discussed) when questioning the jury. Counsel for petitioner asked the following question of the judge: "When a juror, or jurors, indicated that he, or they, were opposed to capital punishment, and if either side had any further questions, did you then and there in a capital case, of course, summarily and automatically discharge that juror and select another or others?" The answer was: "That was the practice". (Tr. p. p. 43, 44).

No witness who testified said that any qualifying or additional questions were asked the jurors who disqualified themselves because of capital punishment. Although most of the original panel of jurors were summoned as witnesses for the March 12th hearing and present in court, neither counsel elected to call any of them to testify on his behalf.

Because of certain statutory prohibitions against judges testifying in cases in which they sat, (Section 19.1-268, Code of Virginia, 1950, as amended), I do not rest my findings in this case in whole or in part, upon the testimony of the presiding judge. This is so even though he is now retired, both counsel agreed to his testifying at a pre-trial conference, and even though the judge, himself, did not object to testifying. I still have serious reservations as to whether his testimony could be considered under Virginia law even under the above circumstances.

After the evidence, instructions, and counsel arguments were concluded on the second day of trial, the jury returned to its jury room, deliberated and returned with a verdict

fixing both guilt and punishment, as provided by State law. The verdict was affirmed.

IV.

CONCLUSIONS OF LAW

page 33 } A. Whether the death penalty under Virginia procedure is constitutional.

Snider's amended petition is a constitutional frontal attack against the death penalty as a form of punishment and against the procedural law of Virginia applying it. Snider testified on this issue at length at the March 12th, 1969, hearing, although most of such testimony was ruled out by this Court as irrelevant. Most of the 110 page opening brief of his attorney is directed toward this issue. Reference is hereby made to the amended petition for the particular grounds upon which this claim is based.

While there have been no reported cases decided by our State Supreme Court on the *Witherspoon* issue, there have been recent decisions of that Court bearing directly on the death penalty issue, which, to my knowledge, have not been overruled. (I am aware that the U. S. Supreme Court has recently agreed to hear new arguments on this issue, see e.g. *Maxwell* v. *Bishop,* 8th Cir. Ark. Docket No. 3450.)

In *Johnson* v. *Commonwealth,* 208 Va. 481, 158 S.E. 2d 725 (1968), the defendant raised similar constitutional questions with particular reference to the discretion vested in the jury. Citing *Giaccio v. State of Pennsylvania,* 382 U. S. 399, 402, 86 S.Ct. 518, 520-21, 15 L. Ed. 2d 447, 450, our Court said in part:

"In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendents guilty of a crime the power to fix punishment within legally prescribed limits." 382 U.S. at 405 n. 8, 86 S.Ct. at 522, 15 L. Ed. 2d 451. For similar holdings see *Andres* v. *United States,* 333 U. S. 740, 68 S.Ct. 880, 92 L. Ed. 1055; *State v. White,* 60 Wash. 2d 551, 570-72, 374 P.2d 942, 953-55; *In re Ernst's Petition,* 3 Cir., 294 F. 2d 556." 208 Va. at 487.

As to the argument that jurors should not decide simultaneously the issue of guilt and the determination of punishment, the opinion read:

"In *United States* v. *Curry,* 2 Cir., 358 F. 2d 904, 914, it is said: 'while the Supreme Court has never passed
page 34 } directly on the question, it has dealt with and upheld these statutes under the assumption that they provide for a unitary trial.'

If there is merit in the suggested procedure, it is for the legislative branch of the government to determine. It appears that the legislatures of at least five of the States have established such procedure. 53 Va. Law Rev. 968, 997. And see the argument of Judge McGowan in his separate opinion in *Frady* v. *United States,* D.C. Cir., 348 F. 2d 84, cert. den. 382 U.S. 909, 86 S.Ct. 247, 15 L.Ed. 2d 160, in which he expresses his view at page 92 that such two-stage procedure is most desirable 'even if the Constitution be not thought to require it.'

Such change in the Virginia procedure, however, should be left to the General Assembly and decided after full hearing and consideration. There is nothing in the present case to establish that the procedure followed deprived defendant of any constitutional right." 208 Va. at 488.

Again, in *Fogg* v. *Commonwealth,* 208 Va. 541, 159 S.E.2d 616 (1968), the Virginia Supreme Court reexamined and reaffirmed the Virginia rule that imposition of the death penalty for rape does not constitute cruel and unusual punishment in contravention of the Constitution of Virginia and the Constitution of the United States. See also, *Rudolph* v. *Alabama,* 375 U.S. 889, 84 S.Ct. 155, 11 L. ed. 2d 119 (1963). *Brickhouse* v. *Commonwealth,* 208 Va. 533, 159 S.E. 2d 611 (1968); *Hart* v. *Commonwealth,* 131 Va. 726, 109 S.E. 582 (1921); *State v. Gamble,* 249 S.C. 605, 155 S.E. 2d 916 (1967), and *Sims* v. *Balkcom,* 220 Ga. 7, 136 S.E.2d 766 (1964).

B. Whether the method of jury selection violated *Witherspoon* v. *Illinois.*

This, in my opinion, is the real issue in this proceeding. Taking the facts as I have found them, does this case meet the test of *Witherspoon* as to jury selection at the *voir dire* stage? As I read *Witherspoon* and cases decided since that time, I conclude that it does not. I do not rule that the Virginia statute on jury examination in death cases
page 35 } is unconstitutional as violative of *Witherspoon* (Section 19.1-210), but I rule that the *method* or *procedure* used in *this* case in examining prospective jurors violated *Witherspoon.*

The seating of jurors in a capital case in Virginia is gov-

erned by Virginia Code Section 19.1-210 (Section 19-185 in 1956). This statute which has remained virtually unchanged since its adoption reads as follows:

"A person whose opinions are such as to prevent his convicting any one of an offense punishable with death, shall not be allowed to serve as a juror on a trial for such offense." (See *Acts of Assembly,* 1847-48, p. 149, §15. The 1847 Act spoke of finding one "Guilty" rather than using the word "Convicting".)

The parallel Illinois statute in the *Witherspoon* case reads as follows:

"In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." (Ill. Rev. Stat. 1959, c. 38 § 743).

It is immediately obvious that the two statutes are not the same. Under the Virginia statute only jurors whose opinions would *prevent* conviction in a capital case are excluded. Under the Illinois statute, a juror can be excluded simply because he *states* that he is in some manner opposed to the imposition of the death *penalty per se.* The Virginia statute is a conviction statute while the Illinois statute is a penalty statute. (See, however, *Hampton* v. *Comm.,* 190 Va. 531, 58 S.E.2d 288 (1950), where the Virginia Supreme Court construed the Virginia statute rather broadly and spoke in terms of "conscientious scruples" against imposing the death penalty". (190 Va. at 548).

In a qualifying footnote to its opinion, the Court said in the *Witherspoon* case:

"We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant page 36 } sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) *that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.* Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the *conviction,* as opposed to the *sentence,* in this or any other case." (Emphasis added) (f.n. 21).

Under (2) of the above quoted language, the Virginia statute, as worded, appears constitutional and non-violative of *Witherspoon.* If the evidence in this hearing showed clearly that the juror or jurors excused for cause from the panel in this case were (in the language of the Virginia statute)—

". . . persons whose opinions are such as to prevent his convicting any one of an offense punishable with death . . .", I would deny this writ; but, there is no evidence before me that such question or questions were asked. In fact, there were only three witnesses who testified who had any specific recollection of events concerning the jury examination, (Martin, Hancock, and Carico). Martin said the Court asked the jurors "if any of them were opposed to capital punishment". (Tr. p. 16); Hancock said the Court asked the jurors as a group "if they had any conscientious objections or religious scruples against capital punishment". (Tr. p. 22); and, Carico said the jurors were asked if they were "opposed to capital punishment on moral or conscientious grounds" (Tr. p. 30). These were all "penalty" questions. I find no evidence that any questions were asked to determine whether the jurors could, despite personal feelings, convict in a capital case as provided by the Virginia Statute. Neither do I find under (1) of the above quoted *Witherspoon* language that the excluded jurors in this case

page 37 } "made it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them". The application of a valid procedural statute can end with an invalid result. The question before me is not whether the Virginia Statute is constitutional but whether it was applied in a constitutional manner *quoad* Frank Jimmy Snider, Jr.

Much has been written and said about *Witherspoon* v. *Illinois* and what the case does and does not hold. Some of the more recent law review articles and notes are

page 38 } footnoted below.*

Briefly stated, William Witherspoon was found guilty of murder by a jury in Illinois and sentenced to death by the same jury. The procedure followed was similar to that practiced in Virginia. (See f.n. 2 of Douglas' separate opinion listing Illinois and Virginia as having similar statutory

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**Univ. of Fla. Law Rev.*, Vol. XXI Fall '68, No. 2—page 262; *South Carolina Law Rev.*, Vol. 20, '68, No. 1, page 75; *Univ. of San Francisco Law Rev.*, Vol. III, Oct. '68, No. 1, page 75; *Wake Forest Intramural Law Rev.*, Vol. 5, No. 1, Jan. '69, page 183; *Calif. Law Rev.*, Vol. 56, Oct. '68, No. 5, page 1369 (Excellent); *Fordham Law Rev.*, Vol. XXXVII No. 1, Oct. '68, page 129; *Univ. of Pittsburgh Law Rev.*, Vol. 29, '67-'68, page 201.

provisions). Acting under the Illinois statute previously quoted herein, 47 veniremen were challenged for cause by the prosecution and excluded because they were opposed to the death penalty. Only one venireman who admitted to a religious or conscientious scruple against the infliction of the death penalty in a proper case was examined at any length. Those jurors so excluded were told to "step aside", and were replaced by other members of the panel. In a post-conviction proceeding before the United States Supreme Court (See f.n. 11 of opinion), the narrow holding of the *Witherspoon* case was as follows:

"Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

In furtherance of its holding, the Supreme Court said in footnote 9 of its opinion:

"Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that this is his position."

The evidence before me clearly does not meet these tests.

Witherspoon does not turn on the question of whether the prosecution or defense had sufficient peremptory challenges at the conclusion of the *voir dire* to remove jurors as to whom they objected. (See dissenting opinion).

page 39 } By way of *dicta,* the majority opinion reached two other conclusions which are important in the case at bar.

(1) *Witherspoon is retroactive in application:*

"We have considered the suggestion, advanced in an *amicus curiae* brief filed by 24 States on behalf of Illinois, that we should 'give prospective application only to any new constitutional ruling in this area', particularly since a dictum in an 1892 decision of this Court approved the practice of challenging for cause those jurors who expressed 'conscientious scruples in regard to the infliction of the death penalty for crime.' *Logan* v. *United States,* 144 U. S. 263, 298. But we think it clear, *Logan* notwithstanding, that the jury-selection standards employed here necessarily undermined 'the very integrity of . . . process' that decided the petitioner's fate, see

Linkletter v. *Walker,* 381 U. S. 618, 639, and we have concluded that neither the reliance of law enforcement officials, *cf. Tehan* v. *Shott,* 382 U.S. 406, 417; *Johnson* v. *New Jersey,* 384 U. S. 719, 731, nor the impact of a retroactive holding on the administration of justice, cf. *Stovall* v. *Denno,* 388 U.S. 293, 300, warrants a decision against the fully retroactive application of the holding we announce today." (f.n. 22). See also, *In re Anderson,* 73 Calif. 21, 447 P.2d 117 (1968), where California Supreme Court recognized retroactive effect of *Witherspoon* doctrine.

(2) *Witherspoon affects only sentence not guilt.*

"Nor, finally, does today's holding render invalid the *conviction,* as opposed to the *sentence,* in this or any other case." (F.n. 21).

Since the holding in *Witherspoon* has not been reversed or modified in subsequent opinions of that Court, there is little need here to make a detailed analysis of later pronouncements of that Court or of the several States. Decisions of state or lower federal courts refusing to apply the *Witherspoon* doctrine are of limited value because of their non-final status. (E.g. *People* v. *Speck,* 441 Ill. 2d 177, 242 N.E. 2d 208 (1968). Nevertheless, some comment should be made of some such cases cited in counsels' briefs.

Considering first the later cases of the Supreme Court itself; *Bumper* v. *State of North Carolina,* 391 U. S. 543 (1968), did not involve a death sentence and *Witherspoon*
page 40 } was therefore held inapplicable. *Boulden* v. *Holman,* U. S. , 89 S. Ct. 1138 (1969), involved an Alabama murder conviction resulting in a death penalty at the hands of a jury. Since the *Witherspoon* issue was not properly raised in the U. S. Supreme Court, no holding was announced on this point, although the Court did state—"It appears, therefore, that the sentence of death imposed upon the petitioner cannot constitutionally stand under *Witherspoon* v. *Illinois*". The case was remanded to an Alabama federal court for further proceedings. In this case a number of jurors were excluded for cause under an Alabama statute which provided—

"On the trial of any offense which may be punished capitally, . . . it is a good cause of challenge by the State that the person has a *fixed opinion* against capital . . . punishment." (Emphasis added).

This opinion would infer that jurors challenged for cause who stated they had a "fixed opinion" against capital pun-

ishment could not, without more, be automatically excluded. If anything, this is an extension rather than a retraction of the *Witherspoon* doctrine.

In *Williams* v. *Dutton,* 400 F. 2d 797 (5th Cir.-1968), the petitioner sought *habeas corpus* relief from a murder conviction resulting in the death penalty by a jury. The jurors were asked—"Are you conscientiouly opposed to capital punishment?" (400 F. 2d 797, at 805 f.n. 25). The case was reversed and returned to the district court for resentencing in accordance with the mandate of *Witherspoon. Sims* v. *Eyman,* 405 F 2d 439 (9th Cir.-1969) involved five jurors who fell within the *Witherspoon* exceptions.

In *Irving v. Breazeale, Supt.,* 400 F. 2d 231 (5th Cir.-1968), the Circuit Court of Appeals said that it did not have enough information before it as to what transpired at the *voir dire* to rule on the *Witherspoon* issue but remanded the case with suggestions that the state courts should first rule on this point.

page 41 } The State relies heavily in its brief upon *State* v. *Mathis,* 52 N.J. 238, 245 A 2d 20 (1968). The distinguishing feature is that the trial judge in the *Mathis* case questioned the jurors at length and determined that at least one juror should be excluded because he was *unable* to return a verdict of death. The following excerpt from the opinion indicates the extensiveness of the *voir dire* examination by that Court:

"The trial court itself questioned the veniremen on this topic. Each prospective juror was asked whether he held any religious, conscientious, or personal scruples or opinions in opposition to capital punishment which would render him unable to return a verdict carrying the death penalty. If the juror said he did, he was questioned further on the nature of his beliefs, and was finally confronted with the question whether his views were so firm and fixed that he was unable to return such a verdict in any case. A venireman who said he was thus unable to do so was excused for cause. So also, the trial court excused for cause a juror who was so firmly of the view that a murderer should die that he could not recommend life imprisonment. But a juror was not excused merely because he was opposed to capital punishment. Thus a juror (Williams), who admitted expressing doubts as to capital punishment, was permitted to serve because he said he was nonetheless able to return a death verdict. So another juror (Booth), was accepted despite an avowed reluctance to vote for such a verdict, and still another juror (Roehrich) who expressed an inclination toward life impris-

onment, although ultimately challenged peremptorily by the State, was not excused for 'cause'. Hence the jury was selected with the correct test in mind." (245 A.2d 20 at 25).

In its brief, the State argues that the Virginia Statute (19.1-210) does not violate *Witherspoon;* that the trial judge's testimony to the effect that it was his habit to ask jurors "if they had any religious or conscientious scruples against sentencing a person to death if the evidence justified such a conclusion" cured any defects in the procedure; that there was no competent evidence that any jurors were, in fact, excluded from the panel for cause; and that
page 42 } even if one or two jurors were excused this would make no difference since many jurors were excluded in *Witherspoon.* I will answer these arguments in the order stated.

On the first point, I am in general agreement with the State that the Virginia Statute, *as written,* is constitutional although a ruling on that issue is not necessary and is not made in this opinion. However, as counsel for the State recognized on page 13 of its brief, the question here is not the validity of the statute but the manner in which the statute was applied in this case. In footnote 21 of the *Witherspoon* opinion, the Court states:

"If the *voir dire* testimony in a given case indicates that venireman were excluded on any broader basis than this, the death sentence cannot be carried out *even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion".* Emphasis added).

As to the trial judge's question. I have already partially answered this argument. Even if we considered *only* this particular question and answer I doubt that it would meet the *Witherspoon* test. The question relates to penalty not guilt. The test then becomes in the words of the *Witherspoon* opinion: Did such jurors who were excused for cause "make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them"? Furthermore, this witness had no recollection of the questions asked in this particular case; answered other questions which somewhat qualified the answer here given; and, as I have said, may not have been competent to testify under Virginia Statute 19.1-268, which states in part that— "no judge . . . shall be competent to testify in any crimi-

nal or civil proceeding . . . as to any matter which shall have come before him in the course of his official duties . . .".

page 43 } The argument that there was no evidence that any jurors were, in fact, excluded for cause is not impressive since the *only* evidence is that one or two were so excused. In a civil proceeding, the moving party need only prove his case by a preponderance of the evidence. Evidence, not inherently incredible, which is uncontradicted must be accepted. *Epperson v. DeJarnette,* 164 Va. 482, 180 S.E. 412 (1935). If the State had wished to prove otherwise, it could have easily done so by calling the jury panel members as witnesses in its behalf. Furthermore, I know of no requirement that the petitioner must actually name the jurors excused.

Finally, as I read the *Witherspoon* decision and cases decided since then, it does not turn on the *number* of jurors excluded but rather on the *fact* of exclusion and reasons for same. *Witherspoon* said that a defendant in a capital case was constitutionally entitled to be tried by a representative cross-section of his peers. No weight was placed on the number of jurors excused and the holding of the Court was not so qualified. Even one juror could have changed the outcome of the case at bar. The California Supreme Court in a case decided since *Witherspoon, In Re Anderson, supra,* said that a defendant may be within the *Witherspoon* rule even though the prosecution had sufficient peremptory challenges to remove all jurors improperly excluded for cause and even though no objections were made at the trial for exclusion of scrupled jurors.

CONCLUSION

page 44 } While I do not feel that a 1968 United States Supreme Court decision affecting criminal procedure should be made retroactive to a 1956 decision in the Courts of Virginia, I am nevertheless bound by the clear language of the *Witherspoon* holding. I will, therefore, grant petitioner's writ of *habeas corpus* to the extent stated herein, set aside the death sentence and grant him a new trial on the issue of punishment. Under the *Witherspoon* ruling, his conviction of guilt is not affected and will therefore stand undisturbed. Petitioner will remain under present confinement pending further proceedings herein.

Since *Witherspoon* did not provide guidelines for a redetermination of sentence, and since there is no clear statutory authority for two-stage criminal trials in Virginia, I do not herein rule at this time on whether the Commonwealth can

retry the petitioner as to sentence alone or retry him on all issues. Counsel did not direct themselves to this issue in their briefs. However, the Commonwealth is directed to elect a course of action and proceed promptly with further proceedings herein all in accordance with the *Witherspoon* mandate and the opinion of this Court.

September 10, 1969

William W. Sweeney, Judge Designate.
William W. Sweeney

Deputy Clerk
Walter R. Carter, Jr.
Received September 10, 1969 And Filed

* * * * *

page 49 }

* * * * *

ORDER

This proceeding came on to be heard on March 12, 1969, upon a petition for a writ of *habeas corpus,* and the Answer of the Respondent, the petitioner appearing in person and by his counsel, Harvey S. Lutins, Esq., previously appointed by this Court, the Respondent appearing by Edward J. White, Assistant Attorney General.

Whereupon, after hearing the evidence and arguments of counsel and considering the briefs filed herein, this Court is of opinion for the reasons stated in its Findings of Fact and Conclusions of Law of September 10, 1969, that the sentence of death imposed upon the Petitioner in the Judgment Order of conviction of June 27, 1956, was invalid as a result of the ruling in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S. Ct. 1770 (1968); it is hereby Adjudged and Ordered that the Petitioner's sentence of death be set aside and vacated; that for reasons stated in this Court's opinion letter of December 5, 1969, that Petitioner remain in present confinement at the State Penitentiary until upon a proper order he be remanded and delivered to the custody of the City Sergeant of the City of Roanoke for a jury retrial on the issue of punishment, the conviction of June 27, 1956, not to be disturbed by this order. Nothing contained herein shall prevent judicial resentencing of Petitioner if he elects to waive the aforesaid jury trial.

page 50 } On or before January 15, 1970, the Commonwealth shall retry the issue of punishment as provided herein or discharge him from further custody under the 1956 Judgment Order of conviction of this Court in this case.

In accordance with Virginia Code Section 53-213, as amended, Petitioner shall be credited with time already served under the Judgment Order in this case in the event a non-capital sentence is imposed.

To all of which action of the Court the Petitioner and the Respondent, by counsel, duly object and except.

The Court doth further direct that all reasonable and proper costs and expense incurred by court-appointed counsel for the Petitioner be paid from appropriate State funds.

The Clerk of this Court shall forthwith certify a copy of this order, and the opinions dated September 10, 1969, and December 5, 1969, to the Petitioner, Petitioner's counsel, the Respondent and Edward J. White, Assistant Attorney General of Virginia.

Enter this 5th day of December, 1969.

William W. Sweeney
Judge Designate.

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* * * * *

Judge's Chambers

SIXTH JUDICIAL CIRCUIT OF VIRGINIA

December 5, 1969

Honorable Edward J. White,
Assistant Attorney General
Supreme Court Building
Richmond, Virginia 23219

Harvey S. Lutins, Esq.
Attorney at Law
Dominion Building
410 Elm Avenue, S. W.
Roanoke, Virginia 24002

In re: *Frank Jimmy Snider, Jr., Petitioner,* v. *J. D. Cox, Superintendent, Virginia State Penitentiary,* Respondent.

Gentlemen:

As you know, on September 10, 1969, I filed an eighteen page opinion in this matter in which I held that the ruling of the Supreme Court of the United States in *Witherspoon* v. *Illinois,* 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, (decided June 3, 1968), invalidated the death sentence imposed upon petitioner in the Hustings Court for the City of Roanoke in June, 1956. In that opinion, I stated that I did not personally agree that this 1968 ruling should have been made retroactive to a 1956 decision in our courts, but I recognized that I was bound by the clear language of the opinion. Following this opinion, counsel for both sides requested that I go farther and rule as to the procedure to be followed in petitioner's retrial. This I agreed to do and counsel have submitted briefs on the subject. In many ways, the corollary question is more difficult than the main one.

Under *Witherspoon,* only the death *sentence* was affected. The Supreme Court's opinion made it clear that the finding of guilt by the jury was not disturbed. On a retrial, there are three possible alternatives; judicial resentencing, jury trial as to punishment only, and jury retrial on all issues. In its brief, the Attorney General suggests judicial page 52 } resentencing, basing his reasoning on an analogy between our case and former Virginia cases involving defects in sentencing, void sentences, and excessive sentences. However, I agree with petitioner's counsel that we are not here concerned with correcting a *defective sentence* but rather with the problem of what to do when a sentence has been ruled illegal on *constitutional grounds.* In other words, we are herewith dealing with errors of constitutional proportions and not with mere defects or irregularities in sentencing procedure under State law.

The Attorney General relies heavily on the case of *Powell* v. *Commonwealth,* 182 Va. 327, 28 S.E. 2d 687 (1942). This case involved an error in procedure in which the accused apparently was not present in person at the time of his sentencing. When this issue was later raised, it was held that he could be resentenced by the Court (in his presence at a later time). It was said in that opinion that "the invalidity of the judgment does not affect the validity of the verdict". 182 Va. at 340. In the case before us, the *Witherspoon* ruling has not only invalidated the judgment as to punishment but also the verdict as to punishment, thereby necessitating some form of retrial procedure at least as to the issue of punishment.

The Attorney General also cites *Johnson* v. *Commonwealth,* 208 Va. 481, 158 S.E. 2d 725, (1968), to the effect that "no precedent exists in this Commonwealth for the employment of

a second jury (for retrial purposes), and the judicial creation of such a system has been condemned specifically in such case". I do not so interpret the *Johnson* case. That case merely held that the single-verdict procedure for determination of guilt and punishment in a unitary trial was not unconstitutional.

In his brief, counsel for petitioner expresses shock that the State seeks judicial resentencing and cites *Ellison* v. *State,* 432 S.W. 2d 955, (Texas, 1968), wherein the Court of Criminal Appeals of Texas in a somewhat similar situation ruled that a new trial on all issues was required. In the *Ellison* case, the defendant had been convicted of robbery in 1966 with punishment fixed at death by a jury. (See *Ellison v. State,* 419 S.W. 2d 849). The verdict was affirmed on appeal. In June, 1968, the Supreme Court of the United States ordered that the judgment be vacated and the case remanded for reconsideration in light of *Witherspoon v. Illinois.* Upon such rehearing, the Court determined that *Witherspoon* was applicable. The jury which assessed defendant's punishment at death had previously found him guilty of the
page 53 } offense in a separate hearing. The applicable Texas statutes made it mandatory that punishment be fixed by the *same* jury that fixed guilt, and provided that "the verdict shall not be complete until the jury has rendered a verdict both of the guilt or innocence of the defendant, and the amount of punishment when the jury finds the defendant guilty". Art. 37.07 V.A.C.C.P. The Texas statutes further provided that failure of the jury to fix a penalty automatically results in a mistrial and a retrial on all issues follows. Tex. C.C.P. Ann. Art. 37.07 (d) 1960. Thus, *Witherspoon,* notwithstanding, the Court was required by its own mandatory statutes to order a new trial in its entirety. In the case at bar, we do not have statutes similar to those in Texas and Texas did not have the practical problems in retrying a 1966 case as Virginia would have in retrying a 1956 case.

Because the *Witherspoon* ruling created a special situation affecting only death sentences, and because it has been only fairly recently decided, there is very little authority on the point in issue. Apparently, the states which have been faced with the problem have treated it in different ways, depending upon their state procedure. For instance, in Illinois, *Witherspoon,* himself, was resentenced by the Illinois Supreme Court to a term of 50 to 100 years in prison. However, the Court acted pursuant to Supreme Court Rule 615 (4), which authorized it to reduce sentences when appropriate. *People v. Witherspoon,* 39387 Adv. 68, (Illinois 1968).

California has a bifurcate trial structure for capital offenses. Normally the same jury will decide both guilt and penalty.

unless, for good cause shown the court discharges that jury in which case a new jury shall . . . determine the issue of penalty.

Cal. Pen Code §190.1 (West 1969).

Because a California penalty trial is governed by different rules of evidence, and hears testimony not necessarily offered in the initial trial, reversals as to penalty alone are not uncommon, and in fact had occurred prior to *Witherspoon. See, e.g., People* v. *Love,* 53 Cal. 2d 843, 350 P. 2d 705 (1960). And the lack of statutory command that the same jury decide both guilt and sentence removed any doubt as to what specific issues shall be retried on remand. Comment, *The California Penalty Trial,* 52 Cal. L. Rev. 386 page 54 } (1964).

In North Carolina, *N. C. Gen. Stat. Ann.* §14-17 (1951) stipulates death as the penalty for murder unless the jury recommends mercy. Defendant had been found guilty under the statute; no such recommendation had been added to the verdict. The majority in *State* v. *Spence,* 274 N. C. 536, 164 S.E. 2d 593 (1968), felt that, were they to affirm as to guilt alone, they would be required, in absence of a mercy recommendation, to uphold an unconstitutional sentence of death. Thus, they reversed on all issues and ordered a new trial. A minority of the court argued that the case should be remanded for trial before a jury whose sole function would be to weigh the merits of adding a mercy recommendation to the original guilty finding.

The Mississippi statute read in pertinent part that—

Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict. . . .

Miss. Code Ann. §2217 (1942). The majority of the Mississippi Court ruled that by authority of *Witherspoon* the issues of guilt and penalty were constitutionally severable under this statute and the case was remanded for a penalty trial. *Rouse* v. *State,* 222 So. 2d 145 (Miss. 1969).

Ga. Code Ann. §26-1302 (1963) makes rape punishable by death. The jury may, however, recommend mercy, whereupon it is authorized alternatively to impose a sentence either

of 1 to 20 years, or life, in prison. Defendant had been convicted of rape; the jury, improperly constituted under *Witherspoon,* failed to recommend mercy. The statute does not clearly require that verdict and sentencing be the function of the same jury. The Georgia court, acting pursuant to *Ga. Code Ann.* §6-610 (1963) which provides that it may

> award such order and direction to the cause in the court below as may be consistent with the law and justice of the case.

affirmed the guilty verdict and instructed the trial court to empanel a jury for the sole purpose of asking if the defendant should be recommended to mercy. *Miller* v. *State,* page 55 } 224 Ga. 627, 163 S.E. 2d 730 (1968). See also, *Massey* v. *Smith,* 224 Ga. 721, 164 S.E. 2d 786 (1968), in which the Georgia Supreme Court remanded for jury trial on penalty alone.

The *Witherspoon* opinion made it crystal clear that the ruling did not affect *conviction* but only the *sentence* in *death* cases.

> "...Nor, finally, does today's holding render invalid the *conviction,* as opposed to the *sentence,* in this or any other case...." (f. n. 21).

In his dissenting opinion, Justice Douglas disagreed and said that new trials on all issues should be awarded in *Witherspoon* cases. In effect, counsel for petitioner urges that I adopt a procedure coinciding with Justice Douglas' conclusions, since our State procedure is not geared to bifurcated or two-stage trials. Having so limited its holding, the Court did not then venture to suggest means consistent with due process by which petitioner could later be resentenced; nor did the Court consider this problem in later applications of the *Witherspoon* principle. *See e.g. Spence* v. *North Carolina,* 392 U.S. 649 (1968).

It is true that we do not have statutory or case authority for bifurcated trials in felonies in Virginia although we do have a statute authorizing a jury in certain misdemeanor cases to first determine the issue of guilt and then, after evidence of prior traffic record has been introduced, to decide the punishment in a separate hearing. Code §19.1-186.2. Also, in civil cases, the State Supreme Court has remanded cases for jury trials before a different jury on the issue of damages alone or other specific issues. In chancery cases, the Court has the power to empanel as "issue out of chancery" to decide specific issues of fact.

While the Virginia statutes have always been interpreted to provide for a unitary trial in a criminal case with the same jury fixing both guilt and punishment, the statutes themselves are somewhat sketchy. For example,

Va. Code Section 19.1-291 provides:

"The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law." See also Code Section 19.1-292.

Virginia criminal procedure statutes have not page 56 } provided for the eventuality produced by the *Witherspoon* decision. We are treading on new ground. Neither the Virginia Legislature nor the Virginia Courts forsaw the likelihood of a United States Supreme Court reversal as to sentence only. To some extent, the question then becomes one of whether a judge-made rule should be fashioned to meet the problem where *Witherspoon* has made it difficult for Virginia to follow its traditional procedure. While I am against judge-made laws that contravene clear statutory procedures, I am not as shocked by the idea as is petitioner's counsel where the Supreme Court of the United States directs us to proceed in a manner that does not conform to our statutes in a special and limited class of cases. Our statutes as well as our case law are subject to Supreme Court modification.

A procedural dilemma is presented by the *Witherspoon* decision. Shall we extend the Supreme Court's holding and set aside the conviction of guilt in this case even though it has been affirmed by our State Supreme Court and some Federal courts? In ordering a retrial of a case which is fourteen years old, are we not granting petitioner a chance of acquittal to which he is not constitutionally entitled and ignoring the effect of the passage of this much time on chances of retrying a rape case? The Supreme Court has indicated that due process would be met on a retrial of sentence alone. In effect, would we not be actually violating the intent of the holding in *Witherspoon* by voiding the conviction as well as the sentence? Since Virginia law does not clearly provide for means and methods to procedurally accommodate the *Witherspoon* holding, can Virginia courts fashion a remedy based upon this special class of case, such remedy to be limited solely to reversals under *Witherspoon?*

I strongly feel that the Virginia statute governing seating of jurors in a capital case (§19.1-210) is constitutional as written and non-violative of *Witherspoon.* Thus, the only cases in which the current question will arise are those death

cases where appeals are still pending and where the application of the above statute violated *Witherspoon.* Recognizing the difficulties in following the mandate of *Witherspoon* and attempting to reconcile Virginia criminal procedure, I feel that retrial as to the issue of punishment alone leaving the issue of guilt undisturbed as directed by *Witherspoon* is the most practical solution and one which affords petitioner constitutional due process. Of course, this does not mean that petitioner cannot elect to have the court resentence him; it merely gives him the right, if he so desires, to a jury trial on the issue of punishment. At such trial, petitioner would be entitled to all constitutional rights afforded a page 57 } defendant in a criminal case. Of necessity, evidence as to the facts of the case as well as evidence bearing on punishment would have to be presented. A practical solution would be for counsel to stipulate the admissibility of the transcript of the 1956 trial as it pertains to evidence.

As pointed out, the states which have passed on this troublesome issue have split in their views. The Supreme Courts of some states have adopted the view taken herein. Other states have decided differently but, to my knowledge, not in cases as old as this one. At least one of the states which has decided *contra* to this opinion has implied that its decision would not be the same if the case before it was final and not in the appeal state. See *State* v. *Turner,* 253 La. 763, 221 So. 2d 67 (1969).

This case cries for judicial finality. Under my ruling, I cannot accept either of the proposed orders of the parties to this litigation. Therefore, I have today prepared and signed my own order showing exceptions and objections on behalf of both sides. My duties as Judge Designate are terminated as I hope and pray this case will be also.

Sincerely,

William W. Sweeney, Judge Designate
Hustings Court for the City of Roanoke.

* * * * *

Received
December 8, 1969
And Filed
Walker R. Carter, Jr., Clerk

page 61 }

* * * * *

NOTICE OF APPEAL and ASSIGNMENTS OF ERROR

TO: The Honorable W. R. Carter, Jr., Clerk of Said Court:

Notice is hereby given that Frank Jimmy Snider, Jr. appeals from a final judgment of the Hustings Court for the City of Roanoke, Virginia, entered on the 5th day of December, 1969, and will apply to the Supreme Court of Appeals of Virginia for a writ of error to said judgment.

In support of his petition for a writ of error, the following assignment of error will be relied upon:

The Court erred in failing and refusing to set aside *in toto* the judgment order of conviction of June 27, 1956, and award a new trial upon the issue of guilt or innocence and punishment.

Respectfully submitted:

Frank Jimmy Snider, Jr.
Harvey S. Lutins

By Counsel

Received
Jan 30 1970
And Filed
Mary K. Goodwin, Deputy Clerk

* * * * *

page 1 }

* * * * *

Roanoke, Virginia

March 12, 1969

APPEARANCES:

Harvey S. Lutins, Esq., of Counsel for the Petitioner; and Edward J. White, Esq., Assistant Attorney General, of Counsel for the Respondent.

Stenographic report of all the testimony, together with the

motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and other incidents of the Hearing on a Petition for Writ of *Habeas Corpus Ad Subjiciendum* in the matter of *Frank Jimmy Snyder, Jr. versus C. C. Peyton, Superintendent,* heard at Roanoke, Virginia, on March 12, 1969, before Honorable William W. Sweeney, Judge Designate, in the Hustings Court of the City of Roanoke, Virginia.

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The Court: May I ask this question for the record: Is it agreed by both Counsel that there is no official record of the preliminary Proceedings of the original trial?

Mr. Lutins: According to my investigation there is none. Your Honor, I asked Mr. Carter to prepare just for the purpose of the record certified copies of each day of the trial, June 25, 26 and 27 of 1956. Of course the Court can take knowledge of its own Orders, but I thought for the sake of the record it would be best to do so. I believe he has and that we can now present a certified copy for each day.

The Court: All right, sir. That will be fine. Any other stipulations?

Mr. White: No, sir. Your Honor, it was my understanding from Mr. Spangler, the original Court Reporter, that the notes of the examination of the jurors were taken, but were destroyed at some later period in time. And to my knowledge they are not in existence today.

The Court: Well, was the case itself recorded?

page 9 } Mr. White: Yes, sir, the case itself was reported and a transcript is part of the record of the Commonwealth against Snyder. The transcript of course beginning and stating "That a jury was duly impaneled and sworn", and that is the only reference it has to the jury.

The Court: Thank you, Mr. White.

The Court: All right. The Court's present plan is to proceed until approximately one o' clock, at that time to recess probably for a half-hour for lunch, and then to go on to four-thirty. I hope we will be through then by four-thirty. If we are not, then there is a possibility that this case will be continued until the day after tomorrow at ten o'clock. That is for the benefit of all present. All right. Gentlemen of Counsel,

you may proceed, and I would like a brief opening statement to focus the issues that we have here.

Mr. Lutins: If Your Honor please, our issue mainly is the Witherspoon Case, that the accused was denied a fair and impartial trial unconstitutionally by virtue of the impaneling of juries and the *voir dire,* and the questions propounded to the veniremen by the Court and the Prosecuting Attorney.

Further we are raising the issues which do not call for the evidentiary production of evidentiary matters
page 10 } as to the death penalty being cruel and unusual; the lack of the bifurcation of the trial—the two-stage trial—that we do not have in Virginia; that being unconstitutional and the two other points which are raised which do not call for any evidence.

Now basically, if Your Honor please, it is the Witherspoon Case that we are here concerned with.

The Court: All right. Thank you, Mr. Lutins. I think at this time before we hear from you, Mr. White, it might be a good time to go ahead and exclude the witnesses at this point. So would you take charge, sir, and have all the witnesses—if you want them called, it might be a good idea to have them called first, and then excluded until they are called to testify.

Mr. Kermit Allman (City Sergeant): All witnesses who have been subpoenaed, as far as space will permit, come into this room here, please.

(All subpoenaed witnesses were then excluded from the Court Room and taken into the Commonwealth's Attorney's office.)

The Court: All right. Now at this point, are there any witnesses in the Court Room at this time who were subpoenaed for this trial; or is there anyone in the
page 11 } Court Room who expects to testify in connection with this trial?

(There was no response.)

There being none, you may proceed with your opening statement, Mr. White.

Mr. White: Your Honor, to begin with, it is the position of the Respondent in this case that we would begin by presuming that the conviction and trial in 1956 were valid. I think we have a presumption that runs in our favor to that nature that any conviction and trial was constitutionally valid.

The Statute in Virginia that is in question, Section 19.1-185, dealing with the exclusion of jurors states: "That a person whose opinions are such as to prevent his convicting anyone of an offense punishable with death, shall not be allowed to serve as a juror."

It will be our position that the Witherspoon Decision specifically upheld this Statute. The Witherspoon Decision in Footnote 21, Page 522, states "that a juror can be excluded, whose attitude toward the death penalty would prevent him from making an impartial decision to the Defendant's guilt."

Regardless of the Respondent's opinion of the Witherspoon Decision—and I would hesitate to criticize it since Mr. Justice White did it so ably in the opinion itself—we

page 12 } feel that we will show that the questions asked the jurors in the Case were not the sort of questions that were precluded by Witherspoon, and would ask the Court to keep in mind that the Witherspoon Decision does not say that a juror who voices objections to capital punishment in any and all cases may not be excluded. He may be excluded, or if a juror has an objection to imposing the death penalty in the case before him, he may be excluded.

He may be excluded under the Virginia Statute and under Witherspoon if he cannot arrive at a decision to the guilt. We feel that those are the issues today as to precisely what questions were asked the jurors, and prospective jurors, in the original trial.

The Court: Thank you. Now, Mr. White, could you tell me then what the official citation of the Witherspoon Case is, for the record?

Mr. White: Yes, sir. It is 391 U.S. 510.

The Court: I believe it was decided in September. When was it decided?

Mr. White: I believe June of 1968, sir.

The Court: And one further question, Mr. White. What was the exact section on exclusion of jurors for feelings about the death penalty, as of 1956?

page 13 } Mr. White: I believe I cited 19.1-185. I think I made a mistake. I think the Statute, at that time, was 19-1-185 and if you find me in error on that, I will correct it; but since then, it has been recodified and I do not know the present Statute number. It's simply 19.1—

The Court: And that has been changed?

Mr. White: No, sir. The Statute has remained unchanged for many years.

The Court: Do you happen to know the derivation of that Statute, as to whether it states what law it was based upon originally?

Mr. White: No, sir, I do not. I know that the Virginia Statute is somewhat different than the Statutes of the other states that I have run across in my research. It is very different from the Illinois Statute that was involved in Witherspoon, which, of course, that Statute has since been repealed in Illinois and changed materially.

The Illinois Statute spoke in general terms against people sitting on the jury who had scruples against imposing the death penalty. The Virginia Statute narrows the issue to guilt. Of course, we have a somewhat different system as to this in Virginia, as to the jury sentencing. I do
page 14 } not know the precise derivation of the Virginia Statute, but I will be glad to include that in my brief.

The Court: Thank you, Mr. White. First witness for the Petitioner.

Mr. Lutins: Mr. Ledgar D. Martin.

The Court: Gentlemen, of course—while we are getting this Witness, I would like, if possible, to have each witness excused after he has testified unless you need him further. That way we can dispose of a number of witnesses.

Mr. White: We will agree to that. Yes, sir.

MR. LEDGAR D. MARTIN, called as a witness in behalf of the Petitioner, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lutins:

Q. State your name—your full name, age and occupation.

A. Ledgar D. Martin. I'm an Attorney at Law.

Q. Where do you practice, Mr. Martin?

A. In Gadsden, Alabama.

Q. Were you retained as one of the attorneys to defend Frank Jimmy Snyder for the crime of statutory rape in June of 1956?

A. I was, sir.

page 15 } Q. Was anyone else retained, together with yourself?

A. Yes; Mr. Houchins.

Q. Mr. Houchins?

A. Yes, sir.

Q. Was he of the Roanoke Bar?

A. Yes, sir.

Ledgar D. Martin

Q. Do you know Mr. Houchins' full name? Do you recall his name, sir?

A. No, sir, I'm sorry; I don't. I believe he is now deceased.

Q. Yes, sir. When and where was the trial held, Mr. Martin?

A. Here in this Court Room, City of Roanoke.

Q. When was that, sir?

A. Let's see, June 25, 26 and 27 of 1956, I believe.

Q. Who presided at the trial?

A. Judge Kuyk.

Q. Who were prosecuting, sir?

A. Let's see; Mr. Cuddy and Mr. Crush.

Q. And, of course, you and Mr. Houchins defended?

A. Yes, sir.

Q. Now, Mr. Martin, did the Prosecution inform the Court it would seek the death penalty, and if so, when?

A. Yes, sir. They, the Prosecution, did inform the Court they were seeking the death penalty. That was

page 16 } prior to the qualification of the jury.

Q. Now what question, or questions, were asked the jurors as to their opinion on capital punishment?

A. The Court asked the jurors—I believe, they had about thirty of them at the time—asked them if they were opposed to capital punishment; if any of them were opposed to capital punishment.

Q. All right, sir. Now, did any of the jurors indicate that they were opposed?

A. Yes, sir.

Q. What further questions were asked when the juror, or jurors, indicated that he, or they, were opposed?

A. As to the capital punishment?

Q. Yes, sir.

A. I don't recall any further qualifying questions as to capital punishment. They were qualified generally, but that is the only question I recall that was asked as to the capital punishment.

Q. Well, what did the Court ask them to do after they indicated they were against it?

A. Well, two of the jurors raised their hand, and I'm positive it was Mr. Cuddy that asked them to stand aside.

Q. Did they stand aside, sir?

A. Yes, sir.

Q. Can you describe these two jurors? Of

page 17 } course, I know it's been a long time, sir.

A. One of the jurors I cannot describe; I don't recall anything about him. The other one I can describe gen-

erally in that he was a slender man, and I would say approximately at that time forty years of age, and he had a dark complexion and dark hair. And the only reason I recall him is that he was personally acquainted with Mr. Houchins; he belonged to some civic club that Mr. Houchins belonged to. He knew him, and had told me beforehand that he would like to have him on the jury. That's the only reason I recall anything about him.

Q. Can you describe the other man?

A. No, sir. The only thing that I remember about the other man is he was more stocky and older, and that's all I remember about him.

Q. Now, Mr. Martin, do you recall whether or not the Court directed the Sergeant to call the first twenty of those veniremen who had been called to Court to come forward and be examined on *voir dire?*

A. I recall that he called a number of them to come forward to be qualified; but I don't know whether it was twenty or thirty. It must have been twenty because each side was to have four strikes, as I remember.

Q. For a jury of twelve?

A. Yes, sir.

Q. Do you recall if any of the veniremen sat in
page 18 } the back during the *voir dire?*

A. Yes, sir.

Q. And the Court was asking those who had been called before on *voir dire,* and those others were not being asked the questions?

A. Not at that time; no, sir.

Q. Now, when these two jurors were told to stand aside, what did the Court do, if anything, in order to fill the panel?

A. Asked two more to take their places.

Q. All right, sir. What questions were asked—were these twenty or whatever number it was?

A. Well, they were asked general qualifying questions as to what they had read, or if what they had read about this case in the papers, or heard through the different news media, would cause them to become prejudiced in any way; and they were qualified as to if they knew any of the parties involved, and the attorneys, or the victim, or anything of that nature. And they were just general qualifying questions. But the only question he asked them relative to capital punishment was "Whether or not they were opposed to it" and none of the ones in the back at that time, or the ones being qualified were opposed to it.

Ledgar D. Martin

Q. Was there ever any question asked by the Court to explore whether or not these jurors could disregard their personal feelings and fix the death penalty? Any ex-
page 19 } ploration at all made once they indicated they were opposed to the death penalty?

A. None that I recall. No, sir.

Q. Was any question asked the jurors to disregard personal feelings and still find the accused guilty?

A. No, sir.

Q. And the jurors who opposed capital punishment were just summarily discharged in a perfunctory manner?

A. That's right. They were told to stand aside.

Mr. Lutins: Your witness.

CROSS EXAMINATION

By Mr. White:

Q. Mr. Martin, you say that the Court asked them if they had any feeling about the death penalty. Do you recall the exact wording the Court used in this—when this was said?

A. No, sir. I cannot recall the exact wording as this was the first time I had ever been involved in a case in Virginia. It was the same qualifying questions, however, that we ask in Alabama—that we asked in Alabama at that time that were asked the jurors. And I remember it for that reason, that they were asked "If they were opposed to capital punishment" and in just those exact words I can't swear, but they were asked if they were opposed to capital punishment ex-
actly as we did in Alabama at that time. And I
page 20 } recall remembering at the time that that was the same way that we did it there in Alabama.

Q. Now, are you sure he didn't say "Are you opposed to capital punishment in this case before you"?

A. No, sir. I am not sure that he didn't say that.

Q. Now, you say Mr. Cuddy was the one who was the man that told the jurors to stand aside?

A. Yes, sir.

Q. When these two jurors were asked to stand aside, did you object to that?

A. No, sir. As I just told you, that is exactly the way we did it in Alabama.

Q. Now, were these—were the jurors who were chosen to fill the two vacancies, was this Judge Kuyk again asking the questions?

A. He just asked those two that question. Yes, sir.

Q. And you are not sure in that instance either whether he said "Are you opposed to capital punishment in this case" or "Are you opposed to capital punishment in general"?

A. I'm not certain. As I recall it, he asked "If they were opposed to capital punishment" period.

Mr. White: Period. No further questions.

The Court: Thank you, sir. Stand aside. Call the next witness.

Mr. Lutins: Your Honor, I would like for this Witness to just remain, not in the Court Room, but in the
page 21 } Court House.

The Court: That is satisfactory.

Mr. Lutins: Just for awhile. Mr. Martin, you just hang around for awhile, please, but you will have to go outside though.

The Court: Of course you understand, Mr. Martin, that you cannot discuss the case with anyone and that applies to you also.

Mr. Martin: Yes, sir.

The Court: All right. Next witness.

The Witness Stands Aside

MR. FRANK P. HANCOCK, JR., called as a witness in behalf of the Petitioner, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lutins:

Q. State your name, please, sir.

A. Frank P. Hancock, Jr.

Q. Mr. Hancock, by whom are you employed?

A. The Times-World Corporation with the Roanoke World News.

Q. Did you attend the trial of Frank Jimmy Snyder here in Roanoke in the Hustings Court on June the 25th, 1956?

A. Yes, sir.

page 22 } Q. In what capacity?

A. As a reporter for the newspaper.

Q. Were you present during the examination of jurors?

A. Yes, sir.

Q. Now, Mr. Hancock, do you recall whether or not any questions were asked with reference to capital punishment?

Frank P. Hancock, Jr.

If so, what was the question, or questions, and by whom were they asked?

A. Well, it was—let me preface by saying this was thirteen years ago, but to the best of my knowledge the veniremen, or the panel of jurors, were brought in and they were asked if they, as a group, I think, not individually, if they had any conscientious objections or religious scruples against capital punishment.

And in referring to the story I wrote on that day (indicating), one man said that he was, or that he had some objections or religious convictions.

Q. Was there a challenge made to this man?

A. Not to my recollection; no, sir.

Q. What did they do—what did they tell him after he indicated that he was opposed?

A. They said he was excused.

Q. Do you recall who told him that?

A. No, sir. I couldn't really say definitely who the person was that told him.

page 23 } Q. Yes, sir. Did the Court explore whether or not this juror could disregard his personal feelings and still find the death penalty, if the case warranted it?

A. No, sir. As I recall, and like I said I have to rely partially on the story that I wrote on that day because I covered quite a few trials.

(Witness produced papers from pocket.)

Q. Well, what did your story show?

A. My story shows that Mr. Snyder "showed an active interest as jurors were chosen from forty called, and the jury selection moved quickly."

Q. I didn't understand that. What was it?

A. "The jury selection moved quickly."

Q. Right; I see.

A. "One man disqualified himself when asked if he had any conscientious objections or religious scruples against capital punishment."

Q. And that juror was told just to stand aside?

A. That's right. Just to stand aside.

Mr. Lutins: All right. Your witness.

Frank P. Hancock, Jr.

CROSS EXAMINATION

By Mr. White:

Q. Mr. Hancock, this article you just quoted from appeared in the Roanoke World News on June 25, page 24 } 1956, did it not?

A. I believe that was the date; yes, sir.

Q. Did you write that article from memory, or did you write it from notes that you had taken?

A. I wrote it from notes which I had taken.

Q. Do you have those notes in your possession now?

A. No, sir, I do not.

Q. Your testimony today is simply on your memory alone; is that correct?

A. It is on memory, plus the article that I wrote on the day of the trial.

Q. Now, could you state for sure that the jurors were not asked the question whether they had any conscientious objections or religious scruples against the death penalty in this case, or whether they were asked if they had objections in general to capital punishment?

A. It is my recollection that it was a general question.

Q. The Court said the words "in general"?

A. I don't think—you say the Court said that?

Q. Did the Court use the words "in general"?

A. No, sir. I didn't mean that. I meant that they asked the prospective jurors as a group in general if they had any objections.

Q. Did the Court ask the jurors as a group, or individually, whether they could conscientiously arrive at page 25 } a decision as to the guilt of the Defendant?

A. (Witness pondered) I'm afraid I couldn't answer that.

Q. Are you positive the Court used the exact words "conscientious objections or religious scruples"?

A. I'm basing that on having been a newspaperman for about twenty-two years—and I'm basing the fact that I used those words in my story and that those were the words used by whoever was questioning the jurors.

Q. Did the Court use the words "capital punishment" at any time?

A. I don't recall that it was used.

Q. You testified to the best of your knowledge the Court asked if they had conscientious objections or religious scruples—

Frank P. Hancock, Jr.

A. Or religious scruples. Right.

Q. —against the death penalty or against capital punishment?

A. Well, "against capital punishment"; yes, sir.

Q. And you don't know for sure whether the Court said "capital punishment in this case" or "capital punishment in general" then, do you?

A. I think it was in general.

Mr. White: "In general." No further questions, sir.

page 26 } The Court: Stand aside, please. Now this witness may be excused, so far as this Court is concerned.

Mr. Lutins: He may be excused, sir.

Mr. White: Yes, sir. I have no objections.

The Court: Thank you, Mr. Hancock. You are excused. Do not discuss the case with anyone until it is all over.

Call the next witness.

The Witness Stands Aside

Mr. Lutins: Judge, this Witness is a juror, a former venireman.

The Court: Well, the Sergeant merely mentioned to me that the man perhaps was ill or old, or in any event would like to leave. And if he is to be called, I merely suggest that he be called early in the Proceedings. That is up to you gentlemen.

Mr. Lutins: Well, I'm just wondering if he can be called as the Court's witness inasmuch as he was a member of the venire. I would be glad to have him go on so he can go out, but the procedure bothers me.

The Court: My present plan is to only call Judge Kuyk as the Court's witness, but to let Counsel call the other witnesses as they see fit; and that the rules which apply to

page 27 } ordinary witnesses as to examination and cross examination would apply as to all witnesses except the Judge, if he testifies. And as to him, both sides would have the right of cross examination.

Mr. Lutins: Well, may I confer with Counsel?

The Court: Yes, sir.

(Mr. Lutins and Mr. White conferred out of the hearing of all parties.)

The Court: Now, if you gentlemen of Counsel have any serious feelings about that rule, I will be glad to hear you on the point; but that is my present thinking as to the way it should be handled.

Mr. Lutins: Well, actually as far as this witness is concerned, I have no desire to call him as my witness.

The Court: I see. All right, sir, I understand.

Mr. Lutins: But still again, if he doesn't feel—well, if the Court would.

The Court: In this particular case, the Court will exercise its discretion and call this witness and let him be the Court's witness, and then allow each side the right of cross examination. All right. Call Mr. Giles.

page 28 } MR. CHARLES S. GILES, called as a witness by the Court, being duly sworn, testified as follows:

DIRECT EXAMINATION

By the Court:

Q. You are Mr. Charles S. Giles, sir?

A. Yes, sir.

Q. Mr. Giles, were you called as a juror in the case of *Commonwealth of Virginia* versus *Frank Jimmy Snyder, Jr.* in this Court in 1956?

A. To my knowledge I was not. I have no recollection of it.

The Court: Counsel may cross examine.

Mr. Lutins: No questions.

Mr. White: No questions, Your Honor.

The Court: Thank you, Mr. Giles. You are excused and you may leave.

Mr. Giles: Thank you, Your Honor.

The Witness Stands Aside

The Court: Next Witness.

MR. MELVILLE CARICO, called as a witness in behalf of the Petitioner, being duly sworn, testified as follows:

page 29 } DIRECT EXAMINATION

By Mr. Lutins:

Q. State your full name, sir.

Melville Carico

A. Melville Carico.

Q. By whom are you employed?

A. Times-World Corporation. I work for the Roanoke Times.

Q. And in what capacity, sir?

A. Reporter.

Q. Did you attend the trial of Frank Jimmy Snyder here in Roanoke on June 25, 1956?

A. Yes, sir.

Q. In what capacity?

A. As a reporter.

Q. Were you present, Mr. Carico, during the examination of the jurors?

A. Yes, sir.

Q. Was there any question or questions asked by the Court with reference to capital punishment?

A. Yes, sir. As I recall it the customary question at that time was asked—

Mr. White: I will have to object to Mr. Carico testifying as to the customary question. That is not the question he was asked by Counsel.

The Witness: I'm sorry, sir.

page 30 } The Court: Well, tell us what you recall. First tell us what you recall as to the question, and as to whether it was a customary question might well be applicable and be admissible; but I think first he should tell us what he actually recalls, if any, about what was asked.

The Witness: The jurors were asked were they opposed to capital punishment on moral or conscientious grounds. I forget the exact phraseology.

By Mr. Lutins:

Q. All right, sir. Now did the Court—well, did anyone indicate that they were so opposed?

A. As I remember, sir, and as I remember having to rely on my memory, of course, that there was one juror.

Q. Could there have been more than one?

A. There could have been. Of course, I don't have any of my notes on it. It was not any, I guess, you'd call it objection to it. If my memory serves me right, he was in one of those chairs (indicating) there, it seems to me.

Q. You mean the Court—excuse me.

A. The one right here (indicating), the second one on the front row.

Q. The Court called a certain number of jurors of the total and asked the question about capital punishment?

A. Yes, sir, in a series of questions.

page 31 } Q. I see. Now what further questions were asked this juror, or if there were more, the other jurors, when they indicated their opposition to capital punishment?

A. If there were any, I don't recall them. It's been a long time.

Q. Yes, sir. What was your recollection as to what was done by the Court after they indicated opposition to the capital punishment?

A. He was excused.

Mr. Lutins: I see. All right, sir. Your witness.

CROSS EXAMINATION

By Mr. White:

Q. Mr. Carico, you said you forgot the exact phrase that the Court used, and your testimony is that the Court asked the question whether they were opposed to capital punishment on moral or conscientious grounds. I gather that was your general recollection and that is not the exact phrase the Court used; is that correct?

A. I'd rather put it that way because I don't have my notes. That was the tenor of the question.

Q. And could you state positively that the tenor of the question was not "are you opposed to capital punishment in the case before you"?

A. I don't believe it was asked that way, sir,

page 32 } but I hate to testify to that under oath because I don't recall it that way.

Mr. White : No further questions.

By the Court:

Q. Let me ask a question or two, please, sir, Mr. Carico. You started to say that Judge Kuyk asked the customary question as to death, or as to the death penalty, did you not?

A. Yes, sir, I did.

Q. Now, had you covered other capital cases in this Court prior to this time as a reporter?

A. I cannot say that I cannot recall definitely whether they were in this Court, but they have been in other parts of the

State. I recall one at Salem, and I recall one at Lexington, and there may have been others.

Q. Well, had you covered other cases in which Judge Kuyk was the Judge, and in which capital punishment was involved?

A. I may have, sir; but I don't recall them.

Q. What did you mean by saying "that the question asked was a customary question"?

A. It seemed to be the customary question that the judges of the courts that I have happened to have been in asked in such cases. It's—I am a little bit embarrassed because it's been such a long time; but it seemed to me, as I heard it, that it was the routine question in impaneling juries in similar capital cases.

page 33 } The Court: All right, sir. Any questions on that, gentlemen?

Mr. White: No, sir.

The Court: Thank you, Mr. Carico.

The Witness: I wonder, sir, if I might be excused. I would like to go back to Richmond if I could.

The Court: You may, sir. Thank you for coming.

The Witness Stands Aside

MR. ARTHUR B. CRUSH, JR., called as a witness in behalf of the Petitioner, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lutins:

Q. State your full name and occupation, please, sir.

A. Arthur B. Crush, Jr; I am an Attorney-at-Law.

Q. Mr. Crush, did you attend the trial of Frank Jimmy Snyder in June of 1956 in the Hustings Court?

A. I did.

Q. In what capacity, sir?

A. As Assistant Commonwealth's Attorney.

Q. You were Assistant Prosecutor?

A. Yes, sir.

Q. All right, sir. Do you have with reference to
page 34 } this particular case any recollection of the *voir dire?*

A. As far as this particular case, I don't have any recollection—no specific facts, no.

Arthur B. Crush, Jr.

Q. Mr. Crush, what was the general custom in the court as to questions pertaining to capital punishment?

A. When the veniremen were impaneled they were asked if any of them were opposed to capital punishment; and, if they answered in the affirmative, they were asked to stand aside.

Q. Was there any procedure engaged in by the Court where he inquired or delved into whether or not any one or more jurors could disregard their own personal feelings?

A. Oh, yes. They were asked whether or not they could give a fair trial.

Q. I see; but as to the death penalty, there wasn't any additional inquiries?

A. There was no additional inquiry.

Mr. Lutins: Your witness.

CROSS EXAMINATION

By Mr. White:

Q. Mr. Crush, in the Snyder case do you recall a juror standing aside or being asked to stand aside?

A. I have no recollection personally as to whether any stood aside or did, or did not.

Q. What was the custom as to who would ask the juror to stand aside? Would the Judge have done it or
page 35 } would the Commonwealth's Attorney?

A. The Judge. That is my recollection.

Q. Did the Commonwealth's Attorney ever ask the juror to stand aside?

A. I can't say at that time that the Commonwealth's Attorney did or did not.

Q. Now what you have testified as to the general custom was to ask the jurors if they were opposed to capital punishment. Would this be asked for the entire panel that was drawn?

A. They were asked one time. They were not asked individually.

Q. Are you sure they were not asked the question "if your opposition to capital punishment would prevent you from convicting a person of an offense punishable by death"?

A. I don't recall any such question. I can't say that they were or were not asked; but if they were, I have no recollection of it.

Q. You were, of course, as Assistant Commonwealth's Attorney, at the time familiar with the Statute that governed this Proceeding of the trial?

Arthur B. Crush, Jr.

A. Yes, sir, I was.

Q. And to the best of your recollection did your office strive to follow the wording of the Statute?

A. We followed it just as closely as we could.

page 36 } Mr. Lutins: Well, that's a little begging the question. If his office tried to follow the Statute,—of course his office tries to follow, I assume, or did at that time all Statutes; but the question is "What was done customarily by the Court on *voir dire* as to capital punishment" and not whether or not his office strives to follow the Statutes as promulgated.

The Court: As related to this particular case, the question may have some relevance as a cross examination question. Objection overruled.

Mr. Lutins: Exception.

By Mr. White:

Q. In other words, you were guided in your efforts in such situations by the Statute in Virginia?

A. Yes, sir.

Mr. White: No further questions.

REDIRECT EXAMINATION

By Mr. Lutins:

Q. Mr. Crush, let me ask you this; was it the custom of the Court to have the City Sergeant call the first twenty on *voir dire,* and if there were more than twenty just to have those remain in the rear portion of the Court Room?

A. As well as I recall, I think we called either twenty or twenty-four.

Q. I see. And there would be remaining venire-
page 37 } men in the rear portion of the room?

A. Yes. In certain cases.

Mr. Lutins: Yes. Thank you, sir. Does Your Honor have any questions?

The Court: Thank you.

The Witness: Judge, may I be excused and go back to my office?

The Court: Mr. Crush, you are excused.

The Witness Stands Aside

The Court: Next witness.

Mr. Lutins: Now, if Your Honor please, at this point—I don't want to do this in stages—but as to the Witherspoon matter and particularly in view of the fact that we are dealing with jurors, and which are sort of a sacred ground, I wish to rest as to Witherspoon and as to the Witherspoon issue.

There might be one other issue in my amended petition for *Habeas Corpus* that you would like to explore; but I don't think it is fair to tie up everybody involved in the Witherspoon matter, you see, just to have them hang on for me and just to explore my petition fully. But I would like just as to the Witherspoon matter to rest at this time.

Mr. White: Your Honor, I have to object to
page 38 } trying this matter in a sort of bifurcated affair.
If Mr. Lutins has the burden of proof, then he should go on and try his case in proper time, and I will try my case. I have no desire to try cases part resting here, and resting there, sir.

The Court: Was it your idea to rest on the Witherspoon issue at this time, and then ask that Mr. White proceed?

Mr. Lutins: Well, I was going to rest, sir, and ask the Court to call—of course, we have got Judge Kuyk to examine, and have the Court call Judge Kuyk and certain members of the venire.

The Court: Well, as I have stated, it is not my present intention to call any members of the venire as the Court's witnesses.

Mr. Lutins: I am trying to get you to change your mind, Judge.

The Court: Well, I'm going to have to overrule you on that, Mr. Lutins. This, of course, is a Hearing as distinguished from a trial before a jury; and for that reason, the rules of evidence possibly could be relaxed somewhat. However, I do feel that it would be proper for you to put on your entire case, and then rest rather than shifting the burden to Mr. White at this time. I think that would
page 39 } be the orderly way to handle it. Now I would call
the Judge at any time you gentlemen wish me to.

Mr. Lutins: Well, suppose we call him now, then.

The Court: All right. Call Judge Kuyk. Judge Kuyk is back in the office.

(Judge Kuyk then entered the Court Room.)

The Court: Judge Kuyk, before we proceed, sir, there is some question as to whether or not this Court could require

you as a retired Judge to testify, sir. I am not at all certain that we can.

Judge Kuyk: I have no objection.

The Court: If you have no objection, and if Counsel has no objection, I see no reason why we should not have the benefit of your testimony; but I simply wanted to let you know that there is some question as to whether or not you could be required to testify, sir. Did you wish to testify in the matter?

Judge Kuyk: I have no desire to testify, but if the Court wishes me to, I have no objection.

The Court: All right, sir. Let's go ahead.

Mr. Lutins: Well, Judge—

The Court: Shall I ask the initial questions or—

page 40 } Mr. Lutins: I have just changed my mind. I believe in view of Judge Kuyk—and I can certainly understand his position of having no desire to testify, and the fact that it is coming from a former Judge of the Hustings Court, I do not care to call him as the Court's witness in any respect and have him examined.

Mr. White: Your Honor, I, of course, would abide by Mr. Lutins changing his mind from the position he flatly stated in the pre-trial conferences in the case "that he did desire Judge Kuyk to testify". Now, I assume that is Mr. Lutins' prerogative to do so; but I feel that the goal of this Hearing is to ascertain the truth, and I feel that if the Judge is kind enough to be willing to testify, I would most certainly request that his testimony be taken by Your Honor.

I do not personally relish the idea of calling Judges, or retired Judges, to testify in any case. But this case is so peculiar, I think, it is merited and I would request though that the Court conduct the examination in this instance, and I would waive cross examination.

The Court: Mr. Lutins, it is true that on previous occasions we have discussed this matter, and it was my definite understanding that we had agreed that if the Judge had

page 41 } no objection to testifying to such that he would testify as the Court's witness. I am going to hear the Judge's testimony.

I am not certain that a retired Judge comes within the Statute anyhow; and further, hearing this case without a jury, if I find later that his testimony should not be received, in all good conscience I would try not to receive it and would try not to consider it in my opinion.

Judge Dirk A. Kuyk

JUDGE DIRK A. KUYK, called as a witness by the Court, being duly sworn, testified as follows:

DIRECT EXAMINATION

By the Court:

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

A. Dirk A. Kuyk.

Q. All right, sir; and I believe you are a retired Judge of the Hustings Court for the City of Roanoke, sir?

A. That's correct.

Q. And I believe further that you were the presiding Judge in the case of the *Commonwealth versus Frank Jimmy Snyder, Jr.,* which was tried before the Court and Jury in this Court in 1956?

A. That is true, except that I don't know the exact date.

Q. Well, it has been established, I believe, that page 42 } that was the date—was it June of '56, gentlemen?

Mr. Lutins: Yes, sir.

Mr. White: Yes, sir.

By the Court:

Q. I believe it was. Now, Judge Kuyk, would you tell us what, if anything, you recall about any questions which you, or anyone else, may have directed to the Jury Panel relative to capital punishment, or the death penalty.

A. I have no independent recollection as to those questions. But it was my habit and in all cases in which the death penalty might have been imposed, to ask the Jury if they had any religious or conscientious scruples against sentencing a person to death if the evidence justified such a conclusion.

I might also add that at the conclusion of that question, I invariably, as I recall now, asked Counsel for both the Defendant and the Prosecution if they had any questions they wished to ask the Jury, the prospective jurors, or that they wished the Court to ask the jurors.

Q. All right. May I ask whether the questions which you asked the jurors on *voir dire* was read by you from any notebook you might have had or not, sir?

A. I don't recall ever giving any instruction based on a written paper other than a—well, we will say a prepared statement by Counsel or the Court.

Q. Do you recall whether or not you referred

page 43 } specifically to the Statute then in effect as to questions to be asked the Jury on capital punishment?

A. No.

Q. You mean by that you did not, or you don't recall, sir?

A. I don't recall. I have no independent recollection about that.

Q. I see. Now, did your custom as to the questions you asked in capital cases vary from case to case?

A. Yes, but very slightly as a general rule.

Q. And as of 1956, for approximately how long had you been serving as Judge of this Court, sir?

A. I think I qualified on or about the first of February, 1946.

Q. And may I ask when you retired, sir?

A. On or about September 1st, 1964.

Q. Now, I believe that the work of this Court was primarily criminal work?

A. To a large extent, yes.

The Court: All right. Either side may cross examine.

CROSS EXAMINATION

By Mr. Lutins:

Q. Judge, let me just ask you this one question: when a juror, or jurors, indicated that he, or they, were

page 44 } opposed to capital punishment, and if either side had any further questions, did you then and there in a capital case, of course, summarily and automatically discharge that juror and select another, or others?

A. That was the practice.

Mr. Lutins: I see. I have no further questions.

Mr. White: I have no questions.

The Court: Thank you, Judge, and you are excused, sir. Thank you for coming, sir.

The Witness Stands Aside

The Court: Call the next witness, please.

Mr. Lutins: Your Honor, may we have a recess?

The Court: You want a small recess?

Mr. Lutins: Yes, sir.

The Court: All right. The Court will take a ten-minute recess at this time.

(Thereupon, a recess was taken from 11:00 o'clock A.M. to 11:10 o'clock A.M.)

The Court: All right. Now, is there anyone in the Court Room who has not registered his name and address with the Clerk or with the City Sergeant?

(There was no response.)

page 45 } The Court: I didn't recognize this gentleman (indicating). That's the reason I asked it. I don't believe he was in here before.

(At this time a gentleman departed from the Court Room.)

The Court: All right. We will proceed with the trial. Call the next witness.

Mr. Lutins: One moment, Judge, please. If Your Honor please, and if it please the Court, you will recall that in my amended Petition I have alleged that the death penalty is cruel and unusual punishment in and of itself.

The Court: Yes, sir.

Mr. Lutins: I am contemplating at this time putting the Petitioner on the stand to show that the death penalty is cruel and unusual punishment as it applies to this case, and as to what this man has had to suffer for a period of twelve years and ten months in the death section.

Your Honor, prior to doing so, I wish a ruling from the Court that inasmuch as this is a *Habeas Corpus* Hearing, that on cross examination no questions will be permitted to be asked which relate prior to June 27, 1956, because we are here concerned with only whether or not the constitutional rights and guarantees of the Petitioner have been denied; and it would not be relevant, nor is it page 46 } within the scope of a *Habeas Corpus* Proceeding, and I have some authority. And that is what I'm asking from the Court, a ruling along these lines.

The Court: What is the position of the Commonwealth?

Mr. White: Your Honor, taking the points in inverse order, I don't see how Mr. Lutins can make an objection to a question that I have asked on cross examination until I ask it. I have no idea at the present time what I want to ask. I don't think Mr. Lutins would know what I want to ask, if I don't know myself.

Secondly, the amended Petition was filed, and it contains the usual allegations about the death penalty being cruel and unusual, which of course, I would assume it is well-

known in Virginia ever since the Fogg Case—at least 208 Va. 541—that the death penalty in Virginia has been upheld flatly and absolutely.

We would take the position that testimony on this from Mr. Snyder would not be apropos for that reason, number one.

And number two, callous as this may sound, Mr. Snyder is in no position to testify as to the cruelty of
page 47 } the death penalty, he not having undergone it.

Number three: As to Mr. Snyder testifying today that it's been cruel to hold him in Death Row for twelve years and ten months, I do not think that the Petitioner is in any position to bring this before the Court. The Petitioner, if ever there was grounds for estopping testimony, is certainly estopped. It has not been the Commonwealth of Virginia who has been responsible for the Petitioner being there for twelve years and ten months. The law of this State justifies the death penalty, the Jury inflicted it, the Court passed sentence, if the Defendant's penalty is opposed the remedy lies in the Legislature which is meeting in Richmond, and not in the Courts of this State. And the Supreme Court of Appeals of Virginia has so held.

The fact that he's been held on Death Row, I think, this Court can take judicial notice of the fact that there are four Decisions of the Fourth Circuit Court of Appeals, and Heaven knows how many other Court Decisions dealing with the Petitioner in this case. He has stayed on Death Row for twelve years and ten months at his own request and by his legal efforts in the Courts, and that is why he has stayed on Death Row. And we feel that he should be
page 48 } estopped from any claim that that is cruel, since he put himself there and kept himself there.

Mr. Lutins: Well now, if Your Honor please, may I—

The Court: Yes, sir.

Mr. Lutins: The Fogg Case is on a certiorari and in the Supreme Court, as well as the Brickhouse Case. So these matters have not been adjudicated. Now, if Your Honor please, for the State of Virginia to say that this man is responsible for the situation as it exists in the East Basement of the Virginia State Penitentiary, seems a little absurd to me. This man, being a human being, is entitled to every right and guarantee under the Constitution of this State, together with the United States; and all he was doing and continues to do is to exercise these rights that are given any citizen.

And to say that he is estopped and not here to be heard to complain because he's trying to breathe each day, and

he's trying to sustain himself and live and not have the execution carried out, seems appalling. I have never heard of an estoppel being sought in such a manner.

The Court: Mr. White, I am reluctant to deny a Petitioner in a *Habeas Corpus* case—no matter how unusual it might be—the right to testify in support of his allega-
page 49 } tions. Whether or not such testimony would in the final analysis be admissible, or whether it should be considered in the Court's Opinion, is another issue; but the effect of your objection would be pretty much to deny the Petitioner the right to testify in his own behalf in his Petition as to several points raised in the amended Petition, and as to which you had no objection.

The Court will overrule your objection at this time and will allow Petitioner to testify, and will give the Attorney General's office the right to object and except to certain particular questions which he feels might not be relevant as asked.

Mr. White: Note my exception, please, sir.

MR. FRANK JIMMY *SNYDER,* JR. The Petitioner, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lutins:

Q. State your full name, please.

A. Frank Jimmy *Snyder,* Jr.

Q. Frank, on June the 27th, 1956, where were you taken to from the Roanoke City Jail?

A. To Richmond, State Penitentiary, Death Row.

Q. What was your age upon admission?
page 50 } A. 29.
Q. What is your present age?

A. 42.

Q. For how long have you been, or have you remained in this section—this Death Section?

A. Twelve years and ten months.

Q. Where is the Death Section located in the Virginia State Penitentiary?

A. In the basement under a Cell House.

Q. Is there another name for it—a general name?

A. East Basement.

Q. They call it the "East Basement"?

A. Yes, sir.
Q. Is it a basement?
A. Yes, sir.
Q. Frank, how many cells are in the Death Section?

Mr. White: Objection. Your Honor, the amended Petition for a Writ of *Habeas Corpus* attacks the death penalty; it does not—it says "Penalty" and it does not say "imprisonment".

The amended Petition nor anything else before this Court deals with the physical circumstances in the Virginia State Penitentiary.

The Court: Objection sustained.

Mr. Lutins: Well, I'm just laying the foundation.

page 51 } The Court: But you are going into matters that are not proper, in the Court's opinion.

Mr. Lutins: Well, he has objected to my question of how many cells in the East Basement?

Mr. White: I will continue to object question by question to anything that deals with the construction, habits or situation of the Virginia State Penitentiary. It is not in the amended Petition for Writ of *Habeas Corpus.*

Mr. Lutins: Well, he still objects, if Your Honor please, to the death penalty. I'm trying to show how this man was housed; what were the conditions—My Goodness, sir—if that is not relevant, I just don't know what would be. I'm just laying a foundation. The Court certainly can hear me, and the Court can disregard it if the Court feels it is not relevant at the appropriate time.

The Court: Mr. Lutins, we are not going into a full-scale review of the conditions at the State Penitentiary in this Hearing.

Mr. Lutins: Yes, sir.

The Court: Now, the question that you asked, and which I sustained, was leading toward that, it seems to me. You may proceed to ask the questions and make your exceptions, but as to that particular question, I have sustained the

page 52 } objection.

Mr. Lutins: All right, sir. Exception.

Q. (continued) What is the size of the cell you have been in for twelve years, ten months?

Mr. White: Objection.

The Court: Objection sustained for the same reason.

Mr. Lutins: Exception.

Q. (continued) What articles are in the cell?

Mr. White: Objection.
The Court: Sustained.
Mr. Lutins: Exception.

Q. (continued) Can you tell the Court, Frank, what a typical daily routine of yours consists of?

Mr. White: Objection.
The Court: This question is in somewhat different vein. I am not certain about it, but I will hear it and overrule the objection.
Mr. White: Note my exception, please, sir.

By Mr. Lutins:
Q. Now, the question was "What is a typical daily routine of yours in the Death Section"?
A. Well, in the morning we are fed around between seven-fifteen and seven-thirty.
Q. Frank, you have to talk up a little louder so page 53 } the Judge can hear you.

The Court: I can hear him.

By Mr. Lutins:
Q. All right. Go ahead.
A. And in the morning we are fed at seven-fifteen and seven-thirty. And after eating then, sometimes I take my Bible and read it, and then in the afternoon, I write my letters. And if I have another book of some kind, I generally read it in the afternoon. And at noon we are fed at eleven-fifteen, and our supper is three-fifteen.
Q. Do you get any exercise?
A. No, sir.

Mr. White: Objection. We will renew my objection to previous question as being irrelevant and not covered by the Petition, Your Honor, and move to strike it from the record.
The Court: Overrule it just as to the last question, and you may answer it.
The Witness: No, sir.

Frank Jimmy Snyder, *Jr.*

By Mr. Lutins:
Q. Well, are you permitted to walk any distance and if so, when—

Mr. White: Objection.

By Mr. Lutins:
Q. —and what distance?

page 54 } The Court: Overruled.
Mr. White: Note my exception, sir.

By Mr. Lutins:
Q. Go ahead and answer it.
A. Once a week I am allowed out of my cell to walk between twleve and fourteen feet to the shower, and back to my cell.
Q. You get a shower once a week and you walk to the shower and back. That's fourteen feet?
A. Yes, sir.
Q. And do you get—you don't get any exercise other than that?
A. No, sir.
Q. Other than to walk back and forth in your cell?
A. That's all. Yes, sir.
Q. Frank, have you ever caught any animals as pets in that Section?

Mr. White: Objection, Your Honor.
The Court: Objection sustained.
Mr. Lutins: Exception.

Q. (continued) Has there been any change in your weight since your admission?

Mr. White: Objection.
The Court: Overruled.
Mr. White: Note my exception.

page 55 } By Mr. Lutins:
Q. What was your answer?
A. Yes, sir.
Q. What was your weight when you were admitted?
A. Approximately 226.
Q. What is your present weight?
A. I weighed 180 before I left, and I figure I gained about 2 pounds here in jail, so I say about 182.

Frank Jimmy Snyder, *Jr.*

Q. You have gained some weight since you have been in the City Jail?
A. Yes, sir.
Q. I guess there is a great deal of difference there?
A. Yes, it is much better.

Mr. White: Objection.
The Court: Sustained.
Mr. Lutins: Exception.

Q. (continued) Frank, have you developed any physical difficulties?

Mr. White: Objection.
The Court: Mr. Lutins, you're going rather far afield of your Petition. Now, if he wants to testify pertaining to the main issue in this case, which has to do with the questions asked the Jury, he's got a right, I suppose, to testify to that; but I am not going to open up this case to any
page 56 } questions you might wish to put to this Petitioner, and I feel I have allowed you to go far enough.
The only reason I have allowed you to go this far is because you did allege in your amended Petition that the death penalty was cruel and inhuman punishment, and I thought possible his daily routine since he had been in this particular place might have some relevance. But beyond that, I am not willing to go.
Mr. Lutins: Well, Your Honor, of course I except to the Court's position. But for purposes of the record, it seems to me that I should vouch the record or fortify the record as to what I would have, or could have, shown had the Court heard me.
The Court: He has got a right to do that.
Mr. White: Your Honor, I would say Mr. Lutins, of course, would have the right to do that had he included it in the amended Petition. But that amended Petition has the word "penalty" in it, and I think there can only be one explanation as to what the word "penalty" means, and it does not include prison conditions. There are forums to go into that and I think the Court should certainly take notice of that as being gone into in detail in Richmond. And I don't see why we have to try that issue in this Court, and I object.
page 57 } The Court: Mr. White, I agree with you. But I don't see how I can deny to Mr. Lutins, for purposes of appeal the right to make up his record on points

upon which he may claim I have ruled or that I may have ruled incorrectly.

Mr. White: I cannot and don't see how he can vouch for the record that which is not in his Petition to begin with. Had he alleged it, I would have said all right; but how can you vouch for the record something that he has not alleged until right now on examination?

The Court: Well, that is your position, sir. I think Mr. Lutins' position is somewhat different.

All right. Let the record show that I have ruled with the Attorney General that further evidence as to conditions at the Penitentiary are not admissible in this particular Hearing; but that the Court will take judicial notice of the fact that the Petitioner would testify that it was certainly not to his liking to be where he was for the time that he was there, and that the only purpose of this additional testimony is to allow the Attorney for the Petitioner to make up the record as to the points to which he objected and excepted in my rulings. And I will ask that you be as brief as possible, Mr. Lutins.

page 58 } Mr. Lutins: I will, Your Honor. Let me just make this further statement: That I am not attacking the conditions per se at the Virginia State Penitentiary; I'm just relating them to this man as the death penalty being cruel and unusual punishment.

Mr. White: Your Honor, I would request that Mr. Lutins vouch the record personally and state what he would intend to prove, rather than going through and having to have the Witness answer the questions. Let Mr. Lutins make the statement what he would have tried to have proved over the objection.

The Court: What about that, Mr. Lutins?

Mr. Lutins: Well, Judge, I'll tell you. I have had a problem along these lines in *Solly* versus *Solly* and Judge Buchanan, writing the Opinion, was speaking about just such a point. And he indicated evidence should have been produced to preserve it for the record on appeal, and just saying "I have got it" isn't sufficient.

And for me to say "That the man would be asked this and answer a certain way" I don't believe is effective in the record as a living record, as the Witness having himself testified. And I'm sure the Court can appreciate my position in view of this Hearing, and I am satisfied the Attorney General—

page 59 } Mr. White: Your Honor, the Court has stated

many times that the purpose of vouching the record is simply to have something before the Court which they could understand what point might have been raised. They do not say that the Witness shall be allowed to go on and testify, but that an Attorney in many of these cases could go on and say "This is what I would have proven" and giving a short statement so the record can be complete. It is simply a rule of practicality for the Appellate Court's convenience.

There is no rule saying that if testimony is included and objected to, that in the guise of vouching the record we can go on and throw the testimony in. I think we are perfectly within our right to ask Mr. Lutins to give a short, brief statement of what he would have intended to have shown.

Mr. Lutins: Well, I have eleven questions—that's what it amounts to, Judge.

The Court: I am going to allow him to ask the questions of the Witness, and allow the Witness to testify so long as it is held to a minimum.

Mr. Lutins: All right, sir.

Mr. White: Note my exception to the ruling of the Court, sir.

By Mr. Lutins: (continues examination)

page 60 } Q. Frank, do you receive three meals a day, seven days a week?

A. No, sir. On Sunday and holidays, we only receive two.

Q. What are those two meals?

A. Breakfast and in the morning at eight o'clock, and our noon meal at twelve.

Q. Well, when are you next fed?

A. Next morning at seven-thirty.

Q. You don't have a meal from Noon until seven-thirty on Sundays and holidays?

A. Yes, sir.

Q. Have you ever caught any animals as pets, which you found in the Death Section of the East Basement?

A. Yes, sir.

Q. What have you caught?

A. I have had a mouse and I have had cockroaches.

Q. Well, with reference to a mouse, how did you house this mouse?

A. In a cigar box.

Q. Did you do—go ahead.

A. And in a cigar box inside of a larger pasteboard box.

Frank Jimmy Snyder, *Jr.*

Q. Did you do anything to distinguish this mouse from other mice, so you would know he was your pet?

page 61 } A. Yes, sir.

Q. What did you do?

A. I cut his tail off.

Q. Bobbed his tail, so to speak?

A. Yes, sir.

Q. And you still have that mouse?

A. No, sir. The guards set a trap and killed it.

Q. What has been—well, I have asked you about your weight, of course; and I believe at that point there was an exception or an objection.

You said you weighed how much upon admission?

A. Approximately 226.

Q. And you weigh what now?

A. 180, maybe 182; but I feel I have gained some since I have been here.

Q. Have you developed any physical difficulties, and if so, what are they?

A. Yes.

Q. What are they?

A. I developed sinus trouble and asthma, rheumatism in my legs and arthritis in my shoulders, arms and wrists.

Q. Are you taking any medication presently?

A. I am taking medicine for sinus and nerves now.

Q. When was the last electrocution performed at the Virginia State Penitentiary?

page 62 } The Court: I will not allow that question.

Mr. Lutins: Well, if it please the Court—

The Court: Not even for making up the record, because that is a matter that could be determined outside of this Hearing.

Mr. Lutins: All right, sir. Exception.

Q. (continued) Whenever there has been an electrocution held, could you tell that there was such electrocution held, and if so how?

A. Yes, sir. Well, by the hum of the motors, the throw of the switch, and the smell of the burnt flesh.

Q. Have you had occasion to smell this burnt flesh in the East Basement?

A. Yes, sir.

Q. How far is your cell from the Death Chair?

Frank Jimmy Snyder, *Jr.*

A. The back of my cell is approximately seven feet from the Death Chamber.

Q. Is there a wall separating your cell and the Death Chair?

A. Yes, sir.

Q. Now, Frank, many Stays have been granted, many procedures have been engaged in to save your life. Do you feel that you are causing this situation because you are prolonging your life?

page 63 } A. No, sir. I am not an animal; I mean, I am a human being and I'd like to live the same as anyone. And, Mr. Lutins, you have told me I had the constitutional rights, the same as any other human being.

Q. Well, what was the closest that you have come to death?

A. On May 9, 1956—1953.

Q. " '63", wasn't it?

A. '63 (Witness cried).

Q. What was—how long was it before your life was spared that you were to die?

A. Approximately twelve hours.

Q. Do you recall when I came down to give you notice that your Stay had been granted?

A. Yes, sir.

Q. What was your condition?

A. Well, I was nervous and I was pretty well wet with perspiration, and my clothes—

Q. Your clothes were soaked clean through?

A. Yes, sir. (Witness cried.)

Q. Frank—

The Court: All right. Let's hurry up now. You said eleven questions.

Mr. Lutins: Yes, sir. I have got one more.

The Court: All right.

By Mr. Lutins:

page 64 } Q. Can you phrase in several words what your existence has been in the Death Section of the Penitentiary for twelve years and ten months?

A. Yes, sir. I'd say a living death and existence.

Mr. Lutins: All right. I have no further questions.

The Court: All right. There will be no questions to be asked about that. Do you care to ask him any other questions pertaining to this Petition?

Mr. Lutins: No, sir. I am just putting him on for the allegations of the death penalty.

The Court: All right. Now, do you care to cross examine?

Mr. White: Your Honor, for the record, I would like to make a statement.

The Court: Yes, sir.

Mr. White: At a pre-trial conference we held in this Court House, we agreed to take up the Witherspoon question as to what questions were asked the jurors. We engaged in another pre-trial conference in Bedford, and you pretty well hammered out what the issues would be in this case.

I received a telephone call two nights ago from Mr. Lutins, in which he asked me would I agree to allowing page 65 } him to amend the Petition for the Writ of *Habeas Corpus*. He told me very candidly what his points were. They were points of law which had been presented to the Virginia courts, and other courts.

We agreed to file briefs on this question. We all know that the case involves many questions of law that we agreed in pre-trial conferences to put in the briefs. He filed an amended Petition which dealt and said that the death penalty was unconstitutional, that it was cruel and unusual.

This is the standard allegations in every death case that I know of in the last five or six years. I had no objection to it because it is a point of law; but I would object to the tactics that have been employed today to turn this Hearing on the Witherspoon question, an issue of fact, into an emotional circus. And I do object very strongly, sir, to that tactic.

The Court: Let the record show that this Court has—that I have been on the Bench for four years now, and while I still have a lot to learn I feel that I can certainly separate my emotions from my reason.

I further want to make it very clear that the testimony which Mr. Snyder has just given was testimony which this Court has ruled out, and the only reason it was allowed to go in was because Mr. Lutins stated to the Court, as page 66 } an officer of the Court, that he wished to preserve the point on appeal. And I felt that he had a right to do it. Otherwise, I do agree with Mr. White, that in the trial of this particular case the evidence which we have just heard has no place, and I will not consider it in my Opinion.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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