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**Record No. 5826**

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

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**URBAN LEROY DEITER, JR.**

**v.**

**COMMONWEALTH OF VIRGINIA**

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FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND

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**RULE 5:12 BRIEFS**

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

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

**HOWARD G. TURNER, Clerk.**

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

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND.

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Record No. 5826

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 22nd day of January, 1964.

URBAN LEROY DEITER, JR.,                      Plaintiff in error,  
*against*

COMMONWEALTH OF VIRGINIA,      Defendant in error.

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From the Circuit Court of the City of Richmond  
John Wingo Knowles, Judge

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Upon the petition of Urban Leroy Deiter, Jr., a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Richmond on the 7th day of January, 1963, in a certain proceeding then therein depending wherein the Commonwealth of Virginia was plaintiff and the petitioner was defendant; no bond being required.

## RECORD

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page 1 ] VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND:

BE IT REMEMBERED, that T. Gray Haddon, Attorney for the Commonwealth of Virginia, and for the Circuit Court of the City of Richmond, who, for the said Commonwealth prosecutes in this behalf, cometh on the 14th day of December, 1960, into the said Circuit Court of the City of Richmond and giveth the Court here to understand and be informed that Urban Leroy Deiter, Jr. a convict in the penitentiary of Virginia, heretofore was convicted of three offenses against the laws of this Commonwealth, then and now punishable by confinement in the penitentiary, and was sentenced to confinement in the said penitentiary for the said offenses and was received into the said penitentiary in pursuance of said sentences, which said convictions will more fully and at large appear by reference to the records thereof, duly certified copies of which are here produced and shown to the Court. And the said Attorney for the Commonwealth giveth the Court further to understand and be informed, that the said convict is the identical person mentioned in each of the aforementioned records.

And the said Attorney for the Commonwealth giveth the Court here further to understand and be informed, that the said convict hath not been sentenced to the punishment by law prescribed for such third offense.

Whereupon the said Attorney for the Commonwealth prays the consideration of the Court herein the premises, and that due process of law be awarded against the said convict in this behalf, to make him answer to the said Commonwealth touching and concerning the premises aforesaid, and that such proceedings may be had thereupon as are directed and required by the Acts of the General Assembly in this case made and provided.

T. GRAY HADDON

Attorney for the Commonwealth

page 2 ] To Urban Leroy Deiter, Jr. #78521

You are hereby notified that the Commonwealth's Attorney of the City of Richmond, Virginia has heretofore filed infor-

mation in the Circuit Court of the City of Richmond alleging that you have been three times convicted and sentenced to confinement in the State Penitentiary for said offenses\* and that you were received in the penitentiary in pursuance thereof. The said information asks that due process of law be awarded against you in this behalf to make you answer to the said Commonwealth touching and covering the premises aforesaid, and that such proceedings may be had thereupon as are directed and required by the Acts of the General Assembly in this case made and provided.

You are further notified that this matter will be heard in the Circuit Court of the City of Richmond, Virginia, on the 20th day of September 1962, or as soon thereafter as the matter can be heard.

You are further notified that a competent attorney will be appointed by the Court to represent you in this matter, if you do not have counsel of your own choosing.

T. GRAY HADDON  
Commonwealth's Attorney

\*You were convicted of a felony and sentenced to the penitentiary;

1st CONVICTION  
April 5, 1948  
Court Lynchburg City Corp.  
Offense Gr. Larceny  
Sentence 1 yr.

2nd CONVICTION  
Feb. 6, 1950  
Court Lynchburg City Corp.  
Offense Gr. Larceny  
Sentence 5 yrs.

3rd CONVICTION  
Nov. 1, 1960  
Court Nelson County Circuit  
Offense Breaking & Entering  
Sentence 2 yrs.

4th CONVICTION  
Court  
Offense  
Sentence

I hereby acknowledge receipt of the above notice, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_.

Inmate refuses to sign. Copy delivered to him August 21, 1962.

---

J. D. Netherland  
Witness

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In the Circuit Court of the City of Richmond, the 29th day of November, 1962

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This proceeding came on again on this day to be heard upon the Information filed on December 14th, 1960, by the Attorney for the Commonwealth for the City of Richmond charging the defendant with having been three times previously convicted of a felony and sentenced to the penitentiary, the said judgment rendered on the 14th day of December 1960, having this day been declared null and void by an order entered on this day in the *habeas corpus* proceeding of *Urban Leroy Deiter, Jr. vs. W. K. Cunningham, Jr.* Superintendent of the Virginia State Penitentiary pursuant to decision of the United States Supreme Court in *Chewning v. Cunningham*, 368 U. S. 493, and a new trial granted to him.

It further appearing to the Court that the Information heretofore filed by the Attorney for the Commonwealth for the City of Richmond charging the above with having been three times previously convicted of a felony and sentenced to the penitentiary is on file with the Clerk of the Court and that the said Attorney for the Commonwealth has notified the Court that he intends to proceed on such Information against the said defendant and the defendant in person and by counsel, W. A. Hall, Jr., stated to the Court that he desired to be tried on this date.

Thereupon came W. A. Hall, Jr., counsel for said de-

fendant, and moved the Court to dismiss said Information on the ground that one of said former convictions was void because two verdicts were combined into one judgment, and further moved the Court to dismiss said Information on the ground of denial of hearing evidence on his plea of insanity at a former trial; and the Court having heard the arguments of counsel for the defendant and of  
page 8 ] the Attorney for the Commonwealth, doth overrule both of said motions.

And the Attorney for the Commonwealth having heretofore filed an Information setting forth the several records of conviction and alleging the identity of the said prisoner with the person named in each and the said Information being read to the said defendant, he being first cautioned as to his rights, and after being advised by his counsel, he admitted in open court that he is the same person mentioned in the several records of conviction, and after hearing evidence and arguments of counsel, (counsel having stipulated that the evidence of Stuart J. Melton in the *habeas corpus* case should be considered in this case);

It is therefore the judgment of the Court that the said defendant be sentenced to further confinement in the Penitentiary for a term of ten years, said term to begin at the end of the present term or terms of confinement of said defendant in the said penitentiary, said term to be credited with six months and thirteen days already served upon his previous void recidivist sentence.

For reasons appearing to the Court, it is ORDERED that five years of the balance of said ten year sentence be suspended on the condition that the said defendant keep the peace and be of good behavior.

Thereupon the defendant, by W. A. Hall, Jr., his counsel, moved the Court to continue this proceeding for thirty days; which motion the Court overruled. Then the defendant, by counsel, moved the Court in arrest of judgment because Section 53-296 is unconstitutional, and for other reasons dictated to the court stenographer at length; which motion the Court overruled.

And the said defendant is remanded to the custody of the Superintendent of the State Penitentiary.

page 9 ] The Court certifies that at all times during the trial of this case the defendant was personally present.

page 10 ] Virginia: Circuit Court for the County of Nelson,  
on Tuesday, the first day of November, nineteen  
hundred and sixty.

Commonwealth Present: The Honorable C. G. Quesen-  
berry, Judge

vs } Indictment this term for breaking and entering the  
    } storehouse of George G. Farrar with intent to commit  
    } larceny and grand larceny therefrom

Urban Leroy Deiter, Jr.

This day came the Commonwealth by her attorney, as well as the said Urban Leroy Deiter, Jr. who was brought into the Court in custody of the jailer and was set to the bar. Also came Robert L. Marshall attorney for the accused.

Whereupon the accused, by his counsel, again made the same motion as made on October 27, 1960 requesting that he be committed to Southwestern State Hospital for observation and examination as to his mental condition and again made the same motion as made on October 27, 1960 requesting the Court to summon as witnesses in his behalf two certain persons from the District of Columbia, namely: James Chochos, Jr. and the Owner of Bill's Cut Rate Motor Sales to testify in his behalf. Both of which motions were refused by the Court and to which motion the accused by counsel excepted.

And the accused having been arraigned on October 24, 1960 on the aforesaid indictment for statutory burglary and grand larceny having plead not guilty thereto and accused having requested a jury for the trial of this case, there came a jury, to-wit: P. D. Payne, III, G. H. Harvey, Gordon Hughes, Jr., Lucy Whitehead, James G. Bryant, John T. Harris, James Vest, J. M. Christian, Jr., W. H.

Thompson, Jr., E. W. Slaughter, Leigh Powell  
page 11 ] and W. L. Lanahan, which jury was duly im-  
          pannelled, selected and sworn in all respects  
as directed by law.

Whereupon, the jury having heard all of the evidence introduced, arguments of counsel and received the instructions of the Court, were sent to their room to consider their verdict, and after sometime spent therein, returned into Court and presented their verdict in the following words, to-wit: "We the jury find the accused guilty of breaking and entering and fix his punishment at one year in the penitentiary. (signed) James G. Bryant, Foreman." "We the jury find the accused guilty of grand larceny and fix



his punishment at one year in the Penitentiary. (signed) James G. Bryant, Foreman.”

Whereupon the accused, by counsel moved the Court to set aside the verdict of the jury because it was contrary to law and without evidence to support, which motion was refused by the Court and to which action of the Court the accused by counsel excepted.

And it being demanded of the accused if anything for himself he had or knew to say why judgment  
page 12 ] should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the said Urban Leroy Deiter, Jr., be and he is hereby sentenced to confinement in the penitentiary of this Commonwealth for the term of two years, the total period by the jury ascertained as aforesaid, and that the Commonwealth of Virginia do recover against the said Urban Leroy Deiter, Jr., its costs by it about its prosecution in this behalf expended.

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

The Court orders that the prisoner be allowed credit for all time spent in jail awaiting trial. The Court certifies that at all times during the trial of this case the accused was personally present.

And the prisoner is remanded to jail.

It is ordered that the items of merchandise and the cash register introduced as evidence be retained for sixty days, but that the items of dry cleaned clothing taken from Farrar's Store be released forthwith to George G. Farrar.

The foregoing consisting of three page(s) is a true copy of order recorded in my office in Commonwealth Law Order Book “Q” page 396.

Teste:

LUCY S. BARNETT, Deputy Clerk  
Circuit Court of Nelson County, Va.

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Received and filed Dec. 14, 1962.

LUTHER LIBBY, JR., Clerk  
By E. M. EDWARDS, D. C.NOTICE OF APPEAL AND ASSIGNMENTS OF  
ERRORSTo: Clerk of the Court, Circuit Court, City of Richmond,  
Virginia.

Petitioner, Urban Leroy Deiter, defendant in this proceeding, hereby gives notice of appeal from and order entered in this cause on the 29th day of November, 1962, and sets forth the following Assignments of Error:

1. That the court erred in rejecting and denying the Petitioner relief which he seeks, and as prayed for.

2. That the Court erred in resentencing the Petitioner twice for the same cause and further such acts  
page 14 ] constitute a denial of due process of law guaranteed the Petitioner by the State and Federal Constitutions.

3. That the court erred in holding that it finds no probable cause to believe that Petitioner is now being detained without lawful authority.

4. That the court erred in resentencing the petitioner after a void Judgment was set aside.

5. That the court erred in the *Habeas Corpus* proceeding when the function of a *Habeas Corpus* procedure was allowed to correct a practice, whereas, the court erred in refusing to ascertain whether the procedure complained of has resulted in an unlawful detention, and in the court's failure to conduct the hearing in *denovo*.

URBAN L. DEITER  
Defendant, *Pro-Se.*  
South Side  
State Farm, Virginia

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Received and Filed Dec. 17, 1962.

LUTHER LIBBY, JR., Clerk  
By E. M. EDWARDS, D. C.

MOTION TO SET ASIDE, ANNUL, VACATE AND  
ARREST ADJUDICATION AND SENTENCE  
OF NOVEMBER 29, 1962.

To the Honorable John W. Knowles, Judge:

Now comes the defendant, Urban Leroy Deiter, Jr., and moves the Court to set aside, annul, vacate, and arrest the adjudication herein entered on November 29, 1962, that defendant has been three times lawfully convicted of a felony and sentenced therefor to confinement in the penitentiary of Virginia, as well as the sentence entered herein under the provisions of Section 53-296 of the Code of Virginia wherein defendant was sentenced to confinement in the penitentiary for a term of ten (10) years, with the execution of five years of this sentence suspended. Sentence of a term of two years in the penitentiary rendered in the Circuit Court of Nelson County, Virginia, on November 1, 1960, being so elongated, added to and enhanced by said recidivist sentence aforesaid.

Defendant avers that he is entitled to have the adjudication and recidivist sentence aforesaid set aside, annulled, vacated, and arrested on account of each of the following grounds, and each ground hereinafter set out in chronological order states a denial of the constitutional rights of this defendant  
page 17 ] under the laws of Virginia and the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

(1)

Defendant maintains that he was denied a public trial herein in contravention of the due process of law clause of the Fourteenth Amendment of the Federal Constitution as interpreted by the Supreme Court of the United States.

(2)

The information drafted under Section 53-296 of the Code of Virginia is not just merely insufficient but totally

and wholly lacking in substance and is void under the laws of Virginia and the due process of law clause of the Fourteenth Amendment of the Federal Constitution, as it is not stated therein in what Court or for what offense or at what time defendant had been convicted of a felony and sentenced to confinement in the penitentiary.

(3)

He asserts and maintains that prior to his trial as a recidivist on November 29, 1962, he had for some months passed completely finished serving the term of two years in the penitentiary rendered against him in the Circuit Court of Nelson County, Virginia and that whereas he finished serving said two years months prior to his recidivist trial aforesaid, the Circuit Court of the City of Richmond in proceedings under Section 53-296 of the Code of Virginia was without jurisdiction, power or authority under the laws and constitution of Virginia to render the enhanced recidivist penalty. Section 53-296 does not create a new offense but under certain circumstances permits enhanced punishment for the last sentence, but not in event the original sentence has been totally served.

(4)

He asserts that Section 53-296 is void under the due process of law clause of the Fourteenth Amendment  
page 18 ] of the Constitution of the United States, and therefore the enhanced punishment against this defendant created former and double jeopardy in contravention of the said amendment.

(5)

He avers that at the September term, 1960, of the Circuit Court of Nelson County, Virginia, the Grand Jury returned an indictment against him as a true bill, the first count charging that he did break and enter the storehouse of George G. Farrar, with intent to commit larceny, and the second count charged him with the larceny of goods and chattels of the said George G. Farrar, in the said storehouse, over the value of Fifty Dollars, a continuous transaction.

He files herewith a certified copy of said indictment and marks same "Exhibit A," and makes it a part hereof, and

prays that it may be read and considered as if fully set out herein.

It will be noted upon inspection of the minutes of the Circuit Court of Nelson County filed in the proceedings herein on November 29, 1962, that the jury rendered two separate and distinct verdicts — finding defendant “guilty of breaking and entering” on the first count and “guilty of grand larceny” on the second count, and fixed punishment at a term of one year in the penitentiary as punishment of each of the distinct counts.

The Circuit Court of Nelson County was without jurisdiction on November 1, 1960, to render the lump sentence of a term of two years in the penitentiary, as such punishment was predicated upon the void verdict rendered against him on the first count of the indictment, and also because such sentence was not in accordance with the verdict of the jury; but the Court should have rendered a distinct sentence on each separate count in conformity with the verdict of the jury.

page 19 ] He avers that by virtue of the notice served upon him and made a part of the record in this case, that the Commonwealth elected to solely stand upon the conviction of the defendant on November 1, 1960 in the Circuit Court of Nelson County, Virginia, on the first count of the indictment, to-wit, for breaking and entering the storehouse of George G. Farrar, with intent to commit larceny, and that such specific designation and election on the part of the State itself, precluded any consideration whatsoever as to the conviction of the defendant in the Circuit Court of Nelson County, Virginia on November 1, 1960, for grand larceny. Wherein the Commonwealth specifically in said notice which was served upon defendant at the prison camp at State Farm, Virginia, advised defendant that the third conviction it would rely on would be his conviction for breaking and entering in the Circuit Court of Nelson County. Such constituted election of the Commonwealth to stand or fall on the conviction for the first count.

The notice constituted a bill of particulars and it's now too late for the Commonwealth to say we ourselves elected to rely on the first count but we will disregard that and rely on the second count or the conviction in the Circuit Court of Nelson County for grand larceny. For such reason, and whereas, the verdict of the jury rendered against petitioner in the Circuit Court of Nelson County on November 1, 1962, upon the first count finding defendant guilty of

breaking and entering, and there being no such crime known to the law, it is totally void, and formulated no predicate for the repeater sentence.

It is respectfully requested that the defendant by counsel be orally heard in argument in support of above motion at such time as the Court may deem proper.

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Respectfully

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W. A. HALL, JR.  
Attorney for the defendant

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### ORDER

On December 17, 1962, the defendant, by counsel, tendered to the Court a motion in writing to set aside, annul, vacate and arrest adjudication and sentence of November 29, 1962, which motion had been previously made orally before the Court on November 29, 1962, and moved that the Court stay the execution of its judgment and sentence heretofore imposed on the defendant on November 29, 1962, and give leave to the defendant to argue the said motion,

UPON CONSIDERATION WHEREOF, it appearing to the Court that service of a copy of the written motion had been accepted by the attorney for the Commonwealth and no objection being interposed to oral argument thereon, it is ADJUDGED and ORDERED that the execution of the judgment and sentence of this Court entered against the defendant, Urban Leroy Deiter, Jr., on November 29, 1962, be stayed and that this proceeding be set down for the hearing of oral argument on defendant's written motion on January 7, 1963, at 10:00 o'clock A. M. in the courtroom at the State Convict Road Force Building, Spring Street, Richmond, Virginia.

Enter: 12/18/62

JOHN WINGO KNOWLES  
John Wingo Knowles Judge

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TRIAL PROCEEDINGS

November 29, 1962  
9:00 a.m.

Before:

HONORABLE JOHN WINGO KNOWLES, JUDGE

Appearances:

CURTIS MANN, ESQ., and  
T. GRAY HADDON, ESQ.  
Commonwealth's Attorney

ARLIN F. RUBY, ESQ.  
Special Assistant to the  
Commonwealth's Attorney

W. A. HALL, ESQ.  
Public Defender and  
Attorney for Defendant

Defendant Urban Leroy Deiter, Jr., *pro se*

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PROCEEDINGS

(The Reporter and all witnesses were sworn.)

The Court: The first case that we had set for this morning is Deiter on his *habeas corpus*, isn't that right?

Mr. Mann: That's right.

The Court: Deiter? Is he here?

Would you come forward, please?

The Defendant: Yes, sir.

The Court: The way we stand on this, as I recall, from looking at the papers, is that the writ of *habeas corpus* came over on November 1, 1962, is that right?

Mr. Mann: That's right.

The Court: And the Attorney General concurred, or the Attorney General had asked for leave to file an amended answer, and he did. Then on motion of Petitioner, by counsel, it was continued until this day for a hearing on the writ of *habeas corpus*. So, that is how we stand at this moment on the petition and the amended answer?

Mr. Hall: I ordinarily make the usual motion myself, but as long as he has done it that is all right.

The Court: To the amended answer the recidivist represents that he does have additional sentences to serve in the *penitentiary*; that he was tried at Powhatan April 11, 1961, for escape, and sentenced to a one-year term, and that term still, or a portion of it is still hanging behind him insofar as any release on the recidivist sentence is concerned?

Mr. Hall: Yes, sir. We ask for a complete release. I think it will declare it void, and if that is the case — I had not gotten into the question as to the computation in the manner Mr. Mann has in respect to Mr. Deiter's time, but if he is on the retrial dismissed and the information is dismissed on the retrial, I guess it is so. Certainly, unless Mr. Mann is mistaken — I know he stated what is right — he will have additional time to serve, and some of the other cases were decided that way the last time where I made the motion and respecting the *habeas corpus*, the Court just set it aside, you or Judge Henning, but I have two still up there because they had some time to serve, but declare it void and hold him over to whatever time he has got there.

The Court: His petition alleges that he was heard before this Court on December 14, 1960, on an information alleging that he had been three times previously convicted and sentenced to the *penitentiary*, and apparently on that date he received a sentence of two years' additional time in the *penitentiary* — ten years' additional time in the *penitentiary*, two years of which were suspended. That is his complaint, that that particular sentence was void by virtue of the fact that he didn't have counsel at that time.

page 4 ] Mr. Hall: Ten years, and two years suspended, isn't that right?

The Defendant: That's right.

The Court: And on the ground that he didn't have counsel at that time he moved the Court that that be declared void, and there is no argument about that from the Commonwealth, is there?

Mr. Mann: No; we admit that.

The Court: You admit he did not have counsel at that time?

Mr. Mann: That's right.

The Court: Under the Cunningham case that sentence imposed on him on December 14, 1960, will be declared void.

Mr. Hall: Yes, sir. So far as Mr. Deiter's retrial is concerned, of course, Mr. Mann isn't handling that. He



*Stewart J. Melton*

is handling the *habeas corpus*. I just talked to Judge Haddon and in another case there is a matter of law which I am going to raise and also a matter of law in this, along with several moral reasons as to why any corporal punishment should not be imposed on a retrial. But I believe the Judge said in the other case he wanted a continuance on it and maybe this one too.

I want to raise the question of law.

The Court: What I want to do is dispose of page 5] the *habeas corpus* matter at this time.

Mr. Mann: That is correct.

The Court: And then we can go into the other.

Mr. Hall: I understand that is right.

The Court: But to do so we have got to declare that sentence void.

Mr. Hall: Yes, sir.

The Court: But since there is no opposition or argument, or is there, to the amended answer, he still has a one-year term?

Mr. Hall: He admits there are two or three months left there.

The Court: Mr. Melton, would you come around and be sworn and tell us exactly what is the status of this case?

(Thereupon, Mr. Melton was sworn)

Thereupon

STEWART J. MELTON

having been first duly sworn, testified as follows:

The Court: *This is* S. J. Melton, and his office is Custodian of the Records of the Virginia State *Penintentiary*.

Q. Now, on Deiter's record we have just declared void his ten-year recidivist sentence which was imposed on December 14, 1960?

A. That's right.

page 6 ] Q. And Mr. Mann, the Commonwealth Attorney, says that there remains an unserved sentence, or a portion of that. How does that stand?

A. After the ten-year recidivist sentence has been voided he has a one-year sentence for escape imposed by the Powhatan Circuit Court on April 11, 1961. He has served six months and 13 days of his void recidivist sentence to date,

*Stewart J. Melton*

which is not enough to offset the one-year escape sentence since it takes eight months to offset the one year anticipating good conduct time.

The Court: Do you want to ask him any questions?

Mr. Hall: No. We admit that. I think the order ought to declare void the ten-year sentence and remand him to the custody of the Superintendent of the *Penitentiary* until the two months have been served.

The Court: We will declare void his sentence of three-time recidivist imposed December 14, 1960, which sentence was for ten years' additional time and two years' suspended, and then it further appearing to the Court that the testimony at the hearing showed that there remained unserved another sentence or a portion thereof that is not yet satisfied and we remand him to the custody of the Superintendent of the *penitentiary*.

Mr. Hall: As to his retrial, Your Honor —  
page 7 ] The Court: Is that all you had, Mr. Mann?

Mr. Mann: Yes, sir.

The Court: You don't have to stay any longer.

Mr. Hall: Your Honor, with respect to another case I have here today where I will only make a motion, my motion is that I want to establish a question of law.

Mr. Haddon: It depends on what question of law you are raising now.

Mr. Hall: On the ground that there are several moral reasons involved, and the legal question involved in his last trial.

The Court: In Nelson County on November 1, 1960?

Mr. Hall: In Nelson County on November 1, 1960, yes, sir, where a two-count indictment was used in that case, and Judge Haddon I don't think ever resorted to it in his practice except in the Frost case, one count for the breaking and entering of a building and the other for grand larceny, a small sum of money got out afterwards. There were two counts in the indictment. Now, he was tried on that by a jury and the jury came in with two verdicts finding him guilty of breaking and entering, and, of course, that is void. There was no adverbial phrase to connect it with the indictment, but they found him guilty of breaking and entering, just like what the Court of Appeals has  
page 8 ] held where one was convicted of an unlawful wounding, without saying the intent. And, then

there is the other question of grand larceny. He was sentenced to two years in a lump sentence instead of sentencing him separately, as he should have been. So if the conviction is void for the breaking and entering, it is certainly void as to the other question. Supposing he had gone to the Court of Appeals? He could not have made bond. Supposing he said "I want to appeal the question of statutory burglary sentence but I want to appeal the grand larceny?" It would all be tied in. He couldn't undergo that. He would say "I want to finish that as quickly as I can; I don't want to encumber the record with carrying it to the Court of Appeals." But he couldn't as long as the sentences were that way, because it is very obvious that —.

The Court: Do you have any cases on that? It is my understanding that both of these matters look like matters that should have been taken care of on the verdict.

Mr. Hall: Not on the verdict.

Mr. Haddon: That question has been raised, and you have argued it here. It is true if you put both in one count — and that is breaking and entering with intent and larceny — you can convict for both, but you cannot sentence for both. But if you put it in two counts you can convict for both and sentence for both.

page 9 ] Mr. Hall: That is true.

Mr. Haddon: In this particular case if the Judge sentenced him to two years, it then would have been either for the statutory burglary or it could have been for housebreaking or it could have been two years for grand larceny.

Mr. Hall: That is true too, but the jury came in with a special verdict.

The Court: How do you know, Mr. Hall, what was done in that court on that day?

Mr. Hall: By giving you this order.

The Court: By what?

Mr. Hall: By giving you this order, the order of the Court in that case.

Mr. Haddon: The Court has held, if Your Honor please, that the verdict and the indictment taken together determines. That is all that is necessary. We have a case where the verdict read, "We the jury find the accused guilty of malicious wounding with intent." It didn't say as to the indictment or anything, but you have got to read both counts.

Mr. Hall: There are two counts, of course, in the indictment.

The Court: I want to see that certified copy of the judgment and order of the Court.

Mr. Hall: I will certainly show it to you. I had  
page 10 ] trouble getting ahold of it. It is a certified copy  
of the judgment.

The Court: Had you seen it?

Mr. Haddon: I haven't seen it. Mr. Hall, there are two verdicts here?

Mr. Hall: Yes, sir.

Mr. Haddon: The verdict is for one year each, and the Judge instead of sentencing him for two years, sentenced him for one year in each count.

Mr. Hall: On a plea of guilty?

Mr. Haddon: What difference does it make?

The Court: Does the jury say "We the jury find him guilty of housebreaking and fix his punishment at one year in the *penitentiary*?"

Mr. Haddon: That's right.

The Court: And the second verdict said "We find him guilty of grand larceny and we fix his punishment at one year in the *penitentiary*?"

Mr. Haddon: Yes, sir.

The Court: And then the Court came along and said in effect, or affirmed the verdict of the jury and sentenced him to two years in the *penitentiary*, that being the aggregate of the two?

Mr. Haddon: That's right; the total period  
page 11 ] by the jury ascertained as therefore said.

The Court: The total period having been ascertained by the jury?

Mr. Haddon: Yes, sir.

Mr. Hall: I was thinking about this: I think Your Honor will concede that this first verdict with reference to housebreaking is void?

The Court: I am not worried about it.

Mr. Hall: You consider that void, don't you?

The Court: I am going to leave that completely out of it.

Mr. Hall: It is partially an aspect, and based upon the decisions in the Courts of Virginia if they don't use that adverbial phrase —

The Court: I say it is immaterial whether it is void or not void. All you need is one conviction.

Mr. Hall: Supposing there had been a plea of guilty, the lumping of those sentences together is a bad thing to do. Suppose he had wanted to go to the Court of Appeals and had taken an appeal just on the housebreaking, for the

reason of the verdict or some other reason? Then, while that appeal was pending he could not have gone ahead and served his sentence. Supposing he said the grand larceny charge and verdict against me is all right? The page 12 ] object of the law is to let a man serve his sentence as quickly as he can and be done with it.

The Court: I agree with all those theories and everything else. But (1) he didn't go to the Court of Appeals although he could have. That is one thing. And, (2) the way this judgment order reads — and it speaks for itself — it recites both the verdicts. The first one is: "We the jury find the accused guilty of breaking and entering and fix his punishment at one year in the *penitentiary*. Signed, James S. Pryor, Foreman." (2) "We the jury find the accused guilty of grand larceny, and fix his punishment at one year in the *penitentiary*, Signed, James S. Pryor, Foreman." Whereupon the counsel for the accused moved the Court to set aside the verdict and it was overruled, and it being asked if the accused had anything to say, and so on and so forth.

According to the judgment of the Court he is hereby sentenced to the *penitentiary* of this commonwealth for a term of two years, the total period by the jury ascertained as aforesaid, so forth.

Mr. Hall: Shouldn't he have protected him should he have gone to the Court of Appeals? He could not have gone and served his sentence.

The Court: Can you point out where there is anything wrong with the grand larceny indictment and page 13 ] trial and conviction and sentence?

Mr. Hall: No, I think not.

The Court: Aren't you hanging your hat solely on the one fact that there were not two separate, distinct judgment orders, and that the Court did not say "It is the judgment of this Court he is hereby sentenced to the *Penitentiary* of this Commonwealth for a term of one year on indictment No. 1 for breaking and entering, and he is hereby sentenced to the *penitentiary* of this Commonwealth for a term of one year on grand larceny?" It looks to me like it is perfectly clear if there is something wrong or if there had been something wrong done that would be one thing. But the Court is saying — he spelled it out twice, when all I have to say is "The total sentence imposed by the jury."

Mr. Haddon: Mr. Hall is familiar with this. I confessed error here two or three times where the sentence was more than the penalty prescribed by law. It went to the Court of Appeals where the man got eight years while the maximum

punishment was five years. He raised the question that that was void. The court of Appeals said it was not void. It was voidable when he had served the five years, and then he could go in on a writ of habeas corpus. That is exactly what is here.

The Court: This case is not that high on its page 14 ] merits.

Mr. Haddon: Assuming, as he says, it comes back to that case, if the two years were void, certainly one year was right.

Mr. Hall: In that case I had reversed the decision on the ground that the good Judge was mistaken in holding the crime was not burglary.

The Court: Isn't it true that the crux of this case is one thing: whether this November 1, 1960 conviction or judgment order, let us call it that, whether that constituted a valid sentence to confinement in the *penitentiary* and whether Urban Leroy Deiter came to the *penitentiary* as a result of that and it constitutes one valid sentence, forgetting completely the breaking and entering and all you are talking about — grand larceny. The order sets out the verdict of the jury and the Court says I sentence him to a sentence of two years, the total amount imposed by the jury by its verdict.

How in the world can anyone misunderstand it? How has he been deprived of any right, whether he served a year which was improper or illegal by virtue of the deficient verdict on the breaking and entering? Isn't it completely and utterly immaterial to this issue here today? Our issue is whether he had three valid convictions or sentences. According to this, I am of the opinion that one of the two left

here is valid, namely, the one on grand larceny. page 15 ]

Mr. Hall: I can see very readily that say the statute had limited the punishment to five years, and that was the maximum the man would get, that would be one thing, but if he received a sentence of seven years that would be another matter.

The Court: If there had been no recital of the verdict of the jury and if the Court had not used the words "The total period by the jury ascertained as therefore said," if they had not used those words, that would have been one thing. You would have an argument. But now the Court has made it as clear as a whistle. They said one year, and he approved it, and they said one year on the other one, and instead of writing the whole thing out, he said "I am going to say a total of two."

Mr. Hall: You may be right, but if the statute prescribed five years and they gave the man seven, you would have to wait until he had served his valid part of such sentence. If this man had taken an appeal he would have had to have taken that whole record up on appeal.

The Court: He didn't take an appeal.

Mr. Hall: No, sir.

The Court: And, he was represented by Robert L. Marshall, an attorney. It doesn't say Mr. Marshall was appointed for him. Further, he had every opportunity to correct this record so far as the breaking and entering, and if there was a deficiency or an alleged deficiency he didn't move it. But again I say it is immaterial.

Mr. Hall: He was appointed, because here is the order allowing him his fee.

The Court: It is immaterial whether he was appointed or not. This would appear to me, as far as the grand larceny part is concerned, to be a matter which must be taken care of on appeal, if it had not been clear as a whistle.

Mr. Hall: Let me show you this other thing, and I will not say anything more about this, that happened on one day of the trial here. The counsel makes a motion and wants to be heard on the question of determining a person's mental condition as a condition subsequent to trial.

The Court: What do you base it on?

Mr. Hall: On the grounds that the Court —

The Court: What is in the order?

Mr. Hall: The Court should have heard evidence on this question, and allowed them to cite laws to that effect.

Mr. Haddon: You can cite a Virginia case that says you do not have to have given evidence. I don't know about any other States, but there is a Virginia case saying you can commit them and the Court doesn't have to hear any evidence.

The Court: What is the order that you are talking about?

Mr Hall: The accused by his counsel made the motion on October 26 that he be committed to Southwestern Mental Institute for observation, and again made the same motion on another date, and proceeded to summon his witnesses, but the Court refused it. The Court has held they have got to give that hearing in order to find out. The Thomas case is before the Fourth Circuit now, and I have already argued it.

The Court: His attorney took an exception, didn't he?



Mr. Hall: Yes, sir.

The Court: You didn't read "both of which motions were refused by the Court, and to which motions the accused by counsel excepted."

Mr. Hall: Yes, sir. I see this here.

The Court: That Court said it was a deprivation of constitutional right to refuse to send a man to Southwestern State Mental Institution?

Mr. Hall: Yes, sir, in the Mitchell case. We know what the Court stressed in the Mitchell case.

The Court: I don't know this. I haven't got the vaguest idea what the case said to which you are referring.

Mr. Hall: It was a case where there was a page 18 ] question of insanity which was raised at the time of the trial, or mental condition. It was the Bishop case. Then where you didn't do that, and although you might have done it, instead you go back 15 years afterward and do it. The Court held you could. It accepted the dissenting opinion from the United States Court of Appeals from the District of Columbia

The Court: You could do that on a habeas corpus?

Mr. Hall: Now I am talking from another conception. That is where you would have to establish the question by a preponderance of the evidence that the man had a lack of capacity to stand trial then, but on this same theory where a man offers evidence for the Court to make a determination as to whether to send him to an institution or not. In the Mitchell case they gave the man every opportunity, the Court said. But the Court said if he fails to hear evidence to determine that question, the trial is void because you are doing too dangerous and unwarranted a thing to try a man under that one condition.

The Court: How did the Judge fail to hear evidence? Was any evidence offered? This order says that the man requested he be submitted to Southwestern State at once and he requested it twice, first on October 21st, and then on November first. His second request was when the Judge said he was not going to do it, and no evidence was offered.

Mr. Hall: But the Judge wouldn't let him do it.

The Court: He summoned two witnesses from page 19 ] the District of Columbia. The Court summoned two witnesses from the District. How could the Court do that?

Mr. Hall: He couldn't do that. That was one question of his alibi. Who was he going to summon?

The Defendant: That was a car driver in Washington.

The Court: Isn't it true that our Court had this matter before it at one time?

Mr. Haddon: It had it before. I don't know what *case* it was. The Near (?) case is pending, because it didn't —

Mr. Hall: No; the Thomas case.

The Court: What did they say?

Mr. Hall: They have had it for about three months and haven't rendered an opinion. It is the same question as we have here.

The Court: The Judge hasn't finished his answer, gentlemen.

Mr. Haddon: Anyway, if Your Honor please, it comes back to this: Our Court — I can't keep up with the various decisions, I am frank to say — our Court said if the Court had jurisdiction of the person and of the offense no matter how many errors it makes, how flagrant they may be or palpable they may be, you cannot attack it in a collateral attack. Certainly, here is a case where he had jurisdiction.

He started into the trial, or whether he started page 20 ] into the trial or not, he certainly had jurisdiction. They make a motion and he overrules it. Therefore it doesn't matter what error there was. Then he should have taken an appeal.

Mr. Hall: Well, say, that he lost jurisdiction because he didn't send him or hear evidence on sending him to the asylum. I think that is what the Court will hold.

The Court: Isn't it true that even though the Court in Nelson County refused to commit the man to Southwestern State, nevertheless the defense's lack of capacity by way of mental illness or insanity was still available to the defendant?

Mr. Haddon: That's right.

The Court: He could have gone ahead and put on his evidence to show that he was insane?

Mr. Haddon: That's right.

The Court: So, why in the world is the State required to pay for a mental examination that he can get on his own?

Mr. Hall: Our Court held last year you could not raise on a plea of "not guilty" in a case from Lynchburg his insanity, and they didn't have to give the Commonwealth attorney any notice that you were going to do that.

The Court: That's right. You could go there and take all of the examinations and he could have been taken by surprise. How, as a matter of law, is he not afforded due pro-

cess when the Court says "I don't think he is  
page 21 ] insane?"

I am not going to bother with it because the statute says it is only in my discretion that he is sent to Southwestern State. The most you can say is an abuse of discretion by the Court. He is not deprived of any consideration.

Mr. Hall: Unless counsel goes in there and pleads that. That was in the Thomas case, and several questions involved this man's plea of guilty. But it was not raised on this. This man pled not guilty.

The Supreme Court of Illinois said this: "No such determination was ever made. The only semblance of an inquiry made by the Trial Judge was at the time of the motion in arrest of judgment when the defendant's counsel renewed his motion for a sanity hearing."

The Court then asked the defendant, "You are not crazy at this time, are you?" "Did you hear me?" To which the defendant replied: "I don't know."

The Judge said "I don't think he is crazy at all." This purely arbitrary decision by the Trial Judge without any advantage of evidence or argument is not the type of inquiry contemplated by the statute which would in effect abrogate the Commonwealth's ruling in denying a hearing on the sanity of the accused and deprived the accused of due process of law in denial of adequate opportunity  
page 22 ] to sustain a plea of insanity and is a denial of safeguarding of due process in its historic procedure, which is within the incontrovertible scope of due process.

The Court: Was that man represented by counsel?

Mr. Hall: Yes, sir; he was represented by counsel.

The Court: Did he plead guilty or not?

Mr. Hall: The counsel in this matter made the motion and he never pled guilty.

The Court: Did he plead guilty or not guilty?

Mr. Hall: He pled not guilty.

The Court: In that case?

Mr. Hall: Yes, sir. If he had pled guilty it would probably have committed him, I think. I think they might decide the Thomas case on another point, but not on that. But I would like to bring this to the Court's attention: If Your Honor please, I would like to say this as to what happened to this boy too for moral reasons here. Besides, these matters are very persuasive. If I am wrong, I stand corrected. I want to say this with reference to his trial in Lynchburg. The

matter that he has done in Lynchburg was just a mere nothing in the world but what we commonly call unauthorized use in 1949.

The Court: Unauthorized use carries one to three years.

page 23 ] Mr. Hall: Yes, sir; but it wasn't at that time.

They got the automobile soon afterwards. The next time he was convicted in Lynchburg —

The Court: That is the same argument, isn't it, Mr. Hall, if you just drive a block and if you get caught, you would not get the same punishment if you got caught two days later?

Mr. Hall: No; there is a lot of difference. If a man is going to keep the car, that would be one thing. He may abandon it and may leave it where the State would recover it.

The Court: After he deprived the owner of his property?

Mr. Hall: I am not arguing this except for moral reasons.

The Court: That is exactly what I am saying. The morality of it, and not the dignity of it. He has no right to put his hand on anybody else's automobile at any time ever, unless authorized.

Mr. Hall: That may be true.

The Court: It doesn't matter whether it is 15 minutes or whether he steals it and keeps it forever. The moral crime is still there.

Mr. Hall: He got five years in the second case, page 24 ] and here is the indictment.

The Court: You didn't learn anything from the first case. After he has had a sentence imposed upon him, he takes it again. These arguments, I don't think, advance the petitioner's case in any way, for the simple reason they show themselves as these things are wrong in mitigation possibly of the use.

Mr. Hall: That is what I am speaking of.

The Court: There is no excuse for it.

Mr. Hall: I am asking for a suspended sentence, Judge.

The Court: We haven't asked the man whether he wanted to be heard or whether he admits wrong. I am asking him a question of law, whether he wanted to proceed today, and it took us 35 minutes before we got to that point.

Do you desire to proceed at this time in this case?

Mr. Haddon: Yes, sir, if Your Honor please.

The Court: We have already declared the *habeas corpus* case, the December, 1960, sentence, void.

So, if the Clerk will ask the question:

The Clerk: The Commonwealth attorney filed this information against you on December 14, 1960, alleging that you

had been three times convicted and sentenced to the *penintentiary*. You do not have to plead unless you  
page 25 ] wish to. Do you wish to admit or deny that fact?

The Defendant: Yes, sir.

The Clerk: You admit you have been?

The Defendant: Yes, sir.

The Clerk: You make this plea after being advised by your lawyer, Mr. Hall?

Mr. Hall: Yes, sir. I am asking the Court for a suspended sentence for this young man. While it wasn't right — I am not saying it is right, and it was wrong, but I don't see where any of his crimes have been of a heinous nature.

The Court: Let me ask you this: Would you stipulate that Mr. Stewart Melton's testimony in the *habeas corpus* case to the effect that he served six months and 13 days on a voidable recidivist sentence? Would you stipulate that is true?

Mr. Hall: Yes, sir; and what the Court has been accustomed to doing in these cases is to give the man a break and especially where one conviction is absolutely void.

The Court: Where is one conviction void?

Mr. Hall: Certainly breaking and entering.

The Court: They are not utilizing that. All they gave him was on November 1, 1960, they sentenced and convicted him to the *penintentiary*, and he came in the *penintentiary*. So  
page 26 ] you are not charging him with being four times convicted. They just say three. The practice has been for years if a man gets two convictions even if they are both valid completely and separate and apart on the same day growing out of the same transaction, they only count for one.

Mr. Hall: But I say in view of the fact that there was some question of his mentality at one time, and some question about his having been afforded a hearing, plus the fact that his crimes have been minor, although they have been wrong, as Your Honor said about this automobile business, but just keeping a car a very short time, a five-year sentence is unusual.

The Court: We can't go into that, can we?

Mr. Hall: They generally consider it.

The Court: The five years is for grand larceny, and I thought you and I had a colloquy as to whether he drove a block before he got caught or kept it for two days before he got caught made any difference at all in the ordinary course of events. Does the trial court go behind that?

Mr. Hall: Certainly we do. Ordinarily you do take that

into consideration; ordinarily they do. It has been my practice here before Your Honor and before Judge Hening to do that. There is a lot of difference between a man being tried for the unwarranted use of an automobile with the intent to sell the car or to utilize it, and where  
page 27 ] a boy probably drunk picks up a car.

The Court: How old were you, Mr. Deiter, when that happened?

The Defendant: Sixteen or seventeen.

The Court: How old were you when you were first convicted?

The Defendant: Seventeen.

The Court: How far did you get in school?

The Defendant: Fifth grade.

The Court: Tenth grade?

The Defendant: Fifth grade.

The Court: How did you get away with that, not having to go after the fifth grade?

The Defendant: To start off with, I never did go to school until I was eight years old.

Mr. Hall: It was over ten years before he was out of the *penintentiary*. He has been living an upright life.

The Court: I am not fussing with that.

Mr. Hall: I am just trying to give you these facts. You decided against me on the law, but I think I am raising moral reasons of mitigation for suspension.

The Court: What I would like to do, and what Judge Hening likes to do, is to get the law point settled, and then we go into the personal history of the individual,  
page 28 ] what he was like before, and what he has been like since he has been in the *penintentiary*. That is what we are interested in, instead of arguing the morality of the offense, whether he takes a car and has it for ten minutes or two days. What we are really interested in is the individual himself. This whole recidivist idea is put in with the idea of imposing a sentence and at the same time you have to couple it with the idea of hoping for rehabilitation. We are more interested in how much rehabilitation has been undergone by this man, or how far he has gone on it, than we are in what he did in the beginning. There are some crimes of violence and there are crimes against property.

Mr. Haddon: From the record it doesn't seem he has done much rehabilitating. He escaped in 1961 and in 1961 he destroyed some property by cutting holes through the roof

of a laundry truck, and then there were some other minor infractions, and he escaped in 1955.

The Court: How old are you now, Mr. Deiter?

The Defendant: Thirty-three.

The Court: Do you have any family? Are you married?

The Defendant: No, sir.

The Court: Do you live in the Lynchburg area?

The Defendant: I am living in Washington now. When I got this time in 1961 —

The Court: Washington, D. C.?

page 29 ] The Defendant: Yes, sir.

The Court: Mr. Hall, it would appear to the Court that your motion to declare invalid the conviction and that sentence imposed on him on November 1, 1960, that you based on the double-barreled idea but primarily on the fact that the Court ascertained or fixed a sentence at two years for the accumulated total, is overruled.

The Court is of the opinion that the conviction of grand larceny was perfectly clearly the jury's verdict, and was properly set out. All the Court said he was going to do was combine the two. He completely disregarded the breaking and entering.

I do not agree with your idea of the effect of the Court having refused these motions on commitment to South-western State.

As far as the second motion that was made, requesting the witnesses to be summoned in his behalf from the District of Columbia, I don't think we have to bother with that. But on the motion refused by the Court, according to this record, it doesn't say one way or the other whether any evidence was heard on it, but be that as it may, he still had every opportunity on his plea and at his trial and with his counsel to bring in his defense of insanity. It was there.

I believe he could have done it, and if they  
page 30 ] didn't let him do it he should have complained of it. There was an exception taken to the refusal of the motion, but no action was taken on the exception. How long do you let a man go on when he had an opportunity to bring it in before the Court at that time, and to the Court of Appeals, which would have knocked out both of them?

Mr. Hall: It would certainly have reversed the case.

The Court: But they would declare the whole thing a nullity if that were correct. But instead of that he sits on his hands and now says the Court refused it without any evidence.



Mr. Hall: He was sentenced to a year.

Mr. Haddon: No; he did not get anything.

The Court: I will overrule your motions to declare that void on that second ground.

Do you have anything you want to tell the Court as to how you feel about it, not with reference to the law, but what is your attitude? That is what I am interested in, primarily.

The Defendant: I would like to get the time suspended, if there is any way possible. For the last 15 months I have not been in any trouble. I lost half of my foot over at the *penintentiary* in an elevator accident.

page 31 ] The Court: You have not been in any trouble in 15 months?

The Defendant: No, sir; for about 15 months I have a clear record.

The Court: Do you have any objection if we ask the *penintentiary* authorities what your reports show?

The Defendant: No, sir.

The Court: How about that?

Mr. Haddon: I think they would show for the last 15 months it has been good.

The Court: How is his record?

Mr. Haddon: We have it. In the last 15 months I don't know whether he has had any trouble.

Mr. Peyton: His last punishment on his record is dated September 18, 1961, for writing an unauthorized letter.

The Court: What has he done, gentlemen, not that that is to be condoned?

Mr. Peyton: The last thing that could be called serious was in February of 1961, cutting a hole in the roof of a laundry truck presumably in an effort to get away.

Mr. Hall: For about 12 years the boy has been out of the *penintentiary*.

page 32 ] The Court: That is all the more reason, Mr. Hall, why he ought not to be back in the *penintentiary*.

Mr. Hall: Well, I understand that generally these repeater statutes are based on what is called an habitual criminal.

The Court: They call it habitual criminal because it doesn't seem that the sentences imposed at the time of the individual crimes do *anygood*. The whole idea is rehabilitation of the individual. But by repeated criminal acts it becomes apparent that rehabilitation doesn't help. Then the theory that has been adopted is "All right; we will let him stay there some more time, and see if that won't help." We have two things hanging over his head here, and then when he

comes back, he knows he is going to get some more time.

Mr. Hall: Don't you think, Judge, a lot of these things happened on the spur of the moment, and when you get these grey hairs and when you think about when you were 16 or 17 years old, you do not think of them otherwise?

The Court: Wait a minute. He did it at 17; is that right?

Mr. Hall: That's right.

The Court: And he came to the *penitentiary*. That was the first lesson. But he didn't learn it, because he came back in a pretty short time. Then he stayed out 12 years. If he learned his lesson there was no thinking about  
page 33 ] what he had been through. So, let us say he was 18. That would make him 30 when he came back again. If he hasn't learned by the time he is 30 years old, when is he going to learn?

Mr. Hall: I think there is a lot of difference soon after a man reaches 30, and especially where the man has not committed a crime of violence — where you get drunk or you *pickup* an automobile and you don't think about those consequences like your Honor speaks of. I believe the ends of justice can be met by giving him a break.

The Court: How about the people who owned the automobile, or who owned the goods? You don't think it is all right just because this man gets drunk to take my stuff?

Mr. Hall: No, sir; I don't think so.

The Court: Society doesn't condone it, and in my opinion getting drunk is at most in mitigation. It can't excuse it.

Mr. Hall: He served some time on the sentence and he has served a void sentence. Also there is a serious question of his mentality. All those are matters that have probably cleared up now. Certainly, under that Illinois decision it is a matter to give him a break, and a lot of sentences have been reduced where one or two were imposed when the party was very young.

The Court: They haven't yet told me to  
page 34 ] suspend them unless they serve a substantial portion of the sentence.

Mr. Hall: Oh, yes, sir.

The Court: I think I will disagree with you, and I don't think so. They have to serve a fairly substantial portion of it before we suspend the whole thing.

Mr. Hall: Without any legal question at all?

The Court: What legal question have we got? You either win or lose on a legal question.

Mr. Hall: As far as the legal questions are concerned, they delve into them and they are important, even though

you are probably right and I am wrong. But where there is some question of a man's mentality, probably where the party had not served anything on it, then it has been recommended in some of these cases.

The Court: But in each one of those cases I think you will find it was somebody who behaved himself. When he has been in the *penitentiary* — and you have heard me say, and Judge Hening say — if a man behaves himself and is making an honest effort to rehabilitate himself, we are going to give him credit for it. If he doesn't do that, and by his actions indicate he has learned his lesson, we are not going to give him credit for it. We could sit here and say that this man is all clear; he is all right, when the facts that are brought before us of his actions indicate we do  
page 35 ] not know what is going on in his mind.

Mr. Hall: There is a serious question that under the law at the time that he was tried back there in Lynchburg in 1948 and 1949 whether the Court had jurisdiction in a small matter like that, because the statute said the crime had to be aggravated or the person had to be vicious or unruly. There is no mention of that in these papers.

The Court: What statute are you talking about?

Mr. Hall: Unless he is 21 years old. Section 1910 of the old 1940 code.

Mr. Haddon: You are talking about the Juvenile Court.

The Court: This gentleman was treated as an adult, and this is 1960 that you are talking about.

Mr. Hall: I am talking about the first two. If the Court had done its study —

Mr. Haddon: I submit, Mr. Hall, that the Court ought not to listen to that. As far as I am concerned you have a question on leniency. But I don't think the Court ought to be burdened with something that happened 20 years ago and that the Court didn't do what it ought to have done.

Mr. Hall: Sentencing a boy 16 or 17 years old to five years in the *penitentiary* is a very serious matter.

The Court: He was 17 on his first case, and  
page 36 ] he got one year.

Mr. Hall: That is mighty young. I believe showing him some leniency now will help.

The Defendant: Your Honor, those indictments are wrong. I have two.

The Court: He was 17 in 1948, and he was 19 in 1950.

Mr. Hall: I think if the Court had done its duty up at Lynchburg the boy would not be here today.

The Court: Mr. Hall, any time you start saying the Court

didn't do its duty you ought to come in with facts, and show it hasn't done its duty. You know that in the domestic relations court in Hanover County and Powhatan County there are individuals who are brought before that Court at the age of 17 or 16.

Mr. Hall: Under the statute now.

The Court: Brought before that Court, and you know they are sending them to Beaumont or Hanover or any of these corrective so-called reformatories would do absolutely no good in view of the crimes and in view of what they know about those people. They usually treat them as an adult and send them before a court of record.

Mr. Hall: Under the statute now. That is the way it read. But speaking of the court, there is no page 37 ] personal attack on my part.

The Court: Then don't say it if you are not attacking it personally. In other words, don't come in before this Court and say that Court didn't do its duty, because you don't know, and I don't know one single thing about what went on up there except what is in these records.

Mr. Hall: It is a mighty heavy sentence, and I think Judge Parker(?), who is probably the greatest Judge of them all, said he didn't know such a thing could happen in a civilized world as happened up here at Stuart, Virginia.

The Court: What does that have to do with this case?

Mr. Hall: Of giving a young man higher punishment than the crime called for.

The Court: Were you in Lynchburg in 1950 when he received the five-year sentence in February?

Mr. Hall: No, but I can look on the record.

How long did you have the car?

The Defendant: About 20 minutes.

The Court: That is what he says. How about the other people who were up there? What would they say if they were here? We are foreclosed from going back into that case. You know that.

Mr. Hall: They have always come back to see page 38 ] the merits of it, Judge, and are interested in seeing whether there is a matter of mitigation a lot of time.

The Court: You cannot go into *themerits* of the case. The judgment is valid or it is invalid.

Mr. Hall: You can go into it for the purpose of suspending the sentence. They have been doing it.

The Court: I don't think you and I can ever agree on the principles and the theories involved in this case.

Mr. Hall: Conceding you are right, Judge, you can go into it on the question of a suspension of the sentence.

The Court: What has he done to earn suspension? He was in the *penitentiary* and he escaped. All right, he has got another punishment for that, and he is in the *penitentiary* and he cuts a hole in a laundry truck. Why? What business did he have cutting a hole in a laundry truck?

The Defendant: That was all on the same charge that I got the year for.

The Court: But then why? You got a year for escape, or attempted escape. But what I am getting at is what was going on in your mind and what you actually did.

Mr. Hall: Well, we do those things that we are sorry for afterwards, especially a young man.

The Court: How young was he in February, 1959, when he cut the hole in the roof of the laundry truck?

page 39 ] Mr. Hall: About 28.

The Court: When do people learn? When are they supposed to learn?

Mr. Hall: I think what the Supreme Court of West Virginia says in the case of Newman against the State to give a man too heavy punishment is very harmful to society.

The Court: What too heavy punishment did he get?

Mr. Hall: I certainly think five years is heavy.

The Court: But that was in 1950.

Mr. Hall: Yes. Well, that was just about a year after the crime was committed.

The Court: He cut the hole in the laundry truck in 1959.

Mr. Hall: He got his year for that.

The Court: But what I am pointing out is, as I take it, he was in here in 1959. Am I correct?

Mr. Melton: No, sir; 1961, sir.

The Court: I have the date wrong.

Mr. Melton: February 17, 1961.

The Court: He had five years for grand larceny, and he got out in 1954; is that right?

Mr. Melton: He went out the first time on July 19, 1949, and the second time, October 12, 1960.

page 40 ] The Court: October 12, 1960, was the last time?

Mr. Melton: Yes, sir. That was on his second conviction.

The Court: And he was then back November 1, 1960, for breaking and entering and grand larceny?

Mr. Melton: That's right, sir. And placed in jail on October 15, 1960.

The Court: And 1961 was when he cut the roof of the laundry truck?

The Defendant: I stayed over at the *penintentiary* from 1950 to 1960.

The Court: Do you have anything else you want to say, Mr. Deiter?

Mr. Hall: How bad was your foot hurt, son?

The Defendant: I got three toes and the side of it cut off.

The Court: The Court, on the information filed against you on December 14, 1960, and you having admitted that you had been three times convicted and sentenced as indicated in the record, will fix your punishment at ten years' additional time in the *penintentiary* and give you credit for the six months and 13 days which you had served on the void recidivist sentence prior to this time, and will suspend five years of the balance. That is the best I can do.

Mr. Hall: Your Honor, don't you think —  
page 41 ] The Court: No, sir, I don't think anything except what I just said.

Mr. Hall: He had served two void sentences. He served a void sentence.

The Court: I don't think anything but what I just said. I said "fix his punishment at ten years' additional time and I credit him with ten years on the recidivist sentence and suspend five years on the balance.

Mr. Hall: I thought you would give him credit for the other. I know Governor Tuck did it.

The Court: I am not the Governor. I am only Judge of the Tenth Judicial Circuit: When I am Governor I might be able to do that.

Mr. Hall: It should be noted that he served two void sentences.

Mr. Haddon: The Commonwealth does not admit he served two void sentences.

Mr. Hall: Somebody does.

Mr. Haddon: The time he served was perfectly legitimate and valid. We do not admit he served any void time except for the recidivist.

The Court: I have pronounced my judgment. If you want to take it any further you will have to take it up to the Supreme Court.

page 42 ] Mr. Hall: I will ask the Court to continue it for the purpose of making a motion, to set this aside at a future time, and then of course the Court can perfunctorily hear it and overrule it, and I can take an appeal. I want to consider whether to take an appeal or

not, and I want the Court to continue it until the next term so the time will not start running.

The Court: Why should I not let the time run, Mr. Hall? If you want to move to set aside the judgment of the Court and vacate it, you can make your motion.

Mr. Hall: That is what I make.

The Court: Then we can come back *inhere* within 10 or 15 days and you can argue that if you want to.

Mr. Hall: All right, sir.

The Court: But, I don't see much sense in arguing it. What are you going to advance that you haven't advanced here today?

Mr. Hall: Maybe I will think of something in the meantime, and also it wouldn't hurt anybody, and it would extend the time within which, say, 15 days from now, I would have 60 days from that date on this motion to file my assignments of error.

The Court: Can't you sit down right now between now and one o'clock and write out your assignment of page 43 ] error?

Mr. Hall: I would like for you to set it down for a month from now, and I might not take the appeal. But I want that consideration, Judge.

The Court: Do you want to oppose that?

Mr. Haddon: I don't see anything on earth that he could say in the future that he hasn't said here. What are you going to raise, Mr. Hall?

The Court: If you were going to raise anything today was the time to raise it. It was continued at your request from October 11, 1962, until this date. So you have had over a month in which to think up things to raise.

Mr. Hall: If you will give me that extension and hear me very shortly, I don't think any harm can be done.

The Court: Why take up the time of the Court if you don't know what you are going to argue? We have already gone over everything in the case, and it has taken us an hour and six minutes, plus talking about the *habeas corpus* matter, on this one recidivist hearing. We don't begrudge this time, but why take up another two or three hours unless you have additional points which you desire to make?

Mr. Hall: I want to talk about that Florida decision with reference to the question that if this sentence has expired, you cannot add onto it.

The Court: The Court has already ruled on that. That is



the case of Cochrane and this Court held that so  
page 44 ] far as Virginia is concerned this Court and the  
Commonwealth is entitled to bring them in on  
a re-hearing at the time. This is six months and 13 days  
that he has been serving on this sentence. It was the case  
of Reynolds against Carl.

Mr. Hall: If that sentence is void, I don't think under the  
Florida decision — will you give me that opportunity of  
amending it and submitting a memorandum?

The Court: No, Mr. Hall. If that is your only point, I will  
overrule right now because I have been into it before in  
about 15 cases and the answer is it is going to take the  
*Circuit* Court of Appeals of Virginia or the United States  
Supreme Court to change my mind on it, because I have  
read it and I went into the second one, and the three cases  
that came out of Florida. I have been into everyone of them  
and you have got three separate statutes, and they are not  
pertinent to this issue.

Mr. Hall: The only thing is this: I don't want to take  
Your Honor's time but I want to file a written motion and  
set out everything specifically so I can protect my record.

The Court: That is perfectly apparent from what you say,  
that I have been over one time or another each of them that  
you have raised, in addition to the ones raised today, and  
I cannot see how it would serve any useful purpose to take  
additional time to come back and argue it all  
page 45 ] over again.

Mr. Hall: I will not argue it, but I will file it.  
Otherwise I do not have my record *preteceed*.

The Court: If you want to note an appeal at this time,  
I will suspend the execution of this judgment for a period  
of 60 days to give you time to perfect your appeal.

Mr. Hall: Will you give me three days in order to file  
that motion to set the judgment aside?

The Court: You can file it, and I have 21 days in which  
to consider it.

Mr. Hall: All right.

The Court: Just what is the difference, because I have  
fixed the punishment? I suspended the execution of it for  
60 days on the basis of your representation that you intend  
to appeal and give you a chance to appeal and you file your  
written motion, and if there is any merit to it I will take  
care of it, but if there is no merit to it, I will overrule it.

Mr. Hall: Couldn't I have time to make the motion and  
then that would give me a little time to think?

The Court: No, sir.

Mr. Hall: You might deprive me of the Court of Appeals of Virginia saying you ought to raise that question.

The Court: You have got 21 days to get it in page 46 ] from this day. The first day starts tomorrow.

You have 21 days. That is enough time for anyone to come in with any motion that they want. If it comes in at the last minute then you are penalizing yourself.

Mr. Hall: When you enter the final order overruling this motion I will make, if made within 21 days, then my 60 days starts from that time.

The Court: I am not going to argue about that. I am entering judgment today and suspend execution for 60 days. You say you are going to appeal. I am just waiting until you do.

Mr. Haddon: You are not making a motion now to set it aside, are you? If you do, and if the Judge overrules it, I don't think you could come in again on a re-hearing.

Mr. Hall: I am not making any — I don't want to take any evidence.

Mr. Haddon: But if you make the motion and the Judge overrules it he certainly is not going to entertain another motion to set aside. Let's have the ordinary order to sentence him and suspend it.

Mr. Hall: Your Honor stated you would do that, and just let it go at that, and within 21 days I will file a written motion with the Court.

The Court: What I am going to do is this: I page 47 ] am going to enter judgment as of today, it being represented to the Court that the defendant desires to note an appeal to the Court of Appeals, and the execution of this judgment is suspended for 60 days in order to let the defendant perfect an appeal. That is all that is going to be done. I am not going to tell you what to do or how to do it, or when to do it. I am going to put a period on it after, as I say, 60 days.

Mr. Hall: Well, I think I can add to it. I think I could make the motion now.

The Court: You may proceed.

Mr. Hall: All right, then, I will do it. I will make the motion right now.

The Court: I have already told you what I was going to do, and as far as the motion being made now is concerned, you may proceed.

Mr. Hall: I move the Court to arrest the judgment on the grounds that Section 53-296 is in its entirety unconstitutional. It provides for double jeopardy in violation of the 14th

Amendment of the Constitution of the United States.

The Court: Mr. Hall, we can take a recess right now and give everybody a chance to relax and also to get the court room aired out. When we come back at the end of that recess, if you have that motion, then you can dictate it real quick.

Mr. Hall: I will just make the motion orally to the Court, then.

page 48 ] The Court: The Reporter is going to take it down. I want to say this now: Let it be understood when we come back all we are going to hear is your grounds for the motion and then we will end it. We have other people who are entitled to be heard today.

(Thereupon, the Court took a short recess, at the expiration of which the hearing continued.)

The Court: Mr. Hall, you may proceed.

Mr. Hall: If the Court please, I would like for the *Repoeter* to read the first part of my motion.

(Thereupon, the Reporter read as follows:)

“I move the Court to arrest the judgment on the grounds that Section 53-296 is in its entirety unconstitutional. It provides for double jeopardy in violation of the 14th Amendment of the Constitution of the United States.”

Mr. Hall: 2. That by virtue of sentence rendered against the defendant in this Court today he has been jeopardized twice for the same and identical offense.

3. That whereas the evidence and admission of counsel of record in this case show that the defendant herein has completely served the sentences imposed in the Circuit Court of Nelson County for house breaking and larceny, to wit, deprives this Court of jurisdiction; that all a  
page 49 ] repeater statute can mean is that the repeater sentence is an elongation and an enhancement and in addition to the last sentence rendered against petitioner, and such sentence if at all can only be imposed during the course of the third or previous sentence, and after the time has been fully undergone, the Court is without jurisdiction to impose said sentence.

Further, that the defendant has been in the *penintentiary* since the rendition of the judgments against him in the Circuit Court of the County of Nelson and 53-296 of the Code of Virginia has been violated by information as to these proceedings having been given to him years later on, to wit, the

20th of September, 1962, and such is not giving information without delay as required by statute.

That the place wherein the defendant was tried did not constitute a public trial and is in violation of the decision of the Supreme Court of the United States in the case of Palmer (?) against Florida, and in the case of in re Oliver, 68 Supreme Court Reporter.

For each and all of the foregoing reasons I further move the Court to arrest the judgment and sentence herein rendered against this defendant; that the information herein filed is defective and in violation of the 14th Amendment of the Federal Constitution, as it does not state the convictions or sentences upon which the aforesaid  
page 50 ] repeater sentence is predicated and based.

That is all.

The Court: Mr. Hall, I will ask you one question.

Mr. Hall: I just want to be protected in it, Judge.

The Court: You do not challenge the fact that a notice was delivered to the petitioner or to the defendant Deiter, which notice is in the record?

Mr. Hall: Yes; the record will show that.

The Court: The notice that he was going to have this hearing?

Mr. Hall: Yes, and as to the statement of facts.

The Court: And that the notice set forth the convictions on which the Commonwealth relied?

Mr. Haddon: Yes, sir.

The Court: I just asked him. I didn't ask you, Mr. Haddon. He got a copy of the notice, and it was delivered to him and in there was set out the three separate convictions and sentences upon which the Commonwealth relied, isn't it?

Mr. Hall: Right.

The Court: So as far as your argument with reference to the information itself in setting it out, as a practical matter he has got them and did have them from the time that notice was delivered to him on August 21, 1962. He had knowledge of every conviction upon which  
page 51 ] the Commonwealth intended to rely. As a matter of fact, he certainly did have knowledge because he saw fit to challenge the November 1960 conviction.

The second point you raise, or rather, another point you raise, is that this is not a public trial and this is not a public place, and you are now standing in a room which is designated as a court room which has the requisite orders designating the same posted on the front door. There is nobody that bars any single soul in this Commonwealth from

coming into this room and you have had people in and out from time to time, some attorneys and other people, whom I did not recognize, but I presume they are not attorneys because I know most of them in this area. And, so the question of whether it is a public trial or not is pretty well resolved, isn't it?

And, then, on each of your other points with reference to Section 53-296 being unconstitutional, the Supreme Court of Virginia has held it was constitutional as recently as *Sims* versus *the Commonwealth*. On the double jeopardy in violation of the 14th Amendment, this Court has ruled — I can't think exactly which ones they were, but I might have my copies of the opinion, in the case of Cunningham against Royster, as late as May 31, 1962, the Court ruled that the double jeopardy principle which was advanced page 52 ] on the basis of Reynolds against Cochrane is not applicable to Virginia law, and Virginia procedure.

And, in sum the Court has ruled at one time or another on every point that you have raised, and on each one the Court has ruled adversely to your position.

Mr. Haddon: We had that same question up before.

Mr. Hall: They have never passed on it.

The Court: Yes, we did, and you went to the Court of Appeals on them.

Mr. Hall: The Court of Appeals never has passed on it.

The Court: Did you apply for a writ of error about this not being a proper place for trial?

Mr. Hall: Yes, I did, and they haven't ruled on the case at all. That is the reason I have not applied for a writ of *certiorari*.

The Court: Didn't you file for a writ of error?

Mr. Hall: It has been there for almost two years without any decision one way or the other.

The Court: I am just asking for information.

Mr. Haddon: There was an allegation to the effect that this was not a court room, and I file an answer.

The Court: I understand. I have already determined it heretofore. At least, it has been raised on three page 53 ] occasions, and I have held consistently that it is a public trial, that the public is freely admitted as well as anyone else, and there is absolutely no prohibition about anyone coming in at any time.

Mr. Haddon: I put that in my answer.

Mr. Hall: What about the Oliver case?

The Court: The whole thing is the fact that not only is the

order designating such court room as a court room open to the public, posted at this particular court house, but it is also posted at the City Hall and downstairs in the City Hall out where the entrance is. Copies of it are properly posted and were served on the *penintentiary* officials and other people as well as the Commonwealth Attorney. There is no question that it has received all the notoriety you need except buying an ad in a newspaper.

Mr. Haddon: I applied for a writ of error.

Mr. Hall: It never has been passed on.

The Court: In view of the fact that the Court has previously ruled on each of the questions that you have raised —

Mr. Hall: I don't think you ruled on the question of elongation after sentence has been served.

The Court: That is what I was talking about, Reynolds against Cochrane. In view of the fact that the Court has ruled on each of those questions, the Court will over-  
page 54 ] rule your motion at this time.

Mr. Hall: Where has Your Honor referred to the fact, as the record shows, and which we admit, that notice was given on the 20th of September, 1962, to the within defendant Urban Leroy Deiter, Jr., as to what convictions?

The Court: Which one are you reading? The information I have says the copy was delivered to him on August 21, 1961.

Mr. Hall: September 20 is the one I have here.

The Court: If you will read it, you will see that the notice says that on September, 20, 1962, the Commonwealth proposes to proceed on those three previous convictions.

Mr. Hall: I will get my dates straight, but I want to say this: In that information the Commonwealth waived any question, if it had, as to the conviction of the accused in the Circuit Court of Nelson County.

The Court: Mr. Hall, let me make this statement to you: I know exactly what you are going to say. I have ruled on it previously, and I am still overruling your motions. As I said before, we have now been on this case, with the exception of an eight-minute recess, for one hour and 32 minutes, most of which has been taken up in argument and very little in factual presentation. I have told you before that I had ruled on each one of the points that you had raised. I now overrule your motion and when  
page 55 ] you leave we will proceed to the other matters on the docket.

Mr. Hall: I haven't made this motion, sir: I most respectfully say I never have made this motion.

The Court: If you want to make that motion, you make it in writing some other time. I have got a long docket. I am going to get to that docket, and right now. That is all. I have listened to you very patiently and very carefully, but now I am not going to listen to anything more on this particular case. You have 21 days in which to file anything you want to file, and if you want to do it, do it. But as of right now we just do not have the time.

Mr. Hall: I could do it in two minutes.

The Court: Suppose you do it in writing.

(Thereupon, the hearing on this recidivist was concluded).

### CERTIFICATE OF COUNSEL

Final judgment in the foregoing suit having been rendered on the — day of —, 19—, counsel for the Commonwealth and defendant hereby affix our signatures to the foregoing transcript of testimony and other incidents of trial to the end that the same may become a part of the record on appeal.

Given under our hands this — day of —, 1963.

T. GRAY HADDON

(Counsel for the Commonwealth)

W. A. HALL, JR.

(Counsel for Defendant)

### CERTIFICATE OF TRIAL JUDGE

Date tendered Jan. 28, 1963

Date signed February 5, 1963

JOHN WINGO KNOWLES

Judge

### CERTIFICATE OF CLERK

Date received Feb. 5, 1963

LUTHER LIBBY, JR.

Clerk

by E. M. EDWARDS, D. C.

A Copy—Teste:

H. G. TURNER, Clerk.

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