

Record No. 5409

**In the
Supreme Court of Appeals of Virginia
at Richmond**

**W. K. CUNNINGHAM, JR.,
SUPERINTENDENT, ETC.**

v.

GLENN W. FRYE

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART II

RULE 5:12—BRIEFS.

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

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

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

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held. **APR 1962**

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

Record No. 5409

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 6th day of October, 1961.

W. K. CUNNINGHAM, JR., SUPERINTENDENT, ETC.,
Plaintiff in Error,

against

GLENN W. FRYE,

Defendant in Error.

From the Hustings Court of the City of Richmond, Part II

Upon the petition of W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, a writ of error is awarded him to a judgment rendered by the Hustings Court of the City of Richmond, Part III, on the 11th day of April, 1961, in a certain proceeding then therein depending wherein Glenn W. Frye was plaintiff and W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, was defendant; no bond being required.

RECORD

* * * *

The Court, having received by mail direct from the petitioner a petition for a Writ of *Habeas Corpus*, doth order the same filed, and the petitioner is permitted to proceed in *forma pauperis*.

And upon a consideration thereof and it appearing to the Court that there is reason to believe that so much of the sentence of life imprisonment as exceeds five years confinement imposed upon the petitioner on November 15, 1957 in the Circuit Court of Smyth County, Virginia, may be void, therefore, the Court doth order that the respondent do file his Answer to this Rule on or before September 7, 1960 as to why the petitioner should not be treated as serving a maximum sentence of five years.

And the Court at this time doth not pass upon the other allegations in the Petition.

Enter 7/15/60.

M. R. D.

* * * *

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* * * *

Filed by order July 15th 1960.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

O. B. 41 Page 141.

PETITION FOR THE WRIT OF *HABEAS CORPUS*
AD SUBJICIENDUM.

To the Honorable M. Ray Doubles, Judge of the above court.

Your petitioner, Glenn W. Frye, a citizen of the United States of America, hereinafter referred to as the relator, shows unto Your Honor and complains that he is being im-

prisoned and restrained of his liberty by the respondent, W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, in the Virginia State Penitentiary, at 500 Spring Street, in the City of Richmond, within the territorial jurisdiction of this Court, and that said imprisonment is illegal and void under the laws and Constitution of Virginia and the due process clause of the Fourteenth Amendment to the United States Constitution. In support thereof, the relator respectfully states as follows:

1. That on or about October 8, 1957, the relator was placed under arrest and was lodged in the County Jail of Smyth County, Marion, Virginia, for investigation concerning the death of one, William F. Tolbert. On October 19, 1957, a Warrant of Arrest was sworn by John T. Wolfe, Sheriff of Smyth County, charging that relator "in said County did on the 6 day of October, 1957: Unlawfully and feloniously kill and slay William F. Tolbert." A hearing was waived in Justice of Peace Court and the case was remanded to the grand jury. A copy of the Warrant of Arrest is annexed hereto, marked Exhibit "A," and is made a part hereof.

2. That on October 28, 1957, the grand jury sitting in and for the County of Smyth, Virginia, at the October Term, 1957, returned in the Circuit Court of said County an indictment, charging the relator as follows:

"The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Smyth and now attending said court, upon their oath, present that, GLEN W. FRYE on the 6th day of October, in the year One Thousand Nine Hundred and Fifty Seven (1957) in said county did, unlawfully and feloniously kill and slay William F. Tolbert against the peace and dignity of the Commonwealth."

A certified copy of the aforesaid indictment is annexed hereto, marked "Exhibit "B," and made a part of this petition.

3. That on the same day and date, October 28, 1957, the Circuit Court of Smyth County appointed Messrs. L. P. Collins, III and D. Burke Graybeal, attorneys, to defend the relator. A certified copy of said order is annexed hereto, marked Exhibit "C" and made a part hereof.

4. That on November 15, 1957, the relator was arraigned upon the aforesaid indictment, and upon the advice of court-assigned counsel waived a trial by jury and pleaded guilty to the charge contained in the indictment; that trial proceedings were duly had before the Circuit Court of Smyth County,

the Honorable Thomas L. Hutton, Judge, presiding; that relator was found guilty of murder in the first degree; and that the relator was forthwith sentenced to serve a term of confinement in the penitentiary of the Commonwealth for the remainder of his natural life. A certified copy of the order relating to the trial proceedings and the judgment of conviction rendered therein is annexed hereto, marked Exhibit "D," and made a part hereof.

5. That no official court reporter was present in court during the trial proceedings related above and, consequently, no stenographic notes were taken of the testimony given at relator's trial. However, a detailed news account of the trial proceedings was reported in the Smyth County News, Marion, Virginia, on Thursday, November 21, 1957. For the information and convenience of the Court, the relator has annexed hereto an exact typewritten copy of the aforesaid report, which is marked as Exhibit "E," and is made a part of this petition.

6. That, likewise, for the convenience and information of the Court, a certified copy of a statement taken from relator and filed with the trial court, is annexed hereto as Exhibit "F," and is made a part of this petition.

7. That the salient facts relating to the evidence submitted to the Circuit Court of Smyth County, Virginia, on the 15th of November, 1957, at the trial and the sentencing of the relator, are accurately set forth in the report and statement contained in Exhibits "E" and "F."

8. That soon after the imposition of the life sentence meted out again relator by his Honor, Judge T. L. Hutton, the relator was transported in confinement to the Virginia State Penitentiary at Richmond, Virginia, where he has since been, and is presently, confined by the respondent, W. Frank Smyth, Jr., as the Superintendent of said penitentiary.

page 5 } 9. That your relator avers and shows that the beforehand mentioned indictment, to which relator pleaded guilty in the Circuit Court of Smyth County, Virginia, on November 15, 1957, did not charge the relator with the commission of the crime of murder and, accordingly, afforded no jurisdictional basis for the adjudication by the court finding relator to be "guilty of murder in the first degree," and for the same reason, afforded the court no jurisdictional basis for imposing the sentence of "a term of confinement in the penitentiary of the Commonwealth for the remainder of his natural life" against the relator, as it did; and that the said adjudication of murder in the first degree

and the sentence to life imprisonment in the penitentiary are nullities.

10. That the element and essential components of the crime of murder, in either the first or the second degree, are wholly and totally omitted from the indictment to which your relator pleaded guilty; and, that the indictment herein merely charges your relator with the commission of the crime and felony of manslaughter.

11. That a physical comparison of the indictment herein, as shown in Exhibit "B," with the statutory forms set forth in Section 19-140 of the Code of Virginia, 1950, shows that the said indictment is drawn in substantial conformity with the statute for charging the crime of manslaughter. From a careful examination of said statute, it is apparent the important words in the two statutory forms, which differentiates the homicide, are the two words "murder" and "slay". It is to be observed that both forms are identical in wording except in charging murder the statutory form requires the indictment to charge that the accused "did kill and *murder* one C * * * D * * *," whereas, the statutory form for manslaughter requires the indictment to charge that the said accused "did kill and *slay* one C * * * D * * *." It
page 6 } is to be noted the indictment in your relator's case
employs the descriptive word "slay" and charges, to-wit, that relator "did unlawfully and feloniously kill and *slay* William F. Tolbert, etc.," and thereby, under the provisions contained in Section 19-140 of the Code of Virginia, 1950, merely charges the relator with the commission of the crime of manslaughter.

12. That in pleading guilty generally to the indictment herein, your relator confessed guilt to whatever crime was well charged in said indictment and, inasmuch as the indictment did not charge the relator with committing the crime of murder, within the statutory requirements of Section 19-140 of the Code, the Circuit Court of the County of Smyth was without any valid jurisdictional basis to adjudicate the relator to be guilty of murder in the first-degree and, it necessarily follows that the said court's adjudication is wholly null and void.

13. That your relator's guilty plea being directed generally to the indictment, embraced only a valid confession of guilt to the commission of manslaughter, and the Circuit Court of the County of Smyth was without any jurisdictional basis, in consequence of said guilty plea, for sentencing the relator to the penitentiary for the term of the remainder of his natural life, because the maximum punishment that may law-

fully be imposed upon conviction of the crime of manslaughter in Virginia, pursuant to Section 18-33 of the Code, 1950, is not more than five years.

14. That your petitioner further respectfully represents, as shown by the record, that his cause was treated as a capital offense, and, being without and unable to employ counsel for his defense in the Circuit Court of Smyth County as aforesaid, that the *Honorable* Judge of said court, appointed the

Messrs. L. P. Collins III and D. Burke Graybeal, page 7 } members of the local bar as counsel for the relator and, further, that such assignment of the Messrs.

Collins and Graybeal was made on October 28, 1957, the very day the indictment was returned into court as a "true bill," or, that is to say, some 18 days before your relator's arraignment, plea, trial and sentencing; and avers that both attorneys, so appointed, by extreme and unwarranted neglect allowed your relator to be found guilty by the trial court without objection and exception of the crime of murder in the first degree upon an indictment merely charging relator with committing manslaughter; that, during the intervening time i. e., from October 28, 1957 to November 15, 1957, both attorneys had ample time within which to scrutinize and study the indictment, and to compare the indictment with the requirements contained in Section 19-140 of the Code of Virginia, 1950, but, it is plainly evident they neglected so to do, because, on November 15, 1957, following your relator's guilty plea, which they recommended, they not only allowed the Circuit Court of Smyth County, Virginia, to wrongfully find your relator guilty of murder, in its highest and first-degree, and to impose a sentence of life imprisonment upon relator, without objection and exception, but, did not, thereafter, undertake to carry the relator's case to the Supreme Court of Appeals of Virginia, wherein, a reversal would almost certainly have taken place.

15. That your relator relies upon the record to establish the incompetency and neglect of the two attorneys appointed by the court to represent relator on his trial, and the relator is fully aware of the fact that the incompetency of counsel within itself must be flagrant indeed to nullify a trial in a criminal case; but, nevertheless, avers that the record herein, on its face, unquestionably discloses grave incompetency on the part of both attorneys to the extent of rendering the relator's trial a sham and a pretense in derogation of the

Fourteenth Amendment to the Federal Constitution. page 8 } 16. That although your relator's statement (Exhibit F) was introduced in evidence against the relator on his trial, his court assigned counsel both absolutely

refused to allow the relator to testify as a witness in his own behalf; that, in particular, the relator wished to refute the false testimony given by the Commonwealth's witnesses that the deceased, Bill Tolbert, did not spend any money during his drinking spree on the afternoon of October 6, 1957, (see Exhibit E), whereas, in fact when John Stuart changed the \$5. for Tolbert, it was done for the purpose of paying for a quantity of moonshine whiskey. Also, as a matter of fact that Bill Tolbert had made several such purchases of moonshine liquor during the afternoon. That, although this fact was known to court assigned counsel, deputy Snodgrass, and most of the witnesses who testified for the Commonwealth, that every one seemed more interested in protecting certain well known moonshiners than they were that the true facts should be made known to the court.

17. That the relator did not understand the true nature, or the probable consequences of his guilty plea. That court assigned counsel advised the relator, and relator believed when he pleaded guilty, that the final sentence imposed against him, as a result of his guilty plea, would not amount to more than twenty year's confinement in the penitentiary; that it was represented to the relator the *Commowealth's* Attorney would recommend a sentence of fifty years, which would subsequently be reduced to no more than twenty years; that after the court ignored the Commonwealth Attorney's recommendations, and forthwith *sentnced* the relator to life imprisonment, court assigned attorneys did not offer any objection or exception on behalf of the relator, and did not note an appeal or to carry the case to the Supreme Court of Appeals of Virginia, but, as a matter of fact, deserted and abandoned your relator to his fate of life imprisonment.

page 9 } 18. That your relator was ignorant of his right to an appeal to the Supreme Court of Appeals of Virginia, and relator was not advised of his appellate rights by court-assigned counsel or by the trial court; that, even if the relator had known of his appellate rights, the relator because of illiteracy and ignorance of the law was wholly incapable of noting or perfecting an appeal from the judgment and sentence without the advice and assistance of counsel; and that, in consequence, as a practical matter an appeal from the judgment of conviction was not a remedy that was available to the relator.

19. That late in 1958, the relator filed a petition for the writ of *habeas corpus* with the Circuit Court of Smyth County which was grounded on a claim that the evidence presented against relator on his trial in the said court on November 15, 1957, was not sufficient in law to support a verdict of murder,

in the first degree; that the cause of the deceased's death was uncertain; and other and different reasons than those set forth above in the instant petition for the writ of *habeas corpus* herein; that the aforesaid petition was summarily denied, without a plenary hearing in the matter; that the relator avers no other *habeas corpus* action has heretofore ever been instituted in respect to his present confinement.

WHEREFORE, the premises considered, your relator respectfully prays that the writ of *habeas corpus ad subjiciendum* duly issue and that he may be discharged.

Respectfully submitted,

GLENN W. FRYE,
Petitioner-Relator.

page 10 } Commonwealth of Virginia,
City of Richmond, ss:

GLENN W. FRYE, being first duly sworn according to law, deposes and says:

That he is the petitioner-relator appearing in the foregoing petition for the writ of *habeas corpus*; that he is familiar with the contents of the same; and that the facts stated in said petition are true to the best of his knowledge, information and belief.

GLENN W. FRYE, Affiant.

Subscribed and sworn to before me a Notary Public this 7 day of July, 1960.

WILLIAM C.
Notary Public.

My commission expires March 5, 1963.

AFFIDAVIT OF SERVICE.

Richmond, Virginia
July 7, 1960.

This day appeared before me, a Notary Public of the City of Richmond, State of Virginia, GLENN W. FRYE, the petitioner above-named, and made oath that he has this 7 day

of July, 1960, served a copy of the foregoing petition by United States Mail, postage prepaid, upon the Attorney General of Virginia, counsel for the respondent, addressed to the Attorney' General's Office, located in the Supreme Court-State Library Building, Richmond, Virginia.

Seal WILLIAM C.
Notary Public.

My commission expires 3/5/63.

page 11 } EXHIBIT "A."

State of Virginia,
County of Smyth, to-wit:

No.....

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, Sheriff John T. Wolfe has this day made complaint and information on oath before me, Helen B. Ellison Justice of Peace of the said County, that Glen W. Frye in the said County did on the 6 day of October, 1957: Unlawfully and feloniously kill and slay William F. Tolbert.

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the County Court of the said County, the body (bodies) of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon:

..... color	Address	[]
..... color	Address	[]
..... color	Address	[]
..... color	Address	[]
..... color	Address	[]

as witnesses.

Given under my hand and seal, this 19 day of Oct., 1957.

HELEN B. ELLISON (Seal)
Justice of Peace.

A Copy—Teste:

LLOYD E. CURRIN, Clerk.

(on back)

DOCKET NO. 10716.

Commonwealth,

v.

Glen W. Frye.

WARRANT OF ARREST.

Executed this, the 19th day of October, 1957.

S. C. SNODGRASS, JR., D. S.

Upon the examination of the within charge, I find the accused

Hearing waived.

Remanded to Grand Jury.

F. M. H.

* * * * *

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EXHIBIT "B."

State of Virginia,

County of Smyth, to-wit:

October Term, 1957.

In the Circuit Court of said County:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Smyth and now attending said court, upon their oath, present that, Glen W. Frye on the 6th day of October, in the year One Thousand Nine Hundred and Fifty Seven (1957) in said county did, unlawfully and feloniously kill and slay William F. Tolbert, against the peace and dignity of the Commonwealth.

Upon the evidence of the following witness sworn in open court and sent to the grand jury to give evidence. S. C. Snodgrass, Vandy Hogston, John Stuart, Dr. William Campbell.

A Copy—Teste:

LLOYD E. CURRIN, Clerk.

(on back)

Appt'd. L. P. Collins, III, Burke Graybeal.

Commonwealth,

v.

Glen W. Frye.

INDICTMENT FOR A FELONY, MURDER.

A True Bill.

JOHN M. BOOTH, Foreman.

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EXHIBIT "C."

Virginia:

At a Circuit Court for Smyth County, at the Court House of said County, on Monday, the 28th day of October, in the year of Our Lord, Nineteen Hundred and Fifty-seven, and in the One Hundred and Eighty-Second year of the Commonwealth.

Present: The Honorable Thomas L. Hutton, Judge.

Commonwealth,

v.

Glenn Frye.

FELONY—MURDER.

It appearing to the Court that the accused is not represented by counsel and stated to the Court that he was unable to employ same, the Court doth appoint L. P. Collins III and D. Burke Graybeal, attorneys practicing before the bar of this Court to defend him.

A Copy—Teste:

LLOYD E. CURRIN, Clerk.

Common Law Order Book 15 Page 280.

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EXHIBIT "D."

Virginia:

Circuit Court of the County of Smyth, on Friday, the 15th day of November, in the year of our Lord, Nineteen Hundred and Fifty-seven.

Present: The Honorable Thomas L. Hutton, Judge.

Commonwealth,

v.

Glenn W. Frye.

FELONY-MURDER.

Came again the Attorney for the Commonwealth and Glenn W. Frye, who stands indicted for a felony, to-wit; murder. The prisoner was again led to the bar in the custody of the jailor of this County. Came also the accused by his counsel, Lewis Preston Collins III, Esquire and D. Burke Graybeal, Esquire, attorneys heretofore appointed by a former order of this Court to represent the accused in this case.

Thereupon the Attorney for the Commonwealth announced in open court that the Commonwealth was ready for trial. Thereupon the defendant by his counsel announced to the court that the defendant was ready for trial on this date.

Thereupon, before arraignment of the prisoner, the court advised the accused that he had a right to a trial by jury if he so desired, which jury would pass upon his guilt or innocence and if the accused was found guilty as charged the jury would fix his punishment; as that the accused had a right to enter a plea of not guilty to the indictment, and with the concurrence of the accused, the Attorney for the Commonwealth and the court, all entered of record, the case would be heard by the court, who would, from the evidence, determine his guilt or innocents; or that the accused had the right to enter a plea of guilty to the charge in the indictment if he so desired, and in which latter event the Court would hear the case without a Jury.

Thereupon the defendant, in person and by counsel, stated in open court, that the defendant desired to waive a trial by

jury and that he intended to enter a plea of guilty to the charge contained in the indictment herein.

Thereupon the accused, Glenn W. Frye, was duly
page 15 } arraigned in open court, and in person entered a
plea of guilty to the charge contained in the indictment.

The Court being of the opinion that the accused fully understood the nature and effect of his plea, directed the same to be entered of record.

Thereupon the Court proceeded to hear the evidence on behalf of the Commonwealth and the following witnesses were heard on behalf of the Commonwealth, to-wit: Deputy Sheriff S. C. Snodgrass, Jr., Dr. R. D. Campbell, John Stuart, Vandy Hogston, C. C. Norris, James Prater, Joe Roark, Ti Davidson, Malcolm Holmes; and thereupon the Attorney for the Commonwealth stated that was all the evidence that the Commonwealth desired to introduce in chief.

Thereupon the defendant by counsel requested and was granted a recess. Thereupon the accused and his counsel returned into open court, all the parties being present as heretofore. The Court proceeded to hear the testimony introduced on behalf of the defendant, to-wit: the testimony of Mrs. Tom Frye; thereupon the defendant announced that this was all the evidence that the defendant desired to introduce, and the defendant closed his case.

Thereupon the Attorney for the Commonwealth called certain witnesses in rebuttal and thereupon the Attorney for the Commonwealth announced that this was all the evidence which the Commonwealth desired to introduce. Thereupon the Court inquired of the defendant and his counsel if the defendant desired to introduce any further testimony. The Court was advised that the defendant was through with the introduction of evidence. Each side closed its case.

Thereupon the Court heard argument of counsel on behalf of the Commonwealth and the defendant.

Upon consideration of all of which, the court being of the opinion, based upon the plea of guilty of the accused, and of the evidence adduced, that the accused is guilty of murder in the first degree as charged in the indictment herein and doth
so find. Thereupon the court inquired of counsel
page 16 } for the defendant in open court if the defendant
requested a pre-sentence report as provided by
Code Section 53-278.1 of the Code of Virginia (see Code of Virginia Section 53-278.1 1956 Supplement). Thereupon the accused by his counsel stated that the accused did not desire to make a motion for such a pre-sentence report. Thereupon

the court doth ascertain the punishment of the defendant to be that he serve the balance of his natural life in the penitentiary of this Commonwealth.

Thereupon it being demanded of the accused by the court, if anything for himself he had to say or offer, as to why sentence should not be pronounced against him in accordance with the findings of this court. Nothing being offered or said in delay of judgment, it is accordingly the judgment of this court that Glenn W. Frye be, and he hereby is sentenced to serve a term of confinement in the penitentiary of this Commonwealth for the remainder of his natural life in accordance with the judgment of this Court ascertained as aforesaid. Further that the Commonwealth of Virginia do recover against the said Glenn W. Frye its cost by it about its prosecution in this behalf expended. That the Sheriff of this county is directed to take charge of the prisoner.

It is further ordered that as soon as possible after the entry of this order, that the prisoner be removed and safely conveyed, according to law, from the jail of this court, to said penitentiary, therein to be kept, confined and treated for the term aforesaid in the manner provided by law.

The Court certifies that at all times during the trial of this case the accused was personally present. The prisoner is remanded to jail to await his transfer to the penitentiary.

A Copy—Teste:

Seal

LLOYD E. CURRIN, Clerk.

Common Law Order Book 15 Page 294.

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EXHIBIT "E."

SMYTH COUNTY NEWS, Marion Virginia, Thursday, November 21, 1957, Page B-8

"FRYE PLEADS GUILTY, AND IS GIVEN LIFE FOR MURDER"

Glen W. Frye last Friday in Smyth County Circuit Court was sentenced by Judge Thomas L. Hutton to life imprisonment for the first degree murder of William F. Tolbert.

This sentence came after Aubrey Matthews recommended 50 years on the plea of guilty by Frye.

Deputy Sidney Snodgrass was the first witness heard. He said that he received a call about 7:20 p. m. Oct. 6 that a body had been discovered in the Rocky Cove section of Poore

Valley. He found the body laying with the head up the hill, on the back with the feet in the path, through a wooded, brushy section near the top of a hill just a few feet from a cleared field. The right arm was lying by the side, and the left arm and hand were crossed over the stomach. The hat was lying by the right shoulder partially under the body. The shirt had one or two buttons open at the chest. There was no belt in the trousers, but there was a belt around the neck with the buckle near the left side of the neck. After photographing the scene and body after Doctor R. D. Campbell, one of the county's two medical examiners, arrived with some flash bulbs, the deputy found three short pieces of stick in about eight 10 and 12 inch lengths. The fresh break in them indicated that they could have been used in the attack. He found no money in the billfold but several tickets from a grocery store. Other such tickets were just to the right of the body. The slippers of the body showed no sign of the body having been dragged.

The hat found beside the body had a mark across the right side with bark and dirt imbedded in the felt.

The deputy in describing his investigation of events prior to the discovery of Tolbert's body said that he learned from

Vandy Hogston that Hogston had been with Tolpage 18 } bert, Frye and some other men talking and drinking near Thompson Tolbert's store from 1 to 4 p. m. Hogston, Tolbert and Glen Frye had gone east from the store to the gate, where they stopped and had a drink or two. They went up the road to the path, where they had another drink or so. Hogston left Tolbert and Frye and went on up to his house. When he last saw Frye and Tolbert they were going up a little path which leads to the road to the Tolbert home.

Hogston told the deputy that he went home, ate supper, went out to feed the hogs and then began to worry about Tolbert and Frye. He decided to go up to the Tolbert home to see if he had returned. Mrs. Tolbert told Hogson that her husband had not come in, and Hogson told her he had left Glen and Bill in the woods. Hogston returned by the path he thought Tolbert would take and found the body about 6:15 p. m. It was beginning to get dark, but he still could see. After he found the body, he started back to the Tolbert home but met Sam Frye, a son-in-law to Tolbert, and Mrs. Frye. Sam Frye and Hogston went to the body; Sam opened the shirt and found no heart beat. The deputy said he certified all of Hogston's statements.

Snodgrass questioned Glen Frye for the first time up in the week in the Saltville hospital. Glen Frye first told

Snodgrass that Tolbert and Frye went down the bank, followed the path, and Tolbert picked up a stick saying he was afraid of a bull in the field. Tolbert sat down coughing. Glen Frye went on to his home but his wife was not there, so he came back between 5:30 and 6 p. m. finding Tolbert lying on the path with a belt around his neck, and went to his father's house. His father told him not to say anything about it as he would get in trouble. He told the officer that he got with some others, ended up in a fight and walked up in the Saltville hospital about 12:15 a. m. Monday.

Snodgrass said Frye repeated the story when he talked with him at a later date. Sometime Oct. 17 Glen Frye told Snodgrass that he, Frye, would start talking if Snodgrass had not found out anything by Oct. 19. The officer said he went through his files before coming to talk with Glen and discovered he had no picture or fingerprints of Frye. While these were being made in the Smyth County Jail, Frye said he wanted to make a statement, which was taken in the presence of Matthews, Sheriff John T. Wolfe and Deputy Snodgrass. Miss Connie Blevins, Mr. Matthew's secretary, took the statement.

Snodgrass said that he found that Bill Tolbert left home and gave his wife \$10 and still had \$7 or \$8. He had 18¢ in his pants pocket when the body was found. The deputy's investigation revealed that John Stuart gave Tolbert five one dollar bills for a \$5 bill just before Hogston, Tolbert and Glen Frye left Thompson Tolbert's store. Tolbert placed the bills in his billfold.

The officer presented the three pieces of stick found the night the body was discovered and two found the next day. The five fitted together to make one continuous stick. Some distance on down the path across the creek Snodgrass and the Saltville police chief found a tree with a fresh break. The break matched one end of the pieces found at and near the body. The sticks, the branch from the tree, the belt found around Tolbert's neck and the belt taken from Glen Frye's pants at the hospital were entered as exhibits, as was a whiskey bottle found just before the path came to the fence at the field. The bottle had had a small amount of moonshine in it when the officers picked it up. Snodgrass said that Hogston said that there was more than an inch of whiskey left in the bottle.

The officer said that none of the men recalled seeing Frye with any money Sunday afternoon, but Glen Frye told Snodgrass that he had received \$50 from Malcolm Holmes, his brother-in-law. The officer learned from Holmes that the money had been given to Mrs. Glen Frye.

The deputy said he saw Frye at the hospital in Saltsville, but he was asleep. There was a strong odor of alcohol about him, and he had a patch over his left eye and a shaved and stitched place on the top of his head. Glen Frye kept reaching up, rubbing his right hand and mumbling, I believe it's fractured." Frye had been in a fight just before being taken to the hospital. There was blood on his clothing. The deputy in checking with all the people who had been with Glen Frye could not find anyone who recalled his having any marks on his head before going to the Hayden home, where his statement said he was struck by two bottles.

On cross examination, the officer said he found no evidence of hard feelings between Frye and Tolbert. He knew of no trouble between the two in the past four or five years.

Dr. Campbell said he felt it was a homicide case after examining the body at the scene. After more extensive examination at the funeral home he ordered the body sent to the state pathologist for a thorough autopsy. The report showed death to be from a cerebral concussion. In answer to a question by the Commonwealth's attorney, he said that a blow by a stick could cause cerebral concussion. There were two lineal fractures of the skull. Dr. Campbell said that he thought that was the cause of death. There was also a small tear in the thyroid cartilage, which could have had some bearing on the cause of death. There was a hemorrhage under the second membrane of the brain and the alcohol in the blood was .18. The physician said that percentage would show a man to be "pretty drunk." The Commonwealth entered the pathologists's report as exhibit 10.

On cross examination, he said he seriously doubted that a stick such as the one exhibited could cause a fracture. He added that if hit by the whole stick which was found near the body the stick would have broken if the blow had been hard enough to cause a skull fracture. He also stated that if such a blow were struck there would be hair and blood on the stick unless the victim were wearing a hat.

page 20 } Hogston also stated much the same story of the afternoon, adding that he had told his wife that Bill and Glen had gone toward home and Bill was pretty full. He was afraid they might get in a racket. He related finding Tolbert's body. Under questioning by Matthews, Hogston said that Tolbert did not spend any money while they were together and that there was no place for him to spend it after Tolbert and Frye left Hogston.

During cross examination Hogston admitted that the three were just good drinking buddies and that there was no hard

feelings and no arguments. He admitted that years back Tolbert had had a reputation for fighting with sticks and rocks. There had been some trouble some time back, but there was no indication of any trouble that afternoon.

James Prater told of having taken Frye to the Surber home and then to the home of Joe Roark, who went with them to Ledbetter's. Prater said that he gave Frye \$1. When he came back to the car he had a bottle of gin. He recounted going to Watson's Gap to Annie Pearl Hayden's house, where Glen Frye was injured in the fight.

Roark testified that Glen Frye came into his home about 10:30 p. m. Octo. 6. Frye who had been drinking mocked Bill Tolbert "acting the fool like he always does," Roark said, adding that Frye danced a little and brushed his shoes as Tolbert did. The rest of his testimony was much the same as the others. He did say that he noticed Frye's hand was swelling a little and looked bruised when Frye put his hand on Roarke's knee and said, "You are my buddy and always have been."

Henry Joe Richardson called, "told of coming to the assistance of the Hayden woman when Frye attempted to get in the house. He said Frye said he had whipped one and was going to whip Davidson.

Holmes told of his wife's giving the \$50 to Mrs. Glen Frye but on cross examination said he did not know what Mrs.

Frye had done with the money.

page 20 } The only witness put on by the defense was

Mrs. Tom Frye, mother of the defendant, who told of having received the \$50 from Mrs. Glen Frye to keep. The mother said that late Saturday, Oct. 6, she gave \$10 of the money to Glen.

In making his recommendation for a 50 year sentence, which would have made Frye eligible for parole in 12 years, Matthews said he felt that would protect the people and serve the best interests of the community taking into consideration the crime which had been committed.

Burke Graybeal, one of the court appointed defense attorneys, said the defendant admitted that Tolbert was struck in the head with a stick but the Frye knew nothing of the robbery or choking. The lawyer pointed out the defendant's statement said that Tolbert struck the first blow and that there was no knowledge of the extent of the injuries sustained by the defendant.

L. Preston Collins III, the other counsel for the defense, traced the background of the defendant, telling of his CCC service, his war record, his various jobs and his family.

Judge Hutton in passing sentence said that as intoxicated

as Holbert was there was a doubt that he could have put the belt around his own neck, so the judge would have to find that the belt was placed around the neck after the head wound was inflicted. There was no evidence of malice or hard feeling, Hutton said, in finding Frye guilty of murder in the first degree and passing the life sentence on the man.

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EXHIBIT "F."

Ex 3

Com.,

v.

Frye.

11/15/57.

T. L. H., Judge.

I, Glen Frye, make the following statement freely and voluntarily. I have been told that the statement may be used for or against me and I have not been threatened nor do I make this statement because of any promises made to me. I have been told that I do not have to make this statement and that I may have a lawyer present if I desire.

My name is Glen W. Frye, I am thirty three years old and I live at Saltville, Route 1 with my wife and two kids. On Sunday, October 6, about 1:00 in the afternoon, Bill Tolbert come to us sitting on the side of the road in Poore Valley. John Stuart, Robert Dinsmore, Charlie Frye and myself were together. We just sat around there and talked a little while and John Stuart and Bill Tolbert had a little liquor and we sat around there about an hour I guess, it wasn't too long, then we moved about fifty yards from there and turned up into the Hollow where my father lives. John was wanting to watch Dinsmore and somebody had stole some liquor and John Stuart accused Robert Dinsmore of stealing his liquor and then Bill Tolbert asked for some more liquor and John Stuart told Robert to hunt him some liquor and he brought it back to him and Bill Tolbert took the lid off and passed it around to us all and then Vandy Hogston come over there where we was at then and John Stuart asked Vandy Hogston what time it was and Vandy showed it was four o'clock or four fifteen, I don't know which he did say. John Stuart said "I got to leave and do the milking," his wife was sick and we

all left. John Stuart and Robert Dinsmore went one way and me and Vandy and Bill left and went the other way. While we were down there in the group in the Hollow me and Bill Tolbert traded belts. We walked out the road to the gate that led to Vandy Hogston's. We went through the gate and up the road about fifty yards and stopped and took another drink of Bill's liquor. Then we went on up the

page 22 } road going on home and Bill and Vandy were talking something about the drive-in theatre. Bill had some tickets, he was telling Vandy something about it and Vandy asked him for another drink of the liquor. Then Vandy said "I might come over and go with you tonight, Bill." And then Vandy said "Let me have another drink of that, Bill" and then Vandy went on up his way and me and Bill followed a path down over the hill and went through a fence and Bill jumped a creek and his feet slipped out from under him and he sat backwards in some bushes and then I jumped the creek and picked him up and he was mumbling something about Daddy and me and him got into a struggle there. He hit me with a stick and I hit him with a stick and he sat down and I was talking to him and got him up and he picked up his stick and went on up the hill walking in front of me still mumbling about Daddy and he went a little piece out from the top of the hill and he sat back down again like he was sick. He was holding his throat like he was wanting to throw up or something and his eyes was right shiny looking and he had a billfold in his hand open and said something about Alex. He didn't say no last name just Alex. I didn't know what he meant and I asked him "Bill, are you sick. Do you want me to take you home or do you want me to go over there and tell some of them" and he said "No Daddy, I will be all right"; and I left and started toward my home and on the other end of the field they was somebody in the bushes and hunting for something. Looked like they was looking for something, and had on a red coat and a blue looking hat and I went over on top of the ridge. I looked back and Bill Tolbert was standing up fooling with his britches like he was going to take them off or something like that and he went walking back towards the creek and I went on home and come back and found Bill lying out there at the top of the hill with a belt around his neck and his billfold was lying on his shirt and I got his billfold and put it back in his pocket and loosened the belt around his neck and he breathed or opened his mouth or something and I run out there to my daddy's home and I went in the house.

page 23 } I went on in the kitchen and my daddy was eating supper and I told him there was something wrong

with Bill Tolbert that he was dying or there was something wrong with him and I asked him what I should do, call the law or the doctor or what and he told me no, not to fool with stuff like that that I could get myself in serious trouble and then I asked him where Wesley was that I wanted to go down in the valley after my wife and kids and he said he (Wesley), and Momma had gone to take Sissy home and I looked out the front door and seen the truck coming up the lane. I said "here they come, I'll go down there and ask him now." And I walked down there and stopped them and asked Wes to take me down after my wife and kids. He said "No, it was 6:00 and he had to go watch Disneyland on television," for me to go and get Thompson, Tolbert or Dave Allison to take me down *ther* and I went on across the road and asked Thompson. He was sitting on his chop block whetting his ax. Said he couldn't that he didn't have time, that he had to cut some wood. I went on out to Dave Allison's and asked Dave to take me down there and Dave took me and on our way I told him to take me on down to A. Ledbetter's that I wanted to see him about some *potatos* and get us a pint of liquor. I gave him a dollar to take me down there and he said he would take me down there but that he couldn't wait on me that he would let me out down there and then he let me out there, he come on back home, I reckon, he left, I reckon he come on back home. Then I got the liquor from A. Ledbetter. I got a pine of gin and paid him three dollars for it and me and A. come back up Poore Valley in his car and we stopped at the Poore Valley Church way up Poore Valley where I was supposed to get out, and I knowed I had never went and got my wife and younguns and that I had to go get them and I went out from the church a little way to the home of James Prater and I got James Prater out of the house and asked him to take me back down the Valley to get my wife and children and he took me down to my wife's mother's and I asked my wife if she was ready to come home and she said no, that the younguns had done gone to bed that she wouldn't fool with getting them up, that she would bring them home
page 24 } in the morning. And me and James went over in Cardwell Town and got Joe Roarks and went back to A. Ledbetter's and got us another pint of gin. I paid two dollars on it and James Prater paid a dollar. I made A. Ledbetter to open the store and I got two packs of cigarrettes and a bottle of pop and brought it with me and then we went back up the Valley to Annie Pearl Hayden's and I pecked on the door and told her to let me in I wanted to talk to her and then she come out the back with a mop and she hit at me with it but I grabbed it then she throwed a pan of water

at me and then T. I. Davidson hit me with two pop bottles and I didn't know no more then till I woke up in the hospital.

I already had one cut before T. I. Fixed me a good one and then I woke up in the hospital and Dr. Finne had them working on me.

I have read and have had read to me the above statement and it is true to the best of my knowledge.

GLEN W. FRYE.

State of Virginia,
County of Smyth, to-wit:

Subscribed and sworn to before me, Connie Ann Blevins, a Notary Public in and for the County of Smyth, in the State of Virginia this 19th day of October, 1957.

My commission expires the 14th day of December, 1957.

CONNIE ANN BLEVINS
Notary Public.

A Copy—Teste:

LLOYD E. CURRIN, Clerk.

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* * * * *

MEMORANDUM.

I. PRELIMINARY STATEMENT.

This is in the nature of a memorandum and argument in support of your relator's accompanying petition for the writ of *habeas corpus ad subjiciendum*.

The relator relies upon the attested Exhibits annexed to his petition, and it is expected that the facts set forth therein will not be controverted by the respondent.

The crucial issue presented is whether, as a matter of law, relator's general plea of guilty on November 15, 1957, in the Circuit Court of the County of Smyth, Virginia, directed to the indictment herein which charges that the relator, "did unlawfully and feloniously kill and slay William F. Tolbert,"

constituted a jurisdictional basis for said court to adjudicate relator to be guilty of murder, first-degree, and for sentencing relator to the penitentiary for the term of the remainder of his natural life.

A supplemental issue is presented whether, or not, the relator, represented by court- assigned counsel, was afforded the effective representation by counsel contemplated by the laws of Virginia and by the due process clause *contained* in the Fourteenth Amendment to the United States Constitution.

page 26 } II. RELATOR'S CONTENTIONS.

The relator's contentions, briefly stated, are as follows:

(a) That the indictment as shown by Exhibit "B" is a valid indictment charging manslaughter.

(b) That the relator's general plea of guilty directed to said indictment constituted a confession of guilt to only such criminal act as was well charged in the indictment, to-wit: manslaughter. (See Exhibit "C").

(c) That as a consequence of the foregoing the Circuit Court of the County of Smyth, Virginia, was without any jurisdictional basis to adjudicate the relator to be guilty of murder, first-degree, or, jurisdiction to sentence the relator to the penitentiary to life imprisonment.

(d) That the conviction of the relator of murder in the first degree and resulting life sentence is null and void.

(e) That, at most, the relator's general plea of guilty to the indictment was a confession and conviction of the crime of manslaughter, for which the maximum punishment was not more than five year's imprisonment in the penitentiary.

(f) That the action of court-assigned counsel in allowing the aforesaid court to find the relator guilty of the crime of murder, first-degree, upon relator's guilty plea to said indictment, and to sentence the relator, without objection and exception, to life imprisonment, and the failure of court assigned counsel to move the court in arrest of judgment, or to carry the case to the Supreme Court of Appeals of Virginia, discloses grave incompetency on the part of court-appointed counsel, and rendered the trial a mere sham and a

page 27 } pretense.

Considering each of the above contentions, in the above order, the relator respectfully shows:

III. THAT THE INDICTMENT AS SHOWN BY EXHIBIT "B" IS A VALID INDICTMENT CHARGING MANSLAUGHTER.

Section 19-140 of the Code of Virginia, 1959, provides as follows:

"The prosecution for offenses against the Commonwealth, unless otherwise provided, shall be by presentment, indictment, or information. While any form of presentment, indictment or information which informs the accused of the nature and the cause of the accusation against him shall be good; *the following shall be deemed sufficient for murder and manslaughter*: (Italics added).

"State of Virginia..... County (or city) to-wit: The grand jurors of the State of Virginia, in and for the body of the County of (or city) of..... upon their oaths present that A..... B..... on the day of nineteenin the County (or city) of feloniously did kill and murder one C..... D against the peace and dignity of the Commonwealth.

"*A grand jury may in case of homicide, which in their opinion amounts to manslaughter only, and not murder, find an indictment against the accused for manslaughter and in such case the indictment shall be as follows*: (Italics added)

"State of Virginia County (or city) to-wit: The grand jurors of the State of Virginia, in and for the County (or city) of upon their oaths present that A..... B..... on the day of nineteen in the county (or city) of feloniously and unlawfully did kill and slay one C D against the peace and dignity of the Commonwealth."

A physical comparison between the indictment as shown in Exhibit "B" annexed to the relator's petition herein with the statutory form set forth above, shows that the said indictment in relator's case was drawn in substantial compliance with the latter part of the statute which provides for the form of the indictment to be used thereunder in charging the crime of manslaughter. As pointed out in the relator's petition the two important and qualifying words which differentiate the homicide, from murder or manslaughter, are the two vital descriptive words "murder" and "slay". As shown, the word "*muder*" appears in the statutory form charging murder (first and second degree), whereas, the word "slay" appears

in the statutory form charging manslaughter. For the above stated reasons, it is clearly apparent that the indictment, to which the relator pleaded guilty in the Circuit Court of Smyth County, Virginia, merely charged the relator with the commission of the crime and felony of manslaughter.

IV. THAT THE RELATOR'S GENERAL PLEA OF GUILTY DIRECTED TO SAID INDICTMENT CONSTITUTED A CONFESSION OF GUILT ONLY TO SUCH CRIMINAL ACTS AS WERE WELL CHARGED IN THE INDICTMENT, TO-WIT: MANSLAUGHTER. (SEE EXHIBIT "C.")

The *comon* law record (Exhibit "C" relating to relator's plea recites, in part, as follows:

"Thereupon the accused, Glenn W. Frye, was duly arraigned in open court, and in person entered a plea of guilty to the charge contained in the indictment."

Corpus Juris, Criminal Law, Volume 16, at Section 738 (4), reads as follows:

"The effect of the plea of guilty, generally speaking, is a record admission of whatever is well charged in the indictment. * * * But it does not cure jurisdictional defects in an indictment, and if the latter is insufficient from the standpoint of failing either to confer jurisdiction or to set forth facts sufficient to constitute a public offense, the plea of guilty confesses nothing."

Inasmuch as the relator pleaded guilty generally to the charge contained in the indictment, and the indictment merely charged the relator with the commission of the crime of manslaughter, it is submitted that the relator's guilty plea amounted to a record confession in open court to the commission of the crime of manslaughter.

page 29 } V. THAT THE CONVICTION OF THE RELATOR OF MURDER IN THE FIRST DEGREE AND RESULTING LIFE SENTENCE IS NULL AND VOID.

Section 19-221 of the Code of Virginia, 1950, states as follows:

“No person shall be convicted of a felony, unless by his confession of guilt in Court or by his plea, or by the verdict of a jury, accepted and recorded by the Court.”

The relator's conviction of murder in the first-degree meets none of the above essential requirements of the law, because (1) relator has never pleaded guilty or confessed to the commission of the crime of murder, in either the first of the second degree, and (2) no verdict of a jury has ever been accepted and recorded by the Court finding relator to be guilty of murder in the first-degree.

VI. THAT, AT MOST, THE RELATOR'S GENERAL PLEA OF GUILTY TO THE INDICTMENT WAS A CONFESSION AND CONVICTION OF THE CRIME OF MANSLAUGHTER FOR WHICH THE MAXIMUM PUNISHMENT WAS NOT MORE THAN FIVE YEARS' IMPRISONMENT IN THE PENITENTIARY.

Section 18-33, of the Code of Virginia, 1950, provides as follows:

“Voluntary manslaughter shall not be punished by confinement in the penitentiary not less than one nor more than five years.”

VII. THAT THE ACTION OF COURT-ASSIGNED COUNSEL IN ALLOWING THE AFORESAID COURT TO FIND THE RELATOR GUILTY OF THE CRIME OF MURDER, FIRST-DEGREE, UPON RELATOR'S PLEA OF GUILTY TO SAID INDICTMENT, AND TO SENTENCE THE RELATOR TO LIFE IMPRISONMENT, WITHOUT OBJECTION AND EXCEPTION, AND THE FAILURE OF COURT ASSIGNED COUNSEL TO MOVE THE COURT IN ARREST OF JUDGMENT, OR TO CARRY THE CASE TO THE SUPREME COURT OF APPEALS OF VIRGINIA, DISCLOSES GRAVE INCOMPETENCY ON THE PART OF COURT-APPOINTED COUNSEL, AND RENDERED THE TRIAL A MERE SHAM AND A PRETENSE.

Numerous State and Federal authorities can be cited in support of the above contention. However, it would seem that the relator has sufficiently stated a *prima facie* case for the issuance of the writ of *habeas corpus* prayed for, and relator reserves the right to en-

large his contention herein at a later date should it be deemed proper to do so.

CONCLUSION.

THE WRIT OF *HABEAS CORPUS* PRAYED FOR SHOULD BE ISSUED FORTH AND THE RELATOR DISCHARGED.

Respectfully submitted,

GLENN W. FRYE
Relator-Petitioner.

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* * * * *

ON A PETITION FOR THE WRIT OF *HABEAS CORPUS AD SUBJICIENDUM*.

AFFIDAVIT AND MOTION TO BE ALLOWED TO FILE AND TO PROSECUTE A PETITION FOR THE WRIT OF *HABEAS CORPUS* HEREIN IN *FORMA PAUPERIS*.

I, GLENN W. FRYE, a citizen of the United States respectfully represent that I am without funds and that I cannot secure funds in any manner; that I was represented by court-assigned counsel, and I placed myself upon the Commonwealth for my trial in the Circuit Court of Smyth County, because of my poverty; that my only source of income is my prison earnings; that the total amount of expendable funds to my credit at the Virginia State Penitentiary is \$7.00; and, I, therefore, respectfully pray that on account of my poverty that I be allowed to file and to prosecute the accompanying petition for the writ of *habeas corpus ad subjiciendum* in this Court, without the prepayment of any fees or costs, in *forma pauperis*, and that the Court appoint counsel to represent me on the plenary hearing herein and grant me such other and different relief in the premises as may appear to be fair and just.

GLENN W. FRYE, Affiant.

page 32 } Commonwealth of Virginia,
City of Richmond, ss:

This 7 day of July, 1960, personally appeared before me the undersigned Notary Public, of the State and City aforesaid, the affiant, Glenn W. Frye, who after being duly sworn, signed the foregoing, and, swore that its contents are true.

WILLIAM C.
Notary Public.

Seal

My commission expires March 5, 1963.

* * * * *

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* * * * *

Filed in clerk's office October 3rd 1960.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

**MOTION TO DISMISS PETITION FOR A WRIT OF
HABEAS CORPUS AND TO DISCHARGE RULE
TO SHOW CAUSE.**

(I).

1. Respondent submits that the validity of the conviction and sentence which Petitioner contests was the subject of a similar petition filed in the Circuit Court of Smyth County, Virginia on or about September 29, 1958. A copy of this petition is attached hereto and marked Exhibit A. This petition was maturely considered by the trial judge who, having personal knowledge of the conduct of the trial in question and having consulted with counsel who represented Petitioner, denied the petition on October 1, 1958. A copy of the order denying the petition is attached hereto and marked Exhibit B. All of the contentions raised by Petitioner in the present proceeding were or could have been adjudicated in the Smyth County proceeding. Specifically, the issue presented in the Rule to Show Cause was before that court. Petitioner now seeks improperly to utilize the present petition as a substitute for an appeal from the adverse decision in the Circuit Court of Smyth County. The principles of former adjudication demand that recognition be given the decision of

that court. The sense of the General Assembly
page 35 } in these matters is expressed in Section 8-605, Code
of Virginia of 1950, which provides that a determination in a *habeas corpus* proceeding shall be conclusive unless reversed.

2. For the foregoing reasons, Respondent, by counsel, hereby respectfully moves this Court to dismiss the petition for a writ of *habeas corpus* previously filed in this matter and to discharge the Rule to Show Cause issued herein.

W. FRANK SMYTH, JR.

Superintendent, Virginia State
Penitentiary

By FRANK V. EMMERSON, JR.
Assistant Attorney General.

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EXHIBIT A.

STATEMENT OF RESTRAINT.

1. Petitioner was indicted by the Grand Jury of the County of Smyth, Commonwealth of Virginia, during the October term, 1957, and the Indictment was returned saying that:—"Glen W. Frye, on the 6th day of October, in the year One Thousand Nine Hundred and Fifty Seven (1957) in said County did; unlawfully and feloniously kill and slay William F. Tolbert," against the peace and *idgnity* of the Commonwealth.

2. On the 15th day of Nobember, 1957, petitioner was placed on trial in Circuit Court of the County of Smyth, on the above indictment, and was subsequently sentenced to life imprisonment.

PETITIONER'S CONTENTIONS.

1. Petitioner contends that he entered a plea of guilty to the "charge contained in the Indictment." He contends that the charge in the Indictment is *not a charge of first degree murder*, and therefore a sentence of life imprisonment is a sentence unauthorized and forbidden by law. Petitioner will cite opinions and rulings, by the Court of the State and Nation, which will support this contention. He will also show that where the evidence is insufficient to support a conviction of 1st degree murder, a short term Indictment is completely fatal to a conviction on 1st degree murder. This Court is aware of

just what this evidence was, but as a plea of guilty was entered, a lot of the power of the Court was taken when such a pleas was entered. This was evident when the Judge of this Court made the statement he did before passing sentence.

2. Petitioner contends that he did not *voluntarily* enter a plea of guilty. He entered such a plea only because he was coerced and intimidated into the plea by his Court appointed Attorneys, Burke Graybill, and L. P. Collins III. That the *only* reason they wanted petitioner to plead guilty was the inconvenience a jury trial would cause the Attorneys. Both of these Attorneys knew that the evidence could have warranted a conviction for manslaughter, or second degree murder, but certainly not a conviction for 1st degree murder.

3. Petitioner contends that he was told by these Attorneys that if he entered a plea of Guilty he would get a light sentence. A case was quoted where a defendant, in a recent trial, was given a five year sentence, and the circumstances surrounding the case was compared with those of the petitioners. He was told by these attorneys that if he plead not guilty, and the jury returned a verdict of guilty, page 37 } he would receive a more severe sentence than he would receive if he plead guilty and waived a jury.

4. Petitioner contends that the right to Counsel is now mandatory under Section 19-214-1 of the Code of Virginia, and that where such Counsel is appointed he is entitled to "effective representation" from the Attorney, or Attorneys, appointed by the Court. Petitioner contends that the record will show that he was not accorded "effective representation" by the Court appointed Attorneys. Petitioner cannot contend that these Attorneys are, or were, "incompetent Attorneys" because he cannot judge such matters, and because of their standing in the Courts of Smyth County. He does contend that he did not receive the full benefit of their knowledge of law, and that they did not defend him to the best of their ability. An examination of the record will sustain this contention.

5. Petitioner contends that he told the Attorneys that he had hit William F. Tolbert with the stick, after being hit himself, by Tolbert, and with the same stick, and if Tolbert had died from the blow, then he was guilty of his death. It is the petitioners contention that the testimony of the Doctor, along with the autopsy report, showed beyond a doubt that petitioner was not guilty. The doctor testified that the stick could not have caused death, because of it's brittleness, and *would not have caused a concussion*. The autopsy report states that a cerebral concussion was the "*probable cause of death.*"

An examination of this autopsy report, attached to the brief of this petition, will show four different things that could have been the direct cause of death. This document, the autopsy report, automatically inserts uncertainty into the matter in determining just exactly what William F. Tolbert died from. If the Attorneys, representing the petitioner had been competent Attorneys, the very first thing they would have ascertained would have been the exact cause of death.

6. If the Attorneys had been competent Attorneys, they would have moved the Court for a change of plea, when the evidence showed beyond a doubt that the petitioner was not guilty of first degree murder. Failing in this they made no motion for the verdict to be set aside as being contrary to law and the evidence. They did not examine the indictment, nor would they honor the request of the petitioner to file notice of appeal. They did say they would do so on Wednesday but Wednesday never came.

7. These Attorneys had told the petitioner that "the Court had agreed on fifty years," but after the sentence, page 38 } "we will see the judge and he will cut it to twenty years." The Commonwealth's Attorney recommended fifty years, but the judge made the sentence one of life imprisonment. For this one reason, the petitioner has doubts of the wisdom of petitioning the trial Court, as the sentence reflects the feelings of the Court. The temper of the Court was not realized by anyone until the sentencing and judgment was rendered by the Court. When petitioner came before the Court he did not know enough about criminal procedure to know if he was being accorded "Due Process" or not. He has a third grade education, and therefore incapable of defending himself. He had been convicted of a felony before, in the trial Court, said conviction being for forgery. He had been placed on probation for two years and had abided by the rules until it was over. This one conviction of a felony could not have given him enough experience or "know how," to properly defend himself.

7. Petitioner contends, and can prove by Sheriff John T. Wolf, that the witnesses that he requested to be summoned, were not summoned. He contends that he requested his attorneys not to proceed with the trial until the witnesses were present. He contends that if they had been present, several controversial issues would have been decided in favor of the petitioner.

8. Petitioner asked for, and was given, a polygraph test (lie detector test) by and at the headquarters of the Virginia State Police, at Wytheville, Virginia. This test proved that petitioner told the truth in his statement as to what happened

on the day of October 6th, 1957. Petitioner was told by the police that Vandy Hogston, John Stewart, Robert Dinsmore, and Joe Roark would be given the same tests, *but they were not given to anyone else*. If they had been, then it would have been shown just who was telling the truth and who was *lieing*. The matters of the belt, the money, whiskey, and other things pertinent to the issues, would have been proven.

The writer of this petition is a layman, and cannot find any authorities on the admission of evidence, favorable or otherwise, obtained by a Polygraph Test. If it is admissable in Virginia, why didn't the Petitioner's Attorneys place the findings of the Test before the Court? Why didn't they demand that his witnesses be summoned, and rely on the evidence, or lack of same, instead of making a "deal with the court," as they put it. The only conclusion is that they were "incompetent Attorneys" for their failure to do so, and that they gave the petitioner ineffective representation.

page 39 } The writer is aware that the guilt or innocence of a person is not an issue in *habeas corpus* proceedings. He is aware that the only issue, is whether or not he was tried by a Court having jurisdiction, given a sentence authorized by law, or deprived of Constitutional Rights in the trial, therefore depriving him of the "Due Process of Law" that is needed for a valid conviction.

Petitioner will show to the satisfaction of this Court that he is entitled to *habeas corpus* because he was not accorded due process of law, he was given a sentence unauthorized by law, and if unauthorized by law, the Court could not have had jurisdiction to render the sentence. Wherefore, in view of the totality of the violations of the Constitution of the United States, 14th Amendment; and the "Bill of Rights" of Virginia Constitution, both explicit and implicit, your petitioner has set forth above his statement of facts, and his contentions, to show "probable cause" under the Statute of *habeas corpus* of Virginia of the Code of 1950 so that this Honorable Court could issue, within its jurisdiction of the Statute, a Writ of *Habeas Corpus Ad Sujiciendum* for the hearing of this cause. The affidavit of this entire pleading follows the prayer for issuance and a Brief is set out—as part II—of the petition and is made a part of the petition.

"When it appears to a Court having jurisdiction to issue a writ of *habeas corpus* that the petitioner is restrained of his liberty contrary to the Constitution of the United States, the WRIT BECOMES ONE OF RIGHT, belonging to the citizen, and a Court has no right to refuse it to the citizen. The Court

exercises no discretion against issuing it but it must go as a matter of right."

Ex parte Farley 40 Fed. 66, 71.

"If in doubt, the Court grants the writ and disposes of the cause on the return day when the prisoner is brought before him."

In *Re: Taylor* 23 F. Ca. 13, 774.

Therefore, your *petitioner*, Glen W. Frye, prays unto this Honorable Court that the Writ of *Habeas Corpus ad subjiciendum* be issued out of and from under the hand and seal of this Honorable Court, directed to W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, Respondent, 500 Spring Street, Richmond 19, Virginia, commanding him to have the body of your petitioner aforesaid before the

Bar of this Honorable Court at a time and place
page 40 } specified therein, together with the true cause of his
detention, if any there be, to do and receive what
then and there shall be considered concerning your petitioner,
and to answer and show cause on that day specified therein
why the sentence and the orders hereof should not be ad-
judged nullities under the true organic laws and the statutes
of our Commonwealth and your petitioner forthwith dis-
charged from the unlawful custody by which the Respondent
aforesaid now detains the petitioner.

And your petitioner will ever pray, etc.

GLEN W. FRYE, Petitioner.

Petition and exhibits attached hereto filed this 1st day of October 1958.

LLOYD E. CURRIN, Clerk.

I Lloyd E. Currin Clerk of the Circuit Court of Smyth County do hereby certify that the foregoing is a true copy of the papers as the same appears of record in my said office.

LLOYD E. CURRIN, Clerk.

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EXHIBIT B.

Virginia:

Circuit Court of the County of Smyth, on Wednesday, the 1st day of October, in the year of our Lord, Nineteen Hundred and Fifty-eight.

Present: The Honorable Thomas L. Hutton, Judge.

Glen W. Frye,

v.

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

Present: J. Aubrey Matthews, Esq., Attorney for the Commonwealth Smyth County.

L. Preston Collins III, and D. Burke Graybeal and J. T. Wolfe, Sheriff.

On or about the 29th day of September, 1958, the undersigned Judge of this Court received through the United States mail at Abingdon, Virginia a Petition for a writ of *Habeas Corpus* purportedly signed by Glen W. Frye, Petitioner, with an affidavit dated the 27th day of June, 1958 and certain exhibits.

The Court on this 1st day of October, 1958 having maturely considered said Petition and the records of said trial and conferred with counsel representing Petitioner at said trial, is of the opinion that the Petitioner, Glen W. Frye, had a wholly fair and impartial trial and was ably represented by competent counsel, is of the opinion and doth so find that no probable cause is shown for the issuance of said writ and the application for a writ of *Habeas Corpus Ad Subjiciendum* is hereby denied. The petition and exhibits are ordered filed in the Clerk's Office of this Court and a copy of this order mailed by the Clerk of this Court to Glen W. Frye at the Virginia State Penitentiary.

A Copy—Teste:

LLOYD E. CURRIN, Clerk.

Common Law Order Book 15 Page 441.

page 42 }

* * * * *

Filed in clerk's office October 3rd 1960.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

MOTION TO DISMISS PETITION FOR A WRIT OF
HABEAS CORPUS AND TO DISCHARGE RULE
 TO SHOW CAUSE.

(II).

To the Honorable M. Ray Doubles, Judge.

1. Respondent submits that Petitioner is at present lawfully detained and that this is so even though it be conceded that Petitioner's conviction and sentence of November 15, 1957 are invalid in so far as the sentence exceeded five (5) years. Petitioner has now served approximately two (2) years and eleven (11) months. Even with credit for "good time," a favorable answer to the proposition presented by the contentions of Petitioner, as limited by the Rule to Show Cause previously issued in this matter, could not effectuate his immediate release. Hence, if it is conceded that the sentence under which Petitioner is detained is valid in so far as it did not exceed five (5) years, *ipso facto* the Court is barred from considering the validity of that portion of the sentence which Petitioner has not yet begun to serve. 39 C. J. S., *Habeas Corpus*, Section 26 (e); *Royster v. Smith*, 195 Va. 228, 236 (last full paragraph), 77 S. E. (2d) 855; *Smyth v. Midgett*, 199 Va. 727, 703, 101 S. E. (2d) 575.

page 43 } A copy of Petitioner's prison record is attached hereto and marked Exhibit A.

2. For the foregoing reasons, Respondent, by counsel, respectfully moves that the petition for a writ of *habeas corpus* be dismissed and that the Rule to Show Cause be discharged.

W. FRANK SMYTH, JR.

Superintendent, Virginia State
 Penitentiary

By FRANK V. EMMERSON, JR.
 Assistant Attorney General.

* * * * *

page 44 }

EXHIBIT A.

PRISON RECORD.

Date September 2, 1960

Name Glenn W. Frye Number 72379 Race White Alias None
 Committed November 16, 1957 Age 33 Married, Occupation

Farmer Court Smyth County Circuit Court Date Nov. 15,
 1957 Crime Murder—1st degree Term Life Years
 Added for escapes None Years Added for Second,
 Third Conviction None Years. Total Term Life Years Served 2
 Years 10 Months 14 Days 28 days jail time included. Term
 Expires Life Eligible for Parole 10-18-72.

PRISON RULES VIOLATED.

No previous criminal record on file.

This is to certify that Glenn W. Frye is now serving on his Life sentence for Murder, first degree, from Smyth County, Virginia, and everything as stated above is a true copy of his record taken from the records on file at the Virginia State Penitentiary, Richmond, Virginia.

C. R. MANN, Director
 Bureau of Records and Criminal
 Identification Virginia Peni-
 tentiary, Richmond, Va.

page 45 }

* * * * *

Filed in clerk's office October 3rd 1960.

Teste:

CHAS. R. PURDY, Clerk
 By IVA R. PURDY, D. C.

MOTION TO DISMISS PETITION FOR A WRIT OF
HABEAS CORPUS AND TO DISCHARGE RULE
 TO SHOW CAUSE.

(III).

To the Honorable M. Ray Doubles, Judge.

1. Respondent submits that a full consideration of the contentions set forth in the petition filed in the subject matter would require an examination into several broad questions of fact such as the manner in which counsel for Petitioner conducted his defense and the understanding of the Court, the defendant, his counsel and other parties as to the nature

and cause of the accusation against him and as to the nature and consequences of his plea of guilty. Since these unrecorded factual questions exist, it is required by statute that any further proceedings in this matter be made returnable in the Circuit Court of Smyth County wherein the original judicial proceeding occurred. Section 8-598, Code of Virginia of 1950, as amended.

2. For the foregoing reasons, Respondent, by counsel, respectfully moves this Court to the effect that, should further proceedings be deemed necessary, they be made returnable in the Circuit Court of Smyth County.

page 46 }

W. FRANK SMYTH, JR.
Superintendent, Virginia State
Penitentiary
By FRANK V. EMMERSON, JR.
Assistant Attorney General.

* * * * *

page 47 }

* * * * *

Filed in the clerk's office October 3rd 1960.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

ANSWER TO RULE TO SHOW CAUSE.

To the Honorable M. Ray Doubles, Judge:

Respondent, by counsel, hereby responds to the Rule to Show Cause issued in this matter on July 15, 1960.

Respondent submits that Petitioner is lawfully detained by authority of a valid final order of conviction and sentence entered in the Circuit Court of Smyth County on November 15, 1957. By this order Petitioner was convicted of murder in the first degree and sentenced to life imprisonment. Copies of the warrant leading to Petitioner's original arrest; of the indictment providing the basis for his conviction, and the aforesaid final order are attached hereto and marked, respectively, Exhibits A, B and C.

Respondent avers that the contention, reflected in the Rule

to Show Cause, that the aforesaid conviction is invalid in so far as it is in excess of five (5) years is without merit for the following reasons:

1. Petitioner was expressly found guilty of first degree murder by the final order of conviction. The sentence is consistent with this finding.

2. Petitioner's contention that the trial court erred in convicting him of first degree murder in the light of page 48 } the language of the indictment to which he pleaded guilty is not of a jurisdictional nature. It is in the nature of a contention that he was convicted erroneously or upon insufficient evidence. These contentions, while reviewable upon appeal, are not a proper subject for the writ of *habeas corpus*.

3. Petitioner's plea of guilty to the indictment constituted a plea of guilty to the highest offense well charged therein. The elements of the offense of first degree murder are included in the words "unlawfully and feloniously kill and slay." The statute relied upon by Petitioner, authorizing the use of the "short form" of indictments for murder and manslaughter is permissive only. In fact, that statute (Section 19.1-165, Code of Virginia of 1950, as amended) also provides that " * * * any form of * * * indictment * * * which informs the accused of the nature and cause of the accusation against him shall be good * * *" This reflects the language of the Virginia Constitution. In the instant case, Petitioner was clearly apprised of the nature and cause of the accusation against him. The statutory short form was not mandatory. If Petitioner had desired further information, he could have requested a bill of particulars. The right to demand the nature and cause of an accusation may be waived and is not jurisdictional. *Pine v. Commonwealth*, 121 Va. 812, 835, 93 S. E. 652.

4. Generally, the form of the indictment is not open to review in a *habeas corpus* proceeding. *Council v. Smyth*, 201 Va. 135, 140, 109 S. E. (2d) 116.

5. In the instant case, the language of the caption on the reverse side of the indictment and the language of the final order of conviction, plus the absence of any objection, indicate that all parties to the trial were aware that page 49 } the charge was murder in the first degree. See also Exhibit D, an affidavit of D. Burke Graybeal, one of Petitioner's attorneys. Additional evidence was heard upon which the trial court could ascertain the degree of the offense charged in the indictment. *Hobson v. Youell*, 177 Va. 906, 912, 15 S. E. (2d) 76. For a case almost identical to the

present case, which was decided adversely to the petitioner's contentions, see *Smyth v. White*, 195 Va. 169, 173, 77 S. E. (2d) 454; see also *Council v. Smyth, supra*.

Respondent, having fully answered by counsel, respectfully requests that the Rule to Show Cause be discharged and that the petition be dismissed.

W. FRANK SMYTH, JR.

Superintendent, Virginia State
Penitentiary

By FRANK V. EMMERSON, JR.
Assistant Attorney General.

* * * * *

page 56 }

EXHIBIT D.

AFFIDAVIT.

The undersigned Attorney, D. Burke Graybeal, Marion, Virginia, after being duly sworn, deposes and says as follows:

I was appointed by the court of the Circuit Court of Smyth County, Virginia, to assist L. Preston Collins, III, in the defense of Glenn W. Frye, charged with the unlawful killing and slaying of one William F. Tolbert.

On the day of the appointment the preliminary investigation of the matter revealed evidence to the effect that the homicide was accompanied by a robbery of the deceased.

In view of this information and from the inception of my work on behalf of Glenn W. Frye, a charge of murder in the first degree was considered to be the charge against the said Glenn W. Frye and the defense was planned accordingly.

Throughout every stage of the preliminary investigation, the preparation for trial and the day of the trial, the matter of defense was discussed with the Defendant, Glenn W. Frye and the undersigned attorney knows that the said Glenn W. Frye was advised that the charge against him was murder in the first degree and that his defense would have to be to that charge.

After the Defendant advised the undersigned attorney that he wished to enter a plea of guilty, this information was related to the Commonwealth Attorney who stated that he would recommend a sentence of 50 years imprisonment. This recommendation was related to the Defendant who knew and understood that such a sentence could be imposed only upon a conviction of murder in the first degree.

Glenn W. Frye was advised by the undersigned attorney continually that the evidence being compiled by the Commonwealth Attorney was to secure and sustain a conviction of murder in the first degree.

page 57 } In witness whereof, I have hereunto placed my hand and seal:

D. BURKE GRAYBEAL (Seal)

Taken, sworn to and subscribed before me, a notary public for the County of Smyth, State of Virginia.

DORIS A. HAGA
Notary Public.

My commission expires: 12-1-63.

page 58 }

* * * * *

ORDER.

It appearing that since the filing of this case, W. K. Cunningham, Jr. has been appointed Superintendent of the Virginia State Penitentiary, it is ordered that the said W. K. Cunningham, Jr. is hereby made the respondent herein in lieu of W. Frank Smyth, Jr.

And the respondent having filed several responses to the Rule To Show Cause heretofore entered herein, and the same having been considered, the Court doth adjudge and order as follows:

1. Respondent's Motion To Dismiss No. I on the principles of *Res Adjudicata* is overruled; to which action of the Court the respondent objects and excepts.

2. Respondent's Motion To Dismiss No. III (in reality a motion to make any writ issued herein returnable to Smyth County) is overruled, the Court being of opinion that the issue presented is a sole question of law; to which action of the Court the respondent objects and excepts.

3. Respondent's Motion To Dismiss No. II on the grounds that even if so much of the petitioner's sentence as exceeds 5 years is invalid, nevertheless even as to a 5 year sentence, this proceeding is pre-mature, is well taken—but, in view of the fact that it appears that with credit for good behavior the petitioner will have served a 5 year sentence by February 19,

1961, and to avoid needless repetition of the pleadings involved in filing a new petition, the Court doth order that a Writ of *Habeas Corpus* do issue herein returnable page 59 } to 2:30 o'clock P.M., Thursday, March 2, 1961; to which action of the Court, the respondent objects and excepts.

And the Court doth designate Arlin F. Ruby, Attorney at Law, to represent the petitioner herein.

Enter 11/10/60.

M. R. D.

* * * * *

page 60 } Commonwealth of Virginia.

To W. K. Cunningham, Jr., Superintendent, Virginia State Penitentiary, Richmond, Virginia:

We command you that the body of Glenn W. Frye, detained by you and under your custody as it is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called, you have before our Hustings Court of the City of Richmond, Part II, at the Courtroom thereof at Tenth and Hull Streets, Richmond, Virginia, at 2:30 o'clock P. M., on the 2nd day of March, 1961, to do, submit to and receive all and singular those things which shall then and there be considered of him in this behalf. And have then there this writ.

Witness, Chas. R. Purdy, Clerk of our said Court, at the Courthouse thereof, in the City of Richmond, the 16th day of November, 1960, and in the 185th year of our Commonwealth.

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

Filed in clerk's office November 17th 1960.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

* * * * *

page 62 }

* * * * *

In the Hustings Court of the City of Richmond, Part II, the 29th day of March, 1961.

ORDER.

This day came the respondent, pursuant to the writ of *habeas corpus* heretofore entered herein, and produced the petitioner, Glenn W. Frye, before this Court, and by leave of Court filed a Return and Answer herein; and came also Arlin F. Ruby, Court-appointed counsel for the petitioner, and the Assistant Attorney General for the respondent.

And after hearing the argument of counsel the Court doth take the same under advisement and doth remand the petitioner to the custody of the respondent pending a decision herein.

Enter this Order.

M. R. D., Judge.

* * * * *

page 63 }

* * * * *

Filed by order March 29th 1961.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

RETURN AND ANSWER.

To the Honorable M. Ray Doubles, Judge:

This 29th day of March, 1961 comes Respondent, by counsel, producing the body of Petitioner, Glenn W. Frye, and for answer to the petition says as follows:

1. Petitioner is lawfully detained by Respondent under authority of a lawful and valid final order of conviction and sentence entered in the Circuit Court of Smyth County, Virginia, on November 15, 1957 whereby the aforesaid court found Petitioner guilty of the crime of murder in the first degree and sentenced him to be imprisoned in the penitentiary of the Commonwealth for the remainder of his natural life.

2. The alleged errors upon which Petitioner bases his contention that the aforesaid conviction is invalid are without merit inasmuch as:

page 64 } (a) No error is shown.
 (b) Such error as is alleged is not of jurisdictional nature and, hence, is not cognizable in a *habeas corpus* proceeding.

3. Respondent expressly reserves the benefit of the three Motions to Dismiss (one of which was actually a motion to transfer these proceedings to the Circuit Court of Smyth County) hitherto filed by him in this matter.

And now having fully answered, Respondent prays that the writ of *habeas corpus* issued herein be discharged.

W. K. CUNNINGHAM, JR.
 Superintendent of the Virginia
 State Penitentiary
 By FRANK V. EMMERSON, JR.
 Assistant Attorney General.

* * * * *

page 66 }

* * * * *

In the Hustings Court of the City of Richmond, Part II, the 11th day of April, 1961.

* * * * *

The Court heretofore on March 29th, 1961, having heard this case upon the writ of *habeas corpus* heretofore issued herein and upon the Return and Answer thereto, and

The Court being of opinion, for reasons set forth in a written opinion of the Court hereby filed as a part of the record herein, that the petitioner is entitled to be released from the custody of the respondent on an order entered by the Circuit Court of Smyth County, Virginia, on November 15th, 1957, whereby the petitioner was sentenced to life imprisonment,

Therefore, the Court doth order that the respondent do release the petitioner, Glenn W. Frye, from custody under the

aforesaid order; to which action of the Court the respondent objects and excepts.

But the Court not being advised as to whether an appeal will be prosecuted herein, the Court doth suspend execution of the foregoing judgment for a period of twenty-one days and doth order that the petitioner be discharged from custody on May 2nd, 1961, unless the Court doth further suspend execution of the aforesaid judgment.

Enter this Order.

M. R. D., Judge.

• • • • •

page 68 }

• • • • •

Filed by order April 11th 1961.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

O. B. 42. Page, 53.

OPINION.

Doubles, J. This is a *habeas corpus* proceeding in which the petitioner seeks to have declared void so much of a sentence as exceeds 5 years as the penitentiary imposed upon him on November 15th, 1957, in the Circuit Court of Smyth County. The petitioner, with credit for his good behavior, has already completed a 5 year sentence.

The petitioner, at his trial, was arraigned upon the statutory form found in the then Section 19-140 (now 19.1-166) of the Code of Virginia, whereby it was alleged that he did "unlawfully and feloniously kill and slay" one William F. Tolbert. This is, of course, the statutory form of indictment for manslaughter. The defendant was represented by Court-appointed counsel.

The material parts of the order of conviction are as follows:

"Came again the Attorney for the Commonwealth and Glen W. Frye, who stands indicted for a felony, to-wit: murder.

* * * Thereupon, the accused, Glenn W. Frye, was duly arraigned in open court, and in person entered a plea of guilty to the charge contained in the indictment. * * * Upon consideration of all of which, the Court being of the opinion, based upon the plea of guilty of the accused, and the evidence adduced, that the accused is guilty of murder in the first degree as charged in the indictment and doth so find. * * * it is accordingly the judgment of this Court that Glenn W. Frye be, and he is hereby sentenced to serve a term of confinement in the penitentiary of this Commonwealth for the remainder of his natural life * * *."

page 69 } Thus the petitioner was arraigned on an indictment charging manslaughter, the maximum punishment for which is 5 years in the penitentiary; he plead guilty thereto; was convicted of first degree murder; and sentenced to life imprisonment. The conviction of murder upon the indictment and plea, of course, was erroneous, and the sole question is whether so much of the conviction and punishment as exceeds "manslaughter and 5 years" is void or merely erroneous.

No case in Virginia cited to the Court is squarely in point.

In *Commonwealth v. Beavers*, 150 Va. 33, a *habeas corpus* case, the question was whether an indictment under the prohibition law, which was treated as an indictment for a felony by all parties in the trial court and indeed by the Court of Appeals on an attempted appeal, but which by virtue of a later decision in another case was deemed only to charge a misdemeanor, would sustain a felony conviction on collateral attack by *habeas corpus*. The Court held that it would because under the circumstances of that case, the law of that case was that the indictment at the time of the petitioner's trial did charge a felony. The Court said: "We have no quarrel with any of (the cases relied on by the petitioner). They do not apply to the situation before us for review here."

In *Smyth v. White*, 195 Va. 169, a *habeas corpus* case, the indictment was challenged as not charging robbery but only grand larceny—but the Court held that the indictment did charge robbery and the case was thus decided on the appellant's second assignment of error. True, there is some dicta in the case that the petitioner knew it was an indictment for robbery because in his plea he said "I hereby enter a plea of guilty to the indictment pending against me for robbery * * *."

It is significant that the Court did not pass upon
page 70 } the appellant's first assignment of error, to-wit:
that the sufficiency of the indictment is not open to inquiry by *habeas corpus*, the Court saying "* * * for as-

suming, but not deciding that the question which the petitioner raises is properly before us in a *habeas corpus* proceeding * * *."

In *Council v. Smyth*, 201 Va. 135, a *habeas corpus* case, the petitioner was tried on an indictment which purported to charge rape; he was tried by a felony jury on his plea of not guilty and was found guilty of rape. Later he attacked the conviction by *habeas corpus* on the ground that the indictment charged only a misdemeanor. The Court held that the indictment was a defective one for a felony, but that its validity could not be attacked in *habeas corpus* when all of the proceedings at the trial were on the assumption that a felony was being tried.

The foregoing cases relied on by the respondent are not in point for at least two reasons. *First*: the petitioner the present case is not attacking the validity of the indictment as charging a felony; he contends that it does charge a felony, to-wit: manslaughter. *Second*: there is no action of record in the petitioner's trial whereby he admits that the charge against him is murder; his only admission was one of guilt to manslaughter.

The type of case presented here is one in which there is a perfectly valid felony indictment and a plea of guilty thereto—but the conviction and punishment is for a higher degree of offense than that charged.

"A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the offense to which it is directed, the effect of which is to authorize the imposition of the punishment prescribed by law on a verdict of guilty of the offense admitted." *Crutchfield v. Commonwealth*, 187 Va. 291, 296. Thus, in the present case, when Frye pleaded guilty, and his plea was accepted by the Court, he stood convicted of voluntary manslaughter. Was page 71 } the Court without jurisdictional power to convict and sentence him for any higher offense? If so, the matter may be reached by *habeas corpus*.

In *Royster v. Smyth*, 195 Va. 228, a *habeas corpus* case, the Court said at 232:

"* * * If the court had jurisdiction of the person and of the subject matter of the prosecution, and if the punishment imposed is of the character prescribed by law, a writ of *habeas corpus* does not lie to release the prisoner from custody merely because of irregularities or defects in the sentence."

And also at 236:

“A sentence in excess of that prescribed by law is not void *ab initio* because of the excess, but is good insofar as the power of the court extends, and is invalid only as to the excess. An accused in custody on such a sentence cannot be discharged on *habeas corpus* until he has suffered so much of the punishment as it was within the power of the Court to impose.”

From all of the foregoing the Court is of opinion that the action of the trial Court in convicting the petitioner of murder and sentencing him to life imprisonment was not merely erroneous, but was beyond the jurisdictional power of the Court.

The remaining question is: what is the effect of such judgment?

If the conviction had been “guilty of manslaughter” or “guilty as charged” and a sentence in excess of 5 years imposed, the Court is of opinion that the solution would be a holding that the conviction was not void *ab initio* but that all punishment imposed in excess of 5 years would be void, and that upon completion of service of 5 years the petitioner would be entitled to an absolute discharge from custody in a *habeas corpus* proceeding. Is this altered by the fact that instead of being convicted of “manslaughter” the Court convicted the petitioner of “murder”?

If the conviction order is void *ab initio*, then the petitioner would be remanded to the trial court where the
page 72 } proceedings would pick up from the petitioner’s plea. The petitioner by having entered his plea placed himself in jeopardy as to the felony of manslaughter, and the Court having received the plea, the petitioner stood convicted of manslaughter. The Commonwealth cannot now either amend the indictment to charge a higher degree of homicide nor can they *nolle pros* the indictment and re-indict the petitioner for murder because he has been in jeopardy and stands convicted of “manslaughter,” which is a bar to a subsequent prosecution for “murder,” and to attempt to amend the said indictment to “murder” would be to “change the nature of the offense charged” which is not permitted under Sect. 19.1-177 of the Code of Virginia. Therefore, as a practical matter the petitioner, if remanded, would have to be sentenced for manslaughter, given credit for the time already served, and discharged.

Wherefore, it is the opinion of the Court that the court’s order of conviction of “murder” should be construed to be a

valid conviction of a lesser degree of homicide necessarily included therein to-wit "manslaughter" but is void as to a conviction of any higher degree of homicide, and that so much of the sentence as exceeds 5 years is also void; and that the petitioner, now having served 5 years, is entitled to his discharge on *habeas corpus*.

1961, April 11th.

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page 75 }

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Filed in clerk's office June 8th 1961.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To the Honorable Charles R. Purdy, Clerk:

Pursuant to the provisions of Rule 5:1, §4 of the Supreme Court of Appeals of Virginia, W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, hereby gives notice of his intention to appeal from that certain final judgment entered in the above-styled cause on April 11, 1961.

Also pursuant to the aforesaid Rule, the following errors are assigned:

1. The Court erred as a matter of law when it failed to recognize the conclusiveness of the final judgment of the Circuit Court of Smyth County, entered on October 1, 1958, whereby that Court denied a petition for a writ of *habeas corpus* which included allegations of error identical to those considered by this Court in the proceeding here considered.

This Assignment of Error is grounded upon the provisions of Section 8-605, Code of Virginia of 1950.
page 76 } 2. The Court erred when it refused to make the writ granted herein returnable before the Circuit Court of Smyth County for the determination of unrecorded matters of fact.

The Assignment of Error is grounded upon the provisions of Section 8-598, Code of Virginia of 1950, as amended, and upon Respondent's contentions that the petition presented factual questions as to the understanding of the various parties to Petitioner's trial on November 15, 1957 in regard to the purpose and intended effect of the plea of guilty entered therein by Petitioner.

3. The Court erred as a matter of law in entertaining the petition filed herein and in granting relief thereunder.

This Assignment of Error is grounded upon Respondent's contentions that:

(a) The petition and exhibits filed herein disclosed that there was not cause to believe that Petitioner was detained without lawful authority.

(b) The contention of Petitioner, as to the partial invalidity of his conviction and sentence due to the apparent discrepancy between the indictment to which he offered a plea of guilty and the conviction and sentence imposed thereon, page 77 } which were considered by this Court and found to be controlling, did not set forth a jurisdictional matter such as is required in order to be raised collaterally in a *habeas corpus* proceeding.

4. The Court erred as a matter of law in the form of relief which it granted.

This Assignment of Error is grounded upon Respondent's contention that the Court erred when it held that the sentence imposed upon Petitioner was valid in part, and invalid in part, it being Respondent's contention that if the Court correctly found that there was jurisdictional error in the Smyth County proceeding, it should have declared the conviction and sentence completely void, and remanded Petitioner for further proceedings.

W. K. CUNNINGHAM, JR.,

Superintendent of the Virginia
State Penitentiary

By FRANK V. EMMERSON, JR.
Assistant Attorney General.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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