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RICHMOND, VIRGINIA

IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 751382

WILLIAM NICHOLAS LINCOLN

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

SUPPLEMENTAL APPENDIX

Ronald W. Denney
Franklin and Franklin
Attorneys at Law
Post Office Drawer 1140
Waynesboro, Virginia 22980

Counsel for Appellant

Jim L. Chin
Assistant Attorney General
Supreme Court Building
Richmond, Virginia

Counsel for Appellee

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SUPPLEMENTAL APPENDIX

The following is filed to supplement the earlier appendix filed in the same case styled:

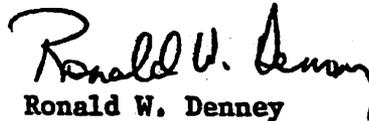
William Nicholas Lincoln

v.

Commonwealth of Virginia
Record No. 751382

The attached letter of July 29, 1976 explains the reason for this.

Respectfully submitted,


Ronald W. Denney

CHIEF JUSTICE
LAWRENCE W. TANSON

JUSTICES
HARRY L. CARRICO
ALBERTIS S. HARRISON, JR.
GEORGE M. COCHRAN
ALEX H. NARMAN, JR.
RICHARD H. POFF
A. CHRISTIAN COMPTON

SUPREME COURT OF VIRGINIA

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

CLERK
HOWARD G. TURNER
EXECUTIVE SECRETARY
ROBERT N. BALDWIN
ASST. EXECUTIVE SECRETARY
FREDERICK A. MODNETT, JR.
SPECIAL ASSISTANT
ROBERT S. IRONS

July 29, 1976

Humes J. Franklin, Jr., Esq.
Attorney at Law
129 North Wayne Avenue
P. O. Box 1140
Waynesboro, Virginia 22980

Ronald W. Denney, Esq.
Attorney at Law
P. O. Box 1140
Waynesboro, Virginia 22980

Jim L. Chin, Esq.
Assistant Attorney General
Supreme Court Building
Richmond, Virginia 23219

Gentlemen:

Re: William Nicholas Lincoln
v. Commonwealth of Virginia
Record No. 751382

In reviewing the petition for writ of error in the above-styled case, the Court intended to limit its award of a writ of error to assignment of error No. 1 as well as to assignment of error No. 2 as it pertains to Instruction I. The Court is, therefore, requesting counsel to be prepared to discuss assignment of error No. 1 when the case is argued on the merits, and in the meantime you are invited to file supplemental briefs on this point.

Sincerely yours,



Howard G. Turner

HGT:ct

RECEIVED JUL 30 1976

NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS

The trial court erred:

1. By allowing the Commonwealth in its' closing argument to comment to the jury on the defendant's failure to testify in his own behalf and deny the crime. The defense objected on the grounds that such comment violated the defendant's privilege against self-incrimination granted by both the United States' and Virginia Constitution.

The Commonwealth argued to the trial court, and the trial court agreed that the Commonwealth had the right to make comments concerning the defendant's failure to testify since the defense had first made comments in this area which "opened the door". The defense merely argued the law and the evidence and in no manner "opened the door" to the Commonwealth to violate the defendant's privilege against self-incrimination. Even if it is assumed for the sake of argument that the defense did make an improper comment, the Commonwealth failed to make an objection at the time of the comment which would have allowed the trial court to remedy the defense's error by instructing the jury to disregard the comment the trial court felt was improper. Having failed to make the objection at the proper time the Commonwealth waived any right to object and should not have been allowed to improperly comment on the defendant's privilege against self-incrimination.

DEFENSE CLOSING ARGUMENT

Record p. 139

Now, the defendant didn't take the stand and the court, of course, has already instructed you on it, that it's the right and privilege of this defendant to testify or not to testify. He's not the one that has to prove this case here today. He doesn't have to prove a thing to you gentlemen. It's the Commonwealth that has to prove it. The defendant didn't take the stand, we don't feel he needs to, we don't feel that you gentlemen of the jury are going to convict this man based on the evidence of two convicted felons, who had already been charged in the thing and obviously looking around to get others involved to save their own skin.

Record p. 143

The other instruction that I alluded to earlier, Bill Lincoln has the right to testify or not to testify and we didn't think it was necessary in this case.

Record p. 145-147

HAUGH: If it please the court Your Honor, on two occasions during the final argument defense counsel mentioned the fact that his client had not taken the stand and he did not find it necessary to have him take the stand. I think that opens the door and allows me, as Commonwealth Attorney to comment on his failure to take the stand. He has opened the door. The law is that nobody can comment on his failure to take the stand and I believe that once the door is open the Commonwealth Attorney has the perfect right to comment on the fact and I would propose to argue the fact that he did say it was unnecessary, he found it unnecessary and that any great blooded man who would stand up charged with a crime like

this and would deny it. That would be my whole argument to the court.

COURT: The question...the statements been made as to whether it was necessary or whether they thought it was necessary Mr. Haugh and that raises the question as to whether you have the right to go all the way or just to meet that.

HAUGH: Yes sir.

COURT: Certainly the door has been opened, as to whether it was necessary for the defendant to testify and it goes to the matter of how the jury is to review the evidence.

HAUGH: yes sir.

FRANKLIN: We submit Your Honor.....

COURT: Go ahead. You know what his proposal is now.

FRANKLIN: Yes sir and we object to it. The only thing we argued was the instruction, that he has the right to testify or not to testify. We told them that he exercised his right not to testify. I don't think Mr. Haugh has any right to comment on it. We are arguing the jury instruction, we are just arguing the law that the court propounded to them and we would certainly object to that.

COURT: You made the statement twice Mr. Franklin that he didn't need to testify or that you didn't think it was necessary. Now, that's a part of your view of the evidence. I think counsel have a right to respond as to his view of the evidence. He might view the evidence as overwhelming that he did think it was necessary but the question is does he have the right to make other inferences from the defendant's failure to take the stand. My ruling is that the door has been open and I caution the Commonwealth Attorney, of course, that he may jeopardize a conviction but the door has been opened and the objection to the references to the failure of the defendant to testify is overruled. That means that the Commonwealth Attorney may respond in

such manner as he sees fit in view of those remarks about the defense considering it unnecessary that the defendant testify. I think that the door has been opened rather wide.

FRANKLIN: If Your Honor please, we of course respectfully except and object to the courts ruling on this matter and for the purposes of the record we'd like to avoid interrupting the Commonwealth Attorney we make an objection now to any reference, at any time in his repeated reference to this in his closing argument.

COURT: It's understood then that your objection is a continuing one and is to be considered as if it's made everytime a reference is made by the Commonwealth Attorney.

FRANKLIN: Yes sir.

PROSECUTION - REBUTTAL

Record 148-149

He then goes on to say that it wasn't necessary for the defendant to take the stand. Then he said how serious a crime this is and the defendant did not take the stand and deny it.