THE WILMINGTON TEN CASE

STATE TRIAL TRANSCRIPT

VOLUME I

Motions, Indigency exams, jury selection, trial transcript (direct and cross examinations of Allan Hall)

PAGE COUNT OF 50 PAGES

NORTH CAROLINA

PENDER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA)
)
-vs-)
)
BENJAMIN FRANKLIN CHAVIS)
1653 and 1655)
MARVIN PATRICK)
1656 and 1658)
CONNIE TYNDALL)
1659 and 1661)
JERRY JACOBS)
1662 and 1664)
WILLIE EARL VEREEN)
1665 and 1667)
JAMES MCKOY)
1668 and 1670)
REGINALD EPPS)
1671 and 1673)
WAYNE MOORE)
1674 and 1676)
JOE WRIGHT)
1677 and 1679)
ANN SHEPARD 13168

TRANSCRIPT OF TESTIMONY

Before: Robert M. Martin, Judge Presiding,
and a jury.

Burgaw, North Carolina September 11, 1972.

Appearances:

James Stroud, Assistant Solicitor, and Dale Johnson, Assistant Attorney General, representing the State of North Carolina.

James Ferguson, Esq. and Charles Becton, Esq. of Charlotte, North Carolina;
Frank Ballance, Esq., of Warrenton, North Carolina;
John Harmon, Esq., of New Bern, North Carolina, attorneys at law representing the defendants Chavis, Patrick, Tyndall, Jacobs, Vereen, McKoy, Epps, Moore and Wright;
Mathias Hunevol, Esq., of Wilmington, attorney at law, representing the defendant Shepard.

Josephine L. Seila,
Official Court Reporter,
P O Box 118
Selma, North Carolina 27576.

I N D E X

VOLUME I

Motions	8
Finding of Fact	40
Motion	42
Indigency Examinations	
Joe Wright	49
Marvin Eugene Patrick	53
Reginald Bernard Epps	59
Wayne Moore	62
Willie Earl Vereen	64
Jerry Jacobs	65
James Matthew McKoy	68
Connie Tyndall	70
Stipulation	75
Arraignments	76
* ** Jury Selection	84
Jury Impanneled	1723
Jury Impanneled	1804
Ruling on Motion	1806
VOLUME II -	Trial Testimony
VOLUME III -	Court's Charge

* (B) - Black

**(W) - White

SOL. STROUD: May it please the Court, State is calling the cases against eleven defendants. I'd like to call them around at this time. Ann Shedard.

MR. HUNEVOL: She is in court, your Honor.

SOL. STROUD: George kirby.

THE COURT: Is he not here?

SOL. STROUD: No, sir.

THE COURT: Call him, Sheriff.

(George Kirby was called and failed to appear.)

SOL. STROUD: William Dallas Wright, Wayne Moore, Reginald Epps, Benjamin Chavis, James McKoy, Willie Earl Vereen, Jerry Jacobs, Connie Tyndall and Marvin Patrick.

THE COURT: Mr. Solicitor, do I understand you have a motion to be made?

SOL. STROUD: Both the State and the defendants.

THE COURT: Do I understand, Mr. Ferguson and Mr. Hunevol, that you wish to be heard in the absence of the jury?

MR. FERGUSON: Yes, we do.

THE COURT: I have conferred with you gentlemen as to where we might have a comfortable place for the jury while they are waiting. I am going to ask the Sheriff to send twelve of the jurors or as many as the jury room can accommodate comfortably, some jurors to the

Commissioners' room and some jurors to the grand jury room; and, Sheriff, would you go over there and dispatch the jurors so we can accommodate them and have comfortable places for them and see if they want some coffee or some soft drinks?

Members of the jury, the Sheriff will tell you where to go until we can hear these matters that have to be heard in your absence. Members of the jury, let me at this time instruct you that you are not to talk with any person about the cases that are to be tried this week. You are not to talk among yourselves about these cases. You are not to allow anyone to talk in your presence about these cases. If anyone should attempt to talk to you about these cases take their names and bring it to my attention. I would prefer, members of the jury - I don't know who is going to be selected, but there will be a jury selected among the jurors. I do not know who yet will be selected of course. I'll admonish you not to discuss this case with anyone nor allow anyone to discuss it to you in your presence. I would prefer that you not talk to anyone around the courthouse about anything nor allow anyone to talk with

you or in your presence. Now remember this, members of the jury. If you will go with the Sheriff, he will show you where to go.

(The prospective jurors retired from the courtroom.)

THE COURT: All right, Mr. Solicitor.

SOL. STROUD: The matter the State would like to bring to the Court's attention at this time, your Honor, is with regard to charges against seven of these defendants - Well there are eleven defendants. Nine of the defendants are charged with - or the State will be calling for trial against the defendants the charge for conspiring to assault emergency personnel and burning of a building, Mike's grocery store. The venue on those cases is presently here in Pender County. Two of the defendants, Ann Shepard and George Kirby, who did not appear this morning, are also charged with conspiracy to assault emergency personnel; and the State has agreed with the defense counsel, Mr. Hunevol representing Mrs. Shepard, and Mr. Ferguson representing Mr. Kirby, that new bills of indictment charging each of those with being accessory before the fact of burning if the venue on that could be changed to Pender County from New Hanover County for trial at

this time. Is that correct, gentlemen?

MR. HUNEVOL: It is correct as far as I am concerned so long as the Solicitor's office takes some action on the two conspiracy charges.

SOL. STROUD: The State will take action on that.

THE COURT: Do I understand that you agree that these cases you represent may be moved to Bender County from New Hanover County for trial at this term?

MR. HUNEVOL: Assuming, your Honor, that the State of North Carolina nol proses the two conspiracy charges against my client, Mrs. Shepard.

SOL. STROUD: The State has entered an agreement with both Mr. Hunevol and Mr. FErguson relative to that, your Honor.

THE COURT: You gentlemen can enter some stipulation on that.

MR. FERGUSON: Let me state this for the record. I believe we talked about this on August 31 when we had the hearing here on bringing in a special venire and at that time I did agree with Mr. Stroud along the lines he has indicated; and as far as I am concerned I am

still willing to abide by that position.
I am in a peculiar position because Mr. Kirby has not appeared yet. I have made effort to contact him and have people looking for him now. I am hopeful he will be here. I don't know if he will be. I went by his house in Wilmington this morning before coming to court and I am not absolutely certain of my position in doing that at this time. That is the only drawback.

THE COURT: In other words, you want him here.

MR. FERGUSON: He is the one that the Court called and I would want him to be present at the time we enter that agreement for the record.

THE COURT: Subject to that -

SOL. STROUD: Yes, sir. What we are calling for trial at this time, your Honor, will be nine of the defendants who are charged and will be tried at this time for conspiracy to assault emergency personnel and for the burning of Mike's grocery store with incendiary devices. Two of the defendants, Shepard and Kirby, should he appear, will be tried with accessory before the fact of burning Mike's grocery store. There is one other matter to bring before the Court's attention in that seven of these defendants are charged with assault on emergency

personnel, this having occurred, according to the State's allegations, on the same evening that Mike's grocery store was burned, being February 6, 1971, some half hour to 45 minutes prior to the burning of Mike's grocery store. The venue on those seven charges against those seven defendants is presently in New Hanover County. Those seven charges were not called for trial in June at the time we had the mistrial in some of these cases. The State would move at this time that the venue on those seven cases and against those seven defendants be changed to Pender County be moved to Pender County so that we can call those for trial along with these other charges. The State in support of its motion would say that having occurred the same evening or within a half an hour before Mike's that it is all part of a continuing venture process and that the charges could be easily consolidated for trial. I see no problem so far as consolidation for these cases for trial. The only problem is the venue is in New Hanover County. It is my understanding Mr. Ferguson objects to that. He will not consent to venue of those charges being brought to Pender County. It is the State's contentions that the Court could

order venue to be changed to Pender County.

THE COURT: Do you mean I have authority to change the venue of the cases in New Hanover and I am sitting in Pender? You may be right. I just don't have any authority for it. I don't know of any authority.

SOL. STROUD: Your Honor, may I interrupt you just a second. On second thought, the State sees some doubt about your Honor's jurisdiction. State will withdraw the objection.

THE COURT: Any other motion for the State?

SOL. STROUD: No, sir.

THE COURT: Soes either of the defendants have a motion?

MR. HUNEVOL: Your Honor, I'd like to make several motions. The first I will make is a motion for the furnishing of a bill of particulars. This accessory before the fact charge was first brought to my attention somewhere around the 24 of August and I believe this bill the State of North Carolina had gone directly to the grand jury and had by-passed the preliminary hearing and I believe they went to the grand jury some two or three weeks prior to apprizing me of the charge of accessory before the fact. Now the State of North

Carolina has assured me orally that they have no other evidence than I apparently have already be apprized of. I would like to formally make a motion for a bill of particulars and request that the State furnish me the following information.

THE COURT: Have you given a copy of this to the Solicitor?

MR. HUNEVOL: Yes, sir; I have. I had several months ago made a similar bill dealing with the two conspiracy charges, some of which was heard by Judge Wells, some of which was denied. The State did furnish me with that information.

THE COURT: You said this new indictment is not conspiracy. It is accessory. Number three would not be relevant..You say the only thing that is changing is changing the indictment, isn't it?

MR. HUNEVOL: Correct.

THE COURT: You say the Solicitor has already apprized you of all the facts?

MR. HUNEVOL: I wouldn't say.

THE COURT: You are talking about anything additional?

MR. HUNEVOL: That they have not previously told me of.

THE COURT: Is there anything you gentlemen can

get together on?

SOL. STROUD: There is nothing additional. The only difference in the previous situation and the present situation is the charge. The evidence is the same.

THE COURT: It is a new charge? They all grew out of the same circumstances of fact?

MR. HUNEVAL: Your Honor, I am court-appointed counsel. I just wanted to get this in the record.

THE COURT: You are not asking for a written bill of particulars, are you?

MR. HUNEVOL: I would like one.

THE COURT: I mean due to the time and everything?

MR. HUNEVOL: I think I can live with that oral stipulation if, in fact, there is nothing in addition to what I have already been told.

THE COURT: Is there anything else, Mr. Hunevol?

MR. HUNEVOL: I'd like to make another motion. It is a motion to inspect the grand jury minutes and/or inspect the grand jurors who brought in this indictment. I personally don't know whether the grand jury in New Hanover County keeps minutes. The reason for the motion is I believe the only person to go before the grand jury was Officer W. C. Brown of the

Wilmington Police Force. I don't believe at anytime in this case Mr. Brown has ever had any personal information of personal, first-hand information of my client's committing any crime and that if he does have any information it is totally based on the hearsay evidence proferred to him by Mr. Allen Hall and Mr. Jerome Mitchell, neither of whom went before the grand jury, and I would like to either see the minutes, if they exist or examine the grand jurors personally.In the alternative I would like to see the indictment for accessory before the fact against Mrs. Shepard dismissed. This is my second motion, your Honor. I have one more motion that I would like to make for permission to interview Mr. Jerome Mitchell. It is our understanding that Jerome Mitchell will be the State number 2 star witness, and Jerome Mitchell is apparently going to offer testimony that my client, Mrs. Shepard executed or was in some way an accessory before the fact of the burning of Mike's with an incendiary device. I don't have any legal authority for this with me right now, but I do have some ethical citations that I would like to present for your attention,and before I do that

I would like to state that as far as Allen Hall is concerned and as far as his testimony is concerned we have a 200 - 300 page transcript from the preliminary hearing and we have a pretty good idea of what his testimony will be. If you will recall I did state that the State of North Carolina by-passed the preliminary hearing, went directly to the grand jury, and I don't have the slightest idea in the world what Jerome Mitchell will state in this case. I made this motion before Judge James on, I believe, June 5 and June James, to thebest of my present recollection, never ruled on the motion. He said, "Well let's hold off, and we will talk about it a little later." The State of North Carolina has resisted our attempts to interview Mr. Mitchell and I would like to make this citation. (Cites two) I think that there are as much authority, as much legal authority which would address itself to the same point of view as there is ethical authority which would permit us to talk to Jerome Mitchell, and I request that we be permitted to do this, expecially in light of the fact that this thing has never been before a preliminary hearing. Those are my three motions.

THE COURT: As to the first motion you made, that is the motion for the bill of particulars, you say that you are satisfied with the statement that the Solicitor has made as to the evidence. And are you withdrawing this moation?

MR. HUNEVOL: I would like to keep that motion in the record, your Honor, just in case there are any surprises in the trial.

THE COURT: Well are you really insisting on a bill of particulars?

MR. HUNEVOL: I think I'd like a written bill of particulars if I could have one, your Honor.

THE COURT: Is the State in position to accommodate?

SOL. STROUD: May I address myself to that? Mr. Hunevol filed a motion for a bill of particulars on behalf of Mrs. Shepard before and Judge Wells ruled on that motion. As a reasult of her ruling certain items that he requested in his bill of particulars were given to him; certain were not. She denied certain of them.

THE COURT: Has that been since this last indictment?

SOL. STROUD: No, sir; that was prior to this present indictment for accessory before the fact. The State's evidence would be the same

with regard to the accessory before the fact charge as the previous conspiracy charge.

THE COURT: Did Judge Wells pass on number one?

SOL. STROUD: She denied that, your Honor. Is that correct?

MR. HUNEVOL: Yes, sir.

THE COURT: Number two, "any overt words or acts which could have been included in the indictment and were not which the State intends to present in testimony about the trial". Was anything in that?

SOL. STROUD: That was not in the first motion, as I recall.

MR. HUNEVOL: That is correct.

THE COURT: Do you mean, Mr. Hunevol, any word to which you have not already been apprized?

MR. HUNEVOL: Right. And I think, your Honor, I would like to be apprized in writing of the words that State maintains that Mrs. Shepard used to be guilty of this particular offense.

THE COURT: She is being charged now with accessory before the fact.

MR. HUNEVOL: Yes, sir, your Honor.

THE COURT: Number three, you are withdrawing number three, are you not?

MR. HUNEVOL: Yes, sir.

THE COURT: Four, "Inform the defendant as to

specific words or conduct she purportedly employed to counsel, incite, induce, encourgge other defendants mentioned in the indictment to commit the acts or alleged acts or else supply the time in which said words were uttered." Can Solicitor supply counsel with this?

SOL. STROUD: This information has already been supplied Mr. Hunevol. He and I have offices in the same building. I have talked with Mr. Hunevol about it.

MR. HUNEVOL: You have informed me as to words that were supposedly used.

SOL. STROUD: Where she was, what time it was, who else was there.

MR. HUNEVOL: I don't believe you informed me as to who else was there.

THE COURT: Is there anything particularly in there that you haven't already been informed about?

MR. HUNEVOL: That is a difficult question to answer.

THE COURT: You say "specific words and conduct she purportedly employed to incite, encourage, induce the other defendants to commit act or acts alleged - "

SOL. STROUD: Your Honor, in items 2 and 4 Mr. Hunevol has been supplied information as

to those items.

THE COURT: Is that right, Mr. Hunevol?

MR. HUNEVOL: Orally, yes, sir; that is correct.

THE COURT: And you are withdrawing number 3?

MR. HUNEVOL: Yes, sir.

THE COURT: And number 1 was passed on by Judge Wells?

MR. HUNEVOL: Yes, sir.

THE COURT: Motion for bill of particulars is denied. (Exception I) Motion to inspect grand jury minutes and examine grand jurors is denied. (Exception II) Third motion was to interview a witness. The Court will take that under advisement at this time. Mr. Ferguson, do you have any motions?

MR. FERGUSON: Yes, I do, your Honor. I would like to join the motion made by Mr. Hunevol to interview the witness Jerome Mitchell on behalf of all the defendants I represent.

THE COURT: I will take that under advisement.

MR. FERGUSON: I would also like to join in the motion to inspect the minutes of the grand jury and to examine the grand jurors.

THE COURT: Do you want to be heard?

MR. FERGUSON: No, your Honor.

THE COURT: Motion denied. (Exception III)

MR. FERGUSON: Now, if your Honor please, when this matter came for trial in June we filed

on behalf of the defendants a couple of written motions which motions were heard and ruled upon by Judge James who was presiding at that time. Quite frankly, I don't know what the status of those motions is as pertains to this trial. I would like to renew each of those motions at this time on behalf of the defendants. We filed a motion for production of evidence and disclosure of witnesses which was a written motion and which should be in the Clerk's file here. We would renew that motion for purposes of this trial. As I recall, Judge James granted the motion in part. State did furnish to us some written information. Now one thing that we have not received is a written statement that the State has from Jerome Mitchell, if they have such, and if the State has such from him we would like to be furnished a copy of it.

THE COURT: Did Judge James pass on that?

MR. FERGUSON: At the time Judge James considered this motion the State had already furnished us a copy of the written statement by Allen Hall. If my memory serves me correctly, at the time we received the written statement of Allen Hall the State did not know whether or not it would be using Jerome Mitchell. Subsequent to that time the State became certain that it

was going to use Jerome Mitchell, and since that time we have not received any written statement from him. So Judge James knew at the time that we had a written statement from Allen Hall. Of course, we did not have one from Jerome Mitchell, and he held our motion to interview Jerome Mitchell in abeyance. I suppose the State could advise us in court now whether or not they have such a statement and whether or not they'd be willing to make it available.

SOL. STROUD: Your Honor, we do have a written statement from Jerome Mitchell. Let me state this, if I may. Prior to the first trial and as a result of a request by Mr. Ferguson I, in addition to giving him the written statement of Allen Hall, gave him a copy of a brief narrative of the testimony of at that time what appeared to be the prospective witnesses for the State at this trial. Jerome Mitchell was mentioned in that narrative. There was a brief narrative as to what his testimony would be at this trial. We do have a written statement from Jerome Mitchell. But Mr. FErguson has already been apprized to some extent with regard to what Jerome Mitchell will testify to as a result of this brief narrative which

he has a copy of.

MR. FERGUSON: We have a list of witnesses, your Honor, which has a one paragraph statement stating in substance that Jerome Mitchell will testify about what happened at the church and what conversation at the church. No particulars as to what he would testify to.

THE COURT: I will take that under advisement. Anything else, Mr. Ferguson?

MR. FERGUSON: Yes, sir. At that time we also filed a motion for disclosure of any favorable evidence that might be in possession of the State. At that time the State advised the Court that they had no such evidence in their possession. We would like to inquire of the State at this time if since the mistrial which was declared in June there has come into possession any favorable evidence. If so, we'd like to move the Court we be apprized of it and given an opportunity to inspect it. This motion is made under dicision of the U. S. Supreme Court which would require that favorable evidence be furnished.

THE COURT: These are the motions that were made at the last term of court?

MR. FERGUSON: That is right.

THE COURT: You have not refiled the motions?

MR. FERGUSON: I'd like to incorporate them by reference for our present purposes and renew our motions in toto. The first one was motion for production of evidence and disclosure of witnesses. The second one was a motion for disclosure of favorable evidence.

THE COURT: Now the first motion I have taken under advisement as to inspecting the statement of Jerome Mitchell. The second one, "Is there any favorable evidence that may have come to the Solicitor's attention since the last trial?" Does the Solicitor wish to respond to that?

SOL. STROUD: Yes, sir. The State isn't aware of any.

THE COURT: That answers that.

MR. FERGUSON: In the file also is a motion to quash the bills of indictment returned by the grand jury of New Hanover County on the grounds of persons of the black race and persons within the age group of 18 to 21. We filed along with it a stipulation of counsel in support of that motion. We'd like to renew that motion for the purpose of this trial.

THE COURT: Has it already been passed on?

MR. FERGUSON: Yes, sir.

THE COURT: By Judge James?

MR. FERGUSON: Yes, sir. He denied the motion.

THE COURT: Motion denied. (Exception #)

MR. FERGUSON: We also filed a similar motion which is in the file to quash the venire of petite jurors drawn from Pender County on the grounds of racial exclusion and exclusion of young people. Judge James heard and ruled on that motion.

THE COURT: Was it denied?

MR. FERGUSON: Yes, sir. (Exception #)

THE COURT: Motion denied. You did not wish to offer any further evidence?

MR. FERGUSON: I don't have any futther evidence in connection with any of these. We filed an oral motion to quash the charge of conspiracy to assault emergency personnel on the grounds of unconstitutionality of the Statute. Judge James denied that motion.

THE COURT: Do you wish to be heard?

MR. FERGUSON: No, sir.

THE COURT: Motion denied. (Exception #)

MR. FERGUSON: We also filed a motion to sequester the jurors during the voir dire examination because of the publicity that these charges have had throughout the State of North Carolina. In order to minimize influence and prejudice among jurors that if jurors were called to the box one at a time and examined out of the hearing

of other jurors we would be making a step towards assuring a fair trial for both sides. We would renew that motion and ask the Court that no jurors be present in the courtroom except the jurors examined on voir dire.

THE COURT: Motion denied. (Exception

MR. FERGUSON: Now, if your Honor please, as best I recall, those are the motions that we wish to renew. The cases have been called and if it is appropriate we wish to enter a plea of former jeopardy to the charges. I do not know whether we should do that at this time or when the Solicitor calls for the plea. Shall I file it now?

THE COURT: Yes, sir.

MR. FERGUSON: I have already handed a copy to the State. I will hadn the original up to the Court. Let me state this to the Court, too.

THE COURT: I believe this motion has to be made after they are arraigned, but before a plea is taken. But it is all right, as far as I am concerned, that you make your motion now.

MR. FERGUSON: In connection with the motion, your Honor, I have requested a transcript of the former trial from the Court Reporter, Mrs. Sylvia Edwards, of Whiteville. I requested

it on August 25. She was unable to do a transcript of the trial because of other work that she had. Now I do have, and I would like to file with the Court, an affidavit from Mrs. Edwards certain things regarding the former trial. I had it prepared and picked it up from Mrs. Edwards yesterday. When I was conferring with Mr. Ballance yesterday in Wilmington I gave him the original of it, and he inadvertently put it in his bag. He will be back tomorrow. I would like to ask leave of the Court to file that affidavit in support of this motion at such time as I can get it from Mr. Ballance. I apologize to the Court for not having it now.

THE COURT: Do you want to be heard, Mr. Ferguson?

MR. FERGUSON: Yes, your Honor.

THE COURT: How long do you think this motion will take?

MR. FERGUSON: I would think it would take us to the noon recess; 12:30.

THE COURT: Sheriff, have the jurors come back in here. I will let them go to lunch.

(The prospective jurors return to the courtroom.)

THE COURT: Members of the jury, it is something after 1 o'clock. The Court is still hearing

motions and considering motions made by both the State and the defendants. And we are not through. These are matters of law in which you are not concerned. So I am going to ask you to go to lunch and come back at 2:30. I don't know how long it's going to take me. I assume it is going to take that length of time; and, of course, we have to eat lunch too. Let me caution you not to discuss these cases with anyone nor allow anyone to discuss it with you or in your presence. Do not discuss it among yourselves. Let me ask you when you are going to and from the courthouse do not linger in the hallways. Do not engage in conversation with anyone around the courthouse or courthouse grounds. You go, members of the jury. Everyone else please remain here and come back at 2:30 to your seats where you are sitting now.

(The jury was dismissed at 12:08 P M.)

MR. FERGUSON: If your honor please, as stated in the written motion the defendants all objected to the declaration of a mistrial in June and now we have entered this plea of former jeopardy. I think the circumstances of this case make this case different from the usual case where a declaration of a mistrial may have been entered at the same stage of the trial. 1. The cases

were initially set for trial on the first of May by the State, seeking an early trial. Because of our inability to prepare and be ready at that time we asked for a continuance. Did not get it prior to the cases actually coming to trial. We filed petition for review in the Federal Court. Subsequently the trial was set for trial on June 5 here in Pender County. Now the defendant, your Honor, are all young men who, as we are prepared to show the Court, have very limited financial means. During the course of these proceedings they have had to obtain court counsel for a two day long preliminary hearing, counsel to file for removal in Federal Court, and then on June 5, after vigorous efforts, came here and announced to the Court that we were prepared for trial. The Court opened Monday, June 5. We got into the case and for one whole week, your Honor, defendants were here on trial. They have had to employ counsel to be here for that full week of trial proceedings. Now at the time the mistrial was declared the the defendants objected because as far as they were concerned and as far as the realities of the case were concerned so much time and effort had been invested in the case by the defendants and by the State that at that point only the most

compelling necessity should have warranted a mistrial. Now Mr. Stroud who had been carrying the ball for the State was ill. But Mr. Stroud realized he was becoming ill on Wednesday or Thursday and he knew that Friday when Court recessed early and over the weekend. I think he went into the hospital on that Monday morning, if I am correct. Now from Wednesday up until Monday morning no efforts at all that we are aware of were made on behalf of the State to have either Mr. Cobb or one of the two other assistants in the Solicitor's office to come into the case and proceed with the jury selection while Mr. Stroud had his illness attended to or diagnosed. Now at one point the defendants through counsel indicated their willingness to accomodate Mr. Stroud and his condition in any way that they could. Mr. Stroud asked for an early recess on Friday, June 9. We had no objections whatsoever to an early recess in order to accomodate. But the defendants knew then, as they know now, that it would place them at a severe disadvantage if a mistrial were declared if they had to come back and go through the same proceedings they had been through before. The whole purpose of the former jeopardy protection, as I understand it, your Honor, is not solely to prevent multiple

convictions on the same charg, but it is to prevent one from being placed in jeopardy. It is to prevent successive prosecutions by the State where it is possible to avoid that, the controlling principle being that the defendants are entitled to be tried by the communal initially summoned or set up to hear their case. Another principle of the former jeopardy protection is that the State not be placed in a position where it can get more favorable conditions for a conviction or favorable conditions for prosecution. Now when we look at what occurred and what was occurring at the time the mistrial was declared I think we have to have candidly looked at the fact that the defendants, all except one, are young black men and one is a young white lady involved in this trial. During the whole process of questioning jurors both the State and the defendants alluded to the racial disturbances that occurred in Wilmington at the time these charges arose. From time to time the State alluded to fear that the jury might have by any actions that had taken place around the courthouse or by supporters of the defendant. In other words, your Honor, the whole contention of the jury voir dire for the most part dealt

with the racial disturbances out of which these cases had arisen. I say that because it is relevant in that context we submit, your Honor, of what the composition of what the jury was at the time the mistrial was declared. We have alluded to in our motion the manner in which the State used its pre-emptory challenges to exclude black persons from serving on the jury. Every pre-emptory challenge that was used by the State was used on a black person at the time the State passed the composition, as I recall it and will be reflected in the affidavit of the Court Reporter, was 9 whites and 3 blacks. At the time the defendants all passed the jury consisted of just the opposite; 9 blacks; 3 whites. The State then proceeded with its examination of the voir dire of the jury Friday morning and up until the Friday recess the composition of the jury had altered to 10 blacks and 2 whites; and we say that the State could have and should have made preparations for someone in the Solicitor's office to continue with this case until they could have been rejoined by Mr. Stroud. In my appearance with criminal courts throughout the State of North Carolina I am sure is no different in New Hanover and Pender County

is that solicitors often try first degree murder cases with half hour preparations. Solicitors come in and select juries with just a bear understanding of what the facts are.inIn this case the State had a transcript of the preliminary hearing. That could have been offered to any solicitor or chief solicitor who is charged with the responsibility of trying the case. He could have read that over the weekend or a night. The State had written statements from Allen Hall. They tell us now they had one from Mr. Mitchell. The detectives and investigating officers were there and available. There was no reason for the State to ask for a mistrial rather than going on with the case, and I do believe,I am not absolutely sure, but the records can be checked, that this was the only session of criminal court going on at that time. It wasn't a matter of manpower. Mr. Cobb, Chief Solicitor, appeared on Monday morning and asked the Court for a mistrial. Mr. Cobb did not relate to the Court any effort that had been made by the State to go on with the prosecution. It may be that Mr. Stroud's illness would only have kept him for a few days. At any rate the jury selection process was going on. He would have

been well before the jury was selected.

THE COURT: How long did you say it would take?

MR. FERGUSON: We had been from Monday, June 5, until Monday, June 12. Three jurors had been seated by both the State and the defendant. I am judging on the way that the trial was proceeding at that time. Another week certainly it would have been enough time for the jury process for the State to go on with the case and Mr. Stroud might have been back before the evidenciary stage of the trial was reached. I think in viewing this motion, your Honor, or this plea of former jeopardy, the Court has to look at what has happened during intervening periods. The State has made several moves in an effort to secure conditions more favorable to conviction by the State. The State filed a motion - I think it was about the 24th or 25th of August asking that a jury be brought in from some other county to hear these cases. The State alleged at that time that they could not get a fair trial in Pender County, that the State couldn't get a fair trial in Pender County. Yet at the time these cases were called in June the State made no objection to the motion for change of venue in Pender County. But here, for some reason, the State

had decided all of a sudden they couldn't get a fair trial and they wanted a jury brought from somewhere else; an effort on the part of the State to secure conditions more favorable to conviction of the prosecution. Since that time the State has seen fit to bring Mr. Johnson into the case, Mr. Dale Johnson, from the State Attorney General's office, to assist with the prosecution of the State, additional effort on the part of the State to secure conditions more favorable to prosecution or conviction. Just this morning the State initially asked the Court that certain charges which were not brought up at the June 5th trial be tried along with these cases, assault on emergency personnel charges in Wilmington. Again an effort on the part of the State,for whatever reasons it has, to secure conditions more favorable to conviction on the defendants. The charges on two fo the defendants has been altered by the State since June 5th, Charges against defendants Shepard and Kirby have changed;for some reason the State has decided it would be more favorable to the State to secure or to change charges for convictions. I am advised by Mr. Stroud that the initial

witnesses we were given, prospective witnesses, has expanded since June 12th on the efforts on the part of the State to secure conditions more favorable to prosecution and conviction. And I would submit to the Court that under these circumstances the State should be barred from prosecuting these cases. Let me just mention again, your Honor, that these defendants are required to employ counsel or have been at this point for all of the proceedings that have gone before and even for now; and all of these defendants are indigent and unable to pay for that; and we will have alternative motion before the Court in that regard if this trial proceeds further. Now I realize, your Honor, that most of the cases dealing with former jeopardy have been cases where a complete jury has been sworn and impanelled. But I think if you look at any of those cases you will find that the time expended and efforts expended by the defendants even though a jury has been was not as considerable as the time, effort and expense that has been expended by these defendants in this trial; and when we look at the interests that are to be protected by double jeopardy clause I think the interests to be

protected in those cases is no different from the interests these defendants have in not being tried again on these charges. The mere fact that a jury may have been sworn and empanelled is no more than a mere formalism when we look at the underlying interest of the former jeopardy protection. I would argue to the Court that because of the circumstances of this case, the peculiar circumstances, the nature and composition, the subsequent efforts of the State to secure conditions more favorable to convict, that under these circumstances I believe former jeopardy should be accepted by the Court.

THE COURT: Mr. FErguson, do you know a single authority for your motion?

MR. FERGUSON: I don't know of a single precise situation.

THE COURT: I am talking about legal authority by the High Court.

MR. FERGUSON: The case that was written by Justice Douglas of the U. S. Supreme Court, Downum vs. U. S. lays out the principles, and it appears in (cites place found). He lays out the relevant considerations. Now the circumstances of that case were different

from this case; that is the case proceeds further along from a legal point of view than this case has. I don't know of any case where the State has spent a week in a trial and then come in and ask the Court to have a mistrial declared. I don't know of any case the State has secured a mistrial and come back with an expanded list of witnesses;where the State has come back and sought to bring in a jury from another county;where the State has gone to the State's Attorney General's office and come in with a Special Prosecutor. I still submit to the Court that the principles laid down apply here.

THE COURT: Mr. Ferguson, Judge James found the facts in this case and it is a rather exhaustive finding of fact. He states the facts that occurred in his order and in detail, among which he found that Mr. Stroud became ill; that it was continued until Monday, June 12 without objection; that during the weekend Mr. Stroud's condition had not improved and on June 12th the physcians ordered his admission to New Hanover County Memorial Hospital for further tests and that thereafter one of the physcians advised the Court that in his opinion Mr. Stroud was unable to proceed with the trial of these

cases.

MR. FERGUSON: We are not denying any of that. I don't doubt the validity of Mr. Stroud's illness. I don't mean to give the Court the impression that I do. I mean in spite of his condition Mr. STroud is the Assistant Solicitor. The Chief Solicitor is responsible for the prosecution.

THE COURT: Mr. Cobb moved for mistrial due to neither he nor any other member of his staff was familiar with the facts of the cases because Mr. Stroud had done all of the investigation and trial preparation; that the assignment of Mr. Stroud had been necessary because of the large caseload and necessity of dividing the work between Mr. Cobb and his three assistants, and it would be impossible for any of them to prepare themselves for the case.

MR. FERGUSON: There is not any finding on the efforts of Mr. Cobb's office to familiarize anybody else with the case.

THE COURT: Let's get back to the law of the matter. The jury had not been impanelled.

MR. FERGUSON: No, sir.

THE COURT: The Court could order a mistrial at anytime up until the jury is impanelled

and after the jury is impanelled upon certain findings of facts.

MR. FERGUSON: I candidly admit to the Court that the law says that until the jury has been impanelled then it is discretionary with the Court. I recognize that fact. Then the law says that after the jury has been impaneled then it can be granted only for compelling necessity in the interest of justice.

THE COURT: And the Court must find the facts. That is what was not done in the Crocker case in Wilson County.

MR. FERGUSON: I am saying here, your Honor, that we have to look at those cases in the context of which they arose. Look at the position of the defendants.

THE COURT: I'll be glad to look at your Supreme Court case. I want to hear everything you have to say about it and read any authority you might cite. But I am just asking you now do you have any authority?

MR. FERGUSON: I don't have any authority precisely to deal with the circumstances of this case. I am saying to the Court that the peculiar circumstances of this case warrants application of the rule of compelling necessity here. I don't have a case I can show you in

precisely -

THE COURT: Do you want to be heard further on it or show me any further authority?

MR. FERGUSON: Are the Supreme Court Reports in this library?

THE COURT: Are you joining in this motion, Mr. Hunevol?

MR. HUNEVOL: I'd like to join in the motion for the disclosure of any favorable evidence for the same reasons Mr. FErguson gave. I was not aware of until a few brief moments ago that Father Jones ever made any written statement. I'd like to see that if there is a written statement.

THE COURT: Did you not say you had that statement?

MR. FERGUSON: Yes, I do.

THE COURT: Can you arrange for him to see that?

MR. FERGUSON: Yes, sir.

MR. HUNEVOL: That is the only motion.

THE COURT: Let me ask you both. Is there any evidence you want to offer on any of your motions or any further argument on any of your motions?

MR. FERGUSON: The only evidence I would have I would like leave of the Court to insert the affidavit of Mrs. Edwards regarding the former trial. I would also like an opportunity to put

into the record, the transcript of the former trial, in order to protect the record.

THE COURT: I'll give you that right. Is there any evidence you want to present or any further argument on any motions?

MR. FERGUSON: I have no further argument on any of the motions we have presented. Should the Court be inclined to disallow our plea of former jeopardy I would move the Court in the alternative to order the State to bear the expenses of the trial for the defendants and to pay counsel. I would like the Court to establish their indigency.

THE COURT: I'll hear you on that when we come back. And I'll be glad to look at that case. We'll be back at 2 o'clock and take those matters up and try to complete them before the jury comes back.

(The Court recessed from 12:35 until 2 P M.)

THE COURT: Members of the jury, would you wait on the outside? You don't have to go into these rooms. It is a beautiful day. Will you wait outside until we get through with these motions? Don't go too far. We'll send for you.

(The prospective jurors retired from the court-

room.)

THE COURT: Are there any other jurors in the courtroom? (No answer)

THE COURT: Mr. Solicitor, the reason I was a few minutes late I was in there reading this case which Mr. Ferguson was speaking of before we adjourned. Mr. Ferguson, this is interesting but I do not think that would apply. In this U. S, case each of the juries had been impanelled This case reiterates what Chief Justice Stacey said: 1. On a valid indictment or information; 2. Before a court of competent jurisdiction; 3. After arraignment; 4. After plea and when a competent jury has been impanelled and sworn to make true deliverance in a case.

MR. FERGUSON: All of those elements are present except the last one.

THE COURT: They had not been sworn and impanelled; and furthermore even after they impanelled them the Court could declare a mistrial if they found physical necessity and the necessity of doing justice. That is when the facts must be found and so forth. In this case the jury was not impanelled, but the Court went even further and found the facts as set forth in its order. So I am going to deny your motion. I expect I

should make some findings of fact. Do you want me to do that now or is it agreeable that I make findings of fact during the progress of the trial?

MR. FERGUSON: It is agreeable with us that such time as your Honor wants to make them you can make them.

THE COURT: Do you agree?

MR. HUNEVOL: Yes, sir.

THE COURT: Does the State agree?

MOL. STROUD: Yes, sir.

MR. HUNEVOL: Your Honor, for the record I would like to except from the rulings on the motions that I made or joined in.

THE COURT: I'll dictate the findings of facts now.

Upon the defendants' plea of former jeopardy, the Court finds as a fact that these cases were called for trial before the Honorable Joshua S. James, Judge Presiding at the two week criminal session of Superior Court of Pender County commencing June 5, 1972; that the cases were consolidated for trial; that the defendants were placed on trial on valid indictments before a court of competent jurisdiction, after arraignment and after plea, but that the jury was not impanelled in either of the cases; that during the progress

of the selection of the jury and before the jury was impanelled the Honorable James T. Stroud, Assistant District Solicitor, became ill, was hospitalized, and the Court was advised by the attending physcian that in their opinion Mr. Stroud was unable to proceed with the trial of the cases, was being admitted to the hospital for further tests and treatment over a period of several days, the result of which they could not foretell. Judge James further found as a fact in his order dated 12th day of June, 1972, that Mr. Allen Cobb, District Solicitor, was unable to continue with the prosecution of the cases for that neither he nor any other member of his staff was familiar with the facts in the cases because Mr. Stroud had done all of the investigation and trial preparation. Judge James in his discretion was of the opinion and conclusion that good cause existed for and that the ends of justice would best be served by granting the motion for mistrial and so ordered a mistrial in these cases, continuing the cases until a subsequent date to be thereafter determined.

Further this Court finds as a fact that the defendants were not put in jeopardy for that no competent jury had been impanelled and sworn

to make true deliverance in these cases. The defendants' plea of former jeopardy is, therefore, denied. (Exception #)

This 11th day of September, 1972.

MR. FERGUSON: Your Honor, at this time I would move on behalf of the defendants I represent that the State be required to bear the expenses of this trial and the former proceedings in the case.

THE COURT: Do you wish to be heard further?

MR. FERGUSON: Yes, sir.

THE COURT: Do you wish to offer any evidence?

MR. FERGUSON: Yes, I do, your Honor.

THE COURT: Let me add to the finding of facts And that physical necessity and the necessity of doing justice which would render impossible a fair and impartial trial under the law. The motion as to the plea of former jeopardy is hereby denied. (Exception #)

MR. FERGUSON: Let me state the basis of my motion and then I would like to present some evidence. Number 1, the defendants are all indigent and I will put them on the stand to establish their indigency; number 2, They have been required to undergo two proceedings and it was not by reason of their own doing or anything

to do with that. They are being subjected, in effect, to two proceedings, one in June which was terminated for the reason stated in the order of mistrial, and the subsequent proceeding commencing today. We think that although it was not completely the State's doing; that is, it had no control over Mr. Stroud's illness, the State did set in motion the machinery for the mistrial. So it was, in effect, at the instance of the State that the defendant had to undergo the proceeding in June and now have to undergo this proceeding today. We think that in fairness to the defendants under the circumstances the State should be required to bear the expences of the trial including paying the reasonable fees and expenses of counsel of their choosing. At this time I would like to have the defendants sworn.

THE COURT: Now, Mr. Ferguson, do you have any authority for that?

MR. FERGUSON: Your Honor, the classic case -in the area of lawyers for indigent defendants Wainwright says defendant is not to be discriminated against because he is poor. Also a California case. A rich man could afford to hire as many lawyers as necessary and keep them retained for as long as necessary to see the

proceedings through to the end. These defendants have not been able to pay for these proceedings coming up now. Of course, we were in the proceedings at the outset in June and we felt under the circumstances that the defendants were entitled to have the same lawyers represent them if that is what they chose to do. But we think that the State ought to be required to pay for that.

THE COURT: Are you saying that they are unable to employ counsel; or are you saying that they ought to be reimbursed for counsel fees because of the action of the State?

MR. FERGUSON: I am saying two things. Basically the motion is that they ought to have counsel appointed - not appointed, but they ought to have the State paying for counsel of their own choosing because this is not their own choosing to go on trial for the second time. I am saying number 2 that because of the prior proceedings without any benefit to themselves is that they ought to be reimbursed for that also.

THE COURT: You are asking for two things then.

MR. FERGUSON: Yes, sir; I am asking for the State, because of its action in these cases, to pay for everything, the first trial and the second trial.

THE COURT: Are you employed for the second trial?

MR. FERGUSON: I have been requested by the defendants and have undertaken to do that, but they have not paid me.

THE COURT: Are you employed, or are you not employed?

MR. FERGUSON: If you mean compensated for my services, I am not. If you mean I am going forward with the case because the defendants have requested me to do that -

THE COURT: The first is if a defendant is indigent and second if they are able to employ counsel. That is usually done before the case comes on for trial.

MR. FERGUSON: Yes. Because of the peculiar nature of the cases we wanted to make that motion before the Court. They had already engaged me to represent them at the earlier proceedings. They are not asking here to have counsel appointed as such, but they are asking to be allowed to proceed with their same counsel but to have that counsel appointed for by the State because it is at the State's instance that they are on trial. They should not be required to hire a lawyer and come here and spend a week and have a mistrial and come back and have the case commence again and have to

employ counsel again.

THE COURT: You are saying two things. Now, of course, I haven't heard you fully and I don't know what the evidence will reveal. But now as far as the mistrial is concerned, Judge James very properly granted the mistrial; and I have so found in my findings. At least I intended to. I have found that the mistrial was proper and that these defendants have not been put in jeopardy.

MR. FERGUSON: That is correct.

THE COURT: Let me leave that now for the time being. If your clients are unable to employ counsel then that brings up another question. They are, of course, entitled to counsel if they cannot afford to employ counsel. Now I'll hear you on that.

MR. FERGUSON: I want to be clear, your Honor.

THE COURT: I don't want it based on the fact that it has been brought about because of something the State did. I don't go along with you on that.

MR. FERGUSON: I am saying that is a circumstance that places them in the position they are in now. It was a contributing factor.

THE COURT: I can understand the circumstances that two trials are more costly than one.

MR. FERGUSON: Right. We are not asking for appointive counsel from the indigent list as that exists in the County. I want to be clear with the Court on that.

THE COURT: Are you asking me now to appoint counsel for these defendants?

MR. FERGUSON: Your Honor, I am asking the Court to bear the expenses of counsel that the defendants have chosen to represent them.

THE COURT: Because they are indigent?

MR. FERGUSON: Because they are indigent, but we cannot consider that, your Honor, without looking at what happened in June.

THE COURT: What you are saying is that they employed you for that trial but are unable to employ you for this trial. Is that correct?

MR. FERGUSON: That is correct.

THE COURT: Have either of the defendants filed an affidavit of indigency?

MR. FERGUSON: They have not filed an affidavit. I will be glad to put them all under oath, or if the Court will permit us we will be glad to prepare an affidavit.

THE COURT: How long do you think it will take to present this?

MR. FERGUSON: I don't think it will take very long, your Honor.

THE COURT: Could you not put that in affidavit form?

MR. FERGUSON: I can put it in affidavit form and be glad to.

THE COURT: Does the State wish to be heard?

SOL. STROUD: No, sir; not at this time, your Honor.

THE COURT: Suppose we take a short recess and you have the defendants to sign an affidavit.

(The Court recessed from 2:50 until 3:09 P M.)

THE COURT: This question of indigency may be determined at any stage. The scope of entitlement goes all the way through to the trial and sentencing. It goes all the way through the entire process from in custody interrogation throughout each and every stage of a hearing. Upon this motion I must make a determination at this time because this is within the scope of entitlement. Do you gentlemen agree or disagree that is the law?

SOL. STROUD: We are not questioning whether or nor the law requires the appointment of counsel for an indigent. We just question the indigency.

THE COURT: They may or may not be entitled, but I have got to make a determination.

MR. FERGUSON: The only point I was making about

the affidavits. We made the motion. Of course, we have appeared for the defendants up until this time and the remainder of the trial. What I was proposing was that I could take the affidavits with me this afternoon upon recess of the Court and have each of the defendants fill one out, present those back here to the Court in the morning.

THE COURT: But I have got to make inquiry myself. You have already proposed putting the defendants on the stand.

MR. FERGUSON: Right.

THE COURT: I think the affidavits should be filed as a matter of record.

MR. FERGUSON: All we intend is to have each defendant tell the Court what his financial circumstances are. It won't take but a couple of minutes each.

THE COURT: All right. Go ahead.

JOE WRIGHT (WILLIAM DALLAS) JR., being duly sworn, deposes and says:

EXAMINATION BY MR. FERGUSON:

Q ~~You are~~ William Dallas Wright, Jr., one of the defendants in this action?

A I am.

Q ~~By whom are you~~ I am not employed?

~~A. No one.~~

~~Q. What is your~~ My present income?

~~A.~~ Zero.

Q. ~~How old are you~~?

A. I am 19. years old

~~Q. You were~~ I was released from custody on or about the 14th of June, 1972. ~~Is that correct?~~

~~A. That is right.~~

Q. Have ~~you~~ been employed since that time?

~~A. No. Yes, I have.~~

~~Q. How long did you~~ I work?

~~A.~~ For about three weeks.

Q. I Do ~~you~~ not know what, ~~your~~ my parents' income is?

~~A. Not right off hand.~~

Q. I Do ~~you~~ not have any money anywhere which is held for ~~you~~ me, owed to ~~you~~ me or coming to ~~you?~~ me.

~~A. No.~~

Q. I ~~Are you~~ am not married?

~~A. No.~~

Q. I Do ~~you~~ not own a car?

~~A. No.~~

Q. I Do ~~you~~ not own any property whatsoever?

~~A. No.~~

~~Q. How much bond are you under, if you recall?~~

~~A.~~ Q. My bond was $15,000.00.

Q. I Did ~~you yourself~~ not post bond with ~~your~~ my own money?

~~A. No, I didn't.~~