

2967

194-267

# Record No. 4017

---

---

In the  
Supreme Court of Appeals of Virginia  
at Richmond

---

**JAMES WILLOUGHBY**

v.

**W. FRANK SMYTH, JR., SUPERINTENDENT  
OF THE VIRGINIA STATE PENITENTIARY**

---

FROM CORPORATION COURT OF CITY OF NORFOLK, PART TWO

---

---

## RULE 5:12—BRIEFS.

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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.

M. B. WATTS, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

194VA 267



## RULE 5:12—BRIEFS

**§1. Form and Contents of Appellant's Brief.** The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

**§2. Form and Contents of Appellee's Brief.** The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

**§3. Reply Brief.** The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

**§4. Time of Filing.** As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of the record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) The opening brief of the appellant shall be filed in the clerk's office within twenty-one days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. The brief of the appellee shall be filed in the clerk's office not less than twenty-one days, and the reply brief of the appellant not less than two days, before the first day of the session at which the case is to be heard.

(b) Unless the appellant's brief is filed at least forty-two days before the beginning of the next session of the Court, the case, in the absence of stipulation of counsel, will not be called at that session of the Court; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

**§5. Number of Copies.** Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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.

**§7. Effect of Noncompliance.** If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.



CLERK  
SUPREME COURT OF APPEALS



IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND.

---

**Record No. 4017**

---

VIRGINIA :

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Wednesday the 23rd day of April, 1952.

JAMES WILLOUGHBY, Plaintiff in Error,  
*against*

W. FRANK SMYTH, JR., SUPERINTENDENT OF THE  
VIRGINIA STATE PENITENTIARY, Defendant in Error.

---

From the Corporation Court of the City of Norfolk,  
Part Two.

---

Upon the petition of James Willoughby a writ of error and *supersedeas* is awarded him to a judgment entered by the Corporation Court of the city of Norfolk, Part Two, on the 19th day of November, 1951, in a certain *habeas corpus* proceeding then therein depending wherein the said James Willoughby was petitioner and W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, was respondent, but said *supersedeas* is not to operate to discharge the petitioner from custody.

## RECORD

\* \* \* \* \*

page 2 } In the Circuit Court of the City of Richmond.

James Willoughby, Petitioner,

v.

W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, Respondent.

PETITION FOR WRIT OF *HABEAS CORPUS AD SUBJICIENDUM*.

To the Honorable Harold F. Sneed, Judge:

Now comes the petitioner, James Willoughby, a citizen of the United States and respectfully showeth unto this Honorable Court that he is being restrained and deprived of his liberty in the Virginia State Penitentiary by the respondent herein, W. Frank Smyth, Jr., Superintendent of said Penal Institution, and that the said imprisonment of the petitioner by the respondent is illegal and void and without lawful authority, under the due process clause of the Federal Constitution and under the laws and Constitution of the State of Virginia.

An information was filed against the petitioner in the Circuit Court of the City of Richmond, Virginia, alleging that he had been convicted of felony and sentenced to the Virginia Penitentiary on three separate and distinct occasions, to-wit, (1) In the Corporation Court Part 2 of the City of Norfolk, July 17, 1935, sentenced to a term of one year in the penitentiary.

(2) In the Corporation Court of the City of Norfolk, Number Two, November 23, 1943; sentenced to a term of one year in the penitentiary.

(3) In the Corporation Court of the City of Norfolk, January 9, 1946, sentenced to a term of eight years in the penitentiary.

page 3 } By reason of said information petitioner was sentenced in the Circuit Court of the City of Richmond; March 13, 1946, to serve a sentence of 10 years in the penitentiary; in addition to the 8 year sentence imposed in the Corporation Court of Norfolk, January 9, 1946.

Petitioner was without and on account of being indigent

unable to secure counsel to represent him in the repeater proceedings and did not know of his Constitutional Right to the aid and assistance of counsel, and was not advised of or offered counsel in the repeater proceedings in the Circuit Court of Richmond.

Yet, independent of any question of counsel, the sentence of 10 years in the penitentiary rendered against the petitioner in the Circuit Court of the City of Richmond, is a nullity, for the following, to-wit, namely, the first conviction and sentence set out in the information, which was imposed in the Corporation Court of the City of Norfolk, Number Two, on July 17, 1935, is void. In this case your petitioner was sentenced to serve one year in the penitentiary on the following verdict of the jury: "We the jury find the accused each guilty of Attempted storebreaking and fix their punishment for one year each".

"Attempted storebreaking" is not a crime under the law of this state and such void verdict afforded the trial court no jurisdictional basis for sentence.

In addition thereto, no breaking is alleged in the indictment, and no citizen can be condemned by a criminal court of an offense not charged against him, or sentenced for an act not made criminal by law.

page 4 } A certified copy of the information is hereby filed and marked "Exhibit A" and made a part hereof; and prayed to be read and considered as if fully set out herein.

A certified copy of the order of sentence rendered in the Circuit Court of the City of Richmond, March 13, 1946, for third conviction, under section 5054 Code of Virginia, 1942, is hereby filed and marked "exhibit B" and made a part hereof and prayed to be read and considered as if fully set out herein.

A certified copy of the indictment upon which petitioner was tried in the Corporation Court of Norfolk, Part 2, July 17, 1935, is hereby filed and marked "exhibit C" and made a part hereof and prayed to be read and considered as if fully set out herein.

A certified copy of the order of trial, in the Corporation Court, Part 11 of Norfolk, containing the verdict, upon which it is contended the repeater sentence is void, is hereby filed and marked "exhibit D" and made a part hereof and prayed to be read and considered as if fully set out herein, said trial being on July 17, 1935.

Petitioner has finished undergoing the sentence of 8 years in the penitentiary imposed in the Corporation Court of Norfolk; January 9, 1946, and the sole process under which he is

held by the respondent, is the sentence of the Circuit Court of Richmond as aforesaid.

Insomuch as the sentence of the Circuit Court of Richmond, is a nullity, petitioner prays that a writ of *habeas corpus ad subjiciendum* be granted, directing that the respondent, W. Frank Smyth, Jr., have the body of the petitioner before the bar of the Circuit Court of the city of Richmond, at a time and place therein specified, together with the time page 5 } and cause of this detention, and that the sentence of the Corporation Court of the City of Norfolk Part Two, rendered July 17, 1935, be declared void and the sentence of 10 years of the Circuit Court of Richmond likewise be declared a nullity, and the petitioner herein discharged.

Respectfully,

JAMES WILLOUGHBY  
By W. A. HALL, JR.  
Attorney for James Willoughby

State of Virginia  
City of Richmond, to-wit:

This 19th of April, 1951, appeared before me, the undersigned Notary Public, W. A. Hall, Jr., attorney for the petitioner, who signed and swore to the aforesaid petition for writ of *habeas corpus ad subjiciendum*; and swore the facts therein are true to the best of his knowledge, information, and belief.

MILDRED K. HALL  
Notary Public.

My commission expires June 16, 1953.  
W. A. Hall, Jr.,  
Law Building, Richmond, Virginia  
Attorney for Petitioner.

\* \* \* \* \*

page 6 } "EXHIBIT A".

Virginia:

In the Circuit Court of the City of Richmond, to-wit:

BE IT REMEMBERED, that T. Gray Haddon, Attorney for the Commonwealth of Virginia, in and for the Circuit Court of the City of Richmond, who, for said Commonwealth,

prosecutes in this behalf, cometh in his proper person on the 13th day of March, 1946, into the said Circuit Court of the City of Richmond and giveth the Court here to understand and be informed that James Andrew Willoughby, a convict in the Penitentiary of Virginia, heretofore, to-wit, on the 17th day of July, 1935, at a Corporation Court holden for the City of Norfolk, Number Two, by the name of James Willoughby was duly convicted of attempt storebreaking, an offense against the laws of this Commonwealth, then and now punishable by confinement in the said Penitentiary, and was by said last mentioned Court on the 17th day of July, 1935, sentenced to confinement in the said Penitentiary for the term of one year, for the said offense, and was received into the said Penitentiary in pursuance of said last mentioned sentence; and that the said James Andrew Willoughby, afterwards, to-wit, on the 23rd day of November, 1943, at a Corporation Court holden for the City of Norfolk, Number Two, by the name of James Willoughby, was duly convicted for another offense, to-wit: Grand Larceny, an offense against the laws of this Commonwealth, then and now punishable by confinement in the Penitentiary, and was by said last mentioned Court, on the 23rd day of November, 1943, sentence to confinement in the said Penitentiary, for the term of one year for the said offense, and was received into the said Penitentiary, in pursuance of said last mentioned sentence; and, that the said James Andrew Willoughby, afterwards, to-wit: on the 9th day of January, 1946, at a Corporation Court holden for the City of Norfolk, by the name of James Andrew Willoughby, was duly convicted of another offense, to-wit: Robbery an offense against the laws of this Commonwealth, then and now punishable by confinement in the said Penitentiary, and was by the said last mentioned Court, on the 9th day of January, 1946, sentenced to confinement in the said Penitentiary, for the term of eight years, for the said offense, and was received into the said Penitentiary, in pursuance of said last mentioned sentence; which said several convictions will more fully and at large appear by reference to the records thereof; remaining filed in the said Corporation Court for the City of Norfolk, Number Two and the said Corporation Court for the City of Norfolk duly certified copies of which are here produced and shown to the court.

And the said Attorney for the Commonwealth giveth the Court here to understand and be informed that the said James Andrew Willoughby, Convict as aforesaid, hath not been sentenced to the punishment by law prescribed for such third offense, as is hereinbefore set forth.



And the said Attorney for the Commonwealth giveth the Court further to understand and be informed, that the Said James Andrew Willoughby, Convict as aforesaid, is the identical person mentioned in each of the said several records hereinbefore set forth. Whereupon the said Attorney for the Commonwealth prays the consideration of the Court herein the premises, and that due process of law be awarded against the said James Andrew Willoughby, in this behalf, to make him answer to the said Commonwealth touching and concerning the premises aforesaid, and that such proceedings may be had thereupon as are directed and required by the Acts of the General Assembly of Virginia in this case made and provided.

/s/ T. GRAY HADDON  
Attorney for the Commonwealth.

A Copy,

Teste:

WILBUR J. GRIGGS,  
Clerk

page 7 }

• • • • •  
"EXHIBIT B".

INFORMATION (THIRD CONVICTION).

Virginia:

In the Circuit Court for the City of Richmond, Wednesday,  
the 13th day of March, 1946.

Commonwealth of Virginia, Plaintiff,

*against*

Willie Lee Walker, alias Willie Mullen and William Mullen, Cam Dieks, alias George Dickeson and Geo. Dickson. James Carter, alias Jas. C. Carter, Charlie Taylor, alias Charley Mack Taylor. Alfred Larsen, Paul Williams, George Bray, alias Bernard Crawford, Thomas A. Lane, Johnie Lawson, Clarence Robert Harmon, Roscoe Penn, James Andrew Willoughby, Allen Robinson, alias Allen Pugh, James G. Boyd, alias James George Boyd, Harold Lee Jones, alias

Robert Lee Hartso and Robert Lee Hartsoe, Robert Lee Warren, Lonnie Edwards, Fred White, alias Elwood Pleasant, and Elwood Pleasants, Robert C. Poteat, alias Jake Poteat and Jake Poteet and William H. Buckner, Defendants.

The Superintendent of the Penitentiary this day produced the above named defendants, and made report in writing that the foregoing named convicts had been thrice convicted and sentenced to confinement in the Penitentiary for a felony; and

THEREUPON, the Attorney for the Commonwealth filed information setting forth the several records of conviction and alleging the identity of each with the person named in each, the information being read to each of the accused, and each being first cautioned as to his or her rights, and each acknowledge in open Court that he or she is the person mentioned in the several records of conviction.

It is, therefore, CONSIDERED by the Court that each of the foregoing named convicts undergo a further confinement in the Penitentiary for a term of ten years, said term to begin at the end of the present term of confinement of each in the said Penitentiary; and each of the said prisoners are remanded to the custody of the Superintendent of the said Penitentiary.

A Copy,

Teste:

WILBUR J. GRIGGS,  
Clerk

page 8 }

“EXHIBIT C”.

Commonwealth of Virginia,  
City of Norfolk, to-wit .

In the Corporation Court of the City of Norfolk,—Part Two.

The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Norfolk, and now attending the said Court, at its July term, 1935 upon their oaths, present that Clyde Baker and James Willoughby to-wit on the 3rd day of June in the year 1935, in the said City of Norfolk, In the night time of said day feloniously did enter the store-

house of one D. Pender Grocery Company, Incorporated, a corporation, there situate, with intent then and there in said store-house, the goods, chattels and moneys of the said D. Pender Grocery Company, Incorporated, a corporation, in said store-house then and there being, feloniously to steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia.

JNO. M. ARNOLD  
Attorney for the Commonwealth.

A Copy Teste:

W. L. PRIEUR, JR., Clerk  
By MARY T. COOKE, D. C.

page 9 } "EXHIBIT D".

Virginia:

In the Corporation Court of the City of Norfolk, Number Two,  
on Wednesday, the 17th day of July, 1935.

Clyde Baker and James Willoughby, who stand jointly indicted for Storebreaking, were this day led to the bar in the custody of the Jailor of this Court, and upon being arraigned plead not guilty to the said indictment, and thereupon came twenty lawful men, free from exceptions, having been obtained from the *Venire Facias* duly directed and issued in accordance with the statute in such cases, made and provided, and summoned by the Sergeant of the City of Norfolk, from which panel the Commonwealth and the defendant each alternately struck four, leaving the following jury, to-wit: F. W. Beach, M. H. McArdle, J. H. Privett, H. H. Swinson, G. A. Brown, H. Brown, F. A. Crain, J. E. Harmon, E. L. Hoagland, G. G. James, W. T. Walden, and F. B. Whitfield, who were sworn the truth of and upon the premises to speak, and having heard the evidence and argument of counsel, returned a verdict in the following words: "We the jury find the accused each guilty of Attempted storebreaking and fix their punishment at confinement in the penitentiary for one year each". Thereupon the said defendants, by counsel, moved the Court to set aside the verdict of the jury and grant them a new trial on the grounds that the said verdict is contrary

to the law and the evidence, which motion having been fully heard by the Court, is overruled, to which action of the Court in overruling said motion, the defendants by counsel, duly excepted. Whereupon, it being demanded of them, if anything for themselves they had, or knew to say, why the Court here should not now proceed to pronounce judgment against them according to law, and nothing being offered or page 10 } alleged in delay of judgment, it is therefore considered by the Court that the said Clyde Baker and James Willoughby each be confined in the Penitentiary of this Commonwealth for the term of one year, subject to a credit of 34 days spent in jail for James Willoughby. The aforesaid sentences of one year in the Penitentiary are not to run concurrently with any other sentence given in this Court or any other Court of this Commonwealth.

And the prisoners were remanded to jail.

A Copy Teste:

W. L. PRIEUR, JR.,

Clerk

By MARY T. COOKE,

Deputy Clerk

\* \* \* \* \*

page 17 }

\* \* \* \* \*

RETURN AND ANSWER OF THE RESPONDENT.

Now comes the respondent, W. Frank Smyth, Jr., by counsel Superintendent of the Virginia State Penitentiary, and, in obedience to the writ of *habeas corpus* heretofore issued, produced the body of the petitioner, James Willoughby, before the Court.

In answer to the said writ and petition the respondent does say as follows:

1. The petitioner is being held under orders of the Circuit Court of The City of Richmond of March 13, 1946, wherein he was sentenced to a term totalling ten (10) years upon an habitual criminal charge. All of the orders of this Court in connection with these charges and any others relating to the



respondent are prayed to be read and considered a part of these proceedings.

2. The respondent denies that the orders of conviction under which the petitioner is being held are void for any of the reasons alleged in the petition, or for any other cause or reason.

Wherefore, the petition for a writ of *habeas corpus* should be dismissed, and the writ of *habeas corpus* discharged.

W. FRANK SMYTH, JR.  
Superintendent Virginia State  
Penitentiary  
By THOMAS M. MILLER  
Counsel for W. Frank Smyth, Jr.

\* \* \* \* \*

page 19 }

\* \* \* \* \*

ORDER.

The Court having heard the argument of counsel for the petitioner and for the respondent on the petition, writ of *habeas corpus* and return and answer, said answer being filed herein on this date by leave of Court first granted, and having taken the same under advisement, and the Court now being advised of its judgment in the premises and being of the opinion that the trials and convictions of the petitioner in the Circuit Court of the City of Richmond, Virginia, on March 13, 1946, and in the Corporation Court of the City of Norfolk, Part Two, on July 17, 1935, were lawful and valid in all respects, it is adjudged and ordered that the writ of *habeas corpus* heretofore issued herein be, and the same is hereby, discharged, and the prayer of the petition be, and the same is hereby, denied; and it is ordered that the petitioner be, and he is hereby, remanded to the custody of the respondent, to all of which action of the Court the petitioner objects and excepts.

Enter 11/19/51.

J. S. S.,JR.

page 20 }

. . . . .

Mr. Thomas M. Miller  
Assistant Attorney General  
and Attorney for Respondent:

This is to notify you that the petitioner herein, James Willoughby, will prosecute an appeal and apply to the Supreme Court of Appeals of Virginia, for writ of error and *supersedeas*, from the order of the Corporation Court of the City of Norfolk, Part II, entered November 19, 1951, dismissing his petition for writ of *habeas corpus ad subjiciendum* and discharging the writ beforehand awarded, and remanding petitioner to the custody of the Respondent.

Petitioner assigns the following assignments of error:

I.

The Honorable Judge of the Corporation Court of the City of Norfolk, Part II committed reversible error in his refusal to declare the verdict of the jury rendered in the Corporation Court of the City of Norfolk, Part II, on the 17th day of July, 1935, a nullity, as the verdict finding petitioner guilty of attempted store breaking, constituted no crime, and such verdict was not in conformity with the indictment, and afforded no jurisdictional basis for the sentence of the Court rendered thereon.

II.

The Honorable Judge of the Corporation Court of the City of Norfolk, Part II, committed reversible error in page 21 } refusing to adjudge the ten year repeater sentence rendered against the petitioner on the 13th day of March, 1946, in the Circuit Court of the City of Richmond, a nullity, as said sentence was based on the beforehand mentioned void verdict and sentence rendered against petitioner on the 17th day of July, 1935, in the Corporation Court of the City of Norfolk, Part II.

## III.

The Honorable Judge of the Corporation Court of the City of Norfolk, Part II, committed reversible error in his refusal to discharge petitioner from the custody of the Respondent.

Richmond, Virginia  
January 14, 1952.

I hereby certify that I delivered a copy of the foregoing Notice of Appeal and Assignments of Error to Mr. Thomas M. Miller, Assistant Attorney General and Attorney for Respondent.

W. A. HALL, JR.,  
Attorney for Petitioner,  
James Willoughby

•   •   •   •   •  
A Copy—Teste:

M. B. WATTS, C. C.

## INDEX TO RECORD

|  | Page |
|--|------|
| Writ of Error and <i>Supersedeas</i> Awarded . . . . .       | 1    |
| Record . . . . .   | 2    |
| Petition for Writ of <i>Habeas Corpus Ad Subjiciendum</i> .. | 2    |
| Exhibit ((A" with Petition—Information . . . . .             | 4    |
| Exhibit "B" with Petition—Order of Sentence . . . . .        | 6    |
| Exhibit "C" with Petition—Indictment . . . . .               | 7    |
| Exhibit "D" with Petition—Order of Trial . . . . .           | 8    |
| Return and Answer of the Respondent . . . . .                | 9    |
| Judgment, November 19, 1951—Complained of . . . . .          | 10   |
| Notice of Appeal and Assignments of Error . . . . .          | 11   |