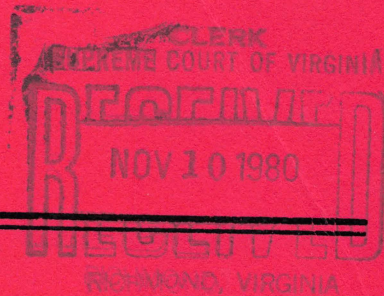


221 Va 972



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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

---

RECORD NO. 800910

---

ROY L. HAIRSTON,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

---

JOINT APPENDIX

---

John C. Lowe  
LOWE & GORDON  
409 Park Street  
Charlottesville, VA. 22901

J. Randolph Parker  
416 E. Jefferson Street  
Charlottesville, VA. 22901

Vera S. Warthen  
Assistant Attorney General  
900 Fidelity Building  
830 East Main Street  
Richmond, Virginia 23219

Counsel for Appellant

Counsel for Appellee



TABLE OF CONTENTS

APPENDIX  
PAGES

1. NOTICE OF TRIAL DATE FILED FEBRUARY 13, 1978 .....	1
2. CONTINUANCE ORDER OF MARCH 13, 1978, FILED MARCH 13, 1978 .....	2
3. CONTINUANCE ORDER OF MAY 8, 1978, FILED MAY 8, 1978 ..	3
4. MEMORANDUM FOR WITNESSES FOR AUGUST 30, 1978, FILED JULY 31, 1978 .....	4
5. CONTINUANCE ORDER OF AUGUST 30, 1978, FILED AUGUST 30, 1978 .....	5
6. CONTINUANCE ORDER OF DECEMBER 5, 1978, FILED DECEMBER 5, 1978 .....	6
7. MEMORANDUM FOR WITNESS FOR DECEMBER 8, 1978, FILED NOVEMBER 8, 1978 .....	7
8. MEMORANDUM FOR WITNESS FOR APRIL 9, 1979, FILED MARCH 15, 1979 .....	8
9. CONTINUANCE ORDER OF APRIL 9, 1979, FILED APRIL 9, 1979 .....	9
10. MEMORANDUM FOR WITNESS FOR JUNE 12, 1979, FILED MAY 17, 1979 .....	10
11. JUDGMENT ORDER FILED JUNE 12, 1979 .....	11-12
12. MEMORANDUM FOR WITNESS FOR SEPTEMBER 18, 1979, FILED AUGUST 28, 1979 .....	13
13. CONTINUANCE ORDER OF SEPTEMBER 18, 1979, FILED SEPTEMBER 18, 1979 .....	14
14. MEMORANDUM FOR WITNESS FOR DECEMBER 11, 1979, FILED NOVEMBER 19, 1979 .....	15
15. INDICTMENT FILED DECEMBER 11, 1979 .....	16
16. JUDGMENT ORDER FILED DECEMBER 11, 1979 .....	17-19
17. JUDGMENT ORDER FILED FEBRUARY 19, 1980 .....	20-21
18. ASSIGNMENTS OF ERROR .....	22
19. EXCERPTS FROM TRANSCRIPT OF EVIDENCE AND INCIDENTS BEFORE THE HONORABLE FRANK I. RICHARDSON, JR., JUDGE ON DECEMBER 11, 1979 .....	23-33

20. EXCERPTS FROM TRANSCRIPT OF SENTENCING BEFORE THE HONORABLE FRANK I. RICHARDSON, JR., JUDGE ON FEBRUARY 19, 1980 .....	34-45
21. NOTICE OF APPEAL WITH ATTACHMENTS FILED SEPTEMBER 29, 1980 .....	46-50

IMPORTANT NOTICE  
CONCERNING TRIAL OF YOUR CASE

Due to a change in the law you are required to have a lawyer representing you on the day of your trial. This case has been set so as to allow sufficient time for you to employ an attorney. It is suggested that you make immediate contact with a lawyer about representing you.

Your appearance on the trial date without a lawyer may cause great inconvenience and loss to witnesses who have been required to come to Court. Therefore, any willful disregard of these instructions by non-indigents will cause inquiry to be made by the Court concerning the status of your bond.

Dated: 2/13/78

J. W. Minter  
Deputy Clerk/Magistrate

TRIAL DATE

Your trial date is 28 day of Feb., 19 78, at 2  
o'clock (~~A.M.~~ - P.M.).

I hereby acknowledge receipt of this notice.

Attach copy to warrant.

x Ron Houston  
Defendant's Signature

VIRGINIA:

In the Circuit Court for the City of Martinsville, this the

13th Day of March, 1978.

Commonwealth

Vs:

INDICTMENT: Sale of Marijuana - 178-21,109

~~Roy Lynwood Hairston~~

This day came the Attorney for the Commonwealth

and on motion of said Attorney and for reasons appearing to the  
Court, this cause is ordered continued until the first day of the  
May term next on behalf of said defendant.

RECORDED IN

Common Law BOOK 29 PAGE 46

VERIFIED

7-27 1978

WITIA:

In the Circuit Court for the City of Martinsville, this the

8th Day of May, 1978.

Commonwealth

Vs:

INDICTMENT: Sale of Marijuana - 178-21,109

Roy Lynwood Hairston

This day came the Attorney for the Commonwealth

and on motion of ~~the defendant~~ <sup>the defendant</sup> and for reasons appearing to the  
Court, this cause is ordered continued until the first day of the

July term next on behalf of said defendant.

RECORDED IN

Crime Lab BOOK 29 PAGE 170

Verified  
8-17-1978

CLERK'S OFFICE CIRCUIT COURT  
CITY OF MARTINSVILLE, VIRGINIA  
MEMORANDUM OF LAW CASES

COMMONWEALTH

Plaintiff(s)

Versus }

ROY LYNNWOOD HAIRSTON

(Sell Marijuana 11/23/77)

Defendant(s)

The Clerk is requested to summon the following witnesses in the above styled case, to appear at 9:30  
o'clock A. M. the 30th day of August, 19 78 Term of this Court,  
in behalf of the Commonwealth

	NATURE OF PROCESS							TOTAL DAYS	MILEAGE	TOTAL
1	Off. Michael O. Wiggs	S								
2	Det. Sgt. Fred D. Nester	S								
3	Det. Wesley G. Ashley	S								
4	PD, City									
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*Cont. Nov. term 1978*  
*Cont. Feb. term 1979*  
*Cont. May term 1979*  
*7-31-78*

*J. Randolph Smith, Jr.*  
J. Randolph Smith, Jr.  
Ass't. Attorney for Commonwealth

WINIA:

In the Circuit Court for the City of Martinsville, this the

30th Day of August, 1978.

Commonwealth

Vs:

INDICTMENT: Sale of Marijuana - 178-21,109

Roy Lynwood Hairston

This day came the Attorney for the Commonwealth  
the defendant by his Attorney  
and on motion of ~~xxxxxxxxxxxx~~ and for reasons appearing to the  
Court, this cause is ordered continued until the first day of the  
November term next on behalf of said defendant.

RECORDED IN

Common Law BOOK 59 PAGE 377

VERIFIED

12-27-78



VIRGINIA

IN THE CIRCUIT COURT FOR THE CITY OF MARTINSVILLE  
COMMONWEALTH OF VIRGINIA,

Plaintiff

v.

ROY LINWOOD HAIRSTON,

Defendant.

CASE NUMBER  
178-21, 109

ORDER

Upon motion of the defendant, for the reason that his counsel is called to a federal court proceeding in Kansas immediately prior to the date set for trial in this case, and will be unable properly to prepare in time for the trial of this matter, the Court being satisfied that the interest of justice are consistent with the granting of a continuance,

It is ORDERED that this case be, and it hereby is, continued to the next term of court, or until such other date as it is determined by the court upon proper notice to both parties.

ENTER this <sup>5<sup>th</sup></sup> day of December 1978.

VERIFIED

2-27-79

Frank L. Richardson Jr.  
JUDGE

I ask for this:

John C. Lowe  
John C. Lowe  
Counsel for Roy L. Hairston

Seen:

John J. Hartley  
John J. Hartley  
Commonwealth Attorney

RECORDED IN

Common Law BOOK 29 PAGE 475

CLERK'S OFFICE CIRCUIT COURT  
CITY OF MARTINSVILLE, VIRGINIA  
MEMORANDUM OF LAW CASES

COMMONWEALTH

Plaintiff(s)

Versus }

ROY LYNWOOD HAIRSTON

(Sell Marijuana 11/23/77)

Defendant(s)

The Clerk is requested to summon the following witnesses in the above styled case, to appear at 9:30  
o'clock A. M. the 8th day of December, 1978 Term of this Court,  
in behalf of the Commonwealth

	NATURE OF PROCESS								TOTAL DAYS	MILEAGE	TOTAL
1	Det.Sgt. Fred D. Nester	S									
2	Det. Wesley G. Ashley	S									
3	Off. Michael O. Wiggs	S									
4	PD, City										
5	David J. O'Neil	S									
6	Div. of Consolidated Laboratories Services										
7	1 N. 14th Street, Richmond, Virginia										
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*J. Randolph Smith, Jr.*  
J. Randolph Smith, Jr.

Ass't. Attorney for Commonwealth

CLERK'S OFFICE CIRCUIT COURT  
CITY OF MARTINSVILLE, VIRGINIA  
MEMORANDUM OF LAW CASES

COMMONWEALTH

*Plaintiff(s)*

Versus }

ROY LYNWOOD HAIRSTON

(Sale Marijuana - 11/23/77)

*Defendant(s)*

The Clerk is requested to summon the following witnesses in the above styled case, to appear 9:30  
o'clock A. M. the 9th day of April, 19 79 Term of this Court,  
in behalf of the Commonwealth

	NATURE OF PROCESS								TOTAL DAYS	MILEAGE	TOTAL
1	Off. Michael O. Wiggs	S									
2	Det. Sgt. Fred D. Nester	S									
3	Det. W. G. Ashley, PD,	S									
4	David J. O'Neil	S									
5	Division of Consolidated										
6	Laboratory Services										
7	1 North 14th Street										
8	Richmond, VA										
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*J. Randolph Smith, Jr.*  
J. Randolph Smith, Jr.  
Attorney for Commonwealth

AGUA:

In the Circuit Court for the City of Martinsville, this the

9th Day of April, 1979.

Commonwealth

Vs: INDICTMENT: Sale of Marijuana - 178-21,109  
Case A

Roy Lynwood Hairston

This day came the Attorney for the Defendant and advised the Court that a material defense witness had not received service and was not available for trial on this date.  
arg or notice of said Attorney and for reasons appearing to the

Court, this cause is ordered continued until the first day of the

May term next on behalf of said defendant, and the Court doth re-set this case to be tried on June 12th next.

RECORDED IN

Common Law BOOK 30 PAGE 160

VERIFIED

5-31-1979

CLERK'S OFFICE CIRCUIT COURT  
CITY OF MARTINSVILLE, VIRGINIA  
MEMORANDUM OF LAW CASES

COMMONWEALTH

Plaintiff(s)

Versus }

ROY LYWOOD HAIRSTON

(Sell marijuana 11/23/77)

Defendant(s)

The Clerk is requested to summon the following witnesses in the above styled case, to appear at 9:30  
o'clock A. M. the 12th day of June, 19 79 Term of this Court,  
in behalf of the Commonwealth

	NATURE OF PROCESS								TOTAL DAYS	MILEAGE	TOTAL
1	Off. Michael O. Wiggs	S									
2	Det. SGT. Fred D. Nester	S									
3	Det. W. G. Ashley	S									
4	PD, City										
5	David J. O'Neil	S									
6	Div. of Consl. Laboratories Services										
7	1 North 14th Street										
8	Richmond, Va										
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*J. Randolph Smith, Jr.*  
J. Randolph Smith, Jr.  
Ass't. Attorney for Commonwealth



VIRGINIA:

In the Circuit Court of the City of Martinsville, this the  
12th Day of June, 1979

COMMONWEALTH

VS:

INDICTMENT: Sale of Marijuana -  
178-21,109

ROY LYWOOD HAIRSTON

This day came the Attorney for the Commonwealth, and Roy Lynwood Hairston, who stands indicted for a felony, to-wit: Sale of Marijuana as charged in the Indictment, appeared according to the condition of his recognizance; and came also John Lowe, his Attorney of his own choosing.

Whereupon the accused was arraigned and after private consultation with his said attorney, pleaded not guilty to the Indictment, which plea was tendered by the accused in person, who requested trial by jury.

The Court then impanelled twenty qualified jurors, free from exception for the trial of the defendant, in the manner provided by law. Whereupon the Attorney for the Commonwealth and the attorney for the defendant each alternately exercised their rights to strike the names of four veniremen from the panel, as provided by law, and the remaining twelve jurors, constituting the jury for the trial of the defendant, were duly sworn.

Whereupon the Court proceeded to call the witnesses summonsed in this case and it appearing that William Perkins, Jr., one of the witnesses summonsed on behalf of the defendant, was not present. Thereupon the Court, the Commonwealth Attorney, the defendant and

his Attorney retired to the Court's chambers and after a full discussion was had the defendant by his attorney moved the Court for a continuance., to which motion the Attorney for the Commonwealth objects, and the Court over-ruled his objection and granted the motion for a continuance.

Thereupon the Court set September 18th next for trial date, recognizing the witnesses to return on said date, and ordered a capias issued for the defendant's witness William Perkins, Jr., and this case is ordered continued.

RECORDED IN  
Common Law BOOK 30 PAGE 269

VERIFIED  
9-20-77

CLERK'S OFFICE CIRCUIT COURT  
CITY OF MARTINSVILLE, VIRGINIA  
MEMORANDUM OF LAW CASES

COMMONWEALTH

Plaintiff(s)

Versus }

ROY LYNWOOD HAIRSTON

(Sell Marijuana 11/23/77)

Defendant(s)

The Clerk is requested to summon the following witnesses in the above styled case, to appear at 9:30  
o'clock A. M. the 18th day of September, 19 79 Term of this Court,  
in behalf of the Commonwealth

	NATURE OF PROCESS								TOTAL DAYS	MILEAGE	TOTAL
1	Off. Michael O. Wiggs	S									
2	Det. Sgt. Fred D. Nester	S									
3	Det. Wesley G. Ashley	S									
4	PD, City										
5	David J. O'Neil	S									
6	Drug Chemist, Div. of Consolidated										
7	Laboratories Services										
8	1 N. 14th St., Richmond, Va.										
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*J. Randolph Smith, Jr.*  
J. Randolph Smith, Jr.  
Ass't. Attorney for Commonwealth

GUILTY:

In the Circuit Court for the City of Martinsville, this the

18th Day of September, 1979.

Commonwealth

Vs: INDICTMENT: Sale of Marijuana - 178-21,109,  
Case A

Roy Lynwood Hairston

This day came the Attorney for the Commonwealth and advised the Court that the Drug Chemist in this case was unable to appear this date; and on notice of said Attorney and for reasons appearing to the

Court, this cause is ordered continued until the first day of the

November term next. ~~on behalf of said defendant~~

RECORDED IN

Common Law BOOK 30 PAGE 628

VERIFIED

2-25-80

CLERK'S OFFICE CIRCUIT COURT  
CITY OF MARTINSVILLE, VIRGINIA  
MEMORANDUM OF LAW CASES

COMMONWEALTH

Plaintiff(s)

Versus }

ROY LYNWOOD HAIRSTON

(Sell Marimuan 11/23/77)

Defendant(s)

The Clerk is requested to summon the following witnesses in the above styled case, to appear 9:30  
o'clock A. M. the 11th day of December, 1979 Term of this Court,  
in behalf of the Commonwealth

	NATURE OF PROCESS								TOTAL DAYS	MILEAGE	TOTAL
1	Off. Michael O. Wiggs	S									
2	Det. Sgt. Fred D. Nester	S									
3	Det. Wesley G. Ashley	S									
4	PD, City										
5	David J. O'Neil	S									
6	Drug Chemist, Div. of										
7	Consolidated Laboratories										
8	Services, 1 N. 14th St.,										
9	Richmond, VA										
10											
11											
12	Def.										
13											
14	Ronald Hairston										
15	Roy Hairston										
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*J. Randolph Smith, Jr.*  
J. Randolph Smith, Jr.  
Attorney for Commonwealth



Commonwealth of Virginia  
City of Martinsville

To-Wit:

IN THE CIRCUIT COURT OF THE CITY OF MARTINSVILLE, VIRGINIA

THE GRAND JURORS OF THE COMMONWEALTH OF VIRGINIA, IN AND FOR THE BODY OF THE  
CITY OF MARTINSVILLE, NOW ATTENDING SAID COURT AT ITS FEBRUARY TERM, IN  
THE YEAR 1978, UPON THEIR OATHS PRESENT THAT ROY LYNWOOD HAIRSTON  
ON OR ABOUT THE 23rd DAY OF November IN THE YEAR 1977, IN SAID CITY,  
did unlawfully and feloniously sell to Michael O. Wiggs a  
controlled substance, to-wit: A quantity of marijuana, a  
Schedule I controlled substance,

IN VIOLATION OF SECTION 18.2-248 OF THE CODE OF VIRGINIA (1950) AND  
AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH.

THIS INDICTMENT IS FOUND ON THE EVIDENCE OF Det. Sgt. Fred D. Nester  
and Off. Michael O. Wiggs

WITNESSES SWORN UPON THEIR OATH BY THE FOREMAN OF THIS GRAND JURY.

VIRGINIA:

4-4

In the Circuit Court of the City of Martinsville, this the 11th  
Day of December, 19 79

COMMONWEALTH

VS: INDICTMENT: Sale of Marijuana - 178-21,109, Case

Roy Lynwood Hairston

This day came the Attorney for the Commonwealth, and \_\_\_\_\_  
Roy Lynwood Hairston, age \_\_\_\_\_, who stands indicted for  
a felony, to-wit: Sale of Marijuana

\_\_\_\_\_ as charged in the Indictment,  
~~was led to the bar in the custody of the Sheriff of this Court~~

(appeared according to the condition of his recognizance); and came  
also John Lowe, his Attorney ~~hereto-~~  
~~fore appointed~~ (of his own choosing).

Whereupon the accused was arraigned and after private consultation  
with his said attorney, pleaded not guilty to the Indictment, which  
plea was tendered by the accused in person, who requested trial by  
jury.

The Court then impanelled twenty qualified jurors, free from  
exception for the trial of the defendant, in the manner provided by  
law. Whereupon the Attorney for the Commonwealth and the attorney for  
the defendant each alternately exercised their rights to strike the  
names of four veniremen from the panel, as provided by law, and the  
remaining twelve jurors, constituting the jury for the trial of the  
defendant, were duly sworn.

After opening statements, the Court and jury heard the evidence presented by the Commonwealth and the defendant. (At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated to the record, which motion was overruled and exception was noted); (at the conclusion of all the evidence, the attorney for the defendant renewed his motion to strike the Commonwealth's evidence on the same grounds, which motion was overruled and exception was noted).

After hearing the evidence, the instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open Court, in the following words: "We the Jury find the defendant guilty of a selling marijuana, as charged in the Indictment and fix his punishment at "5 years confinement in the penitentiary and a fine of \$1.00. Raymond A. Dietz, Foreman."

The attorney for the defendant then moved the Court to set aside the verdict, for reasons stated to the record, which motion was over-ruled, to which ruling the defendant by counsel excepted.

The Court, on motion of the defendant by counsel, before fixing punishment or imposing sentence, directs the Probation Officer of this Court to thoroughly investigate and report to the Court, as provided by law; said Probation Officer is to expedite this investigation and report upon the completion of the same his finding to the Court, at which time the Court will set a hearing in this matter, and this case is continued until said hearing.

It is further ordered the defendant be permitted to remain on bond until the aforementioned hearing.

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

VIRGINIA:

In the Circuit Court of the City of Martinsville, this the  
19th day of February, 1980

COMMONWEALTH

VS: INDICTMENT: Sale of Marijuana - 178-21,109  
Case A  
ROY LYWOOD HAIRSTON

This day came again the Attorney for the Commonwealth, and Roy Lynwood Hairston, age \_\_\_\_\_, who stands convicted of a felony, to-wit: Sale of Marijuana, as charged in the indictment, and came also John Lowe, his Attorney of his own choosing.

And it appearing to the Court that the Probation Officer to whom this case has been previously referred for investigation, is sick and unable to appear in Court this date, and the defendant and his attorney offered no objection to proceeding without the presence of Mr. Anderson, they having no cross-examination they wished to make. Thereupon the written report of the Probation Officer was presented to the Court in open Court in the presence of the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for the accused. The defendant by his attorney moved the Court to strike certain portions of the presentence report, for reasons stated to the record, which motion was over-ruled and exception noted. The report of the Probation Officer is hereby filed as a part of the record in this case.

The defendant and his attorney were then given an opportunity to present such evidence as they desired to present in this matter. Whereupon the Court taking into consideration all of the evidence in the case, the report of the Probation Officer, the evidence as



presented by the defendant, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered in delay of judgment. Thereupon the defendant by his attorney moved the Court to suspend all of a part of the sentence, which motion the Court doth over-ruled, and it is accordingly the judgment of the Court that the verdict of the Jury heretofore rendered in this case be affirmed and the defendant is hereby sentenced to confinement in the penitentiary of the Commonwealth of Virginia for the term of 5 years and to pay a fine of \$1.00, and that the Commonwealth of Virginia do recover against the said defendant its costs by it about its prosecution in this behalf expended in the amount of \$\_\_\_\_\_.

The Court orders that the prisoner be allowed no days credit for the time spent in jail awaiting trial.

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

Counsel for the defendant advised the Court the defendant desires to appeal the judgment rendered, and accordingly the Court suspends execution of the sentence for a period of 30 days and such additional time as may be necessary, until the said appeal is acted upon.

It is further ordered the defendant's recognizance heretofore entered into shall remain in full force and effect pending the appeal.

On motion of the defendant, by his attorney, it is further ordered the transcript in this case be made a part of the record, and the defendant is required to pay to the Court to the Clerk thereof a deposit of Five Hundred Dollars (\$500.00) on said transcript.

### ASSIGNMENTS OF ERROR

1. The trial court violated the Appellant's rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, Va. Code Ann. §1-16 and other pertinent authority by trying the defendant pursuant to Va. Code Ann. §18.2-248, where Appellant had moved the Court to try him pursuant to Va. Code Ann. §18.2-248.1, the latter provision declassifying marijuana as a controlled substance, substantially lightening the penalties for the distribution of relatively small quantities of marijuana and embodying the General Assembly's policy decision that marijuana should be treated differently from other controlled substances.

(Witnesses called, sworn, separated and excluded  
from Courtroom.)

IN CHAMBERS:

THE COURT: For the purpose of the record,  
let's show that we're in Chambers, that the  
defendant is present with counsel and Mr. Smith  
is present on behalf of the Commonwealth and  
Mr. Lowe has indicated earlier that he has  
some motions to make.

MR. LOWE: Yes sir, my first motion is to have the  
Court direct that Mr. Hairston will be tried under §18.2-248.1  
which is the relatively new provision relating to penalties  
for sale gift, distribution or possession with intent to sell,  
give or distribute marijuana, which is a substantial philosophical  
policy change from the prior law. One of the changes that is  
most important about that is not merely the change in some  
of the punishments that are called for, but the philosophical  
and policy decision by the legislature, that based on the  
present information available to it, it is concluded that  
marijuana is no longer to be considered a controlled substance  
in any of the schedules in Title 54 but is such a nature that  
should be considered on separate basis entirely with its own  
provisions and its own penalties. We believe that on a basis  
of due process this represents a legislative finding that the  
classification of marijuana was incorrect prior to that time,

based on information now known to the legislature and that in the light of that, on the basis of Virginia State Constitution and the Constitution of the United States and not just due process but other provisions including cruel and unusual punishment provisions that Mr. Hairston is entitled under the new law which in this case, and which the evidence has anticipated to be 3 pounds of marijuana would mean that he was only charged with a class five felony which means that he could receive I believe a maximum of ten years in the penitentiary and in the discretion of the jury, up to 12 months in jail and a fine, I don't recall the amount of the fine. We believe that that the Constitution requires this, we believe that §1-4 is a legislative mandate relating to the time and earlier occasion when the Code of Virginia was repealed and amended, indicating the defendant should be tried under any mitigated offenses, even though the offense took place when the former harsher punishment or offense classification was in existence. We can take this together, that he should be tried by this, and I state in his presence and for him that he would consent and in fact asks the Court to try him under this new provision for the reasons that I have stated.

THE COURT: What is the date of the amendment?

MR. LOWE: 1979.

MR. SMITH: July 1st, 1979.

THE COURT: Mr. Commonwealth, would you like to reply to that motion?

MR. SMITH: Yes sir. Your Honor, of course this case arose in 1977, and at that time and up until July 1st of course the law remained unchanged as far as this offense is concerned. As you recall the date of this case has been continued twice based on the absence of witnesses; one time I think it was absence of witnesses for the defense, and the other time Mr. O'Neil's situation which required - which prevented him from being present which of course was a Commonwealth witness, so the fact that this case is being tried after July 1st, 1979, is more of a fortuity than anything else based on just the happenstance, or circumstance of the witnesses. So, I think that would certainly go against any sort of change, number one, this law went into effect July 1, 1979 so obviously Mr. Hairston could not have been in violation of this law at the time he committed the acts that he committed. At that time and for some years prior and almost two years subsequent to that the law remained unchanged as to what the consequences were of the acts that he did. That law of course was not repealed in so far as a person could be prosecuted under it. I think that this Section cited in Title One does not in any way, shape or form, it's a very vague section, it does not in any way, shape or form say that the court can or has to try someone under a law that was not in existence at the time



they committed the offense that they committed. Now as far as the philosophical change, I have a hard time understanding that because about the only change I would say that was made was the penalties were changed to some extent and in fact instead of carrying a penalty of five years, not less than five years nor more than forty years and a fine up to \$25,000, the distribution of more than five pounds of marijuana remains a very serious felony carrying from five years to thirty years. The quantities below that have been reduced somewhat in that the - more than one-half ounce but more than five ounces is a Class Five felony which carries up to 10 years in the penitentiary so that can't be looked upon as an insignificant type of crime. About the only thing I would say that has changed of any real significance is the fact that the distribution of not more than one-half ounce has been reduced down to a Class One misdemeanor whereas under the old law unless it was an accommodation distribution it still fell under the five to forty, plus \$25,000 fine provisions so I would say there has been really very little change except insofar as the small minute quantities of marijuana have been changed. Some change has been made in the intermediate quantity. So far as any philosophical - marijuana is still illegal. It's still illegal, only reason for any kind of legislative classification is purely for the purposes of setting forth the crime and setting forth the punishment and whether you

call it marijuana, and make it illegal under its name or call it a Schedule I controlled substance and make it illegal and provide penalties for distribution under that provision of the law, I don't see where it makes any real difference. The point is marijuana is still illegal and distribution of it is still illegal and has been and as far as I know there's no indication that it won't continue to be for a long time in the future.

THE COURT: Alright, Mr. Lowe, I'll overrule your Motion to go under the new statute.

MR. LOWE: Note our exception. Your Honor, a couple of other brief matters. I would renew at this time my Brady Motion that I filed and also under the Agurs Case and Dozier Case, I would make demand upon the Commonwealth for all matters previously requested and I understand from an informal conference with Mr. Smith this morning that he has no new disclosure under those provisions. I would also ask specifically whether the Commonwealth has any specific knowledge about the whereabouts or any other facts concerning a certain a black male named "Timmy" which has been discussed with the Commonwealth and again an informal discussion with Mr. Smith, he indicated they did not but I think on the record I must make those known to protect the record. And, so I would make that motion at this time.

THE COURT: Mr. Commonwealth, I know nothing about these matters. Since you've discussed those with Mr. Lowe, is that your

THE COURT: Ladies and gentlemen, it's now time for you to retire to the Jury Room to reach your verdict in this case. Your first order of business when you get in the Jury Room is to elect one of you as a foreman of this Jury. I have prepared two form verdicts for your foreman to use as a guide in drafting the verdict of this Jury. One reads, "We, the Jury, find the defendant guilty of \_\_\_\_\_ as charged in the indictment, and fix his punishment at \_\_\_\_\_. Signed by the Foreman." The other verdict reads, "We, the Jury, find the defendant not guilty as charged in the indictment. Signed by the Foreman." Now, whichever way that this Jury so finds have your foreman to write the verdict of the Jury on the indictment that the sheriff is holding.

MR. LOWE: Your Honor, I'm not entirely clear. There's a clear possibility of an accommodation sale, do we understand the Jury would fill in the words in that blank?

THE COURT: I'm just talking about the verdict, they'll have to find ---

MR. LOWE: So they will use that form, whatever or whichever way they determine?

THE COURT: That's right.

MR. LOWE: It says, "... as charged in the Indictment", Judge, that's the problem we have. Obviously he's not charged in the Indictment for accommodation and if the Jury finds him guilty of accommodation but not a felony then I think "...as charged in the indictment" is not correct language to have in there.

THE COURT: I think with the Instruction, the Jury could find him guilty of a sale, or guilty of accommodation.

MR. LOWE: Or not guilty.

THE COURT: And I think, "...as charged in the Indictment" covers them all.

MR. LOWE: Alright. We except to the ruling of the Court.

(Jury retires.)

IN CHAMBERS:

THE COURT: For the purpose of the record, let's show that we are in Chambers, the defendant is present with counsel, that the Commonwealth Attorney is present.

The defense indicated at the time we were arguing Instructions that they wanted to make

IN COURTROOM:

( Some time elapses, Jury returns to Courtroom.)

THE COURT: The sheriff has indicated  
you have a question.

JURY FOREMAN: Yes sir. There three ways we  
can find the defendant. We can find him innocent of the  
charge; we can find him guilty of a commercial sale; or  
we can find him guilty of an accommodation sale. If we find  
him guilty of an accommodation sale, the confinement could  
be for up to 12 months and a fine of not more than \$1,000.  
If we find him guilty of a commercial sale the confinement  
is in the penitentiary for not less than five years nor  
more than forty. And the question was, under circumstance  
of that nature, when would he be eligible for parole?

THE COURT: That is an item that I  
cannot discuss with you at this point.  
What I would tell you is that you ladies  
and gentlemen have the duty of fixing what  
you consider to be a fair sentence at  
this time. Parole is something that we  
are not dealing with now. It's done by  
a different body and we are not to  
concern ourselves with that aspect of it  
at this point but your burden and your duty  
at this point is to decide what a fair  
punishment would be under the evidence

that you've heard today but you cannot go into these other aspects of it.

JURY FOREMAN: Are we correct that under the circumstances that he would be found guilty of a commercial sale, the penalty is not less than five years?

THE COURT: Not less than five nor more than forty and a fine not to exceed \$25,000. I feel that is about as far as I can go, specifically.

(Jury returns to Jury Room; some time elapses; Jury returns to Courtroom.)

CLERK: Ladies and gentlemen of the Jury, have you agreed upon a verdict?

JURY FOREMAN: Yes we have.

CLERK: Listen to the reading of your verdict.

"We, the Jury, find the defendant guilty of selling marijuana, as charged in the indictment, and fix his punishment at (5) years confinement in the penitentiary and no fine. Raymond A. Dietz, Foreman." So say you all?

THE COURT: Ladies and Gentlemen ---

MR. SMITH: Excuse me, Your Honor. I believe under the Statute this calls for a fine.

JURY FOREMAN: We would like to add \$1.00 fine.

THE COURT: Do you have any objection to the fine, Mr. Lowe?

MR. LOWE: Your Honor, the Jury has rendered its verdict. I wouldn't want to make any advisory opinions.

THE COURT: Ladies and gentlemen, the Statute reads that if you find him guilty of selling, it says, and a fine not to exceed \$25,000.00. If you would place a fine in the verdict, and agree upon an amount, and add that to the verdict technically speaking the language of the Statute calls for some fine. If you can agree on a normal amount I will accept it.

JURY FOREMAN: We have agreed on a fine of \$1.00.

THE COURT: Just add that to the Verdict there.

(Foreman amends verdict.)

CLERK: Alright, let's read the verdict back to the Jury.

CLERK: Listen to the reading of your verdict.

"We, the Jury, find the defendant guilty of selling marijuana, as charged in the indictment and fix his punishment at (5) years confinement in the penitentiary and a fine of \$1.00. Raymond A. Dietz, Foreman." So say you all.

JURY: Yes.

THE COURT: Ladies and gentlemen, I know it's been a long day for you. Certainly thank you for serving today, and you are now excused until further notice.

MR. LOWE: I move to set aside the Jury verdict as being contrary to the law and to the evidence in the case.

THE COURT: Alright, I overrule your motion.

MR. LOWE: I would like to ask the Court to direct a Presentence Report be prepared on Mr. Hariston, and that he be allowed to remain on bond, pending appeal, being on call to the Court or to his Probation Officer.

THE COURT: What is the Commonwealth's position there?

MR. SMITH: We believe, Your Honor, he has an absolute right, according to the statute, to a presentence report. I have no objection to that, since he has a right to a presentence report. I don't quite understand the Court's question beyond that point.

THE COURT: That he remain on bond?

MR. SMITH: I am not aware of how much the bond is in this case, to be quite honest with you.

MR. LOWE: Whatever it is, Judge, he has appeared every time, we have been here at hearings, he has kept in contact with me.



MR. LOWE: Putting aside the unsupportable rumors that are obtained in the presentence report because I think they should be given little or no weight, I argue no weight. Whether there are rumors good or rumors bad about Mr. Hairston. The facts are pretty clear that this is a man who comes from a good family, in terms of his parents; who has a good family in terms of his wife; he has a good marriage which has weathered a very stormy period and a lot of difficulty in this case and Your Honor knows this case has run over a period of a year and a half now, his wife has stood by him, they have a very cohesive nuclear family. The marital history and domestic environment I think reflects this, I think it reflects that Mr. Hairston has been a hard working man. He has held jobs, he has, right now in a period of transition not knowing what is going to happen in this hearing did not try to get into any particular career of long term employment but based on a favorable ruling by Your Honor would go back and seek employment as he has in the past had. His education I think is certainly average educational background, his other factors ranging from his health and his part time activities, leisure activities, etc., are all reflective of a person who has substantial capability to contribute to this community or any other community in which he lives. There is no question that he has been convicted of an offense which requires treatment for a number

obviously the element of punishment must be involved, the element of rehabilitation must be involved. The idea of setting some sort of prescedent is something that Mr. Smith would no doubt argue. Send the word out to the streets is what the Commonwealth Attorney ususally says but sending the word out to the streets has two edges to it. Mr. Hairston has a good solid family and he has been regularly employed, he has supported his family, he has a lot of very good things in his family life and in his own personal life which are to be encouraged in young people today and the message that goes out to the streets should also include that when you make a mistake the Court is going to give you credit if you have maintained a good family life, if you are supporting your family, if you are regularly employed and if you have in every way been a good citizen, then it's not going to be as difficult as if you in addition to violating the law you have also been a rascal or not been employed regularly , or have left your family or abandoned your wife or failed to support your children then the word that goes out to the street must also be that you are going to be given consideration if you have been a good father and a good husband and a good record of employment, etc. and I think this kind of case cries out for that. We have a unique situation here and in addition to that we had a Jury that came out in the middle of the deliberations and asked you a question

I can't quote but the substance of it was whether they were limited to 12 months in jail or whether they could give him somewhere between the 12 months in jail and the five years in the penitentiary. It was obvious from that, that the Jury did not feel - at least some of the Jury members did not feel comfortable with the five year sentence or others didn't feel comfortable with the 12 months sentence perhaps. The point I'm making is, in that regard, is that I think, Your Honor, when a Jury gives a man more than a minimum on a charge then the Court is a little hard pressed to say, "Well, the Jury didn't have power to suspend so I don't know what they would have done." If they gave him more than minimum then obviously they were going to suspend, but here you have a man that was given the bare minimum that the Jury could give on the charge that they convicted him of. Now, we'll never know, I suppose unless we polled the jurors individually whether they would have suspended three of years of that sentence or remitted it to a jail sentence if that had been optional to them, if that had been open to them. Their questions asked on the day of deliberation would suggest however, that they full well may have done that if they had been given the power to suspend and of course the Jury does not have that power under the Virginia law today, so I believe this is a case where the Court has to take particular notice of circumstance where the Jury

may have had to give him more than the punishment that they felt was appropriate simply because that is what the minimum was prescribed by law. When you combine that with the factors that I have already cited I think this case calls out for the Court to suspend all or a part of the sentence. Now, how much exactly to suspend is something Your Honor will have to weigh. It certainly seems to me that when you weigh the circumstances of the case, the testimony was pretty clear by Mr. Hairston, it was un rebutted by anybody, it was undisputed that he did not receive any profit or any benefit or any money or anything from this sale. This was, if it was a felonious sale in contemplation of the law it is only because of the Ricky King case which says that any time money is involved you don't look to whether you made profit or anything. This is a general overstatement of the King case but the essence was that the instructions to the Jury was to that situation. We believe that taking all of these factors into consideration the Court ought to suspend, certainly ought to suspend three years of the five and would still require Mr. Hairston to serve something in the order of six months before he's even eligible for parole and one of the factors I would ask Your Honor to consider very seriously in suspending the entire sentence is that this man's family is dependent upon him for support, they're

going to become dependent upon who knows, I haven't made inquiries as to whether they would become dependent upon welfare, whether the family would be able to help them, what things they have, but certainly the poor financial condition indicates that Mr. Hairston does not have any assets to speak of and is obviously, the automobiles that he has, there is no indication that he would sell anything, be able to make anything on the sale of that, and Your Honor is well aware as a practical matter when you have a contract on an automobile you got it off the lot and it depreciates about 35 % and there's no indication that even if you are the seller, if he sells the automobiles for example that he could get any assets to support his family. I would ask Your Honor to weigh that very heavily, that this man has a family, he has been a good provider and to suspend so much of his sentence that would enable him to be back supporting them again in a very reasonable period of time so that he can prevent them from becoming a public charge. The evidence again that Mr. Hairston points out, I think the Court remembers this, but I will recall it for the record, that Mr. Hairston's testimony which is uncontradicted is that he was doing a friend a favor, it was not that he was in some kind of a big business operation for himself and I think that puts a different light on it. I would also point out to Your Honor that this is not a man who sat in the Courtroom

silently, who defied and lied, tried to get out of something by lying. This is a man who took the witness stand, who acknowledges anticipation, who acknowledged that he did violate the law, that it was wrong, and said he was sorry for it, I think that has some impact on the Court also, and perhaps is one of the factors that troubled the Jury in their sentencing deliberation and why they came out and asked you about intermediate sentencing possibilities and I think that in terms of the rehabilitation, and the need for punishment, I think that the Courts have always said that the first step toward rehabilitation is to acknowledge that you are wrong, that you are guilty and to turn away from the path that you are on. I think that Mr. Hairston has clearly done that in this case and is entitled to some consideration by Your Honor.

THE COURT: Alright, Mr. Smith, do you have any reply to that?

MR. SMITH: Yes sir. I'm not going to make much of a reply to that. I was just going to say that if you can mind read a jury, they came out with an inquiry about the range of punishment was in the instructions and I think that's all they did. The Jury obviously did not believe Mr. Hairston's accommodation approach to the thing and they

did not find him guilty of accommodation. They found him guilty of the main offense which was the profit type distribution or commercial type distribution. So, I don't think we can second guess the jury and say well, if they had the choice of suspended sentence they would have done this or that. They did not give him the 12 months on the accommodation, they gave him five years for commercial sale. Now, I think that pretty well shows what the Jury thought about the case. The commercial sale type situation. I would say it always amazes me how somebody can get up and say, this person was such a nice person, such a respectable businessman, and all this kind of thing, but yet he made the largest drug transaction, in fact the largest marijuana sale in the City of Martinsville. That, to me, ought to say something about him. Now, you would expect that from somebody from (---inaudible----- so to speak, but to be it would narrow it down to his discredit when he is such a respectable, responsible person that he would get involved in what turned out to be the largest sale made to the Police Officers here in the City of Martinsville, and that to me is of grave significance, than just about anything else in the case. I think the Jury was leaning on him, considering the size of the sale, nature of the situation, and I feel that to suspend the sentence would be an absolute absurdity, considering the nature of the transaction and his position. There was

absolutely no logical legitimate reason for Mr. Hairston to be involved in it, this story that he told about it being an accommodation obviously was not believed by the Jury and the whole situation in its entirety in my view should fall down and be something, the Jury sentence should be affirmed. I feel like their sentence is certainly not an unreasonable extreme outlandish, totally unresponsive sentence to the offense as it was and I think the Jury sentence should stand. That would be my argument.

THE COURT: Alright, gentlemen, the position I find myself in at this point is that not sentencing this defendant on guilt or innocence, I find myself in the position that the Jury has already found him guilty and imposed the sentence and the question is whether or not this Court is going to do anything about the sentence that was imposed by the Jury. Now, certainly Roy Lynwood Hairston realized at the time he chose to be tried by a Jury that if they did find him guilty that they would sentence him and that in their fixing of the sentence that they had no power to suspend any portion of the sentence. That goes without saying. Now, this Jury



I think heard all the evidence, they did find guilt. The law of Virginia placed five years as a minimum in this particular offense. Whether that's good, bad or indifferent, that is the law. Now, I will admit that Roy Lynwood Hairston has a good record. In going over this presentence report, I don't see anything outlandish about him. This Court is not particularly concerned with what goes out on the street. The Court is concerned in doing justice in the Court. And, hopefully, that would create a good impression from the Court and have its effect on society as a whole. Now, as to the family situation, unfortunately, when a person is incarcerated it normally hurts the family more than the individual who is incarcerated but this happens in all cases and any time anyone loses his freedom for any period of time it not only hurts that individual; it hurts all of his loved ones to do without him, to do without the things that he could provide for them. Now, in this case, and with the record that

this defendant has, there is a parole element and I can't sit here and tell you exactly what that would be. I'm sure that Mr. Lowe has discussed this with this defendant but if I remember correctly from the chart that I received from the Department of Corrections the phrase that was a guessability date, that on a five year sentence that he has the possibility of being paroled somewhere around one year.

MR. LOWE: Thirteen months and ten days.

THE COURT: But there are a lot of factors that play into this. I am not aware of all of those but I think when I look at this I see, the Jury fixed a sentence. They gave him the minimum sentence that they could give him under the law.

I remember the fine; they did not give him any fine and after I talked to them they did agree to give him a one dollar fine. That tells me that the Jury had considered this matter, and Mr. Smith pointed out they had the right to find him guilty of

accommodation but they chose not to do so and why I do not know but they were the finders of the facts. And, looking at the jury verdict as a whole I do not feel that I can tamper with it. I feel like it's a good jury verdict, it's justified under the case, the evidence in this case, I feel that this Jury could have gone either way. They could have found him not guilty, they could have found him guilty or they could have had an accommodation finding and they made their finding and I see no reason for the Court to become involved at this point. So, Roy Lynwood Hairston, let me say this to you at this point. I feel that Mr. Lowe has very ably and capably represented you throughout this trial and that you and he have been present at each and every stage of this trial and it would be the judgment of this Court that you be sentenced to five years in the State Penitentiary and that you receive a fine of \$1.00. And, for the purpose of the

record, Mr. Lowe, I'll overrule your Motion to Suspend.

MR. LOWE: Thank you. Your honor, I have fully advised in anticipation of the possible options of what you could do today, I have fully advised Mr. Hairston of his appeal rights, and he has indicated that in the event the Motion was denied today that he does wish to appeal, he will note his appeal within 30 days as required by law. I would ask the Court to suspend execution of the sentence for thirty days subject to his filing notice of appeal within that time and thereafter if he does, to suspend it for the three month period which enables us to file our petition with the Supreme Court of Virginia. At the present time I anticipate that I will be serving as appellate counsel for him and ask that his bond continue in the interim period.

THE COURT: Alright, Mr. Smith, do you have any reply to that?

MR. SMITH: He's currently under \$10,000 bond, is that correct?

MR. LOWE: I think the bond is more than adequate. We have been through this before.

MR. SMITH: Well, I wanted to make sure.

THE COURT: Who is the surety?

MR. LOWE: Julius Murrell, and he has indicated a willingness to continue on the bond.

September 29, 1930

John C. Lowe, Esq.  
Attorney at Law  
409 Park Street  
Charlottesville, Virginia 22901

Dear Mr. Lowe:

An appeal has been awarded in the case of Roy Lynwood Hairston v. Commonwealth of Virginia, Record No. 300910, no bond being required.

The enclosed certificate is being sent to you in accordance with Rule 5:30. Please check it carefully, particularly for the proper parties and the names and addresses of counsel. Also enclosed is a copy of the order awarding the appeal.

Very truly yours,

Allen L. Lucy

ALL/dam

Enclosures

# VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on Friday the 26th day of September, 1980.*

Roy Lynwood Hairston, Appellant,  
against Record No. 800910  
Circuit Court No. 178-21,109  
Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Martinsville

Upon the petition of Roy Lynwood Hairston an appeal is awarded him from a judgment rendered by the Circuit Court of the City of Martinsville on the 19th day of February, 1980, in a prosecution by the Commonwealth against the said petitioner for a felony.

This appeal, however, is limited to the consideration of assignment of error No. 1 which reads as follows:

1. The trial court violated the appellant's rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, Va. Code Ann. §1-16 and other pertinent authority by trying the defendant pursuant to Va. Code Ann. §18.2-248, where appellant had moved the court to try him pursuant to Va. Code Ann. §18.2-248.1, the latter provision declassifying marijuana as a controlled substance, substantially lightening the penalties for the distribution of relatively small quantities of marijuana and embodying the General Assembly's policy decision that marijuana should be treated differently from other controlled substances.

On further consideration whereof, it is ordered that the parts

of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. 1, and the briefs to be filed shall be limited to such discussion as is relevant to the assignment of error upon which this appeal is awarded.

The petition for appeal is refused as to the remaining assignments of error.

A Copy,

Teste:

*Allen L. Leary*  
Clerk

# Supreme Court of Virginia

Roy Lynwood Hairston,

Appellant,

against

Record No. 800910

Circuit Court No. 178-21,109

Commonwealth of Virginia,

Appellee.

From the Circuit Court of the City of Martinsville

## Certificate

Pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, I, Allen L. Lucy, Clerk of the said Court, do hereby certify that on September 26, 1980, an appeal was awarded from a judgment rendered by the court below on February 19, 1980, in the suit therein depending under the short style of Commonwealth of Virginia v. Roy Lynwood Hairston.

This certificate, constituting the summons on appeal, was this day mailed to the court below and to

John C. Lowe, 409 Park Street, Charlottesville, Virginia 22901

J. Randolph Parker, 416 East Jefferson Street, Charlottesville, Virginia 22901

Counsel for Appellant

Marshall Coleman, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219

Counsel for Appellee



Given under my hand this 29th day of September , 1980.

*Allen L. Leay*

Clerk