216 Va. 196

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Richard R. Blatt
of Harman and Julias
9 North Court Square
Harrisonburg, Virginia

[illegible]
of [illegible]
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Harrisonburg, Virginia

Counsel for Plaintiff in Error

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MOTION IN LIMINIE
Filed: August 22, 1974

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The defendant, by his attorney, prior to a selection by the jury in this cause, moves the Court in liminie to instruct the Commonwealth of Virginia and its witnesses through its respective counsel, and its respective counsel individually as set forth below for the following reasons:

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(3) Since it is immaterial to any issue involved in this cause whether or not the defendant, admitted or denied breaking into the building, that the Commonwealth of Virginia, its witnesses, and/ or its attorneys be precluded from using any remark, statement, question, answer, inference, inuendo or testimony of any nature which might inform the jury or infer to the jury the aforementioned circumstances. Were these circumstances made known to the jury in any of the manners as aforesaid, it would be highly improper and prejudicial, even if the Court were to sustain an objection, strike the matter, and/ or instruct the jury not to give consideration to the same.

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(8) Since it is immaterial to any issue involved in this cause whether or not the defendant answered affirmatively the question on page 93 of the Transcript of his trial which was held in the Circuit Court of Rockingham County, Virginia, on July 2, 1974, to-wit: "And one other question, are you guilty of this crime of breaking and entering the livestock sales?" Answer, "No sir, I am not, if I were, I am man enough to plead guilty, I am not guilty of this charge." That the Commonwealth of Virginia, its witnesses and/or its attorneys be precluded from using any remark, statement, questions, answer, inference, inuendo or testimony of any nature which might inform the jury or infer to the jury the aforesaid circumstances. Were these circumstances known to the jury in any of the manners as aforesaid, it would be highly improper and prejudicial, even if the Court were to sustain an objection, strike the matter and/or instruct the jury not to give consideration to the same.

WHEREFORE, the defendant respectfully requests the Court to instruct the Commonwealth of Virginia, and its witnesses, through its respective counsel and its respective counsel individually, not to mention, refer to, interrogate concerning, voluntarily answer, or

attempt to convey before the jury, at any time during these proceedings in any manner either directly or indirectly the subject matters as stated above without first informing the Court and obtaining permission from the Court outside the presence and hearing of the jury, and further, to instruct the Commonwealth of Virginia, and its witnesses, through its counsel and also its counsel individually, not to make any reference or inference to the fact that this motion has been filed, argued or ruled upon by the Court, and further that each respective counsel be instructed to warn and caution each and every witness appearing in their favor in each phase of this cause to strictly comply with the ruling of the Court.

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AMENDED INDICTMENT
Dated: August 19, 1974
Filed: September 4, 1974

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Rockingham, now attending the Circuit Court of the said County, upon their oaths present that Horace C. Rowe, Jr., on or about the 2nd day of July, 1974, in the City of Harrisonburg, Virginia, unlawfully, feloniously and wilfully committed perjury by swearing falsely under oath as to his entering the building and what he did while he was in the building; whether or not he did in fact break and enter said building; whether he did or did not have a fresh cut on his hand and how the cut was sustained, and whether he did or did not refuse to be fingerprinted following his arrest; all of which were material matters in his trial for statutory burglary which was held on the 2nd day of July, 1974, in the Circuit Court of Rockingham County, Virginia, said oath having been administered by an officer of the said Court, the said officer having competent authority to administer said oath.

Va. Code Section 18.1-273

A True Bill

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CHARGE TO JURY
Filed: September 4, 1974

If you find the accused, Horace C. Rowe, Jr., guilty of perjury, as charged in the indictment, then you will say so and fix his punishment by confinement in the penitentiary not less than one nor more than ten years, or by confinement in jail not exceeding one year or a fine not exceeding one thousand dollars, either or both.

If you find him not guilty, you will say so and no more.

JURY INSTRUCTION NO. 1
Filed: September 4, 1974

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The Court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendant, while testifying under oath, wilfully and knowingly testified falsely concerning a matter or thing material to the issue then being tried, you shall find him guilty and fix his punishment by confinement in the penitentiary not less than one nor more than ten years, or by confinement in jail not exceeding one year or a fine not exceeding one thousand dollars, either or both.

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JURY INSTRUCTION NO. 2
Filed: September 4, 1974

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The Court instructs the jury that the indictment in this case is mere accusation or charge against the accused, and is not of itself, any evidence of the accused's guilt, and no juror should permit himself to be influenced against the accused, because or on account of the indictment in this case.

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JURY INSTRUCTION NO. 7
Filed: September 4, 1974

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The jury are further instructed that among the material averments in the indictment are the statements: (1) his entering the building and what he did while he was in the building; (2) whether he did or did not have a fresh cut on his hand and how the cut was sustained; (3) whether he did or did not refuse to be fingerprinted following his arrest; and to warrant a conviction in this case, the fact of such materiality must be established to the satisfaction of the jury, beyond a reasonable doubt, and if, after a careful consideration of all the evidence, and in view of the principles of law given you in these instructions, you entertain any reasonable doubt as to whether the fact above stated did not become material on said trial, you should find the defendant not guilty.

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JURY INSTRUCTION NO. 7A
Filed: September 4, 1974

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The Court instructs the jury that in order to convict the defendant, Horace C. Rowe, Jr., of perjury in his former trial for statutory burglary, the jury must first find that the testimony given by the defendant was material to the elements of the crime as charged in his former trial, to-wit: Statutory burglary, which elements are the breaking and entering a building with the intent to commit larceny therein.

The Court further instructs the jury that should you entertain any reasonable doubt as to whether the testimony given by the defendant in his former trial was material to the crime of statutory burglary then you must find the defendant not guilty.

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JURY VERDICT
(Originally Handwritten)
Filed: September 4, 1974

We the jury find the defendant Horace Rowe, Jr. guilty of perjury as charged in the indictment and fix his punishment at four years confinement in the pententiary.

R. T. Ritenour
Foreman

ORDER ON JURY'S VERDICT AND SENTENCING
Filed: September 4, 1974

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This day came the Attorney for the Commonwealth, and the accused, Horace C. Rowe, Jr., came in the custody of the Sheriff of this County, and by his court-appointed counsel, Franklin R. Blatt. The Court having considered the Motion in Liminie filed herein and heard the arguments of counsel, sustained said motion on a portion of Paragraph No. 3, all of Paragraphs No. 4 and 8, and overruled said motion on all of Paragraphs No. 1 and 2, a portion of Paragraph No. 3, and all of Paragraphs No. 5, 6 and 7. The accused, by Counsel, having moved the Court to quash the indictment, the Commonwealth Attorney thereupon moved the Court to amend the indictment, upon consideration whereof, it is ordered that the indictment be amended and that the motion to quash be overruled. The accused was thereupon arraigned on the amended indictment, and after consulting with his counsel, tendered a plea of not guilty thereto. **********

Having heard the Commonwealth's evidence, the accused, by counsel, moved the Court to strike said evidence, which motion the Court sustained as to "did you break and enter the building", but overruled in all other respects, to which denial of the motion the accused, by counsel, excepted. Having completed the hearing of the evidence, the accused, by counsel, again moved the court to strike the evidence, which motion the court denied, to which action of the Court the accused, by counsel, excepted. Thereupon, having received the instructions of the court and heard the arguments of counsel, the jurors retired to their room to consider their verdict, and after some time they came into court and returned the following verdict: "We the jury find the defendant Horace Rowe, Jr. guilty of perjury as charged in the indictment and fix his punishment at four years confinement in the penitentiary. (signed) R. T. Ritenour, Foreman." Thereupon, the accused, by counsel, moved the court to set aside the verdict of the jury on the ground that said verdict is contrary to the law and the evidence, which motion the court overruled, to which action of the court the accused, by counsel, excepted. **********

MOTION TO SET ASIDE THE VERDICT
Filed: September 25, 1974

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The defendant, by his attorney, moves the Court pursuant to Rule 3A:22 of the Rules of the Supreme Court of Virginia, to set aside the verdict returned against him by the jury in his trial which was held in the Circuit Court of Rockingham County, Virginia, on the 4th day of September, 1974, for the following reasons:

That the Court sustained the defendant's motion in liminie and motion to strike the evidence with respect to the allegations in the indictment "did you break and enter the building", (Shenandoah Valley Livestock Sales Building). Even though the defendant's objection to the evidence offered by the Commonwealth relative to this portion of the indictment was partially sustained in the defendant's motion in liminie and entirely sustained in the defendant's motion to strike the evidence the Court neither told nor instructed the jury of this fact, nor deleted this element from the indictment against the defendant.

In view of the foregoing the defendant, Horace C. Rowe, Jr.,

respectfully requests the Court to set aside the verdict returned by the jury in his former trial in the Circuit Court of Rockingham County, Virginia, which was held on the 4th day of September, 1974.

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MOTION FOR NEW TRIAL
Filed: September 25, 1974

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The defendant, Horace C. Rowe, Jr., by counsel, moves the Court pursuant to Rule 3A:22 of the Rules of the Supreme Court of Virginia, for a new trial on the following grounds:

That the Court sustained the defendant's motion in liminie and motion to strike the evidence with respect to the allegations in the indictment "did you break and enter the building", (Shenandoah Valley Livestock Sales Building). Even though the defendant's objection to the evidence offered by the Commonwealth relative to this portion of the indictment was partially sustained in the defendant's motion in liminie and entirely sustained in the defendant's motion to strike the evidence, the Court neither told nor instructed the jury of this fact, nor deleted this element from the indictment against the defendant.

In view of the foregoing the defendant, Horace C. Rowe, Jr., respectfully requests the Court to set aside the verdict returned by the

jury in his former trial in the Circuit Court of Rockingham County, Virginia, which was held on the 4th day of September, 1974.

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(11) The Court erred in sustaining the defendant's motion to strike the evidence with respect to the question, "Did you break and enter the building" and thereafter not striking this allegation from the indictment.

(12) The Court erred in sustaining the defendant's motion to strike the evidence with respect to the following allegation contained in the indictment, to-wit: "Did you break and enter the building?", and thereafter neither telling, informing, or instructing the jury of same.

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ORDER DENYING MOTION TO SET ASIDE
THE VERDICT
Filed: October 21, 1974

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This day came the attorney for the Commonwealth, and the accused, Horace C. Rowe, Jr., came in the custody of the Sheriff of this County, and by his court-appointed counsel, Franklin R. Blatt. Thereupon the accused, by counsel, moved the Court to set aside the verdict and to grant a new trial, on the grounds set forth in the written motion filed herein on the 25th day of September, 1974. The Court, having heard the evidence herein and the arguments of counsel, denied said motion, to which action of the Court, the accused, by counsel, excepted. **********

TRANSCRIPT OF PERJURY TRIAL

Filed: October 24, 1974

ARGUMENT ON THE MOTION IN LIMINIE

The Honorable Joshua L. Robinson, Presiding

Franklin R. Blatt and William A. Julias, For the Defendant

Jack F. Depoy and David I. Walsh, For the Commonwealth

[TR 19]

MR. BLATT: We would note our exception to both of these. Paragraph No. 3 - it is immaterial whether he denied breaking and entering the building since by entering his plea of not guilty he denied every material allegation.

COURT: Was a confession or admission admitted into evidence?

MR. DEPOY: No sir.

COURT: Well, then..

MR. BLATT: Just his testimony on the witness stand.

COURT: His testimony on the witness stand - what page are you referring to?

MR. BLATT: Page 85, lines 18 and 19, I believe.

COURT: "Did you break and enter this building?" "No sir, I did not." Is that the specific

thing you are referring to? In effect he was denying..

MR. WALSH: Yes sir, there is one other statement on page 93, lines 6, 7, 8 and 9. "And one other question, are you guilty of this crime

[TR 20]

of breaking and entering the livestock sale?" Answer - "No sir, I am not, if I was, I'm man enough to plead guilty. I am not guilty of this charge."

MR. BLATT: Your Honor, that was covered under a proper instruction by the Court, by his plea of not guilty.

COURT: Page 93?

MR. WALSH: Page 93.

COURT: What line?

MR. WALSH: 6, 7, 8 and 9.

COURT: "One other question, are you guilty of...breaking and entering.... No sir, I am not..." Gentlemen, suppose the defendant takes the stand and is asked only that one question and he gives the same answer and

he is not cross examined and he is convicted.

Does that lay him open to a charge of perjury?

MR. BLATT: Your Honor, I would certainly hope not, it would have a constitutionally chilling effect on anyone who pleads not guilty.

MR. WALSH: I would disagree with that - any defendant can plead not guilty, but if he takes the stand, he is put under oath, and is required

[TR 21]

to tell the truth just as any other witness would be.

MR. BLATT: That was a question of fact for the jury and if the defendant knows that if he's put on the witness stand and asked whether he did it or not and he says, I didn't do it, and the jury finds him guilty, that he's open for a charge of perjury, then I feel that there's a chilling effect on any defendant to ever take the witness stand which is his right.

COURT: Of course the Constitution has no purpose of having a chilling effect on someone's lying as to whether or not they committed an offense. He has a right to remain

silent.

MR. JULIAS: Well, Your Honor please, we can't overlook the rule that the defendant has the opportunity to come forward and present his theory of the case, and give a reasonable explanation of his whereabouts. It's under the old theory that ninety-nine guilty people go free than to have an innocent man be convicted and be compelled to serve time. If we would take the position that the Court has suggested that any person by his plea of not guilty or

[TR 22]

denial of the allegations against him to take an oath and get on the witness stand and take a positive position, just simply because the defendant happens to be overwhelmed by a number of witnesses, that would defy the purpose of our adversary system. Whether it be civil litigation or criminal litigation, because in every case there are two different sides, and it would lay the loser open to a perjury indictment in each and every instance.

COURT: Does that mean that one has a privileged right to take

the stand and lie in his own defense?

MR. JULIAS: Well, Your Honor is reading something in to say lie, but that's up to the prosecution to prove and the denial of an allegation is not a lie.

COURT: Well, we're not talking about a plea, we're talking about an answer under oath.

MR. JULIAS: Well, Your Honor, it's very conveivable that I would not - that I would say that I was not on the east side of the street at the time of the accident in question, when it turns out ten people will say, I'm sorry, but Mr.

[TR 23]

Julias is wrong, he was on the east side of the street at the time of the accident in question. Does that make me a liar, if I misconstrued my directions?

COURT: Let me narrow the issue, gentlemen. I am going to sustain the motion with respect to line 6 through 9 on page 93, and that is, "Are you guilty of this crime of breaking and entering?" Because that question

goes to the province of the jury and it's up to the jury to determine whether he is guilty. That calls for an opinion on something that he's not - it's outside his province to give. Now, let's go back to page 85. The question is, "Did you break and enter this building?" Now, that calls for a factual answer that should be within his knowledge. Excuse me, Mr. Depoy, was the evidence in this case that this defendant actually committed the breaking or that he was an accessory.

MR. DEPOY: The evidence was, I believe, that he actually committed the breaking.

MR. BLATT: Your Honor, it was all circumstantial evidence

[TR 24]

as to this man's committing the breaking.

COURT: But I assume the Commonwealth is prepared to prove that this defendant himself did physical breaking.

MR. DEPOY: Well, of course we're prepared to prove that circumstantially as we did in the other case. He was seen in the building.

COURT: So the Commonwealth is prepared to prove that he did the actual breaking. Let's assume that the evidence was uncontradicted that a defendant was present aiding and abetting when his accomplice did the actual breaking and he was asked this question and gave the same answer. He would have to be sophisticated in the law of accomplices and some defendants in other jurisdictions who are being charged with perjury would be expected to be able to make that distinction, but we couldn't expect a defendant like this to make that distinction.

MR. DEPOY: I think that's correct.

COURT: I am going to sustain the motion with respect to line 6 through 9 on page 93, but overrule the motion with respect to line 18

[TR 25]

through 19 on page 85.

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[TR 51]

COURT: Very well. Gentlemen, let me clarify this, as I understand it, rather than proceeding in separate counts, for each of these alleged offenses of perjury, the Commonwealth has elected to put them all in one count so that the jury would render only one verdict.

MR. DEPOY: Yes sir.

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TRANSCRIPT OF DEFENDANT'S FORMER TRIAL
As read into evidence by Mrs. Christine Fulk, Court Reporter

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[TR 56]

Q. Mrs. Fulk, I would like for you to read parts of that testimony. If you will open it up on page 79, begin reading on line 18 where it begins, "..I saw.." and read through line 23 of that same page.

A. On line 18, it's the answer of Horace Rowe, "..I saw the night watchman enter the building and I followed him in. I walked in behind him and I asked.."

Question - "Now wait a minute - is this through the front door?"

Answer - "Yes sir."

Question - "After he'd unlocked the front door?"

Answer - "yes sir."

Q. Now would you turn to page 80, please, and read lines 1 through 4.

[TR 57]

A. Answer - "The door was open and I followed him in - I was about three or four feet behind him."

Question - "So you went in with him?"

(Mrs. Christine Fulk)

Answer - "Yes sir."

Q. Now on that same page, could you please read lines 12 through 15.

A. Question - "All right now, which way did you go out?"

Answer - "I went out the same way I went in."

Question - "The same way you followed him in there ?"

Answer - "Yes sir."

Q. Now, turning to page 85, lines 18 and 19.

A. Question - "Did you break and enter this building?"

Answer - "No sir, I did not."

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[TR 58]

Q. Now, referring to the next page 88, would you please read lines 3 through 24 - excuse me, page 88 lines 3 through page 89 line 19.

A. Question - "At that time you saw Mr. Cook go at the building, going into the building."

Answer - "Yes sir."

(Mrs. Christine Fulk)

Question - "And then you decided that you would go in with him and

[TR 59]

did in fact go in with him, right behind him."

Answer - "Yes sir, I did."

Question - " And ask him about a Coke machine or a pop machine."

Answer - "Yes sir."

Question - "And you indicated that you were drinking at this time and were feeling fairly good?"

Answer - "Yes."

Question - "And that you were out of chaser at this time and you wanted some chaser and that was your purpose for going in there."

Answer - "Yes sir."

Question - "And you said you didn't notice anything unusual about Mr. Cook or about the place, that he mumbled something when he looked at you and you were a matter of what - this far apart at that time?"

(Mrs. Christine Fulk)

Answer - "No, I was right close to him."

Question - "Closer than this?"

Answer - "Yes."

Question - "You say that he did look at your face, you had come in the door behind him and at that time you wanted some chaser and asked him about it - that he mumbled something that you didn't understand what he said.."

Answer - "No sir, I didn't."

Question - "At that time without getting any clarification or anything else you just turned and left the building."

[TR 60]

Answer - "Yes sir."

Question - "Why didn't you ask him or get an answer out of him that you could understand about the pop machine?"

Answer - "I don't know."

Question - "You decided at that time you didn't want the chaser?"

Answer - "No, I don't know what I decided - I just decided to leave."

Question - "Do you have any idea why you decided to leave?"

(Mrs. Christine Fulk)

Answer - "No sir, I don't."

Question - "So you left through the door and not through the upstairs window."

Answer - "Yes sir."

Question - "Now, you say that you didn't leave the premises in a hurry, that you casually went out and got the pint of liquor out of the car and you walked back around the building to the stock pens where the other two individuals were, and that you all stayed there and had another drink."

Answer - "yes sir."

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TESTIMONY OF CLARENCE E. COOK

[TR 66]

Direct Examination by Mr. Walsh:

Q. Would you state your name, please.

A. Clarence E. Cook.

Q. Where do you work, Mr. Cook?

A. Shenandoah Valley Livestock Sales.

Q. Were you employed there on the 21st of April of this year?

A. Yes sir.

Q. What day of the week was that?

A. Sunday.

Q. Approximately what time did you start working on that day?

A. I started at 7:00.

Q. Did you ever go home at any time?

A. About 3:30 for lunch.

Q. Prior to leaving, what was the condition of the building?

A. We locked her up tight.

Q. Who locked it up?

A. I did.

Q. Did you lock up the whole building?

(Clarence E. Cook)

A. Yes sir.

Q. Approximately how many doors are on the building?

[TR 67]

A. You mean goint into the main office?

Q. Yes sir.

A. At least a dozen of them.

Q. And you checked to make sure all of those were locked?

A. Yes sir.

Q. Are there any windows on the building?

A. Yes sir.

Q. Were those locked?

A. No, we have a screen over them.

Q. Were they closed, were the screens on all of them?

A. Yes sir.

Q. Now, you said that you left at about 3:30.

A. Yes.

Q. How long did you stay away?

A. Just about an hour.

Q. When you returned, what did you do?

(Clarence E. Cook)

A. I opened the front door and there was a fellow standing there in the office.

MR. JULIAS: What was the answer, I'm sorry, I just didn't hear it.

Q. Would you repeat your answer.

A. I opened the front door and there was a man standing in the office.

Q. There was somebody standing inside?

A. That's right.

[TR 68]

Q. Right before you went in, Mr. Cook, was anybody standing outside the building?

A. No sir.

Q. Did you see anybody else outside the building at all?

A. No sir, except the truck.

Q. Did the truck driver follow you in at all?

A. No sir.

Q. Did anybody follow you in?

(Clarence E. Cook)

A. No sir.

Q. Did you have any conversation with this man that you found inside the building?

A. I just said, what's going on.

Q. Did you get any answer?

A. No sir, he turned and walked up the steps.

Q. Where do those steps that he walked up lead to?

A. That leads up to the sale ramp.

Q. Is there any way to get out from there?

A. Yes, sure but everything else was locked up except the window where it was knocked out.

Q. The window was knocked out?

A. That's right.

Q. Where was that window located?

A. Right at the top of the steps.

Q. What type of window is it, just a glass window?

[TR 69]

A. Glass window. Part of the frame is missing on one section.

(Clarence E. Cook)

Q. Was the glass broken at all?

A. Yes.

Q. How much of it?

A. Well, we had to buy a new sash for in it.

Q. I mean, is it just one big glass pane..

A. No, it has a number of panels.

Q. How many of the panels were broken out of it?

A. Two of them.

Q. Was there a screen over this window?

A. Yes.

Q. What was the condition of the screen?

A. It was torn off and throwed down in the alley.

Q. On the inside of the building when you returned, was anything broken inside?

A. That's right, the glass was knocked out of the door and he reached inside and unlocked the door.

Q. Which door?

A. That's the one leading down the steps.

(Clarence E. Cook)

Q. This is not the window you're talking about, but you're talking about another door?

A. That's right.

Q. Now, what was the condition of the contents on the inside of the building?

[TR 70]

A. Well, the keys was all took off the nails where we hang them on the wall, they were all laying on the counter. There was papers on the floor.

Q. Where were these things before you left?

A. They hung up on the side of the wall.

Q. Now, how long a time did you have to see the man that you saw inside the building - how long did you see him?

A. Just for a couple of minutes.

Q. Did you have occasion to see him again?

A. Yes sir, when he come around from the stock yard to go down and get in his car.

Q. Now, did you see him after that?

(Clarence E. Cook)

A. I seen him when he left in his car. Then they brought him back in his car.

Q. What type of car did he have?

A. It was a gray car, I don't know the make of it.

Q. Ok, where in the car did he get in?

A. Down there at the feed barn, that over on the west side of the lot.

Q. Did he get in the back seat of the car?

A. He got under the driver's side.

Q. And you said you saw him again?

A. When the officers brought him back.

Q. Now, were you able to identify him?

[TR 71]

A. Yes sir, I identified him by his clothes when he got out of the car.

Q. Was there anything other than his clothes that you identified him by?

A. No sir.

(Clarence E. Cook

Q. Mr. Cook, I will ask you to tell the jury whether you saw the defendant, Horace Rowe, follow you into the office.

A. Positively did no one follow me in.

Q. Including the defendant?

A. That's right.

Q. Did that man or anybody ask you about the Coke machine?

A. No sir.

Q. Is there a Coke machine in there?

A. Yes, in the office there.

Q. But nobody asked you about it?

A. No sir.

Q. Including the defendant?

A. Nobody.

Q. I have no further questions.

Cross Examination by Mr. Blatt:

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(Clarence E. Cook)

[TR 72]

Q. How far is the office from the front door?

A. From the front door, it's about sixteen feet.

Q. So it was about sixteen feet from where you entered to where you saw the man.

A. That's right.

Q. Was it dark or light.

A. It was daylight.

Q. There was nothing to obstruct you from seeing him, was there?

A. No sir.

Q. It was pretty light in there?

A. Oh, yes.

Q. And about how far away from you was this person?

A. Well, it's about four feet from the door to the desk, and I picked

[TR 73]

up some papers and seen him standing there.

Q. You were about twelve feet close to him?

A. That's right.

(Clarence E. Cook)

Q. And when this person left and came out and went up the stairs, you were maybe a little bit closer than twelve feet?

A. No, because he had to turn around and go up the steps.

Q. You were about twelve feet from him.

A. That's right.

Q. And then you watched him for a couple of minutes.

A. That's right.

Q. About as close to him as you are to that table over there?

A. That's right.

Q. It was pretty light in there and there was nothing to obstruct your vision.

A. No sir, he had his head hanging down.

Q. Then you saw this person or another person or somebody dressed in green clothing come out from around the side of the building.

A. That's right, dressed exactly like the fellow that was inside.

Q. Right, and how long did you see him then?

A. Just when he passed by, I was calling the law.

(Clarence E. Cook)

Q. Ok, actually the only way you identified the accused is by his clothes, is it not?

A. Yes sir.

Q. Even though you observed him for a couple of minutes from twelve

[TR 74]

feet away.

MR. DEPOY: Your Honor, I am going to object to this line of questioning. He is not on trial today for whether he broke and entered or not - that is not material to this case. The only thing that's material is whether or not he followed him in the front door when he opened it.

COURT: Sustained.

MR. BLATT: Your Honor, it's part of the allegations in the indictment that this man denied that he broke and entered. I think the identification of the accused is very material.

(Clarence E. Cook)

COURT: Well, it has to do with the following him through the door.

MR. BLATT: It is also in the indictment that this man is on trial because he denied that he broke and entered the building.

COURT: That fact is beyond the scope of this witness' direct.

MR. BLATT: No, this witness was asked on direct

[TR 75]

if this is the man he identified and he said yes. I think that I should be afforded the right to explore the reason or the means that he identified the accused by.

COURT: It's limited to the witness' direct examination.

MR. JULIAS: Well, Your Honor please, the witness did testify in response to a question proffered by the Commonwealth that the upstairs window, two panels were broken, and they went into some extensive interrogation along that line.

(Clarence E. Cook)

COURT: He has been questioned on that and cross examined.

MR. BLATT: Well, my only question is how he can **identify** the accused except by the green clothing.

COURT: He answered that - he said that's the only way he could identify him, isn't that correct?

MR. DEPOY: Yes sir.

Q. I have one other question, you can't positively say today, other than by the green clothing, that this is the man you saw that day.

[TR 76]

A. No sir. No sir, I won't say it was.

Q. And you've never said that this was the man in there, other than by these green clothes.

A. No sir, just by the clothes he had on.

Q. You didn't actually see the accused break into the building, did you?

A. No sir. He was in there when I went in.

Q. Do you know who the guy was that was in the building?

(Clarence E. Cook)

A. No sir.

Q. You don't know who the guy was that was outside the building.

A. No sir.

Q. You never did see the face of the person inside the building?

A. No sir, he had his head hung over.

Q. But you were from here to the table away and observed him for a couple of minutes.

A. That's right.

Q. And you've never been able to identify this man other than by his clothing?

A. No sir.

Q. That's all I have.

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MOTION TO STRIKE
Honorable Joshua L. Robinson, Presiding

Franklin R. Blatt and William A. Julias, for the Defendant

Jack F. Depoy and David I. Walsh, for the Commonwealth

[TR 90]

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MR. BLATT: Your Honor, we would move to strike on the grounds that first, it has not been proven that the oath was administered - it was stipulated that it was administered, but it has not been proven that it was administered properly in this Court and therefore no jurisdiction. Secondly, we would move to strike on the grounds that the Commonwealth has not established as a matter of law a prima facie case against the defendant as to materiality on any of the points that were raised in the indictment. They have not examined or rather established that these statements were made, they have not extablished or shown in any form of examination or any evidence how they materially

[TR 91]

bear on the case of breaking and entering that was tried on July 2.

COURT: Well, your motion is overruled in all respects except with respect to the question, "did you break and enter the building?" Do you want to be heard on that, Mr. Depoy?

MR. DEPOY: No sir, I don't wish to be heard on that at this time.

COURT: So the motion is sustained with respect to the statement about did you break and enter the building, but the motion is overruled in all other respects.

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[TR 92]

COURT: **********

So, the motion is sustained with respect to lines 18 and 19 on page 85 and overruled in all other respects and your exception is noted.

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[TR 93] (In Chambers)

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COURT: Would somebody give me a copy of the transcript?

MR. WALSH: Here are the parts that we are relying on.

MR. JULIAS: With respect to the particulars that are set forth in the indictment, now on our motion to strike, we would like to further elaborate because we feel that we're getting across this without giving proper attention to it, and it's in the Court's hands and we're talking about now matters of law as opposed to questions of fact.

COURT: Now, just what are you directing your motion to?

MR. JULIAS: I am going to direct it to each and every one of the proposed paragraphs that were enumerated.

COURT: Well now, we've ruled on one of them - we've ruled on all of them, you have new grounds you wanted to assign on one of them?

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[TR 99]

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COURT: Any other grounds?

MR. BLATT: No, we would note our exception to the Court's rulings. I would like to get clarified exactly which ones are

[TR 100]

going to the jury. Is it paragraph No. 1, No. 2, No. 5, No. 6, No. 7.

COURT: Everything except, did you break and enter.

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TRANSCRIPT OF HEARING ON MOTION FOR NEW TRIAL

Dated: October 21, 1974

Filed: October 23, 1974

Honorable Joshua L. Robinson, Presiding

Franklin R. Blatt, for the Defendant

Jack F. Depoy, for the Commonwealth

[TR 1]

1. COURT: This 21st day of October, 1974, the Court has
2. before it the case of Commonwealth against
3. Horace C. Rowe, Jr. The record may show
4. the accused is present in person and with his
5. counsel, Franklin Blatt. The Commonwealth
6. appears by Commonwealth Attorney, Jack
7. DePoy. You have a motion, Mr. Blatt?
8. MR. BLATT: Yes, Your Honor, I have a two-fold motion.
9. First, on the grounds stated in my written
10. motion that the defendant's verdict be set
11. aside in his former trial for perjury which
12. was held in this Court. Also, as an alternative
13. that the defendant be granted a new trial for
14. the reasons stated in the written motion.
15. COURT: Well, didn't the Court rule on the motion for a
16. new trial?
17. MR. BLATT: Not on these grounds, Your Honor.
18. COURT: On the 4th of September there was a motion
19. for a new trial which the Court denied and
20. entered judgment on the verdict and sentenced
21. the defendant in accordance with the verdict.
22. Now, what is your motion at this time, Mr.
23. Blatt?
24. MR. BLATT: Your Honor, in reviewing the written trans-

[TR 2]

cript of the proceedings which was prepared by the Court Reporter, we found that at the close of the Commonwealth's evidence the Court sustained the defendant's motion to strike a certain portion of the indictment. And in further going over the record, we found that the Court had failed to instruct the jury or inform the jury that this had been done. The indictment was never changed. Therefore the jury brought back its verdict saying we find the defendant guilty as stated in the indictment. There were four elements in the indictment of which one had been struck by the Court, but the jury was never told to disregard this evidence, and we feel that it was highly prejudicial to the defendant on two grounds. First of all, I think it's more than coincidental that there were four elements in the indictment and the defendant got four years, but that is mere speculation. I feel that it raises the distinct possibility that since the jury was never told to disregard this particular part of the evidence, that this is the only evidence they convicted him on. I feel that there is a possibility that the

[TR 3]

jury could have disregarded the other three elements of the indictment and convicted the accused only on this particular portion of the indictment which was struck by the Court, but was never told to the jury to disregard it. We feel that for this reason the defendant should either be granted a new trial or the verdict be set aside.

COURT: Well, the indictment is only on one count, that he committed perjury.

MR. BLATT: Yes, Your Honor, but the indictment alleged four specific elements in it of which the Court struck the evidence at the close of the Commonwealth's case to the portion as to the breaking and entering.

COURT: Well, the indictment merely says that he committed perjury. I don't know what you are referring to when you refer to four elements.

MR. BLATT: The amended indictment.

COURT: Is there an amended indictment?

MR. BLATT: Yes, we had a ruling that the short-form indictment was not sufficient. Perjury is one of the exceptions to the short-form indictment. This was amended at trial and the defendant

[TR 4]

did not desire a continuance due to the amendment.

COURT: You mean whether or not he did in fact break and enter the building.

MR. BLATT: Yes, Your Honor, that was sustained on a motion to strike at the close of the Commonwealth's case.

COURT: Well, was that sustained on the motion to strike or did the court grant your motion in liminie?

MR. BLATT: The Court partially granted the motion in liminie as to one part of the transcript that the Commonwealth was going to rely on, and then sustained the entire matter on the motion to strike at the close of the Commonwealth's case.

COURT: Mr. DePoy.

MR. DEPOY: Yes, Your Honor. The motion, as I recall, at the end of the Commonwealth's evidence was a motion to strike from the evidence any reference to "did you break and enter the building". There was no motion at that time to amend the indictment or to strike that matter from the indictment. The matter went

[TR 5]

to the jury on three separate instances, was argued before the jury on three separate instances, none of which were "did you break and enter the building". It wasn't involved in the argument to the jury and I feel certainly if there was any error there was not a timely objection to it, that it went on to the jury, and even if that was error, it was harmless error since they had the three matters that were presented to them, were argued, that the matter of "did you break and enter the building" was never referred to.

COURT: Now, wasn't the motion in liminie to exclude that sustained?

MR. BLATT: Partially.

MR. DEPOY: There was a motion at the end of the Commonwealth's evidence to strike "did you break and enter the building" from further jury consideration, which was also sustained at that time.

COURT: Was there a request by the defendant that the jury be instructed to disregard that evidence?

MR. BLATT: No sir.

MR. DEPOY: Well, I think the jury was instructed to disregard it.

[TR 6]

1. COURT: Well, I don't think that evidence was admitted,
2. was it? Is that correct, Mr. Blatt?
3. MR. BLATT: Your Honor, the evidence was admitted
4. through the Commonwealth's testimony on
5. the fact of "did you break and enter the
6. building". Mr. Julias and I requested the
7. Court right before the jury came out if the
8. Court would instruct the jury at that time to
9. disregard it and His Honor made the state-
10. ment, I believe it would be prejudicial to your
11. client at this point, which we did not under-
12. stand that position.
13. COURT: Do you have the transcript?
14. MR. BLATT: I do not have the transcript here. The
15. transcript has not been filed. However, there
16. was evidence admitted by the Commonwealth
17. as to the breaking and entering. Obviously
18. it was not to our advantage after the Court
19. had struck the evidence to lay it before the
20. jury and obviously if it had been struck by
21. the Court neither defense counsel or the
22. Commonwealth's Attorney would argue it to
23. the jury.
24. COURT: Well, one of the alleged perjurous statements

[TR 7]

1. was - the defendant was asked at his previous
2. trial, did you break and enter the building,
3. and his answer was no. You made a motion
4. in liminie that that evidence be excluded.
5. MR. BLATT: Yes, Your Honor.
6. COURT: The Court sustained your motion on the
7. theory that that called for a conclusion of
8. law.
9. MR. BLATT: On that particular question, however the
10. Commonwealth argued to the Court that there
11. was other evidence and there was another
12. question in the bill of particulars that it
13. was relying on that would be proffered to
14. the jury for consideration. That evidence
15. was allowed to be portrayed, it was struck
16. at the close of the Commonwealth's evidence,
17. but the jury was never so informed. I would
18. point out that the verdict the jury gave says,
19. we find the defendant guilty as stated in the
20. indictment - the indictment has the four
21. elements in it. I feel it would raise the possi-
22. bility that the jury could have found the defen-
23. dant guilty on this point alone, disregarding
24. the other three.

[TR 8]

COURT: Now, was there any evidence permitted as to that?

MR. BLATT: Yes, Your Honor, during the Commonwealth's case in chief.

COURT: Ok, did you request at that time that the jury be instructed to disregard it?

MR. BLATT: We requested it after the motion to strike had been ruled on by the Court, I specifically asked Mr. Julias when the Court would do it, he asked His Honor, His Honor said, I believe it would be prejudicial to your client at this point, the trial then proceeded with the defendant's evidence, and the jury was never so informed.

COURT: Well, I don't know specifically what you are referring to without a transcript. Is the transcript available? Do you have a transcript, Mr. Blatt?

MR. BLATT: Yes, Your Honor, I have a transcript but I don't have it with me, I have one at the office.

MRS. FULK: The original transcript is in the Clerk's Office, but it hasn't been filed.

COURT: Suppose you bring up the transcript.

[TR 9]

COURT: Give the transcript to Mr. Blatt and let him point out what he's referring to.

MR. BLATT: Your Honor, I believe on page 24 of the transcript we see where the Court sustained the motion in liminie in part, but allowed the Commonwealth the opportunity to present evidence in part as to whether he committed the breaking and entering.

COURT: Oh, I recall that ruling now. Where is the evidence that was permitted to be introduced?

MR. BLATT: Well, throughout the testimony of the Commonwealth's witnesses. I believe first of all it was admitted when the Court Reporter was allowed to read excerpts of the defendant's transcript of his prior trial.

COURT: Where's that in this record?

MR. BLATT: The Court Reporter was allowed to read the line 18 that we were referring to, I can't place it at the moment.

COURT: If an objection was made to that, the Court certainly would have sustained it. At that time the Court would either have instructed the jury to disregard it or grant a mistrial.

MR. BLATT: Well, the Court had ruled in the motion in

[TR 10]

liminie that this evidence could be submitted and that it would not be left out. The Court Reporter then read the pertinent transcript that is filed within the bill of particulars to the jury, and the line 18 under the question 3 was read to the jury.

COURT: Where is that in the transcript?

MR. BLATT: On page 57 of the transcript, specifically on line 11.

COURT: If objection had been made to that at that time, I would certainly have sustained it. It was my impression that when the testimony was read, that the witness was instructed to exclude what is here lines 11 and 12 from the testimony. What is your recollection of that, Mr. DePoy?

MR. DEPOY: I don't know what lines 11 and 12 say.

COURT: On lines 11 and 12 on page 57 - Q. Did you break and enter the building. A. No sir, I did not.

MR. BLATT: Excuse me, Your Honor, on page 24, His Honor specifically says, "I'm going to overrule the motion with respect to line 18 and 19 on page 85 and these are the questions that

[TR 11]

Mrs. Fulk is now reading into the record - Q. Now turning to page 85, lines 18 and 19, Question - Did you break and enter this building? Answer - No sir, I did not. This was ruled admissible by the Court in the argument on the motion in liminie, but later struck at the close of the Commonwealth's case.

MR. DEPOY: That is a correct statement - it was admissible, we were permitted to read it into the evidence. It was only later that they made a motion to strike it from the evidence, which was sustained by the Court.

COURT: It was held to be admissible in evidence, but it was not a specification of perjury.

MR. BLATT: It was a specification in the indictment.

COURT: But the Court ruled that that question and answer in itself would not constitute perjury.

MR. BLATT: No, I don't believe the Court went that far. The argument was on the motion in liminie to exclude that portion of the indictment, to-wit: Did you break and enter the building or whether the defendant broke and entered the building. It was sustained in part and overruled in part, evidence was allowed to be taken

1. [TR 12] on that particular allegation in the indictment.
2. Under the laws for an indictment you must
3. state the situations you are relying on, and
4. the Commonwealth then offered its evidence
5. to prove that point in the indictment. It was
6. ordered struck by the Court, the jury was not
7. so informed, and it raises the question that
8. this was the only matter that the jury may
9. have convicted the defendant on.
10. COURT: What's your point of view on that, Mr. DePoy?
11. MR. DEPOY: Well, Your Honor, there was a motion, I
12. forget the details of the motion, to strike
13. this from the evidence, and I think the Court
14. did sustain that motion. There was no motion
15. at that time to amend the indictment or strike
16. it from the indictment at that point. As I
17. indicated, the trial proceeded from that
18. point on on three allegations of perjury, any
19. of which would have been sufficient to consti-
20. tute or bring about a conviction. "Did you
21. break and enter" was never mentioned again
22. in the course of the trial in the final argu-
23. ments or anything and I feel that if there was
24. error, and I don't really feel that there was

1. [TR 13] error because it's not the Court's duty to
2. conduct the trial, and if there should have been
3. a motion to have that stricken from the indict-
4. ment, in the absence of that, I don't feel that
5. the Court made any error by not striking it,
6. and that even if there was error it was harm-
7. less simply because there was abundant evi-
8. dence on which the accused could have been
9. convicted.
10. COURT: All right, looking at page 23 of the transcript,
11. my memory is now refreshed as to what
12. happened. There were two questions - on
13. page 23 - "I am going to sustain the motion
14. with respect to lines 6 through 9 on page
15. 93, that is are you guilty of this crime of
16. breaking and entering." The Court sustained
17. the motion in liminie with respect to that
18. question, however there was another question
19. on page 85, "Did you break and enter the
20. building". There were two separate questions.
21. The Court overruled the motion in liminie
22. with respect to that question, and I did not
23. recall when we were discussing this a few
24. minutes ago that there was two questions.

1. [TR 14] One, are you guilty of the crime, and two,
2. did you break and enter the building. We
3. held that did you break and enter was a pro-
4. per subject for a perjury conviction. The
5. question are you guilty of the crime was not
6. a proper subject of a perjury conviction.
7. MR. BLATT: That's correct, Your Honor. Then on page 90,
8. actually on page 91, I believe, the Court sus-
9. tained my motion to strike as to that question
10. which was read in by Mrs. Fulk. But the
11. jury was not so informed.
12. COURT: Well, apparently at that time I was confused
13. and did not recall that there were two separ-
14. ate questions. One, are you guilty of the
15. crime, which was not a proper question for
16. the perjury conviction, or at least that was
17. the ruling of the Court at that time, The
18. second is, did you break and enter the build-
19. ing, which was a proper question of a perjury
20. conviction, at least that was the Court's
21. ruling at that time. In the absence of - as a
22. matter of fact, that's not even in the indict-
23. ment. Now, where did you move that the jury
24. be instructed to disregard that testimony, Mr.

[TR 15]

Blatt?

MR. BLATT: Let's see, well, it's argued back here on page 94 and 95. Your Honor, we made this statement right in court on page 100, it doesn't seem to be in the transcript. Mr. Julias and I approached the bench and asked His Honor, will you instruct the jury at this time to disregard that, and Your Honor informed us that you felt it would be prejudicial to our client at that time.

COURT: Well, if it's not in the transcript, Mr. Blatt, of course this transcript is not yet a part of the record, I don't see how the Court can notice it.

MR. BLATT: Unfortunately, it seems that we've gotten into a situation that we had in another trial previously where it seems that the dictation equipment was not cut on. I believe, I'm not sure if the Commonwealth Attorney remembers this particular conversation or not, but that statement was made by His Honor. However, Mr. Julias in his arguments in Chambers does offer the defense position that we had offered to any of this evidence being

1. [TR 16] offered to the jury because we felt that it was
2. a question of law and not a question of fact
3. and that the Court should have exercised its
4. discretion in sustaining the motion to strike.
5. COURT: Mr. DePoy, should the question of whether
6. he committed perjury in stating that he did
7. not break and enter the building have been
8. submitted to the jury?
9. MR. DEPOY: Of course, it was my feeling that it was,
10. that it should have been.
11. COURT: In reviewing the representations of counsel
12. at this time, perhaps when the Court ruled
13. on it the Court was confused with respect to
14. the two questions, one, are you guilty of the
15. crime, which the court held was not a proper
16. subject of the perjury, and the other, did you
17. break and enter the building, which was.
18. Perhaps at the time of the ruling the Court
19. was confused and thought there was only one
20. question, but as I view it now and as I recall
21. the evidence, there was evidence that the
22. defendant denied breaking and entering the
23. building, at the trial of this case there was
24. evidence that the jury could have found beyond

[TR 17]

1. a reasonable doubt that he did break and enter
2. the building and committed perjury when he
3. made that statement.
4. MR. BLATT: Your Honor, it would be our position that
5. since the Court specifically cited the lines
6. and the pages in the transcript, at the time it
7. ruled on the admissibility of this evidence,
8. that the Court was not confused at that time
9. and was fully apprised of the points that we
10. were trying to make and agreed with us that
11. there was no evidence to support this point.
12. Specifically on page 92 where the Court says,
13. "The motion is sustained with respect to
14. lines 18 and 19 on page 85 and overruled in all
15. other respects, and your exception is noted."
16. COURT: It may be that I was confused with respect
17. to the two different statements that we just
18. referred to, but I don't see how that could
19. possibly have been of any prejudice to your
20. client. The Court on the 4th of September
21. considered the motion to set aside the verdict
22. and denied it and sentenced the defendant in
23. accordance with the verdict. I don't see how
24. the Court can reconsider the matter at this

[TR 18]

time. So, the motion for a new trial will be denied and the Court adheres to its previous rulings.

MR. BLATT: And the motion to set aside the verdict? I assume that is also denied?

COURT: That is correct.

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NOTICE OF OBJECTION TO TRANSCRIPT: CORRECTION
Filed: October 23, 1974

****

Comes now the defendant, by counsel, pursuant to Rule 5:11 of the Rules of Court of the Supreme Court of Virginia, and gives notice of his objections to the transcript and record of his trial as being erroneous or incomplete; to-wit, that the transcript does not accurately state the requests of the defendant to instruct the jury to disregard the evidence relative to certain portions of the indictment which were the subject matter of the defendant's motion to strike which was sustained by the Court. However, the request to so inform the jury is not reflected in the transcript and record. This notice is filed requesting the Court to make such corrections as it deems required, including any accurate corrections to make the said record complete or to certify the respect in which the record is incomplete, and sign the transcript to verify its accuracy.

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STIPULATION OF FACT
Dated: August 28, 1974
Filed: December 11, 1974

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On October 28, 1974, the Circuit Court of Rockingham County, Virginia, heard the oral argument of Horace C. Rowe, Jr., by his court appointed counsel, Franklin R. Blatt, on the motion of the accused to correct the transcript of his former trial in the Circuit Court of Rockingham County, Virginia. Present at this argument were the Honorable Joshua L. Robinson, Judge of Circuit Court of Rockingham County, Virginia, Jack F. Depoy, Commonwealth's Attorney for Rockingham County, Virginia, Franklin R. Blatt, Court appointed counsel for the defendant, and Horace C. Rowe, Jr., the defendant herein. The arguments were heard in the Judge's Chambers of the said court. Prior to the start of the arguments the Honorable Joshua L. Robinson turned on the Court recording equipment and this was checked by Mrs. Christine Fulk, Deputy Clerk. Thereafter, the Court heard the argument of counsel on the motion.

Franklin R. Blatt, appointed counsel, stated to the Court that the transcript of the defendant's former trial was incomplete in that the request of the defendant's attorneys for the Court to instruct the jury

relative to certain evidence was not contained therein. Mr. Blatt stated to the Court, that following his motion to strike in the former trial, the Court sustained that motion as to one of the counts in the indictment to-wit: that the defendant did break and enter the Shenandoah Valley Livestock Sales. Mr. Blatt further stated that the argument on the motion to strike was made in the Judge's Chambers of the Circuit Court of Rockingham County, Virginia, and thereafter, when all present re-entered the court room, but prior to the time the jury was brought back, counsel for the defendant asked the trial Judge when he would tell the jury that his motion to strike had been sustained to a portion of the indictment and to disregard evidence relative to that count. At that time defense counsel contended that the Honorable Joshua Robinson made the following comments, "I believe it would be prejudicial to your client at this time."

The Commonwealth's attorney, stated during the arguments on the Motion for Transcript correction that he had no recollection of the defendant's request for the trial Judge to inform the jury, to disregard the evidence sustained in the motion to strike.

The Honorable Joshua Robinson, Judge of the said Circuit Court, stated at the argument on October 28, 1974, that he had no specific

recollection of the defendant's request to so inform the jury, but stated that, "even if I were requested to so instruct the jury and had not done so, I would have considered it a trial tactic that counsel for defendant did not renew this request at a later time." The trial Judge then stated that "even if this was error it was harmless error."

Counsel for the defendant at this time further stated his contention that it was entirely possible that the jury disregarded the portion of the indictment which was not sustained on his motion to strike, and convicted the defendant only upon the count in the indictment which was sustained by his motion to strike and which should have been stricken from jury consideration.

After hearing the aforesaid argument, the Honorable Joshua Robinson asked both the defense counsel and the Commonwealth's Attorney if they could sign the transcript as being a true and correct copy of the trial proceedings. The Commonwealth's Attorney indicated that he could sign the transcript in this regard, but defense counsel stated that he could not. Defense counsel stated that he could sign the transcript as a true and correct copy of all portions of the trial which were recorded by the Court recording system, however, he reiterated his contention

that his request to the trial Judge to inform the jury relative to his motion to strike was not contained in the recorded transcript and for this reason he could not certify the recorded transcript as being a full transcript of all of the proceedings of the trial.

Thereupon, the Court considered the motion by the accused by counsel, to correct the transcript filed with the Court on the 23rd day of October, 1974, and over-ruled said motion, to which action of the Court the accused, by counsel, excepted. Counsel for the accused then renewed his former motion to allow Horace C. Rose, Jr., to be admitted to bail, which motion the Court granted and set bail in the penalty of $2,000.00 with surety thereupon to be approved by the Clerk of the Court. An order was then entered by the Honorable Joshua Robinson which denied the defendant's motion to correct the transcript of his former trial and also allowing the defendant bail in the penalty of $2,000.00.

This written narrative of the arguments on the motion to correct the transcript of the defendant's trial, has been necessitated due to the fact that when Mrs. Christine Fulk, Deputy Clerk, attempted to transcribe the recording belts of said arguments, it was found that the