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Clerk, Supreme Court of Appeals
Richmond, Va.

214 Va. 495

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 8228

DENNIS RAY WOODARD
Appellant

v.

COMMONWEALTH OF VIRGINIA
Appellee

JOINT APPENDIX

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Portsmouth, Virginia 23704
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Commonwealth of Virginia
City of Chesapeake } *To-Wit:*

In The Circuit Court of the City of Chesapeake:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the The City of Chesapeake, and now attending in said Court at its JULY *Term, 19*71 *upon their oaths, do present that* DENNIS RAY WOODARD *heretofore, to-wit, on the* 23rd *day of* November, *in the year 19*70, *in the said City of Chesapeake,* did unlawfully and feloniously, knowingly and intentionally, distribute and possess with intent to distribute and manufacture a controlled drug, to-wit, MARIJUANA, in violation of Section 54-524.101 of the 1950 Code of Virginia, as amended, against the peace and dignity of the Commonwealth.

SECOND COUNT: And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that Dennis Ray Woodard, on, to-wit, the 23rd day of November, 1970, in the said City of Chesapeake, Virginia, did unlawfully and feloniously, knowingly and intentionally, possess a controlled drug, to-wit, MARIJUANA, in violation of Section 54-524.101 of the 1950 Code of Virginia, as amended,

against the peace and dignity of the Commonwealth.

1A

CSG-4029-R-11-62

RGINIA: In the Circuit Court of the City of Chesapeake on July 16, 1971.

he Commonwealth

s.

An Indictment Upon a Charge of Distributing Marijuana

ennis Ray Woodard

On motion of the Attorney for the Commonwealth it is ordered that this ase be, and the same is hereby continued until the November term of this court.

A COPY, TESTE: CHARLES B. CROSS, JR., CLERK

BY.....D. C.

/IRGINIA: In the Circuit Court of the City of Chesapeake, on the 2nd day of December, 1971.

'he Commonwealth

s. An Indictment Upon a Charge of Possession of Marijuana

)ennis Ray Woodard

Due to manifest necessity, it is Ordered that this case be, and the same is hereby ontinued until the 26th day of January, 1972.

A COPY, TESTE: CHARLES B. CROSS, JR., CLERK

BY Priscilla J. Jennings D. C.

VIRGINIA: In the Circuit Court of the City of Chesapeake
on October 29, 1971.

IT IS ORDERED THAT THIS COURT DO NOW STAND ADJOURNED UNTIL THE NEXT TERM THEREOF, AS FIXED BY LAW.

A COPY, TESTE: CHARLES B. CROSS, JR., CLERK

BY Priscilla J. Immergut D. C.

AT A CIRCUIT COURT OF THE CITY OF CHESAPEAKE, AT THE COURTHOUSE OF THE SAID CITY, ON MONDAY, THE 1st DAY OF NOVEMBER, IN THE YEAR OF OUR LORD, ONE THOUSAND NINE HUNDRED AND SEVENTY-ONE, AND IN THE ONE HUNDRED AND NINETY-SIXTH YEAR OF THE COMMONWEALTH.

VIRGINIA: In the Circuit Court of the City of Chesapeake on December 2, 1971.

IT IS ORDERED THAT THIS COURT DO NOW STAND ADJOURNED UNTIL THE NEXT TERM THEREOF, AS FIXED BY LAW.

A COPY, TESTE: CHARLES B. CROSS, JR., CLERK

BY Priscilla J. Jennings D. C.

VIRGINIA: In the Circuit Court of the City of Chesapeake on December 30, 1971.

IT IS ORDERED THAT THIS COURT DO NOW STAND ADJOURNED UNTIL THE NEXT TERM THEREOF, AS FIXED BY LAW.

A COPY, TESTE: CHARLES B. CROSS, JR., CLERK

BY Priscilla J. Jennings D. C.

:RGINIA: In the Circuit Court of the City of Chesapeake on January 27, 1972.

ıe Commonwealth

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An Indictment Upon a Charge of Possession and Distributing Marijuana

nnis Ray Woodard

This day came the Attorney for the Commonwealth, and Dennis Ray Woodard o stands indicted for a felony, to-wit: Possession and Distributing Marijuana ... ...ared according to the condition of his recognizance, and came also Albert Fary, Jr., his attoreny heretofore appointed.

Whereupon the accused was arraigned and after private consultation with s counsel, pleaded not guilty to the indictment, which plea was tendered by the cused in person. And thereupon, after having been first advised by his attorney d by the Court of his right to trial by jury, the accused knowingly and volun- rily waived trial by a jury and with the concurrence of the Attorney for the ımonwealth and of the Court, here entered of record, the Court proceeded to ar and determine the case without the intervention of a jury, as provided by law l having heard the evidence and argument of counsel doth find the accused guilty possession of marijuana and guilty of distributing marijuana as charged in the ictment.

The court on motion of the defendant, by counsel, before fixing punish- t or imposing sentence, doth direct the probation officer of this Court to roughly investigate and report to the Court as provided by law, and this case continued generally.

The Court certifies that at all times during the trial of this case the endant was personally present and his attorney was personally present and capa- represented the defendant.

And the defendant is allowed to remain on bond.

A COPY, TESTE: CHARLES B. CROSS, JR., CLERK

BY Priscilla J. Jennings D. C.

RGINIA: In the Circuit Court of the City of Chesapeake on June 2, 1972.

e Commonwealth

.

nnis Ray Woodard

An Indictment Upon a Charge of Possession and Distribution of Marijuana

This day came the Attorney for the Commonwealth, and Dennis Ray odard who stands convicted for a felony, to-wit: Possession and Distribution of rijuana, who was again led to the bar in the custody of the jailor of this Court d came also Albert L. Fary Attorney for the accused.

And the probation officer of this Court, to whom this case has been eviously referred for investigation, appeared in open Court with a written repor ich report he presented to the Court in open Court in the presence of the defen- nt who was fully advised of the contents of the report and a copy of said report s also delivered to counsel for the accused.

Thereupon the defendant and his counsel were given the right to cross- mine the probation officer as to any matter contained in the said report and to esent any additional facts bearing upon the matter as they desired to present. e report of the probation officer is hereby filed as a part of the record in thi e.

A COPY, TESTE: CHARLES B. CROSS, JR., CLERK

BY Priscilla J. Jennings D. C.

Whereupon the Court taking into consideration all of the evidence in e case, the report of the probation officer, the matters brought out on cross-amination of the probation officer and such additional facts as were presented the defendant, and it being demanded of the defendant if anything for himself had or knew to say why judgment should not be pronounced against him according law, and nothing being offered or alleged in delay of judgment, it is according the judgment of this Court that the defendant is hereby sentenced to confinemen the penitentiary of the Commonwealth for the term of ten (10) years, and that e Commonwealth of Virginia do recover against the said defendant its costs by it out its prosecution in this behalf expended. It appearing to the Court that it compatiable with the public interest so to do the Court doth suspend two (2) rs of the said ten (10) years in the penitentiary and places the defendant on bation for a period of twenty (20) years after he serves his time in the State itentiary.

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

The Court certifies that at all times during the trial of this case t the defendant was personally present and his attorney was likewise personally sent and capably represented the defendant. It appearing to the Court that the endant desires to appeal this case to the Supreme Court of Virginia the Court n appoint Albert L. Fary to perfect said appeal.

And the defendant is remanded to jail to await transfer to the peniten-y.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,	)	
Plaintiff,	)	
vs.	)	NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR
DENNIS RAY WOODARD,	)	
Defendant.	)	

TO THE CLERK OF THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE:

Pursuant to the provisions of Rule 5:1, Dennis Ray Woodard, defendant in the above action, hereby gives notice of an appeal from the final order, entered on the 2nd day of June, 1972, and sets forth the following assignments of error:

1. The Court erred in overruling the defendant's motion to dismiss the indictment and forever discharge the defendant because more than three (3) regular terms of the Court had passed without the defendant being tried, pursuant to Section 19.1-191 of the 1950 Code of Virginia, as amended.

2. The Court erred in overruling the defendant's motion to strike the Commonwealth's evidence after the Commonwealth rested.

3. The Court erred in that its finding the defendant guilty was contrary to the law and the evidence.

DENNIS RAY WOODARD

By /s/ Albert L. Fary, Jr.

Albert L. Fary, Jr., p.d.
Suite 320 Citizens Trust Building
Portsmouth, Virginia 23704

I hereby certify that a copy of the foregoing Notice of Appeal and Assignments of Error was mailed to Peter M. Axson, Jr., Commonwealth's Attorney, 411 Cedar Road, Chesapeake, Virginia, on the 29th day of June, 1972.

/s/ Albert L. Fary, Jr.

with your attorney?

THE ACCUSED: Oh, yes, sir.

THE COURT: Did you also discuss your constitutional right of trial by jury?

THE ACCUSED: Yes, sir.

THE COURT: So you have discussed both of these with your attorney.

THE ACCUSED: Yes, sir.

THE COURT: After discussing them with him, you have concluded that you will plead not guilty and you'll be tried by the Judge?

THE ACCUSED: Yes, sir.

THE COURT: Are you ready for trial this morning?

THE ACCUSED: Yes, sir.

THE COURT: All right. You may have your seat.

Gentlemen, we'll proceed.

(Two witnesses were sworn to testify.)

MR. FARY: Your Honor, before we get into the evidence I have a motion to make to dismiss and discharge the prisoner from any further prosecution because three terms of the Circuit Court have gone by without the defendant being tried, the three terms being the October, November and December

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term of this Court. The defendant was indicted in July and the matter has been continued on motion of the Commonwealth on both occasions and the October, November and December terms are regular terms of this Court and there are no orders on the order book to the effect that they are not or that no court was held in that term and court was held in all three terms.

The section 17-127 of the Code of Virginia provides that all criminal matters and chancery matters shall be tried at each term of the Court and while the City of Chesapeake has designated several terms to be civil terms, the Code gives the Court the jurisdiction to try the cases at any term. And the statute says, "They shall be tried at each term."

And the defendant has been ready and willing to go to trial. He was arrested in March of 1970 and the offense occurred -- excuse me -- in March of 1971. The offense occurred in November of 1970. We believe that he is entitled to a speedy trial.

And in Flannery versus Commonwealth, 184 Virginia, the Court says it is the duty of the Commonwealth or the person charged with prosecuting the matter to see that a trial is had within three

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terms. And the section 19.1-191 provides six excuses for not trying a person during that term of court or any term of court and requires that those excuses be set forth on the order book. And there are none on the order book falling under any of the six categories set out in 19.1-191.

For these reasons we would move that the defendant be discharged from prosecution forever.

MR. KOWALSKY: If Your Honor please, this is true, that this case was continued in the July term. On our motion this was done with the agreement of the defense counsel to give the defendant an opportunity to cooperate with the narcotics squad. This is the reason that we requested -- it was for his own benefit. This was the reason that we requested this continuance.

MR. FARY: Your Honor, I object to any reasons stated for this. The Court has held in the Flannery case that any parole evidence is not admissible. It's irrelevant and the Court can only go by the order book and I would ask the order book be entered into evidence.

MR. KOWALSKY: Your Honor, I don't have that case before me right now but I certainly think that we could -- for example, I would be entitled

1 to put Mr. Gillette on to testify as to why, if he
2 knows -- as to why this case was continued.
3 THE COURT: Doesn't the statute say a case
4 must be entered by order of the record?
5 MR. KOWALSKY: I was just -- what was that?
6 MR. FARY: 194 Virginia.
7 THE COURT: One nineteen one.
8 MR. FARY: Oh, 19.1-191.
9 MR. KOWALSKY: It says in Section 6, "Where
10 there be no court held at the regular term or where
11 there is court held and for any reason it would be
12 injudicious in the opinion of the Court to have
13 jurors or witnesses summonsed for that term, which
14 reasons shall be specially spread upon the records
15 of that court." That applies only to that section.
16 as I see it; does not apply to any of the other
17 reasons that are there found, that are listed there.
18 I don't think -- I think that applies just to that
19 one section. I think we would be able to -- wouldn't
20 have to necessarily be entered in the order book.
21 I think that we would be entitled to put on other
22 evidence, if we have any, to show the reason for
23 the continuance.
24 THE COURT: The Supreme Court recently decided
25 a case in the last three or four terms, my

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1 recollection, is they should be entered in the
2 record.
3 MR. FARY: 211 Virginia 407, Your Honor.
4 MR. KOWALSKY: Your Honor, could I -- I'm
5 caught a little bit by surprise because he didn't --
6 I wasn't really given notice of what the nature of
7 his motion was. I really wasn't prepared. I
8 hadn't checked the order book but I would like to
9 have an opportunity at this time to check the
10 order book to see if there was a reason for --
11 listed for the continuance but I have --
12 THE COURT: What are the terms of court now?
13 I mean --
14 MR. KOWALSKY: That's another consideration,
15 Your Honor. We have -- we hold criminal terms in
16 July, November, January and April.
17 THE COURT: July, November, January and April
18 are criminal terms?
19 MR. KOWALSKY: Yes, sir. So as I view it,
20 the only terms that have passed in which this case
21 was set for trial were July and November terms.
22 THE COURT: Don't count the July term.
23 MR. KOWALSKY: And this is the -- well, this
24 was a term that has passed. It wasn't set but it
25 was a term that has passed and it's now coming in

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1 this third term, January term, and this would be
2 the third term.
3 Now, his interpretation of this is that any
4 term of court counts, including the civil terms
5 which have passed. This is, I think, the nature
6 of his motion. The Acts of Assembly set out that
7 in the Circuit Court of the City of Chesapeake,
8 that the July, November, January and April terms
9 shall be criminal terms and all of the other terms
10 will be civil terms.
11 MR. FARY: Your Honor, I'd like to say one
12 thing about that. In April, 1968, an order was
13 entered on the order book designating the months
14 of October -- we just speak about these months.
15 That's all we're concerned about -- October,
16 November, December and January as terms of the
17 Court. The Circuit Court, City of Chesapeake, is
18 the only court that designates -- only Circuit
19 Court that designates different times for different
20 causes to be tried. But the Section 17-127
21 specifically provides that the judge can do what
22 he wants to about it in designating those terms
23 but it says the court shall try at every term all
24 chancery and all criminal matters and whatever
25 civil matters that are set. And the Article I,

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1 Section 8 of the Virginia Constitution guarantees
2 a person a right to a speedy trial and the Flannery
3 case and the latest case, 211, 407 case, the
4 Court has specifically said that the legislature,
5 when they enacted this 19.1-191, they enacted it
6 for the sole purpose to codify their interpretation
7 of what a speedy trial is and they said three
8 regular terms. And in the Flannery case they said
9 if they desired to make it -- make the term count
10 against the defendant because he remained silent,
11 they would have said so and the same thing applies --
12 if they meant that it had to be a criminal term,
13 then they would have had to have changed 17-127
14 and say that they could only be tried at criminal
15 terms.
16 There's another section that provides that --
17 19.1-197 -- that a jury -- the judge shall impanel
18 a jury at each term of the court and he can impanel
19 more than one but it is for the purposes -- for
20 the purposes of trying all felony matters and
21 misdemeanor matters and any civil matters that
22 were set. And they can all be tried at any term.
23 And because the court specifies one term is when
24 they are going to try it, they still must give a
25 man -- they can't, by taking one term out of four

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terms and designating as only criminal terms -- they cannot deny a man a speedy trial for those reasons, Your Honor.

MR. KOWALSKY: Your Honor, Judge Hillard did not sit at all during the October and December terms and we had no judge of the court. We could not have tried any of those terms. And, in addition, this -- 19.1-191 lists several reasons for excuses that are granted or allowed the Commonwealth for not trying the cases. It has been interpreted by the Supreme Court. The interpretation here applied by the Supreme Court to this particular statute has been that these excuses are not exclusive; that similar types of excuses where, in the interest of justice it just could not possibly have been tried and that these excuses will also be allowed the Commonwealth. This is in the annotations under 19.1-191.

THE COURT: Let's put the Clerk on the stand. He says he can throw some light on it.

MR. KOWALSKY: All right. That's what I was requesting.

(Witness sworn.)

MR. FARY: Your Honor, suitable to comply with the Flannery case as to the parole evidence, I

1 think the Clerk ought to be limited in his
2 testimony as to what is in the order book.
3 THE WITNESS: I'm going to testify to that.
4 MR. FARY: That's not the order book.
5 THE WITNESS: That's my notes.
6 MR. FARY: I'd like to have the order book.
7 He can testify from -- I'm sure I've got specific
8 dates. I'd like to question him about what I know
9 are in the order book.
10 THE COURT: All right. Well, we'll get that.
11 We'll look at his notes. Then we'll check the
12 order book, see if the order book reflects his
13 notes.
14 All right. For the record, Mr. Clerk, identify
15 yourself.
16 THE WITNESS: H. T. Gillette, Deputy Clerk.
17 THE COURT: All right, sir. In this case,
18 Commonwealth versus Dennis Ray Woodard, what does
19 the record show?
20 THE WITNESS: The record shows he was indicted
21 at the July, 1971, term of the Court. His docket
22 call was set for July 17 -- 16. At that time the
23 attorney for the Commonwealth moved to continue it
24 till the November term of this Court. At the
25 November docket call it was set for December 2,

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which was the last day of the term. And Judge Bray at the July term had agreed to sit on that day and for some reason he made other plans and was out of town. We didn't know that we didn't have a judge until we convened court that morning and no judge. So it was continued due to manifest necessity to January 26, which was yesterday, and at the docket call it was moved to today. We had no court during the month of October or December because we didn't have a judge.

THE COURT: October? What month?

THE WITNESS: October we had Judge Russo and Judge Wahab sat one day each and it was on motion day and they just took everybody that could be heard those two days. December we had to continue everything because of a judge not being available. We asked the Supreme Court to assign us a judge but they didn't do it.

THE COURT: All right. Gentlemen, Commonwealth have any questions?

EXAMINATION BY MR. KOWALSKY:

Q Judge Hillard was not present during the months, you say, of October and December?

A No, sir, he's been ill since July, end of

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1 July.

2 Q And you say the Supreme Court did not

3 designate anyone during those months?

4 A They designated Judge Russo for one day in

5 October and Judge Wahab for one day and they designated no

6 judges for the month of December.

7 Q What types of terms are the October and

8 December terms?

9 A Civil terms.

10 Q Have any criminal cases ever been tried

11 during those terms?

12 A Yes, sir, they have on -- upon agreement of

13 counsel.

14 Q Are they regularly set?

15 A They're not regularly set, no, sir.

16 MR. KOWALSKY: All right. That's all.

17

18 EXAMINATION BY MR. FARY:

19 Q Mr. Gillette, you say that two judges sat

20 two times in the month of October.

21 A One day each.

22 Q All right. Was an order entered on the

23 order book ending the October term?

24 A Probably was.

25 Q All right. There was an order prior to

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1 October ending the previous term and going on to the next
2 term, then.
3 A Right.
4 Q And in December were there any judges present
5 at any time?
6 A No, sir, I had no judge.
7 Q On December the 13th, 1971, was Judge Hillard
8 present?
9 A He could have been. He's been in and out of
10 here. We take orders to his home for entry. The order book,
11 of course, would reflect that he was sitting because he
12 entered that order.
13 Q Was an order entered stating that Judge
14 Hillard was present and an order was entered on his behalf
15 on December 13 on page 462?
16 A I'm sure there was. It could have been, if
17 you saw it.
18 Q On December 14 was an order saying Judge Bray
19 was present -- and this was in the matter of the Estate of
20 Daniel Troy Tarkley?
21 A Yes, sir, that was an order that we sent down
22 to him for entry and it was entered in the common law order
23 book as him being present because he entered it.
24 Q What was the last day of the December term?
25 A December 31 -- 30 -- 31.

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1 Q It wouldn't go into January until the first
2 day of the next term.
3 A That's right.
4 Q When's the first day of the January term,
5 then?
6 A The second -- third day of January. It's
7 always the first Monday in the month begins the term.
8 Q First Monday in the month begins it? It's
9 not the first Wednesday after the first Monday?
10 A No, first Wednesday after the first Monday is
11 docket call.
12 Q But you can't have the term begin before the
13 docket call, can you?
14 A Certainly, first Monday's always Grand Jury,
15 the term begins.
16 Q All right.
17 A Can't have a docket call until you have some
18 cases to set.
19 Q On December 30 was an order entered adjourning
20 the Court until the next term as fixed by law?
21 A If there was a judge that day, yes, sir. I
22 mean, if we had some orders.
23 Q On page 478.
24 A Could be. Might have been the 29th. I'd
25 have to look.

1 Q Was Judge Bray there on the 30th?

2 A I don't think he was physically present. If

3 there's an order in there, it was one that was sent to him

4 for entry.

5 Q There's an order entered showing the State

6 Highway Commission versus Jackson on December the 30th,

7 stating Judge Bray was present.

8 A We set all our orders like that and entered

9 them when he got around to it.

10 Q And this order was entered on December the

11 30th on the following page adjourning the Court until the

12 next day and the next term.

13 A Right.

14 Q So, then, in October the term was convened

15 and ended and in December it was convened and ended.

16 A Yes, sir.

17 Q All right.

18 A But the judge was not physically present here.

19 There was orders sent to him for entry.

20 Q Well, I think -- think you got to go by the

21 order book.

22 MR. FARY: I have no further questions, Your

23 Honor.

24 MR. KOWALSKY: That's all.

25 MR. FARY: I'd like to say one other thing.

1 It's an old case, 20 Grattan Virginia -- 20 Grattan
2 800. The Court specified there that one day is a
3 term.
4 THE COURT: That's a court not of record.
5 MR. FARY: No, sir, that's a court of record.
6 It says a term can consist of thirty days, ten days
7 or one day, as long as the court is convened and
8 an order entered upon the order book adjourning the
9 court until the beginning of the next term. That
10 is a term and a whole term. Once the court sits
11 and adjourns, it is a term. And I'd like to get the
12 Court to look at that case, if it has any questions
13 about it, because it is specific and it has not
14 been overruled and it said that one sitting, as long
15 as the court has been convened and an order entered
16 on the order book adjourning the court until the
17 next term, that is a term.
18 MR. KOWALSKY: Your Honor, I don't have that
19 case before me and I haven't had an opportunity to
20 look at it. Mr. Fary has prepared his cases and,
21 as I said, I wasn't given notice until just shortly
22 before he made his motion that this matter would
23 come up, that this motion would be made. Our
24 contention, however, is that due to the illness of
25 Judge Hillard, the Court could not -- could not be

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held. True some orders were entered during the term. Mr. Gillette has explained how those orders were done. There was certain business that had to go on but we could not have tried and did not try criminal cases during the regular criminal terms of July and November. And during the month -- terms of October and December, it has always been the practice of this Court to set only civil cases unless by agreement of counsel there is some special matter that has to be tried. I can't think of one right offhand since I've been in the office of Commonwealth Attorney that has been tried during those terms. It is our contention -- it is our contention that the July term is the only term that has been continued upon our motion and it was upon our motion. The other continuance was -- the order book, I'm sure, reads due to manifest necessity and it was due to the illness of Judge Hillard and the inability of Judge Bray to sit on that day.

MR. FARY: Your Honor, for the record, I want to state my objections to the parole evidence still continues and I'd like to ask at this time that the Court strike all the parole evidence that has been introduced here in this matter today.

THE COURT: Well, Mr. Fary, at this time I'm

1 going to overrule your motion and hear the evidence.
2 MR. FARY: Note my exception.
3 THE COURT: And you note your exception.
4 MR. KOWALSKY: Trooper Anderson.
5
6 -----oOo-----
7
8 R. K. ANDERSON, called as a witness on behalf
9 of the Commonwealth, having been first sworn, was examined
10 and testified as follows:
11
12 DIRECT EXAMINATION
13
14 BY MR. KOWALSKY:
15 Q Please state your name and occupation.
16 A R. K. Anderson. I'm presently employed as a
17 safety manager, McLean Trucking Company.
18 Q In November of 1970 what was your employment?
19 A Trooper with the Virginia State Police.
20 Q Do you know the defendant, Dennis Ray Woodard?
21 A Yes, sir.
22 Q How did you come to know him?
23 A I was working undercover narcotics
24 investigation. I met him through that work.
25 Q Did you see him on November 23, 1970?

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CLERK
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