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Record No. 6437

In the

Supreme Court of Appeals of Virginia

at Richmond

JAMES JOHNNIE MATHEWS

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

RULE 5:12 BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 6437

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 14th day of June, 1966.

JAMES J. MATHEWS, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Fairfax County
Albert V. Bryan, Jr., Judge

Upon the petition of James J. Mathews a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Fairfax County on the 24th day of September, 1965, in a prosecution by the Commonwealth against the said petitioner for a felony; but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

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page 1]

NOTICE OF VIOLATION
COUNTY OF FAIRFAX, VIRGINIA
POLICE DEPARTMENT

Date: 4/17/65 Time: 1995 Hrs.
Summons No. 032829 Name: Mathews, James Johnnie
Address: 208 W. 105th St., N. Y., N. Y.
Date of birth: 9/26/30
Age: 34; Race: C. Sex: M;
Weight: 160; Height:5-8; Eyes: Brn; Hair: Blk
Place of Birth: Pamalico, N. C.

Signature: Arrested

Nature of Violation
Warrant charging Armed Robbery.

Arresting Officer: Baker; Unit No.: 203; Division: 3;
Duty Station: 1

page 2]

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX, TO-WIT

COMPLAINT #371312

I, Lt. R. H. Lester, whose address is Hdqts., Fairfax County P. D. do hereby complain that on the 7th day of April, 1965, James *L.* Mathews did unlawfully and feloniously on one, John C. Stutz, make an assault and held him, the said John C. Stutz, in bodily fear and by the threat and presenting of a deadly weapon and instrumentality, to-wit: a revolver, did feloniously put U. S. Currency to the value of $75.00 of the property of John C. Stutz and $125.00 U. S. Currency, property of Kenneth Blunt, Jr., owner of Travelers Motel, from the person and against the will of John C. Stutz, and did un-

lawfully and feloniously and violently take, steal and carry away.

Given under my hand this the 15th day of April, 1965.

H. R. LESTER
Compainant

Subscribed and sworn to before me this the 15th day of April, 1965.

ROBERT G. RUSSELL
Justice of the Peace

WARRANT OF ARREST

To the Sheriff, Special Policeman, or to any County Police Officer or State Police Officer, Greeting:

Whereas, complaint has been made on oath to me, the undersigned Justice of the Peace for the County aforesaid, on the information of Lt. R. H. Lester, that on the 7th day of April, 1965, in the County aforesaid James J. Mathews did unlawfully and feloniously on one, John C. Stutz, make an assault and held him, the said John C. Stutz, in bodily fear and by threat and presenting of a deadly weapon and instrumentality, to-wit: a revolver, did feloniously put U. S. Currency to the value of $75.00 of the property of John C. Stutz and $125.00 U. S. Currency, property of Kenneth Blunt, Jr., owner of Travelers Motel, from the person and against the will of John C. Stutz and did unlawfully and feloniously and violently take, steal and carry away.

These are therefore in the name of the Commonwealth, to command you forthwith to apprehend and bring before the Fairfax County Court, the body of said James J. Mathews at Fairfax, on the 21 day of April, 1965, at 2:00 o'clock P. M., to answer the said complaint, and to be further dealt with according to law. And you are also directed to summon _____ to then and there testify as witness. And have then and there this warrant, with your return thereon.

Given under my hand this 15th day of April, 1965.

ROBERT RUSSELL
Justice of the Peace for Fairfax County, Virginia

THE WITHIN NAMED James J. Mathews, on the 5 day of May, 1965, forfeited collateral in the amount of $..... was brought before me and on the evidence of — Held for Grand Jury — he is found guilty as charged in the within Warrant, and I do adjudge that he be confined in the jail of the County of Fairfax for ..... days, and pay a fine of $..... and $..... costs.

I have sent ..... of for further action of the Grand Jury of the said County, and have recognized the above named witness in the sum of $..... each to appear at 10 o'clock, A. M., at the Courthouse of said County on the 1st day of the ..... term, 19 .. , of the Circuit Court of this County.

Plea ..... Dismissed .....
Fine $..... and Costs — Suspended on Condition .....
Jail ..... Days or Months
License Suspended ..... Days or Months
Grand Jury ..... Recommendation CW .....

5/5/65 — Preliminary Hearing — Bond $10,000
To Grand Jury

JOHN A. ROTHROCK, JR.
Judge, Fairfax County Court,
Fairfax County, Virginia

WARRANT OF ARREST
County of Fairfax, Va.

Vs.

JAMES J. MATHEWS

Executed this, the 17 day of April, 1965 by arresting the within named

Det. K. D. BAKER,
Officer

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page 3] IN THE COUNTY COURT OF THE COUNTY OF FAIRFAX

....., 19....

COMMONWEALTH
v.
JAMES J. MATHEWS

ORDER FOR APPOINTMENT OF ATTORNEY
(Pursuant to Virginia Code §19.1-241.1 *et seq*)

This day came the Attorney for the Commonwealth, and James Johnnie Mathews, who stands charged with the commission of a felony, to-wit: Armed Robbery as charged in the warrant, was led to the bar in the custody of the jailer (appeared in Court according to the condition of his bond).

And the Court, before commencing the proceedings and having heretofore on the 21st day of April, 1965, informed the accused of his rights and having allowed the accused a reasonable opportunity to employ counsel of his own choice, doth ascertain that the accused is not represented by counsel.

And having ascertained by oral examination of the accused and other competent evidence that the accused is indigent and having provided the accused with and received from him (her) the statement under oath required by law, which executed statement is now filed with the warrant, the Court before proceeding with the preliminary hearing now appoints J. W. Gilliam, an able, discreet and competent attorney at law, to defend the said accused.

Whereupon, on motion of the attorney for the Commonwealth, with the consent and approval of the accused after private consultation with his counsel, this case is set for preliminary hearing on May 5, 1965, at 10:00 o'clock A.M. and the accused is remanded to jail (and the bond of the accused together with the surety thereon is continued until the further Order of the Court).

Enter: 4/21/1965

JOHN A. ROTHROCK, JR.
Judge

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page 4] COMMONWEALTH OF VIRGINIA

REQUEST FOR COURT APPOINTED COUNSEL

In the County Court of the County of Fairfax

COMMONWEALTH OF VIRGINIA
v.
JAMES JOHNNIE MATHEWS

I, James Johnnie Mathews, have been advised by John Rothrock, Judge of the County Court for the County of Fairfax, of my rights to representation by counsel in the trial of the charge pending against me in said court; I certify that I am without means to employ counsel of my own choosing and I hereby request this court to appoint counsel for me.

Given under my hand this 20 day of April, 1965.

JAMES J. MATHEWS

Subscribed and sworn to before me in open court in the County (City) of Fairfax this 21st day of April, 1965.

J. A. ROTHROCK
Judge of the Fairfax County Court
of the County (City) of Fairfax

J. Wm. GILLIAM
Court Appointed Counsel

page 5]

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INDICTMENT FOR ROBBERY

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its May Term, 1965, upon their oaths present that James J. Mathews, on the 7th day of April, 1965, in the County of Fairfax, in and upon one John C. Stutz, unlawfully and feloniously did make an assault, and him the said John C. Stutz, in bodily fear feloniously did put, and Seventy-Five Dollars ($75.00) in good and lawful currency of the United States of America of the goods and chattels of John C. Stutz, and One Hundred Twenty-Five Dollars ($125.00), in good and lawful currency of the United States of America of the goods and chattels of Kenneth Blunt, Jr., owner of Travelers Motel, from the person of John C. Stutz, or in his

presence and against his will by violence or intimidation and by the threat of firearms, then and there, to-wit: on the day and year aforesaid, in the County aforesaid, feloniously and forcibly with intent to steal, did take and carry away, against the peace and dignity of the Commonwealth of Virginia.

Witnesses called by the Court,
sworn and sent to testify
before the Grand Jury:
Det. Wayland, Fairfax County Police Dept.
Det. Baker, Fairfax County Police Dept.

Teste: This 17th day of May, 1965

THOMAS P. CHAPMAN,JR.
Clerk of said Court
By EDWARD E. YOUNG

page 6]

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INDICTMENT — ARMED ROBBERY

This 17th day of May, 1965, came the Commonwealth, by her Attorney; and the Defendant, JAMES JOHNNIE MATHEWS, who stands indicted for a felony, to-wit: robbery, being confined in jail, was brought into Court and put to the Bar of the Court in custody of a Deputy Sheriff, also appeared J. William Gilliam, Counsel for the Defendant.

Pursuant to Sec. 17-30.1 of the 1950 Code of Virginia, as amended, it is hereby ORDERED that the evidence and incidents of trial in this case shall be recorded verbatim by a Court Reporter. Thereupon, the Court Reporter was sworn.

And it appearing to the Court that J. William Gilliam, Attorney at Law, had heretofore been appointed in the County Court to represent the Defendant in this case and this day the Defendant informed the Court he had no objection to Mr. Gilliam representing him, it is, therefore, ADJUDGED and ORDERED that J. William Gilliam, an able and experienced Attorney at Law practicing before this Court, represent the Defendant in this case in this Court.

And this case is now set for arraignment of the Defendant

and trial with a jury on June 14, 1965, to which time this case is continued without objection of the Defendant or his Counsel.

PAUL E. BROWN
Judge

page 7] Charles W. Walker
Mrs. Jeanne S. Bott
Fred Parnell
H. J. Trees
Mrs. Ruth C. Pusey
Mrs. Elsa S. Woodaman
Mrs. Ester Ham
Raymond Fridley
George Fortune
Burrel James
Francis L. Decker
Frank Rideout
H. J. Trees
Wyman A. Upchurch
Austin Hollway

page 8]

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I, the undersigned, agree that the jury need not be kept together or sequestered during any recess during the trial of this case and during any recess after the case has been submitted to the jury for their deliberation.

Signed by me in the presence of my Attorney this 14th day of June, 1965.

JAMES J. MATHEWS
Defendant

Agreed:
J. Wm. GILLIAM
Attorney for Defendant
Agreed:
ROBERT J. HORAN, JR.
Attorney for Commonwealth

page 9] VOIR DIRE EXAMINATION

1-A Are any of you represented by or related to the defendant's Attorney J. Wm. Gilliam?

1. Are any of you related by blood or marriage to
   (a) John Stutz?
   (b) Kenneth Blunt?
   (c) Detective Wayland, Fairfax County?
   (d) Detective Baker, Fairfax County?

2. Have any members of the jury ever been police officers or have any of you been connected with law enforcement?

3. Are any members of the jury related to any member of the Commonwealth's Attorney Office? Or have any of you at any time been represented by any assistant Commonwealth's Attorney or by the Commonwealth Attorney.

4. Are there any members of the jury who have had an unpleasant experience with a person of the colored race?

5. Are there any members of the jury who do not now, at this point, presume the defendant to be innocent?

6. Can each member of the jury consider the evidence under the instructions given by the Court regardless of the personal belief as to what the law should be for this case?

7. Are there any members of the jury who would not acquit the defendant if the Commonwealth does not
page 10] prove beyond a reasonable doubt the crime charged in the indictment.

8. Are there any members of the jury who do not believe that the fact that defendant has been indicted is not evidence of his guilt.

page 11]

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This 14th day of June, 1965, came the Commonwealth, by her Attorney, and the Defendant, JAMES JOHNNIE MATHEWS, who stands charged with a felony, to-wit: armed robbery, being confined in jail, was brought into Court and put to the bar of the Court in the custody of a Deputy Sheriff; also appeared J. William Gilliam, Court appointed Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

Thereupon, the Attorney for the Commonwealth made a

motion to amend the indictment to read "$71.00" as the amount of currency being the property of Kenneth Blunt, Jr., to which motion to amend the Attorney for the Defendant objected and which objection the Court overruled and granted the motion to amend the indictment, and to the action of the Court in granting the said motion, the Attorney for the Defendant noted his exception. Whereupon, the indictment was amended to read "$71.00" in place of $125.00.

Thereupon, the Defendant was arraigned upon the indictment, as amended, to which indictment, as amended, the Defendant in person entered an oral plea of not guilty. Thereupon, came a jury of twenty veniremen, to-wit: Charles W. Walker, Raymond O. Dart, C. W. Minear, Mrs. Jeanne Bott, Louis A. Sinclair, Fred Parnell, H. J. Trees, Mrs. Ruth Pusey, Mrs. Elsa S. Woodaman, Mrs. Esther Ham, Raymond Fridley, George Fortune, Harry C. Hawkins, Gerald M. Brandon, Herman W. Haught, Warren T. Hayes, Burrel James, Francis L. Decker, Harry Farver and Frank Rideout and took their seats in the Jury Box and were sworn and examined on their *voir dire.* Thereupon, the Attorney for the Defendant informed the Court he had questions page 12] he would like asked of the jury on their *voir dire* and submitted a list of questions to the Court. Whereupon, the Court granted questions numbered one and two and denied those remaining on the list submitted, and to the action of the Court in denying the propounding of the said questions, the Defendant objected and noted his exception. Whereupon, the Court propounded to the jury the questions numbered one and two and all of the jurors were found to be competent and qualified jurors. The Attorney for the Commonwealth and the Attorney for the Defendant having alternately beginning with the Attorney for the Commonwealth, each stricken from the said panel the names of four of the said jurors, to-wit: Raymond O. Dart, C. W. Minear, Louis A. Sinclair, Harry C. Hawkins, Gerald M. Brandon, Herman W. Haught, Warren T. Hayes and Harry Farver, the remaining twelve, to-wit: Charles W. Walker, Mrs. Jeanne S. Bott, Fred Parnell, H. J. Trees, Mrs. Ruth C. Pusey, Mrs. Elsa S. Woodaman, Mrs. Esther Ham, Raymond Fridley, George Fortune, Burrel James, Francis L. Decker and Frank Rideout constituted the jury for the trial of the Defendant, who were sworn the truth of and upon the premises to speak.

Thereupon, the Attorney for the Defendant requested a rule on the witnesses and the Court admonished the witnesses as to their behavior during recess and were excluded from the courtroom.

The Court and jury heard the opening statements of the Attorney for the Commonwealth and the Attorney for the Defendant and part of the evidence on behalf of the Commonwealth. Thereupon the statement of the Defendant was offered, and out of the presence of the jury, but in the presence of the Defendant, the Attorney for the Defendant made a motion that the Defendant's statement was not admissible on the ground that it was not voluntarily made. Thereupon the Attorney for the Commonwealth and the Attorney for the Defendant proffered the evidence in respect to the Defendant's statement. The Court heard the evidence on behalf of the Commonwealth and the evidence on behalf of the Defendant, and the Defendant made a statement in his own behalf. The Court then heard the argument of Counsel and thereupon the Court ruled that the statement was voluntarily made and would be admitted into evidence, to which the Defendant objected and noted his exception.

page 13]

Thereupon, the jury was recalled and heard the remaining evidence on behalf of the Commonwealth and all of the evidence on behalf of the Defendant and upon conclusion of the evidence presented, out of the presence of the jury, but in the presence of the Defendant, the Attorney for the Defendant made a motion that the Defendant be found not guilty of armed robbery on the grounds that no weapon was used, which motion the Court, after hearing argument thereon, denied and to the action of the Court in denying the said motion, the Attorney for the Defendant objected and noted his exception.

It appearing to the Court that it would not be possible to complete this trial this day, and the Defendant having executed a written consent that the jury would not have to be kept together during recess; the Court admonished the jurors as to their behavior while in recess and continued this case until Tuesday, June 15, 1965, at 10:00 A.M.

And the Defendant was remanded to jail.

A. V. B., JR.
Judge

* * * * *

page 14]

* * * * *

This 15th day of June, 1965, came the Commonwealth, by her Attorney, and the Defendant, JAMES JOHNNIE MATHEWS, who stands charged with a felony, to-wit: armed robbery, being confined in jail, was brought into Court and put to the bar of the Court in the custody of a Deputy Sheriff; also appeared J. William Gilliam, Counsel for the said Defendant.

Thereupon the Court Reporter was sworn.

The roll was called and the following jurors took their seats in the jury box, to-wit: Charles W. Walker, Mrs. Jeanne S. Bott, Fred Parnell, H. J. Trees, Mrs. Ruth C. Pusey, Mrs. Elsa S. Woodaman, Mrs. Esther Ham, Raymond Fridley, George Fortune, Burrel James, Francis L. Decker and Frank Rideout.

The jury then received instructions of Court, heard the argument of Counsel and were sent to their room to consult upon their verdict, and after some time returned into Court and rendered the following verdict.

"We the jury on the issues joined in the case of *Commonwealth of Virginia* vs. *James Johnnie Mathews* (#12750) find the defendant guilty of robbery by violence to the person or by threat of firearms and fix his punishment at 20 years

FESTUS B. JAMES
Foreman"

Thereupon, the jury was discharged, and it was demanded of him, JAMES JOHNNIE MATHEWS, if anything he knew or had to say why the Court should not proceed

page 15] to pass sentence and judgment upon him; and nothing offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that JAMES JOHNNIE MATHEWS, do serve twenty (20) years in the Penitentiary House of this Commonwealth, at hard labor, and additional time as provided by law if the costs of this case be not paid, and subject to a credit for sixty (60) days served in jail.

The Court certifies that the Defendant was present at all stages of this trial.

The fee for the Court Reporter who recorded the evidence and incidents of trial in this case is to be assessed as costs in this case as provided in Sec. 17-30.1 of the Code of Virginia.

J. William Gilliam, Attorney who was heretofore appointed to represent the Defendant in this case is hereby allowed a fee of $250.00.

The Defendant is remanded to jail to await transportation to the Penitentiary.

A. V. B., JR.
Judge

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page 16] We the jury on the issues joined in the case of *Commonwealth of Virginia* v. *James Johnnie Mathews* (#12750) find the defendant not guilty.

_____
Foreman.

page 17] We the jury on the issues joined in the case of *Commonwealth of Virginia* v. *James Johnnie Mathews* (#12750) find the defendant guilty of robbery by means or mode other than violence to the person or threat of firearms and fix his punishment at

_____
Foreman.

page 18] We the jury on the issues joined in the case of *Commonwealth of Virginia* v. *James Johnnie Mathews* (#12750) find the defendant guilty of grand larceny and fix his punishment at

_____
Foreman.

page 19] We the jury on the issues joined in the case of *Commonwealth of Virginia* v. *James Johnnie*

Mathews (#12750) find the defendant guilty of assault and fix his punshment at

_____

Foreman.

page 20] We the jury on the issues joined in the case of *Commonwealth of Virginia* v. *James Johnnie Mathews* (#12750) find the defendant guilty of robbery by violence to the person or threat of firearms and fix his punishment at 20 years

FESTUS B. JAMES
Foreman.

page 21] INSTRUCTION NO. 1

AVB

The Court instructs the jury that the Defendant is presumed to be innocent and that this presumption goes with him through all the stages of the trial until the Commonwealth, upon whom the burden of proof rests, has shown beyond a reasonable doubt that the Defendant is guilty. A doubt engendered by sympathy or by a dislike to accept the responsibility of convicting the Defendant is not a reasonable doubt. The law does not require proof amounting to absolute certainty, nor proof beyond all possibility of mistake. If, after carefully and impartially hearing and weighing all the evidence, you reach the conclusion that the Defendant is guilty with such degree of certainty that you would act upon the faith of it in your own most important and critical affairs, then the evidence is sufficient to warrant a verdict of guilty.

page 22] INSTRUCTION NO. 2

AVB

The Court instructs the Jury that the Jury are the sole judges of the credibility of the witnesses; and in determining the weight given to the testimony of the witnesses the Jury may consider the appearance and demeanor of the witness on the witness stand; their manner of testifying;

their apparent intelligence or lack of it; their interest or lack of it in the outcome of the case; their temper, feeling or bias, if any has been shown; their opportunity for knowing the truth and having observed the things concerning which they testify; and from these and all other surrounding circumstances at the trial; the Jury are to determine which witnesses are more worthy of credit and give credit accordingly.

page 23] INSTRUCTION NO. 3

AVB

The Court instructs the jury that the crime of robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation or the presentation of the deadly weapon.

page 24] INSTRUCTION NO. 4

AVB

The Court instructs the jury that if they believe beyond a reasonable doubt that the defendant, James Mathews, did commit robbery, by violence to the person of John C. Stutz, or by threat or presenting of firearms, you shall find him guilty and fix his punishment at death, or by confinement in the penitentiary for life or for any term not less than five years. If you believe beyond a reasonable doubt that the defendant committed robbery at John C. Stutz in any other mode, or by any other means, you shall find him guilty and fix his punishment at confinement in the penitentiary not less than 5 years nor more than twenty years.

page 25] INSTRUCTION NO. 4

AVB

The Court instructs the jury that if they believe beyond a reasonable doubt that the defendant, James Mathews, did commit robbery, by violence to the person of John C. Stutz, or by threat of firearms, you shall find him guilty and

fix his punishment at death, or by confinement in the penitentiary for life or for any term not less than five years. If you believe beyond a resonable doubt that the defendant committed robbery of John C. Stutz in any other mode, or by any other means, you shall find him guilty and fix his punishment at confinement in the penitentiary not less than five years nor more than twenty years.

page 26] INSTRUCTION NO. 4

AVB

The Court instructs the jury that if they believe beyond a reasonable doubt that the defendant, James Mathews, did commit robbery, by violence to the person of John C. Stutz, or by threat of firearms, you shall find him guilty and fix his punishment at death, or by confinement in the penitentiary for life or for any term not less than five years. If you believe beyond a reasonable doubt that the defendant committed robbery of John C. Stutz in any other mode, or by any other means, you shall find him guilty and fix his punishment at confinement in the penitentiary not less than five years nor more than twenty-five years.

page 27] COMMONWEALTH'S INSTRUCTION NO. 5

AVB

The Court instructs the Jury that principals in the first degree are those who are the actual or immediate perpetrators of the crime. Principals in the second degree are those who did not with their own hands commit the act which constituted the crime, but who were present, aiding and abetting in its commission. The test for a principal in the second degree is whether he was encouraging or inciting the commission of a crime by words, gestures, looks or signs, or in some manner offering aid to its commission.

The Court further instructs the Jury that principals in the second degree are liable to the same punishment as principals in the first degree.

page 28] INSTRUCTION NO. 5

AVB

The Court instructs the Jury that principals in the first

degree are those who are the actual or immediate perpetrators of the crime. Principals in the second degree are those who did not with their own hands commit the act which constituted the crime, but who were present, aiding and abetting in its commission. The test for a principal in the second degree is whether he was encouraging or inciting the commission of a crime by words, gestures, looks or signs, or in some manner offering aid to its commission.

The Court further instructs the Jury that principals in the second degree are liable to the same punishment as principals in the first degree.

page 29] INSTRUCTION A

AVB

The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged against the defendant. It is not sufficient that the jury may believe his guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction, but the evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside of the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the defendant and unless you believe, upon a consideration of all the evidence before you, that guilt of the defendant has proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find the defendant not guilty.

page 30] INSTRUCTION B

Refused
AVB

The court instructs the jury that the law presumes the accused to be innocent until he is proven guilty by evidence beyond a reasonable doubt, and this presumption of innocence goes with the accused throughout the whole case and applies at every stage thereof, and if there is upon the minds

of the jury any reasonable doubt of the guilt of the accused, the law makes it your duty to acquit him, and that mere suspicion or probability of his guilt, however strong, is not sufficient to convict him, nor is it sufficient to convict him if the greater weight or preponderance of the evidence supports the charge in the indictment, but to warrant his conviction, his guilt must be proven so clearly that there is no reasonable theory consistent with the evidence upon which he can be innocent.

page 31] INSTRUCTION C

Refused
AVB

The court instructs the jury that robbery is defined as the taking, with intent to deprive the owner permanently of personal property, from his person or in his presence, against his will and by threat of firearms.

The court further instructs the jury that it is incumbent upon the Commonwealth to prove beyond a reasonable doubt the existence of each and everyone following elements in order to sustain a conviction and therefore you must find and believe beyond a reasonable doubt:

1. That James J. Mathews, did take from the person, or in the presence of John C. Stutz the sum of seventy-five dollars (75.00) and that the same was good and lawful currency of the United States of America the goods and chattels of John C. Stutz and also that James J. Mathews did take from the person or in the presence of John C. Stutz the sum of Seventy-one Dollars ($71.00) in good and lawful currency of the United States of America the goods and chattels of Kenneth Blunt, Jr.

2. That the said takings were against the will of the owners of said property;

3. That John C. Stutz was in fear of his physical well being and not of the possibility of loss of property;

4. That James J. Mathews did intend, at the time of taking, to permanently deprive the owners of the aforesaid sums of money;

page 32] 5. That the alleged taking was by threat of, not what may have reasonably appeared to be a firearm, but by the threat of an actual firearm.

If after a consideration of the evidence you have a doubt of the guilt of the defendant upon the whole case, or a doubt as to the evidence as to any fact essential to prove his guilt beyond doubt, it is your solemn duty to give the defendant the benefit of the doubt and to find him not guilty.

page 33] INSTRUCTION C

The court instructs the jury that in order to find the defendant guilty of robbery by threat of firearms it is incumbent upon the Commonwealth to prove beyond a reasonable doubt the existence of each and everyone following elements in order to sustain a conviction and therefore you must find and believe beyond a reasonable doubt:

1. That James J. Mathews, did take from the person, or in the presence of John C. Stutz the sum of seventy-five dollars ($75.00) and that the same was good and lawful currency of the United States of America the goods and chattels of John C. Stutz and also that James J. Mathews did take from the person or in the presence of John C. Stutz the sum of seventy-one dollars ($71.00) in good and lawful currency of the United States of America the goods and chattels of Kenneth Blunt, Jr.

2. That the said takings were against the will of the owners of said property;

3. That John C. Stutz was in fear of his physical well being and not of the possibility of loss of property;

4. That James J. Mathews did intend, at the time of taking, to permanently deprive the owners of the aforesaid sums of money;

page 34] 5. That the alleged taking was by threat of, not what may have reasonably appeared to be a firearm, but by the threat of an actual firearm.

If after a consideration of the evidence you have a doubt of the guilt of the defendant upon the whole case, or a doubt as to the evidence as to any fact essential to prove his guilt beyond doubt, it is your solemn duty to give the defendant the benefit of the doubt and to find him not guilty of robbery by threat of firearms.

page 35] INSTRUCTION D

AVB

The court instructs the jury that if, upon the whole case, there is any reasonable hypothesis consistent with the innocence of the accused, they must find him not guilty.

page 36] INSTRUCTION E

Refused
AVB

If you believe from the evidence that a confession was made by the defendant, then the burden of proof is upon the Commonwealth to prove that such confession was not obtained by any threats or any force or any undue influence or that it was not made under the influence of hope of advantage or fear of injury, excited in the mind of this defendant by a person of authority, or with the apparent sanction of such a person and that it was made absolutely freely and voluntarily, and if you believe from the evidence or if it does not appear from the evidence that such were the circumstances under which and subject to this confession was made, then it is your duty to acquit the defendant and find him not guilty.

page 37] INSTRUCTION F

Refused
AVB

If you believe from the evidence that more than one confession was made by the defendant, then the law presumes that those subsequent are the product and result of the same circumstances which produced the first and the burden of proof is upon the Commonwealth to prove that the original or first confession was not obtained by any threats or any force or any undue influence or that it was not made under the influence of hope of advantage or fear of injury, excited in the mind of this defendant by a person in authority, or with the apparent sanction of such a person and that it was made absolutely freely and voluntarily and if you believe from the evidence or if it does not appear from the evidence that such were the circumstances under which, and subject to,

the original confession was made, then it is your duty to acquit the defendant.

page 38] INSTRUCTION G

AVB

The court instructs the jury that if, upon the whole case, there is any reasonable hypothesis consistent with the innocence of the accused, they must find him not guilty.

page 39] INSTRUCTION H

AVB

The court instructs the jury that upon an indictment for robbery, the jury may acquit the Defendant of robbery and convict him of larceny.

Therefore, if you believe from the evidence that the crime of robbery has not been proven beyond a reasonable doubt, then it is your duty to acquit the Defendant of robbery. However, if you believe from the evidence beyond a reasonable doubt that the Defendant took and carried away the property of another and of a value of fifty dollars ($50.00) or more, against the will of the owner or without his consent and with felonious intent to permanently deprive him of his ownership thereof, then you shall find the Defendant guilty of grand larceny and fix his punishment at confinement in the penitentary not less than one (1) or more than twenty (20) years, or by confinement in jail not exceeding twelve (12) months or by a fine not exceeding one-thousand dollars ($1,000.00), either or both.

page 40] INSTRUCTION H

AVB

The Court instructs the jury that upon an indictment for robbery, the jury may acquit the Defendant of robbery and convict him of larceny.

Therefore, if you believe from the evidence that the crime of robbery has not been proven beyond a reasonable doubt, then it is your duty to acquit the Defendant of robbery.

However, if you believe from the evidence beyond a reasonable doubt that the Defendant took and carried away the property of another and of a value of fifty dollars ($50.00) or more, against the will of the owner or without this consent and with felonious intent to permanently deprive him of his ownership thereof, then you shall find the Defendant guilty of grand larceny and fix his punishment at confinement in the penitentiary not less than one (1) or more than twenty (20) years, or by confinement in jail not exceeding twelve (12) months or by a fine not exceeding one-thousand dollars ($1,000.00), either or both.

page 41] INSTRUCTION I

AVB

The court instructs the jury that the burden is on the state in this case to show beyond all reasonable doubt that a crime, as defined in other instructions, has been committed as the first *indispensible* fact, for if there be no crime, there cannot possibly be a criminal; and further the evidence must show begond all reasonable doubt that the Defendant, James J. Mathews, committed the crime for though it be ever so certain that crime has been committed, no one can be punished for it unless the evidence singles him out from all other persons beyond all reasonable doubt as the guilty agent.

page 42] INSTRUCTION I

AVB

The Court instructs the jury that the burden is on the state in this case to show beyond all reasonable doubt that a crime, as defined in other instructions, has been committed as the first *indispensible* fact, for if there be no crime, there cannot possibly be a criminal; and further the evidence must show beyond all reasonable doubt that the Defendant, James J. Mathews, committed the crime for though it be ever so certain that crime has been committed, no one can be punished for it unless the evidence singles him out from all other persons beyond all reasonable doubt as the guilty agent.

page 43] INSTRUCTION J

AVB

The failure of the evidence to disclose any other criminal agent than the Defendant is not a circumstance which may be considered by the jury in determining whether or not he is guilty of the crime with which he is charged.

page 44] INSTRUCTION K

AVB

Failure of the Defendant to testify creates no presumption against him; and in considering his innocence or guilt, his failure to testify is not a circumstance which the jury is entitled to consider.

page 45] INSTRUCTION L

AVB

There can be no such thing as a principal in the second degree to a crime unless there is a principal in the first degree to its commission. And while it is not necessary for the Commonwealth to prove that any particular person is guilty as a principal in the first degree, or that there has been a conviction therefor, it is necessary that the Commonwealth prove that robbery has been committed. And unless you believe from the evidence beyond a reasonable doubt that robbery has been proven to have occurred, then you cannot find the Defendant guilty as a principal in the second degree thereof.

page 46] INSTRUCTION L

AVB

There can be no such thing as a principal in the second degree to a crime unless there is a principal in the first degree to its commission. And while it is not necessary for the Commonwealth to prove that any particular person is guilty as a principal in the first degree, or that there has been a

conviction therefor, it is necessary that the Commonwealth prove that robbery has been committed. And unless you believe from the evidence beyond a reasonable doubt that robbery has been proven to have occurred, then you cannot find the Defendant guilty as a principal in the second degree thereof.

page 47] INSTRUCTION M

AVB

The mere presence of a person at the scene of commission of a crime is not sufficient to constitute him a principal in the second degree, nor is his mere consent to the commission of a crime sufficient. And unless you believe from the evidence beyond a resonable doubt that the Defendant was not only present but that he was present, aiding and abetting James L. Williams in the commission of robbery and that he shared in the criminal intent of the said James L. Williams, then you must find the Defendant not guilty of Robbery or assault.

page 48] INSTRUCTION M

The mere presence of a person at the scene of commission of a crime is not sufficient to constitute him a principal in the second degree, nor is his mere consent to the commission of a crime sufficient. And unless you believe from the evidence beyond a reasonable doubt that the Defendant was not only present but that he was present, aiding and abetting James L. Williams in the Commission of robbery and that he shared in the criminal intent of the said James L. Williams, then you must find the Defendant not guilty of robbery or assault.

page 49] INSTRUCTION N

Refused
AVB

If you believe from the evidence that the Defendant was not brought before a magistrate within a reasonable time after his arrest and given the opportunity to obtain bail and

that any such failure prevented him from having the opportunity of obtaining evidence in his behalf, then you shall acquit the Defendant.

page 50] INSTRUCTION O

AVB

If you believe from the evidence that a confession was made by the Defendant, then the burden of proof is upon the Commonwealth to prove beyond a reasonable doubt that such confession was not obtained by any threats or any force or any undue influence or that it was not made under the influence of hope of advantage or fear of injury, excited in the mind of the Defendant by a person of authority, or with the apparent sanction of such a person and that it was made freely and voluntarily, and if you believe from the evidence that such were not the circumstances under which this confession was made, or if it does not appear from the evidence beyond a reasonable doubt that such circumstances did not exist at the time the confession was made, then in either event it is your duty to reject it and give it no weight whatsoever.

page 51] INSTRUCTION P

Refused
AVB

If you believe from the evidence that more than one confession was made by the Defendant, then the law presumes that those subsequent are the product and result of the same circumstances which produced the first and the burden of proof is upon the Commonwealth to prove beyond a reasonable doubt that the original or first confession was not obtained by any threats or any force or any undue influence or that it was not made under the influence of hope of advantage or fear of injury, excited in the mind of this Defendant by a person in authority, or with the apparent sanction of such a person and that it was made absolutely freely and voluntarily and if you believe from the evidence that such were not the circumstances under which this confession was made or if it does not appear from the evidence

beyond a reasonable doubt that these circumstances did not exist, then it is your duty to reject it and give it no weight whatsoever.

page 52] INSTRUCTION Q

AVB

The court further instructs the jury that upon an indictment for robbery the jury may acquit the defendant of robbery and find him guilty of larceny or of assault. If you believe from the evidence beyond a reasonable doubt that the defendant attempted with force or violence to do some bodily hurt to John Stutz coupled with the present ability to inflict bodily hurt upon John Stutz and with the intention either of inflicting bodily hurt or placing John Stutz in fear of bodily hurt, and you do not believe from the evidence beyond a reasonable doubt that the defendant committed robbery then you shall find the defendant guilty of assault and fix his punishment by confinement in jail not exceeding twelve months or by a fine not exceeding one thousand dollars ($1000.-00), either or both.

page 53] INSTRUCTION Q

AVB

The court further instructs the jury that upon an indictment for robbery the jury may acquit the defendant of robbery and find him guilty of larceny or of assault. If you believe from the evidence beyond a reasonable doubt that the defendant attempted with force or violence to do some bodily hurt to John Stutz coupled with the present ability to inflict bodily hurt upon John Stutz and with the intention either of inflicting bodily hurt or placing John Stutz in fear of bodily hurt, and you do not believe from the evidence beyond a reasonable doubt that the defendant committed robbery, then you shall find the defendant guilty of assault and fix his punishment by confinement in jail not exceeding twelve months or by a fine not exceeding one thousand dollars ($1000.00), either or both.

page 54]

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ORDER

This day came the Defendant, by counsel, and moved the Court to suspend the finality of the judgment heretofore entered in this case in order that the Defendant might file motions in this case and that the Court might hear argument on motion previously filed by counsel for the Defendant and it appearing to the Court that the twenty-one day period has not yet elapsed since final judgment was entered, it is hereby

ORDERED and ADJUDGED, that the finality of the judgment previously entered in this case be suspended until further order of this Court, but not later than September 7, 1965, on which date the twenty-one day period prescribed by Rule 3:21 shall begin to run, unless another order of this Court specifies otherwise; that the Defendant is granted leave to file such motion during that period of time as he may be advised for consideration by the Court and so that the Court may consider the motion previously filed and enter such order as appears to the Court to be just and proper in each instance.

ENTERED: This 6th day of July, 1965.

A. V. B., JR.
Albert V. Bryan, Judge

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page 56]

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MOTION TO SUSPEND SENTENCE

Comes now the Defendant, James J. Mathews, by Counsel, and respectfully moves the Circuit Court of Fairfax County, to suspend all or part of the sentence heretofore imposed upon the Defendant and states as follows:

1. That heretofore the Defendant, James J. Mathews, was convicted of robbery, by violence, and was sentenced to twenty years in the State Penitentiary.
2. That the Defendant, James J. Mathews, is incarcerated in the Fairfax County Jail.

WHEREFORE, the Defendant, James J. Mathews, by Counsel, respectfully moves the Court to suspend all or part of the sentence previously imposed on him and/or to place him on probation, as the Court may deem proper under the circumstances herein.

JAMES J. MATHEWS
By: J. Wm. GILLIAM
Counsel

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page 57]

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This 3rd day of September, 1965, came to the Commonwealth, by her Attorney, and the Defendant, JAMES JOHNNIE MATHEWS, who stands convicted of a felony, to-wit: armed robbery, being confined in jail, was brought into Court and put to the bar of the Court in the custody of a Deputy Sheriff; also appeared J. William Gilliam, Counsel for the said Defendant.

Thereupon, the Court Reporter was sworn.

Thereupon, the Court heard arguments on the motion of the Attorney for the Defendant to set aside the sentence heretofore imposed in this case and place the Defendant on probation, which said motion the Court, after hearing argument thereon, denied and to the action of the Court in denying the said motion the Attorney for the Defendant noted his exception.

Thereupon, the Attorney for the Defendant made a motion for a new trial, which motion is hereby continued to September 17, 1965, for argument.

And the Defendant is remanded to jail.

A. V. B., JR.
Judge

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page 58]

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This 17th day of September, 1965, came the Common-

wealth by her Attorney; and the Defendant, JAMES JOHNNIE MATHEWS, who stands indicted for a felony, to-wit: armed robbery, being confined in jail, was brought into Court and put to the Bar of the Court in custody of a Deputy Sheriff, also appeared J. William Gilliam, Counsel for the Defendant.

Thereupon the Court Reporter was sworn.

And this case came on to be heard on the Defendant's motion for a new trial, which motion the Court continued to September 24, 1965 on behalf of the Defendant.

And the Defendant is remanded to jail.

A. V. B., JR.
Judge

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page 59]

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This 24th day of September, 1965, came the Commonwealth, by her Attorney; and the Defendant, JAMES JOHNNIE MATHEWS, who stands convicted of a felony, to-wit: armed robbery, being confined in jail, was brought into Court and put to the Bar of the Court in custody of a Deputy Sheriff, also appeared J. William Gilliam, Counsel for the Defendant.

Thereupon the Court Reporter was sworn.

And this case came on to be heard on the Defendant's motion for a new trial, on the grounds that the Defendant's statement was not voluntary and that certain evidence of Mrs. Curley Mathews, wife of the Defendant, was not *admissable,* which motion the Court, after hearing argument thereon, denied, to which the Attorney for the Defendant noted his exception.

Whereupon the Court informed the Defendant that the Court was ready to order the sentence into execution; it is therefore ADJUDGED and ORDERED that the sentence heretofore imposed on June 15, 1965, be, and the same is hereby ordered into execution.

The Court certifies that the Defendant was present at all stages of this trial.

The fee for the Court Reporter who recorded the evidence and incidents of trial in this case is to be assessed as costs in this case as provided in Sec. 17-30.1 of the Code of Virginia.

The Defendant is remanded to jail and to remain in the jurisdiction of Fairfax County until the case of *Commonwealth* vs. *James Lee Williams* is tried or until further order of this Court.

A. V. B., JR.
Judge

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page 60]

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Comes now the defendant, James Johnnie Matthews, and files with the Clerk of this Court this, his Notice of Appeal and Assignments of Error, as follows:

1. The Court erred in admitting into evidence the confession and/or admissions of the defendant over the objection and exception of the defendant, by counsel.
2. The Court erred in refusing defendant's instruction lettered B.
3. The Court erred in refusing defendant's instruction E, as originally offered.
4. The Court erred in refusing to grant defendant's instruction lettered F.
5. The Court erred in refusing to grant defendant's instruction lettered P.
6. The Court erred in granting Commonwealth's instructions numbered 3, 4 and 5.
7. The Court erred in sustaining Commonwealth's objection to the questions asked by defense counsel of the witness, Wayland, concerning his conversations with Sheriff Womble of North Carolina.
8. The Court erred in allowing the witness, Baker, to

be questioned both by leading questions and by the method of cross-examination by the attorney for the Commonwealth.

page 61] 9. The Court erred in refusing, after a request by the defendant, to instruct the jury at the time the evidence was received as to the proper use, if any, to be made of the testimony of the witness, Stutz, as to what was done with him after the robbery, if any, had been proven.

10. The Court erred in refusing to grant defendant's motion, made at the close of evidence, to strike the Commonwealth's evidence.

11. The Court erred in refusing to set aside the verdict and award the defendant a new trial.

Respectfully submitted:
THOMAS O. LAWSON
JAMES JOHNNIE MATHEWS
By Counsel

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page 1]

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Fairfax, Virginia
June 14, 1965

The above-entitled matter came on for arraignment and trial, pursuant to notice, before the Honorable Albert V. Bryan, Judge, Circuit Court of Fairfax County, Virginia and jury in Courtroom No. 1, Fairfax County Courthouse, commencing at 10:20 a.m.

APPEARANCES:

On behalf of the Commonwealth of Virginia:

ROBERT F. HORAN, JR., ESQ.

On behalf of the Defendant:

J. WILLIAM GILLIAM, ESQ.

page 2] JURORS

Charles W. Walker
Mrs. Jeanne S. Bott
Fred Parnell
H. J. Trees
Mrs. Ruth C. Pusey
Mrs. Elsa S. Woodaman
Mrs. Esther Ham
Raymond Fridley
George Fortune
Burrel James
Francis L. Decker
Frank Rideout

page 3] PROCEEDINGS

(The court reporter was duly sworn by the Clerk.)

The Court: This is *Commonwealth of Virginia* versus *James Johnnie Mathews.*

Are you ready for the Commonwealth?

Mr. Horan: Ready, Your Honor.

The Court: Are you ready for the defendant?

Mr. Gilliam: Ready, Your Honor.

The Court: Docket No. 12750. Let the record show the Commonwealth is present through its attorney, Robert F. Horan, and that the defendant is present in person and through his attorney, Mr. William Gilliam.

(Whereupon, 20 jurors were called and seated.)

The Court: I believe I will arraign him before the jury is sworn.

Mr. Horan: Your Honor, please, prior to arraignment the Commonwealth moves to amend the indictment to allege that $71 in good and lawful currency of the United States of America, of the goods and chattels of Kenneth Blunt, Jr., owner of the Traveler's Motel, I merely want to change the $125.00 to $71.00.

The Court: Does the defendant have any objection to that amendment?

Mr. Gilliam: Note my exception, Your Honor.

The Court: What is your exception?

Mr. Gilliam: I think the $125.00 should remain. That is what the Grand Jury indicated him as having received.

page 4] The Court: Do you want to be heard on that?

Mr. Gilliam: No.

The Court: And your objection?

Mr. Gilliam: This is not the offense which the Grand Jury indicated him for. He has changed it now.

The Court: I overrule the objection.

Mr. Gilliam Note my exception.

The Court: The defendant will stand and be arraigned.

(The charge against the defendant, James Johnnie Matthews, was read by the clerk.)

The Court: How do you plead, guilty or not guilty?

The Defendant: Not guilty.

The Court: The defendant has given his plea in person.

(The 20 jurors in the box were sworn by the Clerk.)

The Court: Not only the jurors who have been called for the panel, or called by name, but all other jurors in the courtroom will listen to my summary of the case so in the event one of the present jurors has to step down and you have to take their place, you will know what it is about and know what your answers would be.

Members of the Jury, you are here today to try a charge *or* armed robbery against James Johnnie Mathews. The Commonwealth is represented by Robert F. Horan, Jr., and the defendant, James Johnnie Mathews, is represented by J. William Gilliam of the firm of Kelly, Farley and Lawson.

page 5] The Commonwealth charges that on or about April 7, 1965, the defendant robbed one John C. Stutz and took from him $75 and took from him $71 of money of one Kenneth Blunt, Jr., who was the owner of the Traveler's Motel. The defendant has plead not guilty and you are here today to determine his guilt or innocence.

Now, are any of the members of the jury related or acquainted to the defendant, James Johnnie Mathews?

Are you represented by counsel at the counsel table or their firm?

Do you know anything about the case or do you have any interest in it?

Are you conscious of any bias or prejudice you might have against this type case?

Are any of you opposed to capital punishment?

Do any of you know of any reason whatsoever you cannot sit with absolute impartiality on this case?

Does the Commonwealth have any questions?

Mr. Horan: No questions, Your Honor.

The Court: Does the defendant have any questions?

Mr. Gilliam: Yes, Your Honor.

The Court: I will ask the first two requested.

Are any members of the jury panel related by blood or marriage to John C. Stutz or Kenneth Blunt, Jr. or Detective Wayland of the Fairfax County Police Department or Detective Baker of the Fairfax County Police Department? Have any members of the jurors ever been police officers or have any of you ever been connected with law enforcement in any way?

page 6]

Your name?

Mr. Dawson: Roy Dawson.

The Court: Would that connection affect your ability to be an impartial juror in this case?

Mr. Dawson: I'm afraid it might, sir.

The Court: Will you step down.

Call the next juror.

Did you hear my explanation of the case, sir?

The Juror: Yes, sir.

The Court: Would any of your answers to my questions have been in the affirmative?

The Juror: No, they would not.

The Court: All right. Mr. Gilliam, do you want to let the record show you requested me to ask additional questions to those I asked?

Mr. Gilliam: Yes, Your Honor. I would object to that, take exception to that.

The Court: For refusing to accept the balance of the questions asked on this list?

Mr. Gilliam: Yes, Your Honor.

Mr. Horan: I wonder if I might ask Mr. Trees' occupation?

page 7] The Court: Your occupation, Mr. Trees?

Mr. Trees: I am a retired government employee.

Mr. Gilliam: Your Honor, I wonder if I might get the names of the jurors? I wasn't here when they were read.

(List of jurors submitted to defendant's counsel.)

(The Clerk read the list of the twelve jurors were empanelled to try the case of *Commonwealth of Virginia* versus *James Johnnie Mathews*.)

The Court: Does the Commonwealth want a rule on the witnesses?

Mr. Horan: Commonwealth doesn't desire a rule.

Mr. Gilliam: Move to exclude the witnesses, Your Honor.

The Court: Where are the Commonwealth witnesses?

Mr. Horan: Mr. Stutz is the Commonwealth's first witness. Detective Baker is the other witness.

Mr. Gilliam: Your Honor, the defendant's wife is here and there is a possibility she will be a witness.

The Court: All witnesses in the case please stand. You will retire to the hall and be called at such time as your testimony is need. Until you are called, do not discuss what has gone on in the Courtroom with any witness who has testified or anyone else.

Likewise, after you have testified, do not discuss with anybody what you have testified to in the courtroom.

Mr. Gilliam: Your Honor, may I approach the Bench?

page 8] The Court: Yes, sir.

(Both counsel for defendant and counsel for the Commonwealth approached the Bench and a discussion was had off the record.)

The Court: Do either of you have an opening statement?

Mr. Horan: Yes, Your Honor.

OPENING STATEMENT ON BEHALF OF THE COMMONWEALTH

By Mr. Horan

Mr. Horan: My name is Robert F. Horan, Jr., Assistant

Commonwealth Attorney for Fairfax County. The particular offense with which we are involved is an armed robbery at the Traveler's Motel on No. 1 Highway in Fairfax County.

I want to show to you between five o'clock in the morning on the morning of April 7, 1965, this defendant in company with one other defendant robbed that Traveler's Motel on No. 1 Highway. At the time a Mr. John Stutz was on duty in the motel, had been on duty since midnight. This defendant in company with one other man entered the motel and started a conversation about how to find Route 95, how to get to North Carolina. Then there came a time the other man pulled a gun, put it in Mr. Stutz's stomach, demanded all the money he had. He told him where the the money was. At that time this defendant went and rifled the cash drawer, took the complaining witness' wallet containing $75 and $71 of the motel's money. At that time there was a conversation about whether or not they should kill Mr. Stutz. Eventually they took him to the basement, held the gun on

page 9] him, told him to get in the basement and not come out; closed the door behind him. Then they left.

The Commonwealth's evidence of necessity will rely upon the testimony of Mr. Stutz and the testimony of Detective Baker who went to North Carolina to interrogate this defendant. The Commonwealth's evidence, I am sure, upon completion of the case will convince you beyond a reasonable doubt this is the man who was in the motel in company with the other man and who took the money from the complaining witness, John Stutz.

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

By Mr. Gilliam:

Mr. Gilliam: Ladies and gentlemen of the jury, you are here today to judge a case in which the Commonwealth has alleged that the defendant James Johnnie Mathews is guilty of armed robbery.

I can only say this, that the burden of proof is on the Commonwealth to prove beyond a reasonable doubt that this defendant, although you may think there were two people in

a motel and the Commonwealth has referred to some other person, this other person committed the crime and this defendant is not guilty.

Now, to prove every element of the offense set out in the indictment must be the burden of the Commonwealth. I ask you also to keep in mind every defendant in this country is presumed to be innocent. This presumption of innocence goes with him throughout the trial. I want you to consider all the evidence in this case, not just the Commonwealth's evidence, consider all the evidence in this case before you reach any decision. Then it is the duty of each and every one of you to make your own independent judgment in the case and in making that independent judgment, you are not to be swayed. You will stick to your judgment. This is your duty as jurors. This defendant has got this one day in court. I ask you to reserve any judgment you may have until you have heard all of the evidence. I thank you.

page 10]

The Court: The Commonwealth will call its first witness.

Mr. Horan: Call Mr. Stutz.

Thereupon

JOHN C. STUTZ,

called as a witness for the Commonwealth, and having been duly sworn, took his seat in the witness chair, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:

Q. State your name, please.

A. John C. Stutz.

Q. Where do you live, Mr. Stutz?

A. 45 Carlin Place.

The Court: At any time the jurors cannot hear, let us know and we will have the witnesses speak up. Do you have difficulty in hearing?

page 11]

A Juror: Yes.

The Court: Do you want to move down in the corner seat?
A Juror: I would like to. Thank you.

By Mr. Horan:
Q. What is your occupation, Mr. Stutz?
A. I am retired from the United States Army.
Q. Directing your attention to April 7, 1965, did you have any temporary employment on that date?
A. Yes, sir.
Q. What was that employment?
A. I was night clerk at the Traveler's Motel located on Richmond Highway.
Q. Is that a motel located in Fairfax County?
A. Yes, sir.
Q. Directing your attention specifically to April 7, 1965, tell the jury what time you went on duty on that day?
A. At midnight.
Q. What were your duties in the motel?
A. To rent rooms.
Q. Was there any other employee at the Traveler's Motel on duty on that night?
A. No, sir.
Q. Tell the jury what time you arrived on that evening?
page 12] A. About ten minutes to twelve.
Q. What did you do when you first arrived on that evening?
A. Well, checking the rooms, and they had quite a few vacancies. I checked the money in the cash box which amounted to approximately $75 or $76.
Q. Where was that cash box located?
A. It is located in the center drawer beneath the desk, registration desk.
Q. In what kind of room?
A. It is in the office of the motel.
Q. And how many rooms are there to the office of the motel?
A. Just one.
Q. And in the course of your duties, do you use that room or do you use other rooms in the motel?
A. No, sir. I remain there most of the night. Except when I go in the back. Then I lock the front office door.

John C. Stutz

Q. Who is the owner of the Traveler's Motel?
A. Mr. Kenneth Blunt.

Mr. Gilliam: Your Honor, I object to that testimony as being hearsay on his part of what Mr. Blunt had told him.
The Court: Objection sustained.
Mr. Horan: Your Honor, on the question, I believe the witness can say who employs him.
The Court: Ask him that.

page 13] By Mr. Horan:
Q. Who is your employer?
A. Kenneth Blunt.
Q. How long had you been employed by him on that date?
A. Approximately two weeks at that time. From the 17th of March.
Q. Do you know of your personal knewledge whether or not the motel is owned by a partnership or corporation?

Mr. Gilliam: Objected to as calling for a conclusion of law; also, as being hearsay as to where he got the knowledge.
The Court: Objection sustained.
Mr. Horan: Your Honor, please, I prefaced the question if you know of your own personal knowledge who owns the motel. I believe he can testify to that if he knows personally.
Mr. Gilliam: Somebody would have had to have told him.
Mr. Horan: Your Honor, I think in the course of human —
Mr. Gilliam: Your Honor, if he wants to argue this, I suggest it be outside of the jury.
The Court: I have ruled on the objection.

By Mr. Horan:
Q. On this particular evening, did you immediately go on duty when you arrived?
A. Yes, sir.
page 14] Q. Did there come a time when anything unusual occurred during your course of duty?
A. Yes, sir.
Q. What time would that be?
A. Approximately 5:15 in the morning.
Q. And would you tell the jury when you first became aware

that something unusual was occurring?

A. Well, at the time of the morning around 4:30 or 5:00 o'clock —

Mr. Gilliam: Your Honor, that is not the question. The question was when he first became aware of it. That calls for a specific answer.

The Court: Objection overruled.

By Mr. Horan:

Q. Tell the jury what occurred.

A. I usually sweep and mop the floor of the front office at that time of the morning. When I was finished with it, I usually leave the front door, screen door, open, so the floor will dry. I finished. After about ten or fifteen minutes it had been open and I had closed it and was walking over towards the desk and I turned around and I seen two men approaching the motel office.

Q. Can you describe those men?

A. They were two colored men, two Negro men.

Q. Describe them as to size.

page 15] A. Both approximately 5 foot, 9 inches tall.

Q. Do you see either one of those men in this courtroom?

A. Yes, sir.

Q. Would you point to either one of those men?

Mr. Gilliam: I don't think the question is proper, to allow him to state he has seen a certain individual at the time. That question is not proper. There may have been subsequent things that happened. He pointed in this defendant's direction. Does he have recognition from the facts of what he saw the night in question? I think he has got to be more specific than that.

The Court: Objection overruled.

Mr. Gilliam: Well, note an exception.

By Mr. Horan:

Q. Do you see either one of those men in this courtroom?

A. Yes.

Q. Would you point him out?

A. This man sitting here.

John C. Stutz

Mr. Horan: Let the record show he indicated the defendant.

By Mr. Horan:

Q. Now, what did the two men do when they first entered the motel?

Mr. Gilliam: Your Honor, I object as irrelevant, the fact it is being directed to the defendant.

The Court: Overruled.

page 16] Mr. Gilliam: Note an exception.

By Mr. Horan:

Q. Now, what did the two men do when they first entered the motel?

A. The first man told me they had come down from New York and they had got off Route 95.

The Court: I think you should identify who the first man is.

By Mr. Horan:

Q. When you refer to the first man you are referring to this defendant?

A. No, sir. The other man asked for instructions.

Q. Was this man present?

Mr. Gilliam: I object to that as hearsay; what the other man said at that particular time.

Mr. Horan: Your Honor, please, I don't think is would be hearsay if this defendant was present and acting in concert with the other one.

The Court: I don't know whether the defendant as a possible charge of principal or principal in the second degree, if they acted in concert.

Mr. Gilliam: I haven't heard any evidence of that.

The Court: I don't know the connection. Objection overruled.

Mr. Gilliam: Note my objection.

page 17] By Mr. Horan:

Q. Did the two men come into the motel together?

A. Yes, sir.
Q. How close together at that time?
A. Right behind the one.
Q. Where were you located at that time?
A. Standing behind the desk, registration desk.
Q. How big is the particular room in which you were?
A. About 15 by 10.
Q. Was it light out at this particular time of the morning?
A. No, sir, still dark.
Q. Was the room lighted at all?
A. Yes, sir.
Q. How was the room lighted?
A. Well, we have a desk lamp that sets on one end of the counter with four bulbs in it. At night we only leave one bulb on. I think it is a 75-watt.

Mr. Gilliam: Your Honor, I object to the testimony as to the wattage, what he says he thinks it is.

By Mr. Horan:
Q. Can you describe *itas* bright or dim?
A. Well, it wasn't bright.
Q. Are persons in the room visible to you, can you see them?
A. Yes, sir.
page 18] Q. Can you see them clear?

Mr. Gilliam: Objected to as leading.
The Court: Objection sustained.
Mr. Gilliam: Move to strike the answer.
The Court: There was only one. It was the last question asked. The jury will disregard both it and the answer.

By Mr. Horan:
Q. As they came into that room how close did they approach to you?
A. Well, the first man asked instructions —

The Court: I will have to ask the witness not to refer to the man as the first man. Either it is this defendant or the

other man. The first man doesn't mean anything to us. Call him something other than the first man. Say either this man or his companion.

A. This man's companion asked instructions. He was standing at the desk closest to me. This — the defendant here, was standing over near the door.

By Mr. Horan:

Q. How far would that have been from you?

A. About six feet, approximately.

Q. Now, what did the defendant's companion say to you, if anything?

A. He said that they were from New York and were coming down Route *97*. They had got off it and they
page 19] wanted to know how to get back on Route *97*.

Q. Then what happened?

A. Well, I began to tell them how to get back on there but it didn't seem to be getting across to them. He didn't say anything to me, so I suggested we go outside and I could show them how to get back on the Beltway. It was only a thousand yards from there and I thought I could tell them better. As I came out from behind the desk this man's companion stuck a revolver in my stomach and told me to back up.

Mr. Gilliam: Your Honor, I object to testimony about a revolver. I think it is a conclusion not based upon facts. That is his opinion. I don't think he could testify absolutely it was a revolver.

The Court: Objection overruled.

Mr. Gilliam: Note my exception.

By Mr. Horan:

Q. Can you characterize the kind of weapon?

A. It was a 38 caliber revolver.

Q. What color?

A. When he stuck it in my stomach, I just glanced down at it. It was dark-colored.

Q. What did he say at that time?

A. He told me to back up. I was partially out from behind the desk, out in the center of the room. He backed me up

into the hallway directly through the door behind the desk.

page 20] Q. Where was the gun at this time?

A. In my back.

Q. Where was the defendant at that time, if you know?

A. He was going through the drawers of the desk.

Mr. Gilliam: Your Honor, he has already testified he had his back to what was happening.

By Mr. Horan:

Q. Could you tell where the defendant was at that time?

A. When I was taken into the vestibule, the other man had the gun in my back. We were facing this direction. The desk was here. Every once in a while I would glance over my shoulder. He didn't say anything to me, just kept shoving the gun in my back.

Q. What was the defendant doing at the time?

A. He was trying to open one of the drawers. It was locked. It had the cash box in it. But he was unsuccessful.

Q. What else did he do, did he do anything else back there?

A. Well, he kept searching. I could hear him opening and closing some drawers. The next time I glanced over, he had the cigar box under his arm.

Q. Could you identify that cigar box?

A. Other than it was a cigar box that was kept in the drawer. They collected telephone call money from the tenants when they checked out. It was the only cigar box in the place.

page 21] Q. What was the defendant's companion doing at this whole time?

A. Holding me at the point of the gun in the hallway.

Q. Were you concerned at all at the time?

A. I most certainly was.

Mr. Gilliam: Your Honor, that's a leading question. I move to strike.

The Court: Overruled.

By Mr. Horan:

Q. Were you concerned at this time at all?

John C. Stutz

A. Yes, sir. I was. With a gun in my back anybody would be.

Q. Would you tell the jury what in the way of money or other valuables might have been in the area behind the desk you described the defendant having occupied at this time?

Mr. Gilliam: That's not what we're trying, what was taken by the defendant. It is alleged he did take $75 and $71.

The Court: Overruled.

Mr. Gilliam: Note my exception.

By Mr. Horan:

Q. What was back there?

A. Well, every night when I come on there I usually took my wallet out and placed it on the shelf underneath the desk, because my hip pocket had been sewed up by my wife and the wallet didn't fit all the way down. Whenever I page 22] sat down the wallet would come out, so I used to put it under there.

Q. Was your wallet there this particular night?

A. Yes, sir.

Q. Can you tell the jury how much money was in that wallet?

A. $75 even.

Q. How do you know that?

A. Because I had got paid on the first, drew a payment of $83 and some cents and had only spent a few dollars.

Q. When was the last time you saw that wallet?

A. When I put it under there around midnight.

Q. Was there $75 in there at that time?

A. Yes, sir.

Q. What other money was in there behind that counter?

A. There's a cash drawer in the registration desk. There's a wooden tray you put the change in and four drawers there you put different denomination bills in.

Q. Had you counted the money in that drawer?

A. I counted the bills but I didn't count the change.

Q. How much was there in bills?

A. As for as I can remember, either $75 or $76 in *vills.*

Mr. Gilliam: Your Honor, just one thing. We are hearing

testimony now about the cash drawer and testimony about the cigar box. Now he's not alleged if th emoney *He's* alleged to have stolen was money out of the cash drawer. I object to anything about the cigar box, then. I move to
page 23] strike all the testimony dealing with the cigar box. He hasn't testified about the money in the cigar box and if that's the way it stands, what is in the cigar box is irrelevant to the charge.

The Court: Overruled.

Mr. Gilliam: Exception.

By Mr. Horan:

Q. Can you estimate how much change was in the drawer?

A. No, because I didn't count it.

Q. Was there any money in the cigar box itself?

A. Yes. Always some in there.

Q. Had you looked into the cigar box?

A. Yes. I looked in it.

Q. Can you estimate how much money was in there?

A. No, sir, because I never counted it.

Q. Did you look in there that particular evening?

A. Yes, sir.

Q. Was there money in there at that time?

A. Yes, sir, there was.

Q. Did there seem to be a great deal of money in there?

A. Didn't seem to me to be too much. Maybe $5 or $6.

Q. Whose money was in the cigar box and the cash drawer?

Mr. Gilliam: Your Honor, I object to that question. I think he's getting back to the same issue. It seems to me that money may have belonged to who the owner of the motel was. In order to be able to testify to that, he's got to
page 24] know who the owner of the motel was. You already sustained the objection this man could only prove that by hearsay.

The Court: Objection overruled.

By Mr. Horan:

Q. Whose money was in the cash box and the cigar box?

A. It belongs to the owner of the motel.

John C. Stutz

Mr. Gilliam: Objection and move to strike the answer. He started to give the name and the court said if it was his employer's name to say it was.

The Court: Objection overruled.

Mr. Gilliam: Note my exception.

By Mr. Horan:

Q. Was any of your money either in the cash box or the cigar box?

A. No, sir.

Q. Now, did there come a time when the defendant and his companion left?

A. Yes, sir.

Q. Tell the jury what occurred just prior to the time they left?

A. The man that had the gun in my back —

Q. That's the defendant's companion?

A. That's the defendant's companion. He kept telling him to hurry up and he kept saying, "Did you get the money, did you get the money?" Finally he said "Yeah, I got page 25] it." The man with the gun in my back said "Should I shoot him." And the other guy said "No, let's get out of here."

Q. What occurred then?

A. He had me by the back of my shirt and shoved me up the stairs up to the owner's office. When we got up to the top of the stairs *hesaid,* "I got a better idea," and he raced me back down the stairs again. At the foot of the stairs there is a door going down to the basement. He told me to open the door and I did and he shoved me down there head first.

Q. Did he leave the door open at that time?

A. No, sir, he pushed the door shut after me.

Mr. Gilliam: Your Honor, at this time I move the Court to instrutct the jury that testimony of this *naturecannot* be used against the defendant. It appears to me whoever was there, this force and violence used to effect escape was not in connection with the robbery. I move the Court to instruct the jury as to its use.

The Court: I think the jury will be instructed at the proper time what use it will be put to. There are circumstances in

which it can be used against him, in my opinion. I will not instruct them at this time in this regard.

Mr. Gilliam: Exception.

By Mr. Horan:

Q. What did he do after he put you in the basement, the defendant, or what did he do after he put you in the basement?

page 26] A. I couldn't see. I was down in the basement.

Q. How long did you remain down in the basement?

A. Well, I sat down there about a minute. I was kind of dazed. And I listened and I couldn't hear any sounds of them leaving the office or anything. I had only been down in the basement once before and I forgot at the time there was a basement door leading to the outside. There was no light on down there and I didn't know where the light switch was. Finally, I stumbled around and I found the door and opened it. It leads out into the back road behind the motel. I went through there. There is a service station next door to it which I had to pass through coming around out on Route 1 to come in the front entrance of the motel into the office and there was no sign of the two men around at that time.

Q. What did you do at that time?

A. First thing I did was look in the drawer where the cash box was kept and it was still locked, so I knew they didn't get anything out of there. I checked the cash box which was still in the drawer but the bills were gone and I knew he had the cigar box under his arm when I looked at him one time and I checked that drawer and the cigar box was gone. And I called the police and notified them of the robbery and how many men were involved.

Q. Now, Mr. Stutz, between midnight when you came on duty and the time of this occurrence, had any-

page 27] one else come into the office of the motel?

A. No, sir. Not to my knowledge.

Q. Would you have known if anyone came in?

Mr. Gilliam: Your Honor, he's leading the witness again, asking him and leading him right into the answer he wants.

The Court: Objection overruled.

John C. Stutz

By Mr. Horan:

Q. Would you have known if anyone else came in?

A. Well, when I have occasion to go into the back linen room and at night I have to wrap glasses in paper for customers back there, and there's a coke machine I have to fill up. I lock the door, the office door. There's two locks on it, lock on the screen door. No way possible anybody could get in there without breaking the door.

Q. Was that door ever unlocked between midnight and the time you opened it to clean, was it ever unlocked?

A. No, sir.

Q. Did there come a time when you found your wallet?

A. Well, after the police had arrived there and I made statements to them, or, after I had called the police, I had called the owner and he said he would be right down, and it was about five minutes after eight when I left the motel. I live about two miles down the road on Route 1. When I got home I discovered I didn't have my wallet with me, so I called the motel and asked the lady employed daytime to look under the desk shelf to see if my wallet was there. She said it was not there.

page 28] Mr. Gilliam: Objection to that as hearsay.
The Court: Sustained.

By Mr. Horan:

Q. Did you come back to the motel to find your wallet?

A. I came back there and searched the office and searched the area outside there.

Q. Did you find your wallet?

A. No, sir, I didn't.

Q. Where was the wallet with relation to the cash drawer and cigar box?

A. About two feet to the right on the desk shelf. Underneath the desk.

Mr. Horan: I have no further questions.

CROSS EXAMINATION

By Mr. Gilliam:

Q. Mr. Stutz, is it your testimony now that there are three places they keep money in this motel?

A. The motel's money?

Q. No, not the motel's money. You said, you have been testifying about a cigar box and you testified about a cash drawer and you testified about something other than a cash drawer or cigar box, haven't you?

A. Yes, sir.

Q. What was that?

A. My wallet.

page 29] Q. And something else besides the cash box?

A. Yes, sir.

Q. So is there a cash drawer there?

A. Yes, sir.

Q. And a cash box?

A. Yes, sir.

Q. And that's different from the cash drawer?

A. Yes, sir.

Q. And then there was a cigar box?

A. Yes, sir.

Q. And then there was your wallet?

A. Yes, sir.

Q. So, four different places right now. What time did you go on duty?

A. About ten minutes to midnight.

Q. What is the first thing you did?

A. I counted the bills in the cash drawer.

Q. How many were there?

A. Approximately $75, $76.

Q. Approximately $75 or $76. Don't you know which?

A. $75.

Q. Why did you say $76 before, then, Mr. Stutz?

A. Because you asked me for a specific answer.

Q. Well, I did ask you and you said $75 or $76. Now I asked you don't you know, and you said $75.

page 30] Mr. Horan: I object to that line of questioning, Your Honor.

The Court: Overruled.

By Mr. Gilliam:

Q. Why did you say $75 or $76 one time and now you say $75, Mr. Stutz? Do you want to change your answer and just say there was some money there?

John C. Stutz

A. No. I did count it.

Q. You did count it and what was that count, exactly $75?

A. It was approximately $75 or $76. I don't recall right off.

Q. You don't know which?

A. No, sir.

Q. So if you said $75 you would be guessing?

A. I guess you could say that.

Q. If you said $76, you would be guessing, wouldn't you?

A. Yes.

Q. So what you mean to tell the jury is you counted the money and there was some money there but you are not sure of the exact amount, is that correct?

A. I know there was over $70.

Q. Something over $70?

A. Yes.

Q. Could it have been $71 or $72, $73, $74, $75, anything over $70?

page 31] A. Yes, sir.

Q. That's the approximate figure?

A. Yes, sir.

Q. And you are just guessing at that figure? Wouldn't you rather change your answer, Mr. Stutz, and say "there was some money there but I am not sure how much" because you have given us three different figures, Mr. Stutz.

A. All I can tell you, I know there was over $70 there. As I said before, it was either $75 or $76.

Q. Now, that was something over $70 in the cash drawer, is that right, is that your testimony?

A. Yes.

Q. Now, how much money was in the cash box?

A. I don't know.

Q. You don't know how much money was in the cash box?

A. No, sir, because I didn't count it. It's in a locked drawer. All I know is there was a cash box in there with money in it.

Q. You say all you know is there was a cash box in a locked drawer with money in it?

A. That's what I have been told. I didn't see it.

Q. Are you telling us you were told that?

A. I said I wasn't told how much money it was in the cash box.

John C. Stutz

Q. You testified there was money in it because
page 32] somebody *somebody* told you that?
A. Well, the man that I relieved, he puts all the excess money in there.
Q. Just answer my question.

Mr. Horan: I object. He answered that question. He said somebody told him. The witness answered that somebody had told him. I don't think he can argue with the witness.

By Mr. Gilliam:
Q. So somebody told you, is that your answer?
A. Yes, sir.
Q. You didn't check that money yourself?
A. No, sir. It's locked.
Q. The only basis you have for testifying there was money in this particular box was somebody told you?
A. Yes, sir.

Mr. Gilliam: Your Honor, at this time I move to exclude that evidence of being any money in that box as hearsay.
The Court: Objection overruled.

By Mr. Gilliam:
Q. So you are saying no money was taken from the cash box?
A. No, sir.
Q. Now, we have got the cash drawer and the cash box. Now, this cigar box you referred to, did that have a hole in the top of it, or what?
A. No, sir.
page 33] Q. Just a flat-top cigar box?
A. Yes, sir.
Q. You say that was telephone money?
A. Yes, sir. Money they collect from the guests for personal phone calls.
Q. When the last man left, the man you relieved, did he tell you there was money in the cigar box?
A. I looked in the cigar box.
Q. How much was in there?
A. I didn't count it.
Q. Did you make an examination, Mr. Stutz, of the cur-

rency, was it in fact good and lawful currency of the United States of America or was it something other than good and lawful currency of the United States of America, are you an expert in the field of good and lawful currency of the United States of America?

A. (No response.)

Q. Would you answer the last question, please? Are you an expert in determining whether or not the money in the cash box or any money, in fact, was good American money?

A. It's my knowledge —

Q. I said are you an expert, Mr. Stutz?

A. No, sir.

Q. You didn't make an examination, did you, to determine whether or not this was something other than that, did you?

A. No, sir.

page 34] Q. Mr. Stutz, I am going to ask you if you testified at the preliminary hearing that there was only one lamp lit in this particular motel room you described?

A. Yes, sir.

Q. Didn't you testify at that time, Mr. Stutz, that there were four 25-watt bulbs in that lamp?

A. No, sir, I did not.

Q. Did you testify as to the wattage?

A. I testified one bulb was on.

Q. One bulb was burning?

A. Yes, sir.

Q. You said on direct examination you thought it was a 75-watt bulb?

A. Yes, sir.

Q. Do you know for sure it was a 75-watt bulb?

A. No, sir.

Q. So it could have been a 25-watt bulb?

A. I don't believe so.

Q. You don't know for sure what the wattage was?

A. No, sir.

Q. Now, was that the only light on in the room?

A. Yes, sir.

Q. Now, the man that you testified, without the gun, how was he dressed?

A. He was dressed in a black suit with a black hat.

page 35] Q. Did you say he had a black suit on?

A. Yes, sir.

Q. A black hat?

A. Yes, sir.

Q. What else did he have on?

A. Necktie, shirt.

Q. What color was the necktie?

A. I don't know. I think it was a dark color of some kind.

Q. Dark blue? Dark brown?

A. I couldn't say what color.

Q. What color was it like?

A. It wasn't a light-colored necktie.

Q. Didn't you tell the police officer, Mr. Stutz, that the man who came into the place of business there had on sun glasses?

A. No, sir.

Q. Did they have on sun glasses?

A. No, sir.

Q. Didn't have on any glasses?

A. No glasses.

Q. What kind of glasses did they have on?

A. They didn't have any glasses on.

Q. They didn't have any glasses on, are you sure of that?

A. Yes, sir.

page 36] Q. Did you tell one of the investigating officers that the man who came into your place, at least one of the men, the man you identified as the defendant right now, had on sun glasses?

A. No, sir.

Mr. Horan: I object unless he lays a foundation. He doesn't tie it down to a time or place or what police officer. I think he must do that if he wants to lay a foundation.

The Court: That is correct, Mr. Gilliam.

By Mr. Gilliam:

Q. Mr. Stutz, you said a Fairfax County Police Detective came out pursuant to your call, is that right?

A. Yes, sir.

John C. Stutz

Q. Did you say you gave him a statement?

A. Yes, sir.

Q. At that time did you tell him that the men were, at least, the man you have identified as the defendant now, had on sun glasses?

A. No, sir, I did not.

Q. Did you say he had on glasses?

A. No, sir, I did not.

Q. Did he, in fact, have on glasses?

A. No, he did not.

Q. Now, there was one light in this room. Where is the light?

A. It's on the center of the desk *nextto* the window to the right.

page 37] Q. Now you say there is a door behind the counter?

A. Yes, sir.

Q. Is that directly behind the counter or offset or what?

A. It's right at the end of the counter.

Q. Where is the cash box, where is the cash box and the cash drawer, where was the cash box with reference to where you were standing?

A. The cash box was in the drawer at the end of the desk next to the switchboard.

Q. Is that on the end opposite to where the door was you said you went into?

A. The door is like here and the switchboard and the box at the far end.

Q. It would be at the far end away from the door?

A. Yes, sir.

Q. Now, you say you had your back —

A. I was standing sideways in the doorway.

Q. Which way were you facing?

A. Facing that door that goes down into the basement.

Q. Which direction is that door to the opposite end of the counter where the door is?

A. On the other end.

Q. What I am getting at, assuming this was the counter right here, the counsel table, and this is the area where the door is, where you were, understand? Now, this

page 38] is the end where you said the money was, is that right?

John C. Stutz

A. Yes.
Q. Which way were you facing here?
A. This way.
Q. You were looking this way?
A. This way.
Q. Away from this area here?
A. Yes, sir.
Q. Now, is there a partition along here?
A. The desk.
Q. The desk, you mean something other than the counter out here?
A. Well, the desk, what we call the desk, registration desk.
Q. Behind that isn't there a partition that runs over here?
A. The registration desk is here and a wall behind it and the door is here.
Q. The wall, then, comes along like this here by the door, right?
A. Yes.
Q. You were in here, inside?
A. Yes, sir.
Q. So if you look back in this direction you have a partition?
A. There is no partition there at all.
page 39] Q. Well, a wall?
A. Yes, sir.
Q. Is that wall all the way up to the ceiling?
A. Yes.
Q. Now, Mr. Stutz, you testified that after you were placed in the basement that you went out through the basement door?
A. Yes, sir.
Q. You went around through a gas station?
A. Yes, sir.
Q. And came back in the front door?
A. Yes, sir.
Q. And you checked at that time and found that the cash box was still there, is that right?
A. The drawer that it was in was locked.
Q. I understood your testimoney to be, Mr. Stutz, that you didn't make a search at that time for your wallet?
A. No, sir.
Q. Now, about what time was this?

John C. Stutz

A. They came in the office at approximately 5:15 and by the time I called the police it was all over with. I believe in about 12 or 15 minutes, the whole thing lasted.

Q. Did the police respond to your call?

A. Yes.

Q. And the police came in then and thoroughly

page 40] went over the premises?

A. No, sir.

Q. They did not?

A. No, sir.

Q. What did they do at that time?

A. They stood on the outside and talked, asked me what happened and I made a statement to them.

Q. How many policemen were there?

A. Two.

Q. They didn't come around and look and see what happened?

A. No, sir.

Q. They didn't?

A. No, sir.

Q. What did you do?

A. After they had left the owner hadn't got there. I called him again and asked him to come down there.

Q. Then you went on home?

A. Yes, sir.

Q. What time did you arrive at your home?

A. About ten minutes after eight.

Q. Were there people in and out during that period of time from 5:30 until 10 minutes after 8:00?

A. Two people.

Q. Two people?

A. Detective Wayland had been there after the police officers left and before I left.

page 41] Q. Detective Wayland was?

A. Yes.

Q. Did he make an investigation of the premises?

A. Yes, sir.

Q. He made a further search around?

A. Yes, sir.

Q. And after Detective Wayland came there, did you leave immediately or what?

A. No, I had to wait until my relief got there, Mrs. Kirby.

Q. So only three people were there, then, until you left, were the two police officers, Detective Wayland, and then Mrs. Kirby arrived?

A. Yes.

Q. Then you left and went home?

A. Yes.

Q. At this time you still hadn't made a look for your wallet?

A. No, sir.

Q. Then you got home and you missed your wallet?

A. Yes, sir.

Q. Did there come a time when you went to the motel to look for it?

A. Yes, sir.

Q. What time was that?

page 42] A. Well, as I testified before, I called the motel.

Q. I didn't ask you that, Mr. Stutz. I am asking when you went to the motel to look for it.

A. Yes, sir.

Q. And what time was that?

A. About 8:30 it was, when I returned to the motel.

Q. You got there at 8:30?

A. About 8:30.

Q. What time had you left?

A. Five after, ten after.

Q. Ten after what?

A. Eight.

Q. Mr. Stutz, I want to get a couple of things straight. You said it was dark at the time this occurred?

A. Yes, sir. It was 5:15.

Q. And that the lighting in the room you characterized as being not bright, is that correct?

A. That's right.

Q. Now, which of the two men were you more interested in, more concerned with?

A. The man that had the gun on me.

Q. The man that had the gun?

A. Yes, sir.

Q. Now, you said he originally put the gun in your stomach,

is that what you're saying?

page 43] A. When he told me to back up.

Q. Did he push you back to wherever you were going?

A. Into that little hallway.

Q. Did he have to open this door?

A. No, sir, it was already open.

Q. Did you go through it?

A. Yes, sir.

Q. How far through the door did you go?

A. Well, there is a very small vestibule inside there. You can only go so far.

Q. How far?

A. Ten or twelve inches.

Q. That's all the bigger the vestibule is?

A. Yes, sir. A staircase goes upstairs and a small one goes down into the basement.

Q. It must be at least as big as the staircase?

A. I only went halfway into the hallway.

Q. You went halfway into the hallway?

A. Yes.

Q. On direct examination, Mr. Stutz, didn't you say that you just glanced down and you saw what you described as a gun and you said it was dark?

A. Yes, sir.

Q. And then you were immediately turned around, weren't you?

page 44] A. Yes, sir.

Q. So you couldn't see what was in your back?

A. No, sir.

Q. Is it true you just glanced down?

A. Yes, sir. Because he kept prodding me with it to my back.

Q. So you had just a momentary view of whatever that was?

A. Yes, sir.

Q. Now, what day did this take place on?

A. April 7.

Q. In the A. M.?

A. A. M.

Q. Now, did you have any fear, Mr. Stutz, of losing your

property?

A. Not my property.

Q. What time, did there come a time subsequent when you were called upon, later called by certain Fairfax County police officers with reference to this case?

A. Yes, sir.

Q. Do you remember that day?

A. No, sir.

Q. You do not?

A. I don't recall what date it was.

Q. Tell us what the purpose of that call was.

A. To make a statement.

page 45] Q. To make another statement?

A. Yes, sir.

Q. You had only made one statement?

A. He didn't write anything down. I just told him what happened that night.

Q. Did you make a written statement?

A. Yes.

Q. So there is, in fact, a written statement made by you and signed by you?

A. Yes, sir.

Q. As to what transpired on this particular night?

A. Yes, sir.

Q. Do you have a copy of that written statement?

A. No, sir.

Q. Who has it?

A. I don't know.

Q. Who took it?

A. Stenographer.

Q. A stenographer? Where was it taken?

A. Fairfax County Police Station.

Q. What police officers were present when it was taken?

A. Detective Wayland.

Q. Is that Robert Wayland?

A. I don't know what his first name is.

Q. Is that all that transpired on that date?

page 46] A. Yes, sir.

Q. Were you subsequently contacted by the police?

A. Yes, sir.

John C. Stutz

Q. You remember that day?
A. I don't remember what day it was or the date.
Q. What was the purpose of that call?
A. To view some suspects in a line-up.
Q. Who told you this? Who were you dealing with in this particular case?
A. Detective Wayland.
Q. What did he tell you that he wanted you to do?
A. Well, he said, "I have five men in the line-up in here and I want to see if you can pick out the two men that were in the offce the night of the hold-up.
Q. Did he tell you the two men were in the line-up?
A. No, sir.
Q. He did not?
A. No, sir.
Q. Were you led to believe the two men who you were to pick out were in the line-up?
A. No, sir.
Q. Did he tell you where he got these two men?
A. No, sir.
Q. Did you view some other men?
A. There was five altogether.
page 47] Q. Five men altogether?
A. Yes, sir.
Q. And you were the only one at the police line-up?
A. Yes, sir.
Q. How is that conducted?
A. Well, I was taken into this room and these five men were standing up on a platform.
Q. How was it lighted?
A. There were lights behind it.
Q. Well lighted?
A. Not bright.
Q. Wasn't brightly lighted?
A. I would say medium lighted.
Q. Did you have any trouble with your eyesight?
A. I used reading glasses for reading.
Q. Is your vision corrected?
A. By glasses.
Q. Did you have on glasses?
A. No, sir.

John C. Stutz

Q. Did you have on glasses at the time of the line-up?
A. No, sir.
Q. Now, you say that there was a platform?
A. Yes, sir.
Q. And on that platform were there heights of the men, and so *fort*?
page 48] A. Yes, sir. Lines behind them denoting the height.
Q. How tall was this defendant?
A. I don't recall what height was behind him.
Q. You testified the man who robbed you was five foot, nine?
A. Approximately five foot, nine, nine and a half.
Q. Approximately five foot nine, nine and a half? Now, isn't it true that one of the ways that you have recollected what the height was of the man, this particular man, you testified he is five, nine and a half, didn't you?
A. Approximately.
Q. And you got this height from what you saw on the lines at the line-up, didn't you?
A. I guess so.
Q. Now, go ahead and tell us a little bit more about how this line-up is conducted. Did they conduct the five men out from somewhere one at a time?
A. They were all standing on the platform when I entered the room.
Q. When you got there?
A. Yes, sir.
Q. Did you go there with Detective Wayland?
A. Yes, sir.
Q. You knew he had some suspects for your robbery, is that right?
page 49] *that right?*
A. That's what he told me.
Q. And he wanted you to view the suspects?
A. Yes, sir.
Q. Had he told you that?
A. Yes, sir.
Q. Now, where was Detective Wayland when this line-up was taking place?

A. He was standing to the rear of me in the back of the room.

Q. Were you communicating at all with him?

A. No, sir.

Q. You didn't say anything at all to him?

A. No.

Q. What did he say to you?

A. He said they had five suspects in there today. There would be no names used, anything, they would be numbered one through five from left to right, and if I could *identifyany* of the men there to remember what number they were in the line-up.

Q. Didn't he ask you, Mr. Stutz, to have the men step forward?

A. I believe he told them to step forward. He told them to step forward?

A. Yes. One time. And then he told them to step backward.

page 50] Q. What do they do when they step forward?

A. When they stepped forward it seemed like they were in more darkened light.

Q. Didn't they give you all the different views of their body?

A. Yes, I think they did. Then turned either left or right in profile.

Q. Isn't it true you picked somebody out who stepped forward?

A. Yes, sir.

Q. Did you pick the defendant out when he stepped forward?

A. Yes, sir.

Q. Who was the first man you picked out?

A. This man here.

Q. How did you do this, did you say, "That's him*A*"

A. No.

Q. Did you ever pick out the second man who was supposed to have been with this man?

A. Yes.

Q. When did you pick him?

A. Same time.

Q. Which did you pick first?

John C. Stutz

A. This man here.

Q. Then you picked the second man?

page 51] A. Yes.

Q. You didn't have any trouble at all?

A. Detective Wayland had them move forward and had them move back and your profile view, and then had them face forward again.

Q. Isn't it true that you were puzzled?

A. Well, I wanted to make sure.

Q. Isn't it also true you picked out a man in this particular line-up?

A. I don't know. I just picked out two.

Q. You didn't pick out a man who was incarcerated for drunkenness?

A. No, I don't know. I picked two men by number and told Detective Wayland and that was it.

Q. You're sure that's what happened?

A. Yes, sir.

Q. What did the other man look like in the line-up?

A. He was about the same size as this man here.

Q. The same size as this man here?

A. Approximately.

Q. Same height?

A. Yes, sir.

Q. So they were all approximately five, nine, five, nine and a half?

A. Yes, sir.

page 52] Q. What where the weights of the other men?

A. Well, I judged his weight when I made the statement, on what I weigh. I weigh 170 pounds. When I first made the statement to the police, I figured he was about 150, 155 pounds.

Q. You figured the man who didn't have the gun was approximately 150 to 155 pounds?

A. Yes, sir.

Q. And that was at the time you gave the statement?

A. Yes, sir.

Q. And that was closer in period of time than your statement of today as to weight, isn't that correct?

A. It might have been a better estimate. I don' know. I was basing it on how much I weigh.

John C. Stutz

Q. But your estimate or recollection was closer in period of time when you made that statement or closer in period of time than the one you have given us today?

A. Yes, sir.

Q. What was the one you have given us today?

A. I don't know. I don't think I even gave any testimony. If I did, I don't recall it.

The Court: I didn't think he had testified to that.

Mr. Gilliam: I thought he had.

The Witness: I don't recall.

By Mr. Gilliam:

Q. Let me ask you this, then, the man who didn't have the gun, you described as five, nine, or five, nine and a half.

page 53] A. Yes.

Q. And you got this estimation of height based on the marks behind this man in the line-up?

A. Yes, sir.

Q. And his weight was a statement you gave the police was the man weighed 150 to 155 pounds?

A. Yes, sir.

Q. Mr. Stutz, who did the talking when these people came in asked directions?

A. This man's companion.

Q. Now, what did this, who do you refer to as the first man, what did he ask you, I mean?

A. He said they were from New York. They were coming down Route 95 and coming through Alexandria they got off it and they wanted directions about how to get back on Route 95.

Q. Did he appear sincere in this?

A. Yes, sir.

Q. Did he give any indication that anything else was afoot?

A. No, sir. I was the most surprised person in the world.

Q. How about the second man?

A. He didn't say anything to me.

Q. He didn't say anything to you?

A. No, sir.

Q. So your attention primarily was directed to whom you

refer to as the first man?

page 54] A. He was the one I was talking to and looking at.

Q. Now, isn't it true, Mr. Stutz, that four men have been charged with commission of this crime?

A. I don't know, sir.

Q. You don't know that?

A. No, sir.

Q. Weren't you called to testify in four different cases?

Mr. Horan: I am going to object to this line of questioning, Your Honor. He has already said he didn't know.

The Court: Objection overruled.

By Mr. Gilliam:

Q. Isn't that true, there were four different warrants issued for four different people for this crime?

A. There might have been, but I don't know anything about it.

Q. Now, did you get the request of the man, other than the man that had the gun, you said you were surprised at what transpired when you walked to the door with the man, did you get the request of the other man? How is it you didn't?

A. I only got as far as the counter. His companion shoved the gun in my stomach and backed me up in the hallway. I wasn't even looking at him.

Q. You say you weren't even looking at the other man?

A. No.

Q. Which man was the closest to the man you testified to?

A. This man.

page 55] Q. This man was closest to the lamp?

A. Yes.

Q. At what time?

A. When he first came in.

Q. You weren't paying any attention to him at that time, were you?

A. When they came in I glanced at both of them. But he stayed over by the door.

Q. Was that the entrance door?

A. Yes, sir.

Q. Is the entrance door in the middle of the room or to one side?

A. Well, it has a funny-shaped front on it, comes out like this, sort of half rectangular shape.

Q. When you put the drawer down here, money down here, where would the entrance door be?

A. Right directly behind him.

Q. Where was this lamp you refer to?

A. Right in front of you, on top of the desk.

Q. This man you have identified as the defendant was back here?

A. Yes.

Q. Where were you?

A. I was standing in the center of the desk.

Q. Where was the other man?

page 56] A. He was standing here at the other end.

Q. At that end down there?

A. Yes.

Q. And you were talking to him?

A. Mostly.

Q. Was he to your left?

A. To my left, yes.

Q. To you left?

A. Yes, sir.

Mr. Gilliam: That's all I have, Your Honor.

REDIRECT EXAMINATION

By Mr. Horan:

Q. Mr. Stutz, is there any doubt in your mind as to what the defendant's companion was prodding you in the stomach with?

A. No, there's no doubt in my mind what it was.

Q. What was it?

Mr. Gilliam: Your Honor, I think that calls for a conclusion. The Court overruled my objection before, but I think the Court understands from the testimony what he is asking this witness is something the jury is going to have to decide. I think it is proper to ask him what he observed, but not to

testify what the weapon was. He can testify to the shape it was, but he is drawing a conclusion. He is asked to draw his conclusion.

The Court: Overruled.

page 57] By Mr. Horan:

Q. What was he prodding you in the stomach with?

A. A 38 caliber revolver.

Q. Mr. Stutz, in answer to one of Mr. Gilliam's questions you said you weren't afraid of losing your property?

A. Yes, sir.

Q. Was there anything you were afraid of losing?

A. Losing my life.

Mr. Horan: I have no further questions.

Mr. Gilliam: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Will counsel approach the Bench?

(Both counsel approached the Bench and a discussion was had off the record.)

The Court: Members of the Jury, we will take a 10-minute recess. During this or any other adjournment, do not discuss the case with each other or anyone else or allow it to be discussed in your presence. Do not form or express any opinion as to the merits of the case until you have received the instructions of the Court and heard all the evidence.

We will stand adjourned.

(Recess for 10 minutes.)

Mr. Horan: The Commonwealth calls Detective Baker.

Mr. Gilliam: Your Honor, may we approach the Bench?

(Both counsel approached the Bench and a discussion was had with the Court.)

page 58] (The Jury was retired to the Jury Room.)

The Court: Let the record show at this time the evidence of this witness is being taken up out of the presence of the jury and in the presence of defendant and his counsel for the purpose of determining whether the written or oral statement of the defendant is *prima facie* voluntary.

Mr. Gilliam: I think that covers it, Your Honor.

The Court: My understanding of it is I will make a determination as to whether the statement is *prima facie* voluntary. The jury does still have to find beyond a reasonable doubt that it was voluntary and my only finding is to determine whether it should go to them at all.

Mr. Gilliam: My understanding, Your Honor, is similar to your understanding, but I think the burden is upon the Commonwealth to prove not just *prima facie* but to satisfy his innocence you decide whether it is a question of fact, not just *prima facie,* but the burden of proof is certainly upon the Commonwealth by a preponderance of evidence to prove this confession is in fact voluntary.

The Court: I have to be satisfied it is voluntary.

Thereupon

KIMBERLY D. BAKER,

called as a witness for the Commonwealth and, having been duly sworn, took his seat in the witness chair, was examined and testified as follows:

page 59] DIRECT EXAMINATION

By Mr. Horan:

Q. State your name and occupation.

A. Kimberly D. Baker.

Mr. Gilliam: Your Honor, I would also say there are certain other findings the Court has to make. The Court has to find in accordance with certain cases other things pertaining to voluntary or involuntary statements. I will go into those at another time. I think there are other things the Court has to find.

Kimberly D. Baker

The Court: I think the other things you are taking into account have to be determined.

Mr. Gilliam: There are some confessions excluded for that consideration.

The Court: We will get to that.

By Mr. Horan:

Q. State your name and occupation?

A. Kimberly D. Baker, Detective for Fairfax County Police Department.

Q. Do you know the defendant James Johnnie Mathews?

A. Yes, I do.

Q. Would you tell the Court when you first met him, when and where?

A. April 16th, in Nash County, North Carolina.

Q. Where was he at that time?

page 60] A. He was in the courthouse or the jail located in Nashville, North Carolina.

Q. In Nashville, North Carolina?

A. In Nashville, or Nash County.

Q. The town of Nashville is located in Nash County, North Carolina?

A. Yes, sir.

Q. Now, did there come a time on the 17th of April when you had a conversation with the defendant?

A. Yes, sir.

Q. Prior to having any conversation —

Mr. Gilliam: Your Honor, I don't want this witness led as to what happened there. I want him to tell us, not have the Commonwealth ask him questions and he says yes or no to them.

The Court: Right.

By Mr. Horan:

Q. Prior to having any conversation with him, did you advise him as to any rights he might have?

A. I'm sorry. I don't understand exactly what you mean.

Q. It is a badly worded question. Did you advise the defendant, prior to taking any statement from him, as to any rights he might have?

Kimberly D. Baker

A. Yes, sir, I did.

Q. Would you tell the Court what rights you
page 61] advised him of?

A. I advised him he had a right to counsel, he had a right not to make any statement unless he wished to do so. Also, any statement he might give to me might be used against him in a court of law.

Q. Did you identify yourself to him?

A. Yes, sir.

Q. What did you tell him in that respect?

A. I identified myself to him as being a Detective Baker. That I was with the Fairfax County Police Department and I was there in reference to an investigation wherein a robbery had *occurrrd* in our jurisdiction.

Q. Who else was present at the time you originally had your conversation with him?

A. Sheriff Glen Womble. He's the High Sheriff of Nash County, North Carolina.

Q. Relate to the Court specifically what your conversation was with him?

Mr. Gilliam: Your Honor, I object to this. I don't think sufficient foundation has been laid.

Mr. Horan: Strike that question.

By Mr. Horan:

Q. At the time you were having this conversation with him, did you make any promise to him in order to get him —

Mr. Gilliam: Your Honor, I object. I think this
page 62] witness was there. He will have to tell us what transpired, and not in response to questions by the Commonwealth. I think we had better get at the truth.

Mr. Horan: It is a little difficult to bring out something that wasn't done, without asking him if he did something positive. If he did something positive, that's fine, but if he remained silent, it is hard to find but, to bring out the man didn't do something.

Mr. Gilliam: Well, if he didn't do it at all, he just has to say he did not do certain things.

Mr. Horan: Without a question?

Kimberly D. Baker

Mr. Gilliam: That's right. What did you do, not "I did not do this."

Mr. Horan: Well, that covers a multitude of things. If you are willing to have him ask on that, almost anything he may say would be responsive to the question. Is that the way you prefer the question?

Mr. Gilliam: I want the witness to say what he did not do. I don't want you to ask what he did or didn't do. I think you are leading the witness. I think negligence has to be proven. I was confronted with that situation last week and the Court held against me.

By Mr. Horan:

Q. Will you tell the Court what, if anything, you did in order to induce him to make a statement to you?

page 63] A. I asked him if he would be willing to give me a statement of his own free will.

Q. Isn't it a fact you threatened him at this time in order to get that statement from him?

Mr. Gilliam: He is cross examining the witness.

Mr. Horan: Mr. Gilliam didn't want —

The Court: Objection overruled.

Mr. Gilliam: I take exception to that, Your Honor. I think he is leading the witness.

By Mr. Horan:

Q. Isn't it a fact you threatened him in order to get this statement from him?

A. No, sir.

Q. What, if anything, did you do in order to induce him to give you a statement?

A. I just asked if he wished to give me a statement.

Q. Prior to your asking him to give you the statement, was there any violence, any suggestion made on your part, in order to induce him to give you a statement?

A. No, sir.

Q. Isn't it a fact that in the course of the conversation with him that you told him it would go easier on him if he were to give you a statement?

A. No, sir.

Kimberly D. Baker

Mr. Gilliam: Your Honor, may I have a continuing objection? Not only is he cross examining, he is leading the witness. I move to strike the previous answer on the same grounds.

page 64]

The Court: Overruled.

By Mr. Horan:

Q. Did anything at all further happen prior to the time you took a statement from him?

Mr. Gilliam: You mean while he was there?

Mr. Horan: While the defendant was there and you were there.

Mr. Gilliam: While you were there, previous, he can't testify as to what transpired prior to the time he was there.

The Court: I didn't understand the question.

Mr. Gilliam: I just want to make that clear.

Mr. Horan: Your Honor, the only way Mr. Gilliam requested this be done —

The Court: The last question is permissible.

By Mr. Horan:

Q. Was anything further done by you in order to get the statement from the defendant?

A. No, sir.

Q. Did there come a time when he did make a statement to you?

A. Yes, sir.

Q. Was there a time when that statement was later reduced to writing?

page 65]

A. Yes, sir.

Q. I show you this document and ask you can you identify it?

A. Yes, sir.

Q. How do you identify that writing?

A. By the signature as a witness on the last page.

Q. Was the statement signed in your presence?

A. Yes, sir.

Q. Is that the defendant's *signataure* to it?

A. Yes, sir.

Q. What time of day was this taken?

Kimberly D. Baker

A. This statement was begun at 10:07 a.m. and completed at 10:31 a.m.

Q. And that was on April 17th?

A. Yes, sir.

Mr. Horan: I have no further questions?

The Court: Do you want to cross examine him?

Mr. Gilliam: Yes, sir.

CROSS EXAMINATION

By Mr. Gilliam:

Q. Now, you say this was in reference to armed robbery which occurred on April 7, 1965?

A. Yes, sir.

Q. When did you go to Nash County?

page 66] A. I arrived in Nash County at approximately 7:00 p.m. on April 16th.

Q. On April 16th?

A. Yes, sir.

Q. And at that time were the defendants in custody of Sheriff Glen Womble?

A. Yes, sir.

Q. Do you know what they were charged with?

A. I had been advised what they had been charged with down there.

Q. And what was that?

A. Armed robbery.

Q. And they were charged with armed robbery at the time of the interview, is that right?

A. Yes, sir. I assumed they were charged at the time I interviewed them.

Q. And were they represented by counsel?

A. I don't understand what you mean.

Q. Were they represented by an attorney-at-law at the time you first spoke to them?

A. I don't know.

Q. Was an attorney present advising the defendant of his constitutional rights, his right not to make a statement, at the time you first met him?

Kimberly D. Baker

A. No, sir.

page 67] Q. Who was present?

A. When I first met them?

Q. Yes.

A. Sheriff Womble and the Clerk of the Superior Court of Nash County. I believe his name was Levilla.

Q. Pardon?

A. I believe his name was Levilla.

Q. Was anybody else present?

A. Officer Eugene King, of the Fairfax County Police Department.

Q. Now, when you arrived *atNash* County, you arrived on April 16th?

A. Yes, sir.

Q. Did you immediately go to the Sheriff's home?

A. Yes, sir.

Q. Did you identify yourself?

A. Yes, sir.

Q. You had a conversation with him?

A. Yes, sir.

Q. What was the import of that conversation with regard to waiver of extradition?

A. He advised me he had talked with all four of the subjects and that they had all agreed to waive extradition proceedings.

Q. Did he tell you they had confessed to him

page 68] that they had given him statements concerning Virginia?

A. He — yes, sir.

Q. And this was concerning the Virginia armed robbery?

A. Yes, sir.

Q. Did he tell you what was contained in that statement?

A. Yes, sir.

Q. He did?

A. Yes, sir.

Q. Was that a confession of guilt on the part of this defendant?

A. Yes, sir.

Q. What did you understand from Sheriff Womble to be stage of the procedure in Nash County at the time you interviewed the defendants?

Kimberly D. Baker

(The question was read by the reporter.)

Q. In other words, had they had a preliminary hearing on that North Carolina charge?

A. I do not know.

Q. You do not know? Do you know the stage of procedure that they were in down there?

A. No, sir, I do not.

Q. You don't know whether they had waived preliminary hearing, had preliminary hearing, had been indicted or not?

A. In reference to North Carolina?

Q. Yes.

page 69] A. No, sir, I do not know.

Q. Now, when you first met with the defendants, it was in the presence of Sheriff Womble, the Clerk of the Superior Court of Nash County, Officer King and yourself?

A. Yes, sir.

Q. Did Sheriff Womble introduce you?

A. Yes, sir.

Q. And what did he say?

A. I don't recall his exact words.

Q. You don't recall what he said?

A. I recall briefly what he said. Not word for word.

Q. Did he tell you, did he say these boys had cooperated fully with him?

A. Yes, sir.

Q. And that he expected them to cooperate fully with you?

A. I don't recall him saying anything like that.

Q. Anything of that import?

A. Yes, sir.

Q. There was something of that import?

A. Yes, sir.

Q. You remember what that was?

A. He stated something to the effect that they had cooperated fully with him and that they had expressed a desire to cooperate with our department.

page 70] Q. Do you know what the North Carolina plans are with regard to extradition on these other proceedings?

A. No, sir.

Kimberly D. Baker

Q. Did Sheriff Womble lead you to believe if the case was disposed of to his satisfaction it would not be prosecuted in North Carolina?

Mr. Horan: Your Honor, I object to the question. Whether they are going back to North Carolina is irrelevant.

Mr. Gilliam: The question was did Sheriff Womble give them any reason to believe that if the defendants were dealt with in Fairfax County that the charges against them in North Carolina would probably be dropped. This is a fair inference, Your Honor. This will, of course, give way to a whole line of questioning. I will withdraw the question.

The Court: All right.

By Mr. Gilliam:

Q. Now, at that time did they make an oral statement to you? That first meeting. By the way, what time was that meeting?

A. Between 7:30 and 8:00 p.m.

Q. Were they all present together?

A. Yes, sir.

Q. All the defendants?

A. Yes, sir.

Q. And how many defendants were charged?

page 71] A. Four.

Q. Now, at that time did this defendant make an oral admission of his guilt?

A. I am sorry, I don't understand exactly.

Q. At that time, between 7:30 and 8:00 p.m., when you first met them, or from 7:30 on that night when meeting this particular defendant that night, did he orally tell you what happened?

A. No, sir.

Q. What happened then?

A. What happened then?

Q. Yes, sir.

A. Sheriff Womble went over with the four defendants what the four defendants had told him and they answered that it was the truth.

Q. Sheriff Womble went over this in their presence?

A. Yes, sir.

Kimberly D. Baker

Q. And they answered yes and no, that was the truth?

A. Yes, sir.

Q. Now, had they waived extradition at that time?

A. No, sir.

Q. Was *thereany* discussion at that time of waiver of extradition?

A. After Sheriff Womble had discussed the case in their presence.

page 72] Q. And then there was a discussion of extradition?

A. Yes, sir.

Q. You remember what Sheriff Womble said?

A. No, sir.

Q. What?

A. In reference to what?

Q. In reference to the extradition proceedings?

A. No, I don't recall his exact words.

Q. Could you tell us in substance what he said?

A. He explained to them about the extradition proceedings, asked them if they were willing to be extradited.

Q. And did he say something about "You boys better go up there and get that thing cleared up?" Did he encourage them to be extradited, waive extradition?

A. I don't recall.

Q. You dont' recall whether he did or did not?

A. No, I don't. I recall him talking over the extradition proceedings with them, explaining to them and reading the papers to them.

Q. How did he explain to them, what did he say to them?

A. He read the extradition papers to them and explained to them this allowed us to take them back up here to bring them back up here to stand trial.

Q. Do you have any idea why they consented voluntarily to go?

page 73] A. No, sir, not at that time.

Q. Not at that time? Do you know now?

A. I know what they told me.

Q. What is that?

A. That they wanted to come back up here and get it straightened out.

Q. They wanted to come back up here and get it straightened out?

A. Yes, sir.

Mr. Gilliam: Your Honor, I think the groundwork has not been laid for this confession. I think sufficient evidence has been shown to the Court to bar the admission of the confession given the next day and that is, Your Honor, that you have a situation here, I have done quite a bit of research of the problem, starting with the proposition —

The Court: Just a minute. I am not going to give you a preliminary ruling on this. The purpose for this hearing out of the presence of the jury was at the conclusion of this hearing for me to determine whether or not I am satisfied this is proper for admission for the jury, so I think if that concludes your entire examination of this witness, you can put on any other witness on this issue that you want.

By Mr. Gilliam:

Q. All right, Detective Baker, after that I assume you left, you left that night, which was April 16th?

page 74] A. Yes, sir.

Q. Did there come a time when you returned?

A. Yes, sir.

Q. When was that?

A. Approximately 9:00 a.m. the morning of the 17th of April.

Q. Had they signed waivers of extradition that night?

A. Yes, sir.

Q. One other question. You said there were four boys charged?

A. Yes, sir.

Q. And two of those charges were dismissed against two defendants and not prosecuted.

A. I believe that's correct.

Q. At the time those charges were dismissed, were there any detainers lodged against these defendants by North Carolina parties?

A. I believe that there were.

Q. Do you know of your own knowledge there were?

A. No, sir.

Kimberly D. Baker

Q. You returned at 9:00 a.m. the next morning?
A. Yes, sir.
Q. What procedure did you follow then? Excuse me, I just might at this time, at this time they made these admissions to Sheriff Womble, was it your part in it just to
page 75] introduce yourself?
A. Yes, sir.
Q. Did Sheriff Womble advise them of their constitutional rights?
A. He did.
Q. Sheriff Womble did?
A. Yes, sir.
Q. When you went back the next morning at 9:00 o'clock, did you see the defendants separately at that time?
A. Yes, sir.
Q. What transpired then?
A. I again advised them of their rights, reintroduced myself to them, and talked to each one of them.
Q. Separately?
A. Yes, sir.
Q. And they gave you an oral statement at that time?
A. Yes, sir.
Q. And you took notes on that?
A. Yes, sir.
Q. And then you reduced that to writing?
A. Yes, sir.
Q. And then you had them sign it?
A. Yes, sir.
Q. And that's this statement?
A. Yes, sir.
page 76] Q. You arrived at about 8:00 o'clock the night before and you talked with them about 8:00 the night before, and this was about 14 hours after you first met with them?
A. Yes, sir.
Q. Is this a complete statement, written statement, of what was said orally on all the different cases?
A. Only on the notes that I took from my conversation with them on the 17th.
Q. Do you have those notes?
A. Yes, sir.

Kimberly D. Baker

Q. With you?
A. Yes, sir.
Q. May I see them?

(The witness produced the notes referred to.)

By Mr. Gilliam:
Q. Were these, when were these notes made? Are these the notes you made that night or the next morning?
A. These are the notes I made as I talked with them on the morning of the 17th.
Q. Did you make notes of the conversation that night?
A. No, sir.
Q. I notice in your statement here that Mathews told you, according to you, he was wearing dark-rimmed glasses. You didn't put this, how he was dressed, in your statement, did you?
page 77] A. No, sir.
Q. I don't see anything in these notes about what is in this written statement about the fact that you had advised them, identified yourself, and you advised them of their right not to give a statement, that you advised them the statement could be used against them in a court of law, and that no promises or threats of any sort were made. This is contained in your notes. Would you look over those notes?
A. I wrote them. These notes are only to refresh my memory in writing the statement. I didn't think it necessary to put in the statement what I do, everything that is done.
Q. No transcript of the Court to show what took place there, is there?
A. Only this and what is in my mind.
Q. Did Officer King take notes, too?
A. No, sir.
Q. He was present?
A. Yes, sir.
Q. And Sheriff Womble is the High Sheriff, is that what you said?
A. Yes, sir.
Q. Of Nash County?
A. Yes, sir.
Q. The first statement was given in his presence, I mean,

the first time you heard their admission was in his presence?

page 78] A. Yes, sir. I didn't talk with them at that time.

Q. Well, Womble did?

A. Yes, sir.

Q. Then the second time you talked with them that morning, who was present then?

A. Officer King and myself, and Sheriff Womble.

Q. What was Sheriff Womble's part in it on that morning?

A. He took no part.

Q. He just stood there?

A. He just stood there.

Q. Was he dressed in Sheriff's uniform?

A. No, sir.

Q. Plain clothes?

A. They knew who he was.

Q. They knew who he was?

A. Yes, sir.

Q. Now at the time this — then you went and reduced your notes to writing, then asked this statement be signed, is that right?

A. I asked them to read it over and if it met with their approval, and if it did not meet with their approval, to make any corrections and then sign it, if it was correct.

Q. Did they read it over?

A. Yes, sir, they read it out loud to me.

Q. Who was present then?

page 79] A. Officer King and myself.

Q. Where was this done?

A. In Sheriff Womble's office.

page 80] Q. Where was Sheriff Womble?

A. He was not in the office.

Q. Any of his deputies around?

A. We were the only two in the office.

Q. You don't know the stages of the proceedings, you don't know whether they were indicted or not in Nash County at the time the statements were taken?

A. No, sir.

Mr. Gilliam: Your Honor, I think that is all I have of this

Kimberly D. Baker

witness at this time.

The Court: Any redirect?

Mr. Horan: I have none.

The Court: You may step down.

(Witness excused.)

Mr. Gilliam: I have a witness to call. I call Detective Wayland.

Mr. Horan: At this point, we are on the question of the voluntary confession. Detective Wayland wasn't in there and I don't know what this has to do with voluntary confession.

The Court: I think this is the time to establish it, to my satisfaction anyway, and if it takes additional evidence to establish it, now is the time to hear it.

(Discussion off the record.)

(At this time the jury was called back into the courtroom and were admonished by the Court and excused until 2:15 p.m.)

(Whereupon at 1:15 p.m. a recess was taken until 2:15 p.m. of the same day.)

page 81] AFTERNOON SESSION 2:15 P.M.

The Court: The jury will retire to the room, please, while the Court and counsel continue what we were doing before.

(The jury was retired.)

Mr. Horan: Your Honor, I wonder if we might have the Court's permission to send Mr. Stutz home with a police officer to get some glycerine tablets he needs and there is no one home and he lives about 15 miles away. There is a possibility he might be recalled.

The Court: Do you have any objections?

Mr. Gilliam: Yes, Your Honor, I have no objection. Officer Porter is outside and he probably won't be called.

Mr. Horan: May I have that permission, Your Honor?

The Court: Yes.

Thereupon,

DETECTIVE ROBERT J. WAYLAND

was called as a witness for the Defendant and, having been first duly sworn, took his seat in the witness chair, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Gilliam:

Q. Would you state your name and occupation, please?

A. Detective Robert J. Wayland, Fairfax County Police Department.

page 82] Q. Have you done any, are you familiar with the alleged armed robbery which took place late the 7th of April?

A. Yes, I am.

Q. Have you had any correspondence from North Carolina with reference to their, any communication with North Carolina representatives?

A. Yes, I have.

Q. What are they?

Mr. Horan: I object to the question. It is definitely documentary hearsay, at this point. Anything anybody might have said about these defendants. I don't know whether it gets by the hearsay rule.

Mr. Gilliam: I don't know about that, Your Honor. I think he can go into the communication he had with North Carolina official records.

The Court: Correspondence?

Mr. Gilliam: Well, communications from officers in that area which might be of interest, against the interest of those people. I think he should be able to go into it a little.

The Court: If it comes under declaration of interest, I won't sustain the objection at this time.

By Mr. Gilliam:

Q. Have you had any communication from Sheriff Womble with reference to detainers lodged against these defendants

Detective Robert J. Wayland

and two other defendants?

page 83] A. Yes, I have.

Q. What did Sheriff Womble say?

Mr. Horan: I object to that, Your Honor. That is definitely hearsay. Anything Sheriff Womble said is hearsay. He is not available to be cross-examined.

Mr. Gilliam: Your Honor, if I can show with this witness Sheriff Womble's statement to detainers, possible lifting of detainers, possible nonprocessing of detainers, that would show Womble had, in fact, any statements Sheriff Womble made about detainers would tend to incriminate him, would be a declaration against the interest used as a possible inducement here.

The Court: Objection sustained.

By Mr. Gilliam:

Q. Do you know that four defendants were charged with this possible armed robbery?

A. Yes, they were.

Q. Do you know what happened to two of those cases involving Terain and —

Mr. Horan: Your Honor, please, this question has been gone into before and if it does any good the Commonwealth is willing to stipulate, I am personally willing to stipulate — we will stipulate those cases were nol-prossed, no warrants or detainers were issued against the defendants and North Carolina authorities had to be contacted to place

page 84] detainers. As I recall it, those two defendants have waived extradition back to North Carolina on the charge and nol-prossed. They didn't admit to doing anything with the act. That's the reason they were nol-prossed. I know Thompson, one of the men involved, waived extradition and has gone back to North Carolina. Whether the other man went back —

Mr. Gilliam: I know that Thompson did waive extradition and go back. I can only assume possibly there was a detainer here.

The Court: I think we are not saving much time trying to stipulate to anything.

Detective Robert J. Wayland

By Mr. Gilliam:

Q. At the time those cases were nol-prossed against Terain, is that correct?

A. Yes.

Q. What is the other defendant's name?

A. Thompson.

Q. At the time those charges in this state were nol-prossed, were warrants or detainers lodged against the other two here?

A. On that date those charges were nol-prossed against Terain and Thompson, the only detainers that we had was I filed myself fugitive warrants against those two persons as being fugitives from the State of North Carolina.

page 85]. Q. But Sheriff Womble of Nash County had not lodged anything with authorities here?

A. Nothing but a phone conversation with him on that date and that he stated, I stated the action had done with reference to the fugitive warrants and he could call for them if he still wanted to carry them back to Nash County. He stated he did have warrants charging them with armed robbery in his state and he would call for them the following day.

Q. That was after you told him what happened here?

A. Yes.

Q. At that time no warrants or detainers were lodged against those two defendants?

A. Not lodged in this jurisdiction.

Q. What was Sheriff Womble's reaction to the fact these two cases had been dismissed?

Mr. Horan: I object as totally irrelevant as to what his reaction would be.

The Court: Sustained.

Mr. Gilliam: Your Honor, Sheriff Womble is not here. He should be here, but if I can't go into that line of inquiry with this witness, if it is going to be objected to as hearsay, then my hands are really tied, so I will suspend any further questions of this witness.

The Court: Do you want to cross-examine?

Mr. Horan: No.

page 86] Mr. Gilliam: Just one other question.

Detective Robert J. Wayland

By Mr. Gilliam:

Q. Did he say why he hadn't lodged detainers against them?

A. Why he hadn't forwarded his detainers?

Q. Yes.

A. No. There wasn't any explanation for it.

Mr. Gilliam: That's all.

The Court: You may step down.

(Witness excused.)

Mr. Gilliam: Your Honor, I have one other witness here but I don't think I will need him. He can be excused if the Court wishes to excuse him. Lieutenant Leston.

The Court: You have no reason to keep him?

Mr. Horan: No, sir.

The Court: You can tell him he is excused.

Mr. Gilliam: Your Honor, at this time I would object to the admission of the confession in evidence based on the grounds, if the Court rules there has been a case of involuntary confession made, the Commonwealth, that the confession was voluntary, I would like to take up several points in that respect.

The Court: Is that all the evidence you have?

Mr. Gilliam: Your Honor, the evidence is undisputed that these defendants were arrested, charged in Nash County with robbery in North Carolina. Now that arrest took *plalce* shortly, I think, they had been held there for a page 87] number of days. I don't know how many. Now in that situation, having been charged with robbery in North Carolina, the dealings here would be successive. Confession. I point to the fact we are dealing with successive confessions. The rule underlying this rule obtains even if only one confession where the accused had been in charge of a person in authority other than one confession had been made the prosecution must show the absence of inducement from authority other than they must show absence of inducement from the former as well as the latter. So we are dealing with a situation here, Your Honor, High Sheriff Womble of Nash County had these defendants charged with armed robbery, they were in his custody, he was present when

the first, he was present when Detective Baker and *Office* King arrived in North Carolina. He questioned the defendants in the presence of Officer King and Officer Baker at which time they admitted their guilt. Well, Your Honor, there's been absolutely no proof produced before this Court that the person in authority, Sheriff Womble in this case, he had not made any inducements to the defendants for the giving of this confession. On the contrary, there is slight inference, we say there is, there is in evidence here, since there were no North Carolina detainers lodged against these particular individuals, that Sheriff Womble was not going to prosecute those charges. We think it certainly places the burden on the Commonwealth to refute that evidence. But the law is, Number One, the Commonwealth must prove

page 88] that confession is voluntary and as authority for that proposition, Your Honor, I cite *Jackson* vs. *Commonwealth* 193 Va. 664, 70 SE 2d 322 and 328, where a statement, the burden of proving it voluntary, is on the Commonwealth.

Now an even clearer case in this in the *Thompson* case, 20 Grattan 731, in the *Thompson* case, there were, in fact, two confessions. I wonder if I could send down for that, Your Honor? That case went into the proposition, number one, the burden of proof is on the Commonwealth to show if the confession is voluntary. Further proposition, here are two confessions. Then it is presumed that the circumstances which produced the first continued to produce the second. It is the presumption one flows from the other. That being the case, that presumption existed then. You have got to show the first confession, the first statement was given and the testimony is they have confessed to North Carolina authorities before Detective Baker and Officer King arrived on the scene. That is in evidence before the Court. That was the first confession. That is, in fact, the reason our police authorities responded to North Carolina jurisdiction. That is in evidence here. That is the rule for successive confessions. The presumption being, one flows from the other. It is incumbent upon the Commonwealth to prove the first, in fact, was voluntary.

As I said, the *Thompson* case deals with confessions where the Court reversed the case.

page 89] It is also the law in Virginia, as I understand, the real test of whether or not a confession is voluntary and that the second confession is not is, in itself

inadmissible. If the first confession is involuntary or circumstances were not such as there was no proof of that situation that there has to be proof that those facts and circumstances which produced the first confession existed and caused a voluntary confession, or, if the first confession, in fact, involuntary or obtained by threats, fear, offers of lighter punishment, what have you, that these inducements that were brought on the defendant when he made the first confession continued or did not continue at the time he made his second confession, and the burden is on the Commonwealth, Your Honor, to come forward and prove this second confession was voluntary.

We have shown the second confession had been made. We don't know what the circumstances were of that confession. That deals with successive confessions.

Now the rule of law is closely entwined in this situation. Here the accused had been charged by a person in authority and then the prosecution must prove inducements did not fall from that person in authority.

I think this rule is doubly true when you are in the custody of another person in authority charged with a crime in that jurisdiction, that no inducement is given by that person in authority. The Commonwealth has not offered one

page 90] iota of evidence that Sheriff Womble of North Carolina did not induce this confession in an involuntary manner.

I cite *R.* v. *Courtenay*, 2 CR & D 62, cites where a defendant was under arrest by the Constable and he confessed to another person in authority after he had been with the Constable to which a confession was not given. In other words, this is different people but people apparently in authority.

I also cite *R.* v. *Watkins,* 4 C & P 549, which gives a confession to one Constable after interview with another, and in *State* vs. *G rvey,* 28 LA. ANN 925, which emphasizes the same proposition.

There was also a law in this jurisdiction, Your Honor, where we had a person present when a confession is given where an issue is raised of voluntariness or involuntariness. Necessarily, the burden of proof is always on the Commonwealth, incumbent upon the Commonwealth, *the* produce witnesses to seek to have this confession admitted. It is their burden to come forward with witnesses, to have this refuted.

And different cases hold that the prevailing rule is that

confessions are *prima facie* voluntary. A successive confession may become admissible when it is perfectly free from influences which produced the original confession. The rule on this subject is well stated. Where a confession has been obtained or an inducement held out, under circumstances which would render a confession inadmissible, a
page 91] confession subsequently made is not admissible, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled.

In the absence of such circumstances, influences and the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will be rejected. But it is sometimes held that confessions are *prima facie* involuntary and therefore inadmissible, and they can be rendered admissible only by showing that they are voluntary and not constrained. But a confession is not rendered inadmissible by the fact that the party is in custody, provided it is not extorted by inducements or threats.

Whether a confession is voluntary is held to be primarily for the Court to determine. Necessarily, the Court must be satisfied the confession is voluntary, and the burden of proving it is voluntary falls on the Commonwealth.

For those reasons, Your Honor, two reasons, we have successive confessions, we have no proof of the fact and circumstances which produced the original confession. We have this case which says the circumstances which produced the first continue down to the second, but there is no proof the first was, in fact, voluntary. I think also it is inadmissible, Your Honor, if there had been only one confession
page 92] where it is shown the defendant confessed when he was in the custody of a person in authority or apparently in authority, other than the one to whom he confessed. It is not shown by clear evidence this person did not, Sheriff Womble did not, offer inducements to a confession.

Mr. Horan: I don't necessarily think the *Thompson* case says what he said the *Thompson* case says. The *Thompson* case, as I understand it, is merely if an inducement is given that inducement will presume to continue and the Commonwealth must overcome that presumption that the condition continued.

In this case we have at least three confessions. There is no evidence on one. The Sheriff called and said I think we have your people who committed the robbery in Fairfax County. The second of the 16th, the confession Detective Baker obtained was clearly a voluntary confession. The conversation between the four persons and the Fairfax County police and Sheriff Womble, which Detective Baker related, a conversation took place between the defendants where Sheriff Womble recited what they said happened and the defendants said yes, that's what happened. Certainly in that conversation there is no evidence of anything induced or that any inducement happened as far as the defendants were concerned; this defendant is concerned.

Then on the morning of the 17th, certainly the evidence is quite clear there was no inducement or promise or threat or that that confession was anything other than voluntary.

page 93] Now I don't know whether the rule in Virginia is where a man is in the custody of one person that another person cannot take a confession from him without showing the first person didn't do anything to induce a confession. I think it is merely a question of fact for the Court as to whether any inducement was offered, any inducement was shown by anyone else at that time. The Commonwealth evidence in this case certainly shows no inducement, no inducement Saturday night, or Sunday morning, no inducement Saturday night in the oral statement and no inducement offered Sunday morning when the confession was given.

Certainly the *Thompson* case doesn't say the Commonwealth has the burden of proving anybody in authority had given any inducement to these defendants.

I think the Court must be satisfied there were no inducements offered.

Mr. Gilliam: I would like to say this. I think Mr. Horan is arguing the facts, going to argue the facts of what I contend should be the second reason, the fact this man was in custody of North Carolina authorities, charged with robbery in North Carolina. He was in the custody of Sheriff Womble. There has been no showing what Sheriff Womble did to induce the confession. It is undisputed he confessed to Sheriff Womble of the Virginia supposed armed robbery. When he

first talked to the Detective from Fairfax Coun-
page 94] ty, Detective Baker, in the presence of Sheriff
Womble, there had been absolutely no showing where the defendant was in the custody of a person of authority with regard to ability to either help or hurt him. There is no showing, there is no evidence to show, that this particular individual did not offer inducement. Let's assume, Your Honor, that the confession itself to be admitted, in fact, is the first confession, the first confession made to Sheriff Womble. Then wouldn't Sheriff Womble have to come here to tell the Court, wouldn't he have to show the Court it was voluntary? I say he would. Take into consideration the presumption the second confession is voluntary as a result of the first being voluntary, then I think also it is incumbent to show the first is voluntary, that the second is voluntary or that if the first was involuntary that the circumstances which existed to produce the first had ceased to excite this individual. There has been absolutely no showing of that.

So for those reasons, Your Honor, I think there has been a real lack of proof here of voluntariness of the confession.

The Court: Let me look at the *Thompson* case, please.

Mr. Gilliam: Your Honor, I have another citation here from *Corpus Juris Secondum.* Although a confession may have been obtained such confession, subsequent confession with like circumstances should be admitted if it appears to the Court in the length of time intervening the promise or threat
had been removed but if it does not so appear the
page 95] subsequent confession must be excluded even
though it was made subsequent to warning the accused he not make it or if he did *he* might be used against him.

I cite *People* vs. *Lacocco,* 94 NE 2d 178, ordinarily the first of several confession made by the accused is *controling,* the presumption being that the repetition of a confession is the product of the same circumstances which produced the original confession.

And different jurisdiction, where there is split authority, different jurisdiction, there is a question of whom the burden of proof of voluntariness falls upon, but in this jurisdiction it is clear it falls upon the Commonwealth.

The Court: I don't think there is anything that the Court can presume to continue because there has been no showing of anything that first may have induced the hope of benefit

or immunity or promise of reward and that coupled with the warning given by the officers as to the consequences of the confession or statement they further advised him he was entitled to have counsel present, in my opinion, dispels any feeling that a former promise, hope of reward or benefit, induced the statement.

I am satisfied that the statement was voluntary and it will be admitted in evidence.

Mr. Gilliam: Is it possible to put the defendant on at this particular stage of the proceedings without subjecting him to preliminary cross-examination in this particular area?

The Court: Yes. He can take the stand for the
page 96] limited purpose of being questioned on the admissibility of this piece of evidence. He once having taken the stand he can be treated insofar as this inquiry is concerned as any other witness that is cross-examined, *et cetera,* but the jury will not hear it. It will just go to such weight I give his testimony in this instance.

Does Commonwealth attorney want to be heard on that?

Mr. Horan: As long as it is *cearly* understood he can be impeached on these as well as any other facts.

The Court: Very well.

Thereupon,

JAMES JOHNNIE MATHEWS

called as a witness for the defendant and, having been first duly sworn, took his seat in the witness chair, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Gilliam:

Q. Now, Mr. Mathews, did you give a statement to Sheriff Womble?

A. Yes, I did, sir.

Q. When did you do this?

A. I was arrested about midnight and I gave it to him the next morning.

Q. The next morning?

A. Yes, sir.

page 97] Q. What, if anything, did Womble say he would do for you if you gave him the statement?

A. Well, in the way he asked me, he told me if I would cooperate and tell him what happened with the fellows and myself that it would be lighter on me and that I could be back home with my family earlier.

Q. Did you tell him what your part was in North Carolina?

A. Yes, sir.

Q. What did he say he would do?

A. He told me that he would speak to the Judge for me. He said that you being asleep in the car when this thing taken place, he said, my sentence, he said, the decision of the court would be different with me than the other fellows that committed the crime.

Q. What was said with reference to parole?

A. He said I was very stubborn in the beginning and refused to answer his questions. He told me keeps his notes in which he talks to the man who commit crime and when they come up for parole he has the right to refuse to accept them back in his county if and when he is notified of their eligibility for parole.

Q. What is your formal education?

A. Well, I finished the second grade in school, sir.

Q. Did you go to a preliminary hearing in North Carolina?

A. Yes, sir.

page 98] Q. Did Sheriff Womble speak on your behalf at that time?

A. Yes, he did. In fact, he spoke of two of the fellows which there were four.

Q. He had already told you he would do that?

A. Yes, sir, he did. There was a witness he said so also.

Q. What did he tell you about getting back to your family?

A. Well he told me to cooperate and tell him what happened and he would speak to the Judge for me. Also, he said, well, you know, if I didn't cooperate, you know how police officers talk, actually kind of begging you. But he said if you will cooperate, I will see that you are back with your family earlier and he continued to debate on the issues that if you don't believe I have a case against you, don't you tell me nothing. He didn't use those words. He used curious words. He said if you believe I have a case against you, boy, you

kick in and come clean. He indicated someone else told him something already, because he told me later that they had.

Q. Did these statements and attack of the Sheriff Womble influence you in giving a statement to the Fairfax County police detectives?

A. Very much, sir, because I wanted to get back home after I felt I didn't do anything down there. Way he spoke to me showed me hope I would get free down there by cooperating. He said it would be light on me up here.

Q. What did he say to you about detainers
page 99] in North Carolina?

A. At the time he talked with me concerning the crime and me telling him about everything that happened, he told me that if we promised him we would cooperate that if we waive extradition and come back here for trial that he would not place detainer against me. If we sign waiver and ask the jailers to come back down there we could have a trial if we wanted to come up here.

Q. Now did these influences that you have spoken of, you refer to, did they continue at the time you gave your statements to the Fairfax County police?

Mr. Horan: I object. He's clearly leading the witness.

The Court: Sustained.

By Mr. Gilliam:

Q. What did he say to you about concurrent sentence, did he say anything to you about current sentence if you happened to catch any time in North Carolina?

A. Yes, sir. He told me, he said he would ask the authorities here to show me how to go about getting my sentence here running concurrent with whatever I got down there, if I got anything there. He made that very clear. He also said if these authorities not do that if after I got back there, got a sentence there, that would run concurrently.

Q. All this was prior to the time of your giving statements?

A. It was within three days, sir, of my arrest.
page 100] Q. Now when the statement was given to Detective Baker, what rights did he advise you of?

A. He simply asked me did I know my rights.

Q. Did you know your rights, what did you say?

A. I told him yes.
Q. Did he tell you what they were?
A. No, sir. Nobody ever told me what they were. I always tried to act like I knew everything, and I always said yes.
Q. And you then were convicted of arson, *haven't* you?
A. Yes, sir.
Q. How many years ago was that?
A. Five years ago.
Q. How many?
A. Five.

Mr. Gilliam: That's all I have.

CROSS-EXAMINATION

By Mr. Horan:
Q. Mr. Mathews, what day were you arrested in North Carolina?
A. Approximately midnight the 8th.
Q. That's about midnight?
A. Yes, sir.
Q. On *way* day?
A. On the 8th.
page 101] Q. And that was just a few minutes after the robbery of the gas station?
A. About seven, eight minutes.

Mr. Gilliam: Your Honor, I don't see that's relevant here what time the robbery took place, what time the arrest.
The Court: Objection sustained.
Mr. Horan: Your Honor, if I might, I would like to lead into this because I think it is necessary to know the reason for all Sheriff Womble's original questioning of this man, and I would like to bring out the bulk of what this witness is testifying to has to do with the North Carolina robbery, admissions to the police officers and sheriff as to the North Carolina robbery.
The Court: Objection sustained.

By Mr. Horan:
Q. Now when you first began to talk to Sheriff Womble,

all his questions were directed at the North Carolina offense, isn't that correct?

A. Yes, sir.

Q. Actually when that robbery took place you were asleep in the back of the car, isn't that correct?

A. Yes, sir.

Q. You told Womble that from the very beginning, isn't that correct?

page 102] A. Yes.

Q. In fact, you have said before and you still believe Womble is a fairly decent sort of person, isn't that correct?

A. Well, he's quite short favor, sir.

Q. Actually, Sheriff Womble was trying to get you to testify against Terain and Thompson as to the North Carolina robbery?

A. Well he showed me he was trying to do that or help me get out of it or show me he was showing favors one way or another.

Q. Actually he knew and he know you were asleep?

A. I don't think he knew, sir. I would say no.

Q. When you told him you were asleep he kind of agreed with you, didn't he?

A. After a long talk.

Q. When he was telling if you would come clean with him, if you were asleep, that it would go easy on you in North Carolina?

A. If I tell him what happened.

Q. And that, in effect, was what he was telling you?

A. Well, yes.

Q. Isn't it a fact, Mr. Mathews, what happened once you got all finished with North Carolina's questions as to the North Carolina robbery, you and Terain and Thompson and Williams had too much money then than you could have taken in that robbery?

page 103] A. No, sir.

Q. Let me put it this way. Only 95 dollars was taken in the North Carolina robbery and you people just happened to have more than 95 dollars?

A. It wasn't 95 dollars that was taken.

Q. How much was taken?

A. It was over a hundred.

Q. But Womble actually told you when the North Carolina case was out of the way there was still too much money left over?

A. I don't know, sir.

Q. Isn't it a fact, the way he led up to the Fairfax robbery, he was asking you how come you had so much money?

A. No, sir.

Q. That's not a fact?

A. No, sir.

Q. Were you present with Terain and Thompson when the Fairfax question first came up?

A. Yes, sir.

Q. You all were present at that time?

A. Yes, sir.

Q. At that time one of the four of you said the rest of the money came from the Fairfax robbery, isn't that correct?

A. No, sir.

Q. How did he lead up to the question of the page 104] Fairfax robbery?

A. During questioning of me next morning a question was asked about the cigar box with some money in it and he asked me to tell him about it, if I would tell him about it, where it come from, he would do everything possible for me. He was showing me he was a pretty big man around there and he could have influence on different things.

Q. Well, the time he was talking to you about probation, anything like that, he was talking to you about the North Carolina offense?

A. Not altogether.

Q. You knew he had no power outside North Carolina?

A. No, sir, I didn't know that, because I known quite a bit of people to do things when they transfer state to state. North Carolina is my home.

Q. You are from New York?

A. Originally North Carolina.

Q. It was in New York you were convicted of larceny?

A. In North Carolina.

Q. Grand Larceny?

A. No, sir.

Q. It was not grand larceny?

A. No, sir.

Mr. Gilliam: Your Honor, I think the term was arson.

By Mr. Horan:

page 105] Q. Was it a felony you were convicted of?

A. Yes, sir.

Q. Now did you discuss about the Fairfax robbery taking place the same day you discussed the North Carolina robbery?

A. In fact, the same 15, 20 minutes.

Q. You had already told him about the North Carolina robbery at that time?

A. We was talking about it. Asking about the cigar box.

Q. Was that the cigar box you had?

A. The cigar box in the car.

Q. In your statement to Detective Baker you indicate in this question, can you read and write, and you indicate yes?

A. I nodded my head.

Q. Well, you can read and write, can't you?

A. I can read my name.

Q. Is it your testimony you cannot read anything on this paper?

A. No, that is not my testimony. I can read some things on the paper.

Q. Can you read this question here, this question right here?

A. There's two words on there I don't understand.

Q. Read what you can of it.

A. Have you been — I don't know that word right there — I can read that one to that word there, Statement.

page 106] It's two words I don't understand in them, sir.

Q. How about this line here?

A. No, sir. I can't read that line.

Q. Did you hear Detective Baker testify you read this statement to him?

A. I heard him testify.

Q. That you read this statement to him?

A. Yes.

Q. Do you deny that?

A. Yes, I do deny it.

James Johnnie Mathews

Q. How do you know what's in this statement?

A. I don't know. I know what they told me.

Q. Did he read it to you prior to your signing it?

A. Yes, sir.

Q. Did you hear him read, have any threats or promises of rewards been made to you?

A. I was standing as far as from where you are.

Q. Did you hear what he said?

A. I could hear part of it.

Q. Your answer to that was none?

A. I didn't say anything.

Q. You didn't say a word?

A. I didn't say anything, sir.

Q. Did you hear him say I advised you that you have a right to see counsel?

page 107] A. We didn't hear anything about counsel until we came here.

Q. Who told you about that?

A. Mr. Wayland.

Q. That was the first time you were aware of your right to counsel?

A. Yes, sir. He told me within a few days I would come over to court and they would see about giving me counsel and at that time I was assigned Mr. Gilliam.

Q. Is this your testimony that this paper was never read to you?

A. There was a paper read in the room with Mr. King and Mr. Baker and Williams and myself.

Q. Is that your signature?

A. Yes, sir.

Q. Was Detective Baker there when you signed this?

A. Yes, sir.

Q. Did you tell Lieutenant Baker you didn't know what any of this meant?

A. I didn't discuss the papers with Mr. Baker at all. I signed three copies, my initials.

Q. With erasures on it you initialed it?

A. Three times.

Q. You initialed it?

James Johnnie Mathews

A. Yes. And during that time they were telling
page 108] me something about waiver to come back to Virginia.

Q. When you were talking about waiver, didn't you sign a waiver for Sheriff Womble that you would go back there when Fairfax was finished with you?

A. No.

Q. Didn't you sign such a waiver for Sheriff Womble?

Mr. Gilliam: Your Honor, I think that calls for a conclusion. I don't think witness is competent to know whether or not he signed a waiver to come back to this jurisdiction. If he has got something like that to show, that's fine, but he is asking this witness to draw a conclusion of what he had in mind. I don't think that legally can be done.

The Court: Overruled.

By Mr. Horan:

Q. Did you sign a waiver?

A. They told me I did.

Q. Waiving extradition back to North Carolina when we were finished here?

A. I really don't know, sir.

Mr. Gilliam: I object. The witness doesn't know what a waiver is.

The Court: That's the answer he gave to the question.

By Mr. Horan:

Q. Did you have an attorney when you were tried for larceny?

A. Yes, sir.

page 109] Q. You did have an attorney at that time?

A. Yes, sir.

Q. And did you, did you aid that attorney in your defense, did you talk to your attorney about your defense in that case?

Mr. Gilliam: That is objected to. It goes to the privilege attorney-client relationship.

Mr. Horan: If at this point the witness is to be believed, he doesn't know anything, doesn't know what was on that

paper, and I want to see how alert he is as to what goes on legally.

The Court: Objection overruled.

By Mr. Horan:

Q. Did you assist your attorney in defense of the larceny case?

A. Did I assist him?

Q. Yes, did you tell him what happened?

A. Oh, yes.

Q. Do you recall the trial of the case?

A. Yes, sir.

Q. Was there a conviction in that case?

A. No, sir.

Q. No conviction? Now when Sheriff Womble indicated to you — strike that question. You heard Detective Baker testify that on Saturday night when he first came to the jail that you and the other three boys were present in page 110] the room with Sheriff Womble, Baker and the other Fairfax officer, do you recall that testimony? And do you recall being there at that time?

A. Yes, sir.

Q. That did happen?

A. Yes, they were there.

Q. Do you recall Detective Baker testifying at that time Sheriff Womble told you about your constitutional rights?

A. I recall him testifying to that.

Q. You recall that happening?

A. No, sir.

Q. There was not talk about rights?

A. I recall him telling Mr. Baker and Mr. King that we were the four fellows which they came to get and that we had cooperated with him very well and he expected us to do so with Mr. Baker and Mr. King and he would see us in the morning.

Q. Did anybody ever tell you you had a right to remain silent?

A. In the line of law, sir?

Q. Any law officer?

A. I haven't had that much dealing with the law, sir.

Q. I am not asking how much dealing you had with the law,

James Johnnie Mathews

I am asking you if anybody in North Carolina told you you had a right to remain silent?

A. No, sir.

Q. Did anybody ever tell you anything you said page 111] could be used against you?

A. Yes, sir.

Q. Who told you that?

A. My attorney.

Q. Your attorney?

A. Yes.

Q. How about Sheriff Womble?

A. He wasn't too interested in what could be held against me, he was trying to find out what he could find out, maybe trying to get another raise, trying to building himself up higher. May *he* wasn't interested in that pai

Q. So it is your testimony, Mr. Mathews, nobody ever said anything like that to you? Sheriff Womble never said anything like that to you?

A. Seemed like he wasn't interested in that part.

Q. Is it your testimony Sheriff Womble never said anything like that to you?

A. He wasn't talking to me all the time directly, he was talking to all four of us.

Q. Were you paying attention when he was talking to all four of you?

A. Yes, sir.

Q. Ever hear him tell you your constitutional rights?

A. No, sir.

Q. Nobody ever mentioned that?

page 112] A. He never mentioned that.

Q. It is your testimony you never heard the phrase anything you say can be used against you?

A. Yes, sir, I've heard it.

Q. Prior to your attorney telling you about it?

A. No, sir.

Q. What time of the night were you picked up in North Carolina?

A. About twelve after twelve.

Q. About twelve after twelve?

A. Yes, sir.

Q. How do you specifically recall it was about twelve after twelve?

A. It was the most frightening time I ever been in in my life.

Mr. Gilliam: I think that gets back to same objection I had before, I can't see where the time of arrest, et cetera, is relevant to this.

The Court: Overruled.

By Mr. Horan:

Q. What time did you arrive at the police station?

A. Oh, a few minutes later.

Q. Did you meet Sheriff Womble right away?

A. No, sir.

Q. You didn't meet him?

page 113] A. No, sir.

Q. Did you meet him at all that night?

A. No, sir.

Q. When did you first meet Womble?

A. Following morning.

Q. What did he tell you when he first saw you?

A. Introduced himself, told me was Sheriff of Nash County and he had heard about the little ruckus *in* which we had caused that night.

Q. He heard about the ruckus?

A. Yes, sir. That's the phrase he used.

Q. Were all four of you present at the time?

A. No.

Q. Did you?

A. Yes.

Q. Had he already talked to the others, do you know?

A. He had talked to two.

Q. Two others?

A. Yes, sir.

Q. What did he ask you about the particular events involved in North Carolina?

A. He asked me what had happened, where was I from, general questioning, and, eventually, he led up to my part in the crime and to tell him about what happened, who went in,

who didn't go in, where was I at when it was
page 114] going on, why the boys didn't give me none of the
money, things like that.

Q. Were you answering all these questions?

A. I was looking at him.

Q. You didn't answer any of these questions?

A. No, sir.

Q. Why was that?

A. I was afraid.

Q. Pardon?

A. I was afraid.

Q. You were afraid to answer any of his questions?

A. Yes, sir.

Q. What did he do when you didn't answer any questions?

A. He started in telling me about paroles, breaks, things he could give me, things to make it easier for me, and he indirectly told me about this case.

Q. When you say he indirectly told you about this case, what do you mean?

A. He said he knew what happened and I should come on and tell him my part on it.

Q. Where did you learn the word indirectly?

A. I heard it quite a bit.

Q. You have heard it quite a bit?

A. Yes, sir.

Q. Now was the North Carolina confession reduced to writing?

A. I would say he was writing down every-
page 115] thing I said, well, everything he asked me he was
writing down everything he asked me.

Q. Did you sign that confession?

A. No, sir.

Q. You didn't sign the North Carolina confession?

A. No, sir.

Q. Were Terain or Thompson or Williams present when you signed this confession?

A. Williams were.

Q. Williams was with you at that time? And did Detective Baker say anything to you prior to taking this statement from you?

A. How do you mean?

Q. Did you have any conversation with him before you sent in and signed this piece of paper?

A. That's how he got it, he was talking to everybody, talking to all four of us.

Q. All four of you were there at the same time?

A. Yes. He was talking to them and he goes and leaves us and he comes back with it.

Q. How about this answer of his, tell the Court whether you made this answer: "Well, I took about 75 dollars from the wallet and then took all the papers away and after we got down the road we counted some and after we spent money for gas and food we had about 179 dollars."

page 116] Did you make that statement?

A. I don't recall which one made it. It was said during the questioning, oral statement when all of us were talking and Sheriff Womble was telling what we told him.

Q. Is it your testimony you and Detective Baker didn't have any conversation on Sunday morning?

A. We had no private conversation he taken a statement. There was no pencil and paper during the time we was alone together. Notes what he taken, he had taken them from what Sheriff Womble explained to him what we had told him.

Q. When you were present Saturday night?

A. When we were present Sunday morning.

Q. In other words, the conversation Detective Baker testified to Saturday night never took place?

A. What conversation?

Q. Where Womble explained to him what happened?

A. There was nothing like that said Saturday night. We was introduced to Mr. Baker and Mr. King and they said they had to go somewhere and they would see us the next morning. In fact, they wasn't there five minutes. We had a conversation next morning. He called all of us down next morning and Sheriff was telling about all we had done, continuing what he had told us that night. We was the fellows he was looking for. After he introduced us he said these four boys are the ones you come for. Are the ones you

page 117] come for. They have been very cooperative and I am sure they will be the same way with you. See you in the morning.

Q. Did there come a time when Baker took you out and

talked to you alone?

A. No, sir.

Q. He never said?

A. No, sir. Never talked to him alone.

Q. Where did he get this?

A. I just told you. From the conversation Sheriff explained to him.

Q. Who typed it up?

A. I have no idea.

Q. All four of you were present when Baker came in and handed this to you?

A. No, sir.

Q. You were by yourself?

A. No, sir.

Q. Who was with you?

A. Williams.

Q. He brought this in and showed it to you and showed one to Williams at the same time?

A. Yes, sir.

Q. Did you say anything?

A. Yes. I asked him what was it.

Q. What did he tell you?

page 118] A. He said it was a statement.

Q. What?

A. He told me it was a statement.

Q. Did he tell you what the statement was based on?

A. He told me it was based on what Sheriff Womble said.

Q. So it is your testimony Baker never asked you any questions?

A. Not directly.

Q. Did you ever answer *of* Baker's questions?

A. No.

Q. Never did?

A. No.

Q. He never turned around and looked at you and asked you a specific question?

A. Me directly, no. Each time he asked, each time he asked something, each of us, all four of us present, I never said a word.

Q. You never answered?

A. No. Never said a word.

James Johnnie Mathews

Q. In other words, some of these long sentences in here aren't your words?

A. Like I said, what's in there wasn't on his notes.

Q. This was in his notes and this is an answer here. Willams was driving, he pulled off the road about 300 feet and Williams and I got out and walked inside while

page 119] Terain and Thompson stayed in the car. Who told that?

A. I don't know.

Q. You were there?

A. Yes, sir.

Q. You don't know it was said?

A. There's a possibility.

Q. Was it said?

A. I don't know.

Q. Why wouldn't you know?

A. Because I wouldn't want to say it was or wasn't.

Q. Do you know was it said?

A. So much said I wouldn't know, sir.

Q. You don't know whether that was said?

A. Because I said he wasn't talking to each one, he was talking to all four of us. I had nothing to say at all.

Q. How about this statement: "While Williams was holding his gun on the man I went behind the counter and took the money box from one of the drawers." You said that?

A. He asked which one took the money. They said I did. I didn't say nothing.

Q. Now did anybody say anything to you to get you to sign this?

A. Yes, sir.

Q. What was said by whom?

A. By the Sheriff. Caused me into signing that

page 120] statement, and telling him what he wanted to know about everything else by promising me a lot of things. By promising me things would go better up here which they didn't.

Q. What were the promises?

A. Some promises I would get a break in his county and up here. If I got a life sentence I would be home early in which case I wouldn't get time down there because I didn't do nothing up here or down there which had been proved.

Q. Did Womble tell you all of this altogether in the room Sunday morning?

A. Yes, sir.

Q. Before this big conference started, where Baker was asking questions, you weren't answering any?

A. Not a one. I'm not the only one he promised that, sir.

Q. What?

A. I'm not the only one he promised that.

Q. If you weren't saying anything at all, why did they promise you anything?

A. I don't know.

Q. Is it right you didn't say a word?

A. It's very true. I didn't answer none of those questions you read there.

Q. Did you say anything at all on Sunday morning?

A. I nodded my head.

Q. So you did nod your head?

page 121] A. I did nod my head.

Q. Did you ever say yes?

A. I'm not in the habit of saying that.

Mr. Horan: I have no further questions.

Mr. Gilliam: I think that's all I have.

The Court: Will you step down.

(Witness excused.)

The Court: Do you have any further evidence?

Mr. Gilliam: No further evidence. Do you want to hear argument on that?

The Court: I think the same principle would apply.

Mr. Gilliam: One other thing, Your Honor. The evidence here of threats, not threats per se but threats, "If you don't cooperate it's going rough on you." promises of parole, promises of lighter sentences, promises of speaking to the Judge in his behalf, all of these inducements leading to the confession and continuing, Your Honor, right down to the time the statement was given to Detective Baker, it is uncontradicted and certainly the burden is on the Commonwealth to come forward now and show we are in the wrong.

His testimony is, I think, consistent. He was taken round and round and over and over and I didn't object. He demonstrated to the Court that these things actually happened. I don't think this confession should be admitted in evidence.

The Court: I adhere to my original ruling. Ob-
page 122] jection is overruled.

Mr. Gilliam: Note my exception. One other exception to the admissibility of the confession, Your Honor, lack of proof of time the defendant confessed is no proof he had not been, in fact, indicted in the North *Caroline* crime of armed robbery. After he is indicted he is entitled to counsel and any statements made, voluntary or involuntary, are not admissible. Object to that.

Mr. Horan: I will only say, Your Honor, I don't think the *Messed* case has anything to do with involuntariness. He can't talk to him about involuntariness before the indictment for that crime. I refer to the New York case.

The Court: Will you re-call the jury.

The confession will be received in evidence at this time as Commonwealth's Exhibit No. 1.

(The document referred to was marked Commonwealth's Exhibit No. 1 for identification and received in evidence.)

(At this time the jury was returned to the courtroom.)

Mr. Horan: Call Detective Baker.

Thereupon,

DETECTIVE KIMBERLY D. BAKER,

was called as a witness for the Commonwealth and, having been previously been duly sworn, took the witness stand, was examined and testified as follows:

page 123] DIRECT EXAMINATION

By Mr. Horan:

Q. State your name and your occupation.

A. Kimberly D. Baker, detective, Fairfax County Police Department.

Detective Kimberly D. Baker

Q. Directing your attention to the 16th day of April, 1965, were you so employed on that date?

A. Yes, sir.

Q. Do you know the defendant, James Johnnie Mathews?

A. Yes, sir.

Q. Would you tell the jury how you come to know him?

A. I received instructions from the Supervising Officer in my Police Department to respond to Nash County, North Carolina, to pick up prisoners and transport them back into our jurisdiction in reference to armed robbery that we were investigating that had occurred in this county.

Q. Did you, in fact, go to Nash County, North Carolina?

A. Yes, sir.

Q. On what date was that?

A. I responded to Nash County, North Carolina and arrived on the 16th of April.

Q. What time of day or night did you arrive?

A. Approximately 7:00 p.m.

Q. Did you see the defendant that particular night?

A. Yes, sir.

page 124] Q. Where was he at that time?

A. At that time he was in the Nash County jail.

Q. Were the other suspects present with him at that time?

A. Yes, sir.

Q. Tell the jury what occurred when you first met him?

A. Upon my arrival in Nash County courthouse I met with High Sheriff Glen Womble who took me along with the Clerk of the Superior Court of Nash County into the jail section of the courthouse where he had one of his turnkeys bring in the four suspects at which time he introduced each one of them to me and introduced me to each of them as being a Fairfax County detective, and went over the story that he said they had given him in their presence at which time each of them agreed that the story was correct.

Q. Did there come a time when you personally interrogated the defendant Mathews?

A. Yes, sir.

Q. When did that occur?

A. The following morning.

Q. What time would that have been?

A. Let's see. Approximately ten o'clock, ten a.m. on the 17th.

Q. Prior to taking any statement from him, did you advise the defendant of any of his rights?

A. Yes, sir, I did.

page 125] Q. Tell the jury what you advised him.

A. Upon speaking with him the next morning, I again introduced myself as being a detective from Fairfax County. I advised him that he was a suspect in an armed robbery. I advised him that he had a right to counsel. I advised him that he had the right not to make any statement to me at all and that in the event a statement was made that it could be used either for or against him in a court of law.

Q. Did you promise him anything or threaten in any way in order to get a statement from him?

A. No, sir.

Q. Subsequent to warning him of his rights, did there come a time when he did give you a statement?

A. Yes, sir.

Q. Was that statement later reduced to writing?

A. Yes, sir.

Q. I show you this document marked Commonwealth's Exhibit No. 1 and ask you to identify this.

A. Yes. This is the statement I took from James Johnnie Mathews in the courthouse in Nash County, North Carolina.

Q. Is that his signature to that writing?

A. Yes, sir.

Q. Were you present when that signature was put on there?

A. Yes, sir.

Q. It your name on that document?

page 126] A. Yes, sir.

Q. Where would that be?

A. Lower left-hand corner of the last page.

Q. Did you read or explain this statement to the defendant prior to his giving it to you, the written statement, what did he do with the written statement prior to signing it?

A. I asked him to read this statement to me *aloude* and if there should be any corrections would he please make corrections, initial them, and if the statement met with his satisfaction, affix his signature thereto.

Q. Were there corrections made in that statement?

A. Yes, sir.

Q. Did he have any trouble reading that statement?

A. No, sir. He read very slowly but no trouble. He read it out loud to me.

Mr. Horan: Your Honor, I would like to offer that in evidence as Commonwealth's Exhibit No. 1.

Mr. Gilliam: I would like to examine the witness, Your Honor.

The Court: All right.

CROSS EXAMINATION

By Mr. Gilliam:

Q. Detective Baker, was this statement made in the presence and under the supervision of counsel?

A. No, sir.

page 127] Q. Was it made in the presence of High Sheriff for the Nash County, Sheriff Womble?

A. Yes, sir.

Q. On the night preceding this particular day which is April 16th, is this April 17th, April 17th, did Sheriff Womble advise you they had made a statement, that a statement had been made by this defendant?

A. Yes, sir.

Q. Now when you interviewed, you say you interviewed all four of them that night?

A. No, sir.

Q. You met with all four of them that night?

A. Yes, sir.

Q. That was in the presence of Sheriff Womble?

A. Yes, sir.

Q. Did Sheriff Womble then tell them in your presence what happened?

A. I beg your pardon?

Q. Did Sheriff Womble tell you in the presence of the four defendants what their part was, what they had told Sheriff Womble?

A. Yes, sir.

Q. Did the various defendants nod their heads or say yes or no?

Detective Kimberly D. Baker

A. He asked if this was a correct statement he
page 128] had made and each one gave an affirmative answer.

Q. How long had they been in custody in Nash County?

A. I can only go by what Sheriff Womble told me.

Q. How long was that?

A. He stated they were picked up at approximately ten minutes after midnight on the 8th of April.

Q. This statement was taken on the 17th?

A. Yes, sir.

Q. Do you know of inducements, if any, Sheriff Womble gave this defendant in order to obtain the statement?

A. No, sir.

Q. Can you testify and tell this jury that prior to the time you arrived Sheriff Womble had, in fact, made them no promises?

A. Only through the defendants themselves.

Q. I am asking you, do you know of your own personal knowledge?

A. No, sir.

Q. You don't know whether or not it happened?

A. No, sir.

Q. Now Sheriff Womble was the person in authority there in that particular county, was he not?

A. Yes, sir.

Q. And it was to him that you went with your warrants, is that correct?

page 129] A. Yes, sir.

Q. And he said these four boys had confessed, is that right?

A. Yes, sir.

Q. But you don't know what happened before you got down there, do you?

A. No, sir.

Q. Do you know whether or not they had confessed to a Virginia robbery before you arrived there?

A. I was told that that they had, sir.

Q. And that you can't tell us what inducements, influences, were used to obtain this confession because you weren't there, isn't that correct?

A. That's correct.

Detective Kimberly D. Baker

Q. Now do you know what the defendant's education is?
A. No, sir.
Q. Isn't it a fact you asked him what his education was before you took this statement from him?
A. No, sir.
Q. You didn't obtain his education?
A. No, sir.
Q. He didn't tell you he had a second grade education?
A. No, sir.
Q. Did you go into where the defendant was born, et cetera, with him?
page 130] A. No, sir.
Q. Well, that's funny, Detective Baker, because I refer you here to Question 4 of this written statement and ask you to read that.
A. I stand corrected.
Q. What is that question?
A. "Where were you born?"
Q. What is the answer?
A. "Parmacilo, North Carolina."
Q. Did you ask him what highway the robbery took place on?
A. Which robbery is this, sir?
Q. The Virginia robbery.
A. Yes, sir.
Q. Is that in the statement?
A. I don't recall, sir.
Q. You asked him that question?
A. I believe so.
Q. But you don't know whether it's in here or not?
A. I can't recite it word for word, no, sir.
Q. Would you look and see whether or not it is?
A. Yes, sir. Yes, sir.
Q. You asked if you had occasion to be in the vicinity of the Travelers Motel and you said it was on Richmond Highway?
A. Yes, sir.
Q. And what was the answer to that?
page 131] A. Yes, sir.
Q. Yes, what?
A. I didn't read the answer.

Detective Kimberly D. Baker

Mr. Horan: I am going to object to the method of questioning. I don't think the police officer is required to sit here and he didn't have to remember this thing word for word. I think the document should be offered and then he should be asked a specific question.

The Court: Overruled.

By Mr. Gilliam:

Q. Did the defendant tell you he had been a resident of North Carolina?

A. Yes, sir, I believe so.

Q. Did you put that in the statement or do you remember?

A. I don't recall.

Q. Has he been a resident of North Carolina?

A. Yes, sir, I believe he has.

Q. Are there some things you didn't put into this particular statement you asked him to sign, had he said other things you didn't incorporate in this statement?

A. Yes, sir.

Q. Let me ask you this. What do you put in the statement, have you been advised you do not have to give this statement or say anything else unless you wish to, why don't you put that in the statement?

page 132] A. Because I advised him of this.

Q. You advised him of certain other things too, didn't you?

A. Yes, sir.

Q. Did you pick out certain things to put into the statement?

A. Such as?

Q. You did pick out certain things to put into the state-
put into thestatement you asked the defendant to sign, you don't put everything that happened into this statement and ask him to sign it?

A. Are you speaking now of a general statement or this particular statement?

Q. This particular statement.

A. I didn't put everything he said in the statement, no sir.

Q. Was there any recording device or machine this statement can be verified by?

A. No, sir.

Q. Did he answer these questions by nodding his head or did he make verbal statements to you?

A. Verbal statements.

Q. Did he ever nod his head?

A. I don't recall.

Q. If *you* did, how would you put your answer

page 133] in this statement, how would you show the answer, show he nodded his head yes?

A. Nodded his head yes.

Q. Now the first, the first time you heard any damaging admissions from this defendant was in the presence of Sheriff Womble, is that correct?

A. Beg your pardon?

Q. The first time you heard any damaging admissions by this defendant was in the presence of Sheriff Womble, the High Sheriff of Nash County?

A. Yes, sir.

Q. And you cannot tell what transpired between Sheriff Womble and this defendant to bring about these admissions because you were not there?

A. That's true.

Q. And isn't it true the four men were arrested for this North Carolina robbery?

A. Yes, sir.

Q. And charged?

A. Yes, sir.

Q. And all four gave confessions?

A. Yes, sir.

Q. Do you know anything about the defendant's background?

A. No, sir.

Q. Do you know where he was employed?

page 134] A. No, sir.

Q. But he did tell you he was a native of North Carolina?

A. He mentioned during our conversation that he had lived in North Carolina, I believe.

Q. Did he tell you when he was born?

A. Yes, sir.

Detective Kimberly D. Baker

Q. When was that?
A. September 26, 1930.

Mr. Gilliam: Your Honor, those are all the questions I have. I object to the statement for the reasons previously stated and, also, based upon the ground the defendant was not represented by counsel at the time the statement was given.

The Court: Objection overruled. It will be received in evidence.

(The document referred to previously marked as Commonwealth's Exhibit No. 1 for identification was *recieved* in evidence.)

REDIRECT EXAMINATION

By Mr. Horan:

Q. Detective Baker, in answer to Mr. Gilliam's question, you said all four persons were standing there?
A. Yes, sir.
Q. Did all four confess to being in the motel?
A. No, sir.

page 135] Mr. Gilliam: I object as hearsay of what the other people said. That has got nothing to do with this defendant. He already said they confessed. Confession has a definite meaning. Anything else they said calls for hearsay.

The Court: I don't think the Commonwealth attorney is compelled to let it stand where you left it. Objection overruled.

Mr. Gilliam: Note my exception.

By Mr. Horan:

Q. How many confessed to being in there?
A. Two.
Q. Did the other two say they were in there at all?
A. No, sir.
Q. Who were the two who confessed to being in there?
A. The defendant Mathews and James Lee Williams.

Detective Kimberly D. Baker

Mr. Horan: Your Honor, I wonder if we might at this time have Detective Baker read this to the jury? It's in evidence.

The Court: Yes.

(The document referred to, Commonwealth Exhibit No. 1, having been received in evidence, was read to the jury by the witness, Detective Baker.)

Mr. Horan: I have no further questions of this witness, Your Honor.

CROSS EXAMINATION

page 136] By Mr. Gilliam:

Q. This part here where it says he took both of these and went out to the car and Williams stayed inside with the man and came out a few minutes later, there is nothing in here about any threat made by Williams to Stutz, was anything said about that?

A. In this statement?

Q. Yes.

A. No, sir, not in this statement.

Q. You asked about what his intention was when he went into this motel, and he didn't answer that in the affirmative, did he, he gave an explanation?

A. Yes, sir.

Q. Was anything said about the lack of knowledge in Mathews that Williams had a gun or what appeared to be a gun or what he used to represent what Stutz said to be a gun?

A. Not in the statement. However, he did tell me that he did have knowledge there was a gun in the car. However, he did not have knowledge the gun was on Williams' person when they went in.

Q. Mathews told you what now?

A. That he did know there was a gun in the car belonging to Williams. However, he did not know it was on Williams' person when they left the car.

Q. So at the time Williams performed this act
page 137] with the gun, this must have been a surprise to Mathews based on that statement?

Q. Let me see if we can get your testimony straight. You said Mathews knew Williams owned a gun which was in the car and when they went in the motel Mathews told you he didn't know Williams had the gun with him?

A. He didn't know whether he had it with him or not.

Q. When you questioned Williams, when you took his statement, didn't Williams admit he was the one who had stolen the money and not Mathews?

A. No, sir.

Q. Doesn't Williams say he is the one who stole the wallet?

A. No, sir.

Q. Does Williams say he took any of the money, does Williams say he is actually the one who took the wallet and all the money?

A. No, sir.

Q. Did you ask him about that?

A. Yes, sir.

Q. And did he say he was not?

A. Yes, sir.

Q. Did you ask the defendant how he was dressed?

A. Yes, sir.

Q. How did he say he was dressed?

page 138] A. I don't recall. I can check in my notes.

Q. Would you check, please?

A. (Witness checked notes.) Wearing dark rim glasses, black coat and black hat.

Q. Wearing what?

A. Dark rimmed glasses, black coat and black hat.

Q. Does it say what color his suit was?

A. No, sir.

Q. This was supposed to be Mathews?

A. Yes, sir.

Q. Now this statement talks about "we," "we did this, we did that," says Terain and Thompson stayed in the car, is that a correct statement? Is that what Mathews said?

A. Yes, sir.

Q. When Mathews, when you asked Mathews about why they went inside, did he tell you the reason they went inside was because they were, in fact, lost?

A. No, sir.

Q. Weren't they lost?

A. I don't know, sir.

Q. Mathews didn't tell you the reason he thought they were going inside was to find out directions?

A. No, sir.

Q. That he had been sleeping all the way down from New York?

page 139] A. No, sir.

Q. Did you ask him?

A. No, sir, I don't recall, sir.

Q. Did he tell you he was getting out to stretch his legs and walked to the motel with Williams?

A. No, sir.

Q. That Williams went inside and Mathews he didn't know Williams had gone?

A. No, sir.

Q. Did you ask him those questions?

A. Yes, sir.

Q. What answers did he give?

A. They had been discussing the fact they were low on money.

Q. But there was no discussion of robbing this motel, was there?

A. Not that particular motel, no, sir.

Mr. Gilliam: I have no further questions.

The Court: Are you through with your examination?

Mr. Horan: Yes, Your Honor, I am.

The Court: You may step down.

(Witness excused.)

Mr. Horan: Call Kenneth Blunt.

Whereupon,

KENNETH BLUNT, JR.,

page 140] was called as a witness for the Commonwealth, and having been first duly sworn, took his seat in the witness chair, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:

Q. State your name, please.

Kenneth Blunt, Jr.

A. Kenneth Blunt, Jr.

Q. Where do you live, Mr. Blunt?

A. 1104 Villamay Boulevard, Alexandria, Virginia.

Q. You know whether or not the Traveler's Motel is on No. 1 Highway?

A. Yes.

Q. What is your connection with that motel, if any?

A. Owner. And manager.

Q. Owner and manager of the motel?

A. Correct.

Q. Is there any other organization that has a connection with the proceeds of that franchise?

A. No. Proceeds come to myself.

Q. Directing your attention to the evening of April 7th, 1965, were you the owner of the motel on that date?

A. Correct.

Q. Did there come a time on the 7th that you examined the cash drawer and the cash box to see if any of your money was missing?

page 141] A. Yes. There was money missing.

Q. Would you tell the jury where the money was kept of the motel's funds, if you know?

A. Well we have a cash drawer which we keep change in to give to the customers as they pay their room rent and we had a separate box where we keep our money separate for people making telephone calls, keep that money in a separate drawer. And that's all kept right at the desk in front.

Mr. Horan: I have no further questions.

CROSS-EXAMINATION

By Mr. Gilliam:

Q. Mr. Blunt, is the Traveler's Motel — you own that yourself or is that a corporation?

A. It's owned by myself and my father.

Q. You own it together?

A. My father and I own it together.

Q. The proceeds of the business go to both of you?

A. That's correct, sir.

Q. You more or less are in partnership?

A. Yes, that's right. That's a partnership.

Q. He is as much entitled to that money as you are?

A. That's correct.

Q. Now you said there was a cash box, I believe?

A. Well, we have a drawer in the desk there where we make change, cash drawer, if you want to call it that.

page 142] Q. You have a cash box also?

A. Well, right joining the cash drawer there's another drawer where we keep money in, telephone money. In other words, we have a switchboard and a customer makes a call and consequently he is to pay for the call and when he comes up to pay for the call the money goes in this drawer. We keep it separate from our room rent.

Q. Had you been on duty that night?

A. No. I work mostly during the day. I wasn't on at the time at night-time, no.

Q. Do you keep bills in the cash drawer?

A. Yes.

Q. You keep bills there?

A. Bills and change.

Q. Do you know whether or not there were any bills there that night?

A. Where?

Q. In the cash drawer.

A. Yes.

Q. How do you know this?

A. Because we always have a check-in and a check-out. This is done at change of shifts.

Q. That would have been done at twelve o'clock?

A. We have a shift change every eight hours. That would be at midnight.

page 143] Q. And you are assuming that a money check was done then?

A. There was a check at twelve o'clock.

Q. You weren't there though, were you?

A. No, I was not there.

Q. You're just assuming?

A. I'm assuming it was done. Which is done all the time.

Q. But somebody told you, you weren't there?

A. No. I wasn't a witness to the twelve o'clock change.

Kenneth Blunt, Jr.

Q. Now the room in which the desk is in is not a desk, but a counter?

A. Yes, sir.

Q. Is the money in the middle of it, is the cash box and cash drawer in the middle of it, or at one end?

A. Well the cash drawer where we make change for room sales, guess you would call it, is in the center and the drawer where we keep the telephone money is at the end.

Q. Is it at the end away from the door which leads off into the vestibule and some stairways?

A. No. The telephone money which is, would be to the right of the room where we keep our room sales, would be to the right.

Q. The right of what?

A. The drawer where we keep the telephone money is to the right of the drawer where we keep the money for room sales.

Q. Where is the door with the steps up and
page 144] down in relation to that?

A. The telephone money would be the farthest away from going up and down the steps.

Q. Now the — is the doorway like this, suppose the doorway you walk in is like this, this would be out here where the counter is? Say that's the exterior office behind the counter. The front door would be back here and he would walk in the front door like that?

A. That's right.

Q. Is the door with the stairs along in here some place?

A. No, over at this side.

Q. Over to the right? Is there a hall here or what?

A. There is a door right in front where you stand behind the door and the stairway goes upstairs and the stairway goes downstairs.

Q. So the stairs would be up this way directly in front of your office, right?

A. Right.

Q. Then one to the left, split-level type?

A. Blank wall right here.

Q. How big is this in here from where the door is to this blank wall over here?

Kenneth Blunt, Jr.

A. Oh, just a stair well. About three feet, two and a half, two, three feet.

Q. More than 12 inches?

page 145] A. Oh, yes.

Q. Now, is there a partition or wall right down this way, then your counter in front of that, that's the idea, the wall is this way straight down like this?

A. That's right.

Q. And then there is a counter out front here?

A. The counter is right running parallel with the wall. I could draw it for you.

Q. I think we know pretty well.

Mr. Gilliam: That's all the questions I have. Oh, just one other question, Your Honor.

By Mr. Gilliam:

Q. How is that room lighted?

A. Which room is this?

Q. The room where the counter is?

A. Well, we have overhead lights.

Q. Is there a lamp there?

A. There is a lamp on the counter and right over here as well.

Q. Is there four bulbs in the *ramp*?

A. There is a place for four bulbs.

Q. You usually have four bulbs in it?

A. I couldn't swear to that. When one burns out we normally replace it. I mean, there is a place for for bulbs, put it that way.

page 146] Q. What do you replace it with?

A. Another bulb.

Q. What wattage?

A. Usually keep anywhere from 40 to 60-watt.

Q. You know what was in it on that night in question?

A. No, sir.

The Court: Any further questions?

Mr. Gilliam: No, sir.

Mr. Horan: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Horan: That's the Commonwealth's evidence, Your Honor.

(The jury was admonished by the Court and a five-minute recess was taken.)

Mr. Gilliam: Your Honor, I call Detective Wayland to the stand.
Thereupon,

DETECTIVE ROBERT J. WAYLAND,
called as a witness for the Defendant, and having been first duly sworn, took his seat in the witness chair, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Gilliam:

Q. Would you state your name and employment, please.

page 147] A. Detective Robert J. Wayland, Fairfax County Police Department.

Q. Did there come a time in the course of your employment that you investigated what was alleged to have been a robbery in the Traveler's Motel on Richmond Highway?

A. Yes.

Q. What date was that?

A. April 7th, 1965.

Q. What time did you arrive there?

A. Between five and five-thirty a.m.

Q. And who was present at that time?

A. Police officers or all parties concerned.

Q. Pardon?

A. Just police officers?

Q. No, everybody that was present.

A. Mr. John C. Stutz, the manager of the Traveler's Motel, night manager; Sergeant Hurst, Officer Porter, myself.

Q. Now, at that time, did Stutz tell you what had happened, why he had put out a police call?

A. Yes, he did.

Q. What did he say?

A. He stated he was sitting behind the desk in the office of the Traveler's Motel when two subjects came into the office and asked about how to get on Route 95 South.

Q. Let me just interrupt you a minute. Did

page 148] he tell you how the room was lighted when they came in?

A. He did. Lights on the outside and a light in the office.

Q. One light?

A. I don't recall.

Q. Did he tell you how these particular — what you refer to as subjects, how they were dressed?

A. Yes, he did.

Q. How were they dressed?

A. He stated one was dressed very neat in a business-type suit.

Q. What color?

A. Dark.

Q. With a dark color suit?

A. Yes.

Q. Did he say this was a man who was supposed to have taken the money, the man dressed in the dark colored business suit?

A. This was the man that took the money, yes.

Q. What else did this man have on?

A. That was the only description we had was the suit, white shirt and tie.

Q. Did he tell you he had a hat on?

A. To the best of my recollection, he did, state this man had on a hat.

page 149] Q. He did have on a hat?

A. Yes.

Q. What did he tell you about dark rimmed glasses?

A. I don't recall anything about glasses.

Q. He didn't state he had on any glasses?

A. Not to my recollection. No, sir.

Q. Did this man who was dressed very neatly, he did not have glasses on according to Stutz?

A. I don't recall.

Q. You don't recall whether he said he had on glasses or didn't have them on?

A. I don't remember any discussion at all about glasses.

Q. Now there did come a time subsequently when he gave you a written statement as to what happened?

A. Yes.

Q. Do you have that with you?

A. I do not have it with me but it is in the folder. I thought it was in the Commonwealth's attorney's possession.

Q. Could I see that statement?

A. I don't have it.

Mr. Horan: I don't have it.

Mr. Gilliam: Where is the written statement he is supposed to have given?

Mr. Horan: I assumed it had been introduced as evidence. It's from Detective Baker's —

page 150] The Court: I don't think you are talking about the same statement.

Mr. Gilliam: No, Your Honor, I am talking about Stutz' statement given to him the following a.m.

By Mr. Gilliam:

Q. Did you give it to Baker?

A. As far as I knew it was in the folder with the warrant, other items.

Q. Who did you give it to?

A. It was all in the folder together and it was introduced in the lower court, last I seen of it.

Mr. Horan: Your Honor, unless there is some confusion this is in the Police Department folder.

Mr. Gilliam: Your Honor, I would like to get, would like Detective Baker to get the Police Department folder.

(Detective Baker was brought into the courtroom and instructed by Mr. Gilliam to get the folder referred to and bring it to the courtroom.)

By Mr. Gilliam:

Q. Now, did there come a time when you took Mr. Stutz to a lineup?

Detective Robert J. Wayland

A. Yes, we did

Q. And were there in the lineup how many people?

A. Five persons.

Q. Five persons and included in those five

page 151] persons were who?

A. Mathews, Williams, Terain, Thompson and an additional Negro male that we had charged with, that was charged with vagrancy.

Q. You said Williams, Mathews, Terain and who else?

A. Thompson.

Q. And who?

A. I have the lineup sheet in this folder we are referring to.

Q. You say there was another Negro male?

A. Yes.

Q. Will you give us a physical description of Williams?

A. Williams is approximately six foot. Dark complected Negro.

Q. Weight?

A. 175 to 180 pounds.

Q. Okay. Mathews?

A. Five-foot nine.

Q. Weight?

A. 155 pounds.

Q. Terrain?

A. Five-foot eight, 152 pounds. I remember that specifically.

Q. Where did you get these weights from?

A. From recollection. You asked me to give a description.

page 152] Q. Did you weigh these people?

A. No, when I booked them they put their weights down.

Q. Where did you get that from?

A. It was given to me by them when I asked.

Q. Thompson?

A. Approximately five foot ten, 160 pounds.

Q. The other Negro male you referred to?

A. Approximately five-nine to five-10. 160 pounds.

Q. Now, who did — how was this line-up conducted and how was identification made?

A. They were taken to headquarters and placed in our lineup room, lined up directly in line.

Q. How were they dressed, all dressed alike?

A. I have that line-up sheet. I can't tell you without looking at that.

Q. Were they dressed as the defendant is dressed now?

A. If I can look at my line-up sheet I can tell you.

The Court: Mr. Horan, do you have that? The line-up sheet? Why don't you bring everything in?

By Mr. Gilliam:

Q. Now who did Stutz pick out first? Or did he make a positive identification?

A. Mr. Stutz did not make a positive identification.

Q. He didn't make a positive identification of anyone?

A. No, sir.

page 153] Q. Now were Williams, Mathews, Terain and Thompson all charged with the same crime?

A. Yes.

Q. Did he pick out any of these particular individuals?

A. Yes. He picked out either Thompson or Terain as one of the persons. And one of the persons that was charged with vagrancy.

Q. Pardon?

A. And the person that was charged with vagrancy. Could I make an additional statement in reference to this, Mr. Gilliam?

Q. I think you can on cross-examination. So he picked out two people, Thompson or Terain and the person charged with vagrancy?

A. Yes, sir.

Q. Now referring to Mr. Stutz' statement, I ask you, did you ask this question of Mr. Stutz? First of all you asked him to refer to Subject Number One and Subject Number Two and you asked him to refer to Subject Number Two as the person without the gun, without what appeared to be a gun? You can look at this if you like. Who is Subject Number Two in this statement?

A. Subject Number Two, and I am referring now to the way that he addressed the two early in the statement, Subject

Number Two would be the well-dressed Negro male who is the defendant.

Q. Subject Number Two was the man who did-
page 154] n't have the gun or didn't have what appeared to be a gun?

A. That's correct, Mr. Gilliam.

Q. Would you read Mr. Stutz' answer to this question? Read the question and then read the answer.

A. Subject Number Two was a male Negro.

Q. Would you read the question?

A. "Mr. Stutz in the same manner would you describe Subject Number Two? Answer: Subject Number Two was a male Negro in his late twenties, approximately five foot nine inches, very well dressed in a dark suit, black hat, white shirt. He was wearing glasses, reading glasses, I suppose, with large rims. He was round-faced. That's all I can think about him."

Q. So at that time he told you he was wearing glasses?

A. Yes, sir. That's correct.

Q. Now did you ask Mr. Stutz whether or not he received any injuries as a result of this incident?

A. Yes, I did.

Q. What was his answer?

A. He sustained no injuries.

Q. Did you ask him how much money had been taken?

A. Yes, I did.

Q. Do you remember that answer?

A. To the best of my recollection—

Q. Would you like to refer to this to refresh your memory?

A. Yes. His answer to the question of how
page 155] much was taken from the motel, best of his knowledge, was approximately $109 United States currency.

Q. When you took his statement, did he refer to being shoved down in the stairs, anything like that?

A. Yes.

Q. Did he say he walked downstairs, fell or was shoved down, you said he didn't sustain any injuries? This part right here, where he talks about stairs, what does he have to say about the stairs?

A. The stairs he is referring to in the statement leads from

the hallway at the rear of the office to the basement.

Q. He said he was ordered down the stairs, didn't he? He said first he began to take him upstairs and then changed his mind and ordered him back downstairs, isn't that correct?

A. That's correct. I have in my interview with Mr. Stutz at the time referring to Subject One who placed his hands on him when ordering him upstairs, assisting him in this manner by pulling his belt, bringing him back down and pulling him at the same time and the stairs referred to in the latter part of the statement are the stairs going down in the basement when he stated was assisted, however, he never lost his balance, was never forced downstairs or let go in any way.

Q. Did you ask him whether or not he could see what was going on, he could see money being taken by what you refer to as Subject Number Two?

page 156] A. I don't believe so, Mr. Gilliam. Subject Number Two, I believe he saw him come behind the counter, realized his presence behind the counter, but just exactly what he saw I don't remember what he said in the statement; however, at the time this was going on, according to Mr. Stutz, there was conversation going on between Subject Number Two who was behind the counter and Subject Number One who allegedly was holding him at gun point.

Q. Did you take any fingerprints, do any investigative work, to establish identification through other evidence?

A. Yes, sir. There is normal procedure where a report of claimed violence occurred that the area be processed for fingerprints, any other evidence we feel is significant in the case. In this particular case we did look around the area for any property that may have been left by his assailants, this with negative results, so, consequently, we proceeded — referring to we, my partners, Officer Porter and I — I dusted what I felt were the areas any alleged assailant may have touched.

Q. Did you dust in the area where the money was kept, et cetera, for fingerprints?

A. The counter was dusted on the top of the surface where they had stood when they came in. The area where the money actually was taken was a box, best of my recollection, this is not the type surface you would normally get latent prints

from. This was not dusted. The door going off
page 157] the rear to the hallway was dusted and the door
that goes down the stairway was dusted.

Q. The counter was dusted?

A. Yes.

Q. Was the money box dusted?

A. I don't recall dusting the box. It was the type paint through my experience which is limited, dusted prints, lifting prints, isn't the best surface.

Q. Did you obtain latent prints?

A. Yes. To the best of my recollection, we lifted three or four prints.

Q. Do you remember where they came from?

A. Yes.

Q. Where did they come from?

A. The prints I lifted from the door leading down from the hallway into the basement, the stairwell side in from the outer surface.

Q. Did you obtain any other prints from any other places?

A. No, I did not.

Q. Did you then, what did you do with these latent prints you obtained?

A. I kept them with my report for further reference and after four persons, suspects, were arrested in this case, referring to Mathews, Terain, Thompson and Williams, they were fingerprinted and mugged in our identification bill and
after their prints were rolled on a card they were
page 158] forwarded to the FBI Office. I left the prints
in the Bureau for the identification officers to compare to see if they were one and the same of any of the four subjects in question.

Q. Did they match any of the prints of the four subjects?

A. The prints that I had did not compare with any of the four subjects in question.

Q. Does that include the defendant?

A. That includes the defendant, yes, sir.

Q. Now referring to your line-up information there, would you tell us how Williams was dressed?

A. Brown sweater and charcoal grey pants.

Q. Would you tell us how Terain was dressed?

A. Blue sweater, black trousers.

Q. Would you tell us how Thompson was dressed?

A. Black sports coat and grey pants.

Q. The other Negro male you referred to, how was he dressed?

A. Blue shirt, tan trousers.

Q. Now how was the defendant Mathews dressed?

A. He had a grey suit on.

Q. A dark grey suit?

A. No, sir. I wouldn't refer to it as dark grey. It was black, shade of tweed in it. I would actually classify it as medium-colored.

Q. Medium charcoal grey?

A. You couldn't hardly call it charcoal grey. It
page 159] had mixed colors in it, Mr. Gilliam. It was shiny irridescent type material.

Q. Would it have approximated the description of the way this particular defendant was supposed to have been dressed?

A. In reference to his appearance in the office of the Traveler's Motel?

Q. Yes.

A. Yes.

Q. Did you reach a conclusion as to the result of the line-up?

A. It would be Subjects Four and Five, Ronnie Terain and Thompson.

Q. Terain and Thompson were picked out?

A. Yes, sir. But that was—

Q. Let me ask you this—

Mr. Horan: He should be allowed to qualify his answer without being cut off.

The Witness: I would like to clear the statement.

The Court: Is it qualification to the question he asked?

The Witness: Yes.

The Court: All right, go ahead.

The Witness: Well, the results were of Four and Five, Thompson and Terain, but earlier when you asked this question you said was there positive identification and
page 160] I stated yes. I beg your pardon, no, there was no positive identification made as a result of this

line-up and Four and Five were pointed out by the defendant but at the same time he stated that he —

Mr. Gilliam: Don't tell us what the defendant said.

Mr. Horan: Your Honor, I think he should be allowed to answer that.

Mr. Gilliam: I don't think it is permissible to tell what the defendant said. I want to get all the competent evidence, but I don't believe it should be hearsay evidence.

The Court: What the defendant said?

The Witness: That was my error. It was a statement made by Mr. Stutz.

Mr. Gilliam: So that wouldn't be admissible. It's hearsay evidence. I object to it.

I don't have any other questions.

CROSS EXAMINATION

By Mr. Horan:

Q. How long after the robbery was this line-up held?

A. Did I place a date on the line-up sheet, Mr. Horan? The following Monday morning after these persons were brought back from North Carolina we arranged a line-up just as soon as we could get Mr. Stutz to headquarters.

Q. April 18th sound like it might be the date?

A. Yes. It was the following morning.

Q. That would have been some eleven or twelve page 161] days after the crime?

A. Yes. The offense was reported on the 7th of April, yes, sir.

Q. Tell the jury how long after the robbery occurred did you talk to Mr. Stutz?

A. I would approximate it at twenty to twenty-five minutes.

Q. Would you tell the jury what was his condition at that time?

A. Mr. Stutz was in a weakened condition, very very nervous and [illegible]et.

Q. Did [illegible]u [illegible]ave trouble getting to talk to him at all in the course of your conversation?

Mr. Gilliam: Your Honor, I think that is an objectionable

question whether he had trouble. I think that's something Stutz should answer. I don't see how this witness can testify to that.

The Court: Objection overruled.

By Mr. Horan:

Q. Answer the question, please.

A. There were certain elements in the case such as descriptions or what-have-you that we had to go over two or three times before we could establish what occurred or what had allegedly occurred.

Q. Now at the time you were taking the prints, how long after the alleged robbery would that have occurred?

page 162] A. I would say 45 minutes to an hour.

Q. Now you say you got a print off the door to the basement steps?

A. Yes.

Q. Is that not a traveled portion of the motel?

Mr. Gilliam: Your Honor, I don't see how he could know that, whether that is a traveled portion of the motel or not.

The Court: Objection overruled.

The Witness: This would be for employees only.

By Mr. Horan:

Q. And you say the other prints you got from the countertop?

A. I dusted the countertop, but the latent prints were not lifted from the countertop, only from the door.

Q. So the door is the only place you got a print?

A. Yes, sir.

Q. Now if the print was lifted from the countertop, the print may have been smudged. It wasn't a print you could make identification on.

Q. What was the print that was compared?

A. The one from the basement step door.

Q. Is it your testimony you were unable to get any prints from the counter portion where the cash box and cash drawer would have been?

Detective Robert J. Wayland

A. The cash box, as I stated earlier, was the
page 163] type of finish, paint, I don't recall, but I do not
remember dusting this surface where the money
was stolen.

Q. In other words, it is a fair statement the —

Mr. Gilliam: Your Honor, I don't think he should be admonished whether it is a fair statement or unfair statement.

Mr. Horan: I haven't asked the question.

The Court: Objection sustained.

By Mr. Horan:

Q. It is correct, is it not, you got no prints from the area where the money was taken?

A. That's correct.

Q. And you got no prints from the countertop of the registration desk?

A. The only thing I could get was overlap and smudges, nothing that could be identified.

Q. When you say nothing could be identified, isn't it a fact it couldn't be identified as belonging to anyone?

A. That's correct.

Q. Tell me this, Detective Wayland, did you ever tell Mr. Stutz that he had been unable to pick this defendant out of the line-up?

Mr. Gilliam: Your Honor, I think that's a statement made out to the Court, what he told Mr. Stutz, nothing to do with his testimony today, what he did or said against what he
said under oath.

page 164] The Court: Objection overruled.

Mr. Gilliam: Note my exception as self-serving.

By Mr. Horan:

Q. Would you answer the question, please?

A. Mr. Horan, I remember the time was running short, being that I had several appointments that morning, and that Mr. Stutz did drive to headquarters and he viewed these people, picked out subjects as I stated earlier and I thanked him and he went into Lieutenant Leston's office and had a brief conversation with him and I don't remember having

any conversation with Mr. Stutz after this line-up.

Q. So you never told him he didn't pick out Mathews?

A. No, sir. Not to my recollection, Mr. Horan.

Mr. Horan: I have no further questions.

Mr. Gilliam: That's all I have.

The Court: You may step down.

(Witness excused.)

Mr. Gilliam: Excuse me, I think I have a witness subpoenaed, Officer Bollus, and he can go.

Mr. Horan: Officer Bollus can go as far as I am concerned.

Mr. Gilliam: Call Mrs. Mathews.

Thereupon,

MRS. CURLEY MATHEWS,

called as a witness for the Defendant and, having been first duly sworn, took her seat in the witness chair,

page 165] was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Gilliam:

Q. Mrs. Mathews, now you are the wife of the defendant?

A. Yes.

Q. What is your age?

A. Twenty-four.

Q. Your full name?

A. Curley Mathews.

Q. Now, as you said, you are the wife of the defendant?

A. Yes.

Q. What is your daughter's name?

A. Deborah.

Q. How old is she?

A. Five.

Q. Do you know whether or not your husband was born in North Carolina?

A. Yes. He was as far as I know.

Q. Pardon?

Mrs. Curley Mathews

A. Yes.

Q. He was born in North Carolina?

A. Yes.

Q. What education does he have?

A. Well, it's kind of — well, it comes in two parts. As far as formal education, as far as school, it goes to second grade.

page 166] Q. What grade?

A. Second.

Q. Second grade?

A. Yes.

Q. What's the second part?

A. Well, he has numerous amount of trades. This he gained through apprentices, working under someone, learning this. This was gotten through school. He took a course in Bible Study, also, which helped him in his education. He would go through different phases to study in order to be able to understand these things. He had to have another degree in education so like he went through a period like a home study course and then proceeded gradually and went into Bible Study.

Q. What are the various trades he has?

A. Brick mason, plasterer, painting, this sort of thing. He learned paper hanging.

Q. You said something about paper hanging?

A. Yes.

Q. Now in April of this year, where was he employed?

A. Well, he had two jobs at the time.

Q. Have you — what were these two jobs?

A. He had a full-time job downtown on 42nd Street and he was working part-time in the post office.

Q. How many hours did he work per day?

A. Well he would go to the post office around

page 167] two and leave there around five.

Q. Where?

A. At the post office from six in the evening until three or four in the morning at the theater.

Q. What was his job at the theater?

A. Variety. Usher, maintenance man, electrician, a little bit of everything there.

Q. Was he a full-time employee of the post office?

A. No, he was a part-time employee, part-time work.

Mrs. Curley Mathews

Q. Just when they called him?

A. Yes.

Q. Now is your husband the type who is regularly and steadily employed?

A. He has been employed ever since I have known him.

Q. Does he support you and your child?

A. Yes.

Q. Would you say he is a good provider?

A. Yes. Very much so.

Q. What is this Bible Study course you referred to?

A. Well my husband, he has, well, when he comes down to religion he has a thing about it. He feels within himself. He doesn't more or less understand, feels there is more to it. If he can learn himself it will help him to be a better person. That's the main reason why he took it. We don't attend church too regularly with the two jobs there page 168] isn't that much time to go to church. He felt he couldn't get the full benefit to benefit himself.

Q. Where is this study course given?

A. The name of it was Christian Science. They send you studies through the mail.

Q. Through the mail?

A. Yes.

Q. Did that cost any money?

A. Yes.

Q. How much does that cost?

A. Well the books ran about 15 or $20 for the first four lessons, I think it was, and your tests you paid so much for the tests and it depended on the degree which you increase the work. They cost a little more as you go a little further.

Q. Did you take part in this program too?

A. Well, to help him out at home.

Q. What do you mean to help him out at home?

A. Well, we would study this together because this was something to benefit him. Anything that benefited him was for the whole family and we both learned from this.

Mr. Gilliam: That's all the questions I have.

Mrs. Curley Mathews

CROSS EXAMINATION

By Mr. Horan:

Q. You are fairly well educated, I take it, Mrs. Mathews?

A. Yes.

page 169] Q. You are a high school graduate?

A. Yes.

Q. I think it can be said you consider your husband a pretty intelligent man?

A. Yes.

Q. You say he is an electrician, has been an electrician?

A. Well, he doesn't have a license as an electrician.

Q. Has he studied to be an electrician?

A. Just become an apprentice, working under somebody else, that actually has a license.

Q. Has he studied anything at home to improve himself?

A. No, not at home.

Q. He doesn't have any trouble reading the Bible books?

A. Yes.

Q. He can read and write, things like that?

A. Yes. He was raised in a church. Bibles are no problem.

Q. You and he live in New York together?

A. Yes.

Q. Are you a New Yorker by birth?

A. No, by birth, Columbia, South Carolina.

Q. How long have you known James Mathews?

A. About three years.

Q. You have been married how long?

A. Only been married a few months.

page 170] Q. Did you meet in New York?

A. No, I met him in Philadelphia at the time.

Q. In Philadelphia?

A. Yes.

Q. And on the 6th day of April or 7th day of April, did you know where he was going when he left?

A. No.

Q. You didn't know?

A. No.

Q. Did you know Thompson, Williams and Terain?

A. Who?

Q. Thompson, did you know him?
A. I know him.
Q. And Ronnie Terain?
A. Yes.
Q. And Jimmie Williams?
A. Jimmie? Yes.
Q. He left with them at that time?
A. At the time he left I didn't know he was leaving with anybody. In fact, I didn't know he was going.
Q. When were you first aware of the fact he had gone?
A. When he called me.
Q. When he called you he was in jail in North Carolina?
A. Yes. He called me on my job.
Q. Had he told you about the fact he had been page 171] convicted once before for grand larceny?

Mr. Gilliam: Your Honor, I object to the question and move to strike.
Mr. Horan: He's gone into the character of this defendant and I think I should be entitled to go into it more fully.
Mr. Gilliam: If he is going to be arguing, I think he should argue outside of the presence of the jury.
The Court: Objection sustained.
Mr. Horan: I have no further questions, Your Honor.
Mr. Gilliam: That's all I have.
The Court: You may step down.

(Witness excused.)

Mr. Gilliam: That's our case, Your Honor.
The Court: Will counsel approach the bench?

(Both counsel approached the bench.)

The Court: Do you want to excuse this jury until tomorrow morning at ten o'clock? Do you have any request they be kept together?
Mr. Gilliam: No, I don't, Your Honor.
The Court: I can't see any reason for keeping them together in a case of this sort, so unless the Commonwealth has some objection?

Mr. Gilliam: No, I don't, Your Honor.

Mr. Horan: I won't request it.

page 172] The Court: The reason I asked was I thought you may have some objection to their being adjourned overnight?

Mr. Gilliam: No, Your Honor, I don't have any objection.

(Both counsel returned to their respective places at the counsel table.)

The Court: Members of the jury, we are going to adjourn until tomorrow morning at ten a.m. You have heard all the evidence and now I will ask you on behalf of the Defendant and Commonwealth who are entitled to have you deliberate only with the other eleven jurors and nobody else, so overnight, do not discuss this with your wife or your husband or do not discuss it with anyone and do not visit the scene of the Traveler's Motel to attempt to decide for yourself what went on inside of that office or what it may have looked like, do not attempt to come to any conclusion on it until you have heard the argument of counsel and received the instructions of the Court which you will hear the first thing tomorrow morning.

(Thereupon, at 5:15 o'clock p.m., the Court was recessed, until 10:00 o'clock a.m. on the following day, June 15th, 1965.)

page 173] SETTLING OF INSTRUCTIONS

(In the chambers of the Court, out of the presence of the jury and in the presence of the Court both counsel and the Reporter, commencing at 5:30 o'clock p.m.)

The Court: I think this is a proper instruction, I will grant number one.

Mr. Gilliam: I will have to take exception to it on the grounds it attempts to define reasonable doubt.

The Court: I will grant two.

Three?

Mr. Gilliam: Three, Your Honor, is an instruction charging a crime the defendant is not charged with. The indictment states "against his will by violence or intimidation and by

the threat of firearms." Really, violence or intimidation is an element of robbery, but that is supplied by the presentation of the firearms as in the indictment a lesser offense of violence or intimidation as in the indictment you have the claim of violence or intimidation by the threat of firearms, but we, too, want to make a motion at this time to direct the verdict and acquit the defendant based on the fact there has been no proof of threat of firearms such as charged in the indictment. If there is any proof of a firearm being used, it was presented and there was no threat of it as an actual presentation and the Code I think makes specific reference to both those instances and sets them out separately. I

page 174] think the evidence is lacking as to any threat as threat of firearm as charged in the indictment.

I also object and move to strike, based on the fact there is no allegation in the indictment that the threat of firearms preceded or was simultaneous with the taking of the alleged money.

The Court: Deny your motion.

Mr. Gilliam: Now that we have got the motion in, Your Honor, I think the indictment does charge threat of firearm, does charge presentation of a firearm. The indictment also charges the threat of robbery of certain amount of money. arises as a general definition of robbery, but I don't think it is applicable to the particular act of robbery this defendant is charged with having committed. Violence or intimidation is one thing and if violence *of* intimidation is accomplished by presentation or threat of firearm, the indictment charge is a firearm, not a deadly weapon, and deadly weapon is broader than firearm.

Now the first part of it, if you would strike the last of it, "or presentation of a deadly weapon" then you are limited in the punishment instruction to 20 years, but the way this reads by violence or *intimindation,* under that instruction it appears to me the defendant could end up with punishment by death, merely on the mere violence or *intimindation* alone.

page 175] Mr. Horan: If the word bothers you, I will be glad to change the word to presentation of firearm.

Mr. Gilliam: I don't think you can.

The Court: I don't know that intimidation belongs in there. If you are going to ask for an instruction —

Mr. Horan: I don't see how you really can present a weapon to somebody and ask for their money and not intimidate them.

Mr. Gilliam: It is true in robbery one of the elements is violence or intimidation but where a firearm is presented, deadly weapon, that is punishable by death.

Mr. Horan: Any crime against a person is punishable by death.

The Court: In your punishment — I think that this is correct, Mr. Gilliam.

Mr. Gilliam: I have to take exception to that.

The Court: Four is the punishment.

Mr. Gilliam: There, again, that instruction is broader than the indictment. I don't think you can have an instruction which charges something and tells the jury they can base the punishment on something not charged in the indictment.

The Court: What do you object to, the deadly weapon?

Mr. Gilliam: I object to that.

The Court: What does the indictment charge?

Mr. Horan: Take from a person against his
page 176] will by violence or intimidation or presentation of a firearm.

Mr. Gilliam: But it doesn't charge, says take from a person or in his presence or against his will by violence or intimidation or threat of firearm. There is an example there why instruction three is wrong. The indictment uses the *conjuctive* and by threat of firearm where the instruction says or by the threat of firearm,

The Court: I don't think the indictment being in conjunctive would prevent him being convicted of it if they didn't find all of them. I think maybe this, that the words "or deadly weapons or instrumentalities" could be deleted or deadly weapon, but I think the rest of it is all right. I will grant it with that deletion.

Mr. Gilliam: I object to that.

Mr. Horan: Instruction four is taken right from 18.190.

Mr. Gilliam: The indictment doesn't charge violence to the person so I think that is erroneous in three and four. And there is no evidence of any violence to the person. Certainly presentation of a firearm but you have no evidence of violence to a person.

The Court: I think when you jam a revolver up against a man's stomach —

Mr. Gilliam: The jury could also find that was presentation of a firearm.

You are taking a situation where the Legisla-
page 177] ture said this may be one particular aspect of violence to a person and you are saying there is other evidence of violence to a person. The only action is presentation or threat of firearm. There is no other evidence of any further violence to a person. It is set out in the Code. You are leaving the jury free to wonder without evidence to support other violence to a person.

I agree that is probably violence to a person but why instruct them twice, why say, I say threat of violence to a person can be broad. I think there is no evidence of it being any broader than threat or presentation of a firearm.

The Court: Threat of violence to the person is not punishable by death, is it, it is violence to the person, isn't it?

Mr. Horan: Yes, sir. I think that is right. By the threat *of* presentation of firearm is the way it reads.

Mr. Gilliam: The man is specifically charged in the indictment with threat of firearm. The instruction reads threat or presenting of firearm and that instruction is broader than the indictment. There is no allegation in the indictment there was any other violence to the person, yet, the instruction goes into other violence to the person. There is no threat or other violence to the person yet the instruction covers that too.

The Court: Whether I ought to allow them to consider robbery by means other than by one of these
page 178] methods. So that they can find a lesser punishment. Do you contend that the balance of that ought to be added to that instruction, Mr. Gilliam; balance of the statutory punishment be added to this? Suppose the jury, for instance, did not feel there is no other evidence, any other threat except by firearm, it is either that or —

Mr. Gilliam: It is either that or the man did not, in fact, have a firearm. I contend there has to be proof this man, unless it is proven this was a firearm, a 38 revolver, then it was not a firearm because something which appears to be a firearm and is not a firearm cannot be the basis for conviction as I understand it.

Are you striking deadly weapon or other instrumentality?

The Court: Yes, and I am striking the words "threat of."

Mr. Horan: Make that all by presentation of firearm.

The Court: I have stricken the words "threat of" and

stricken the words "or by threat of any other deadly weapon or instrumentality whatsoever."

Mr. Gilliam: I think it should say, "The Court instructs the jury if they believe beyond a reasonable doubt from the evidence."

Your Honor, I want to go back to three just for a second, if I might. I think that also includes the element "without the consent of the owner."

page 179] The Court: Against his will —

Mr. Gilliam: And without the consent of the owner. If there has been a — this is a situation where the owner has consented to the theft of his property then it is not robbery.

Mr. Horan: It always is when taken from the person.

Mr. Gilliam: I think it has to be without the consent of the owner.

The Court: All right, number five.

Mr. Gilliam: Your Honor, in Number Four, are you leaving in by threat or presentation of a firearm or are you striking out presentation?

I have to take exception to this on the ground the indictment does not charge presenting of firearm and the indictment also does not charge violence to the person and further, the only evidence in the case of any violence is by dealing with what is not yet proven to be a firearm and there is no other proof of any violence to the person.

The Court: Number five?

Mr. Gilliam: Is this taken from Michie's instructions? I think instruction five, Your Honor, that I have an instruction on that and I think that *Snyder* vs. *Commonwealth,* instruction on firearms find a person also showed in the criminal intent in the principle first degree.

The Court: I think probably you are entitled

page 180] to such an instruction, but I don't think that is contrary to this instruction.

Mr. Gilliam: I don't think any instruction which tells the jury what is principle in the first degree and what is principle in the second degree and it does not tell the jury in order to constitute principle in the second degree, I do say that in one of my instructions, but that could be confusing, could read this instruction —

The Court: We will instruct them as I usually do they are to consider the instructions as a whole and not single out one

instruction alone.

Mr. Gilliam: If it is correct once it seems to me if you have proof this constitutes principle in the second degree, seems this instruction would be erroneous. If it doesn't have that element in it. My instruction, I think it's form —

The Court: What instruction are you talking about now of yours?

Mr. Gilliam: Instruction M. The evidence obvious by a series of questions as to whether or not, legally I am not sure it made any difference, but at this time they went into the motel whether or not he shared in any criminal intent of robbery. Also, the question there I think Detective Baker's testimony is pretty clear he didn't know the man had a gun when he was going in, so the person may have intended to commit larceny but didn't share in the intent to
page 181] commit robbery. So unless this element exists it could be a second degree. The instruction, I think, given in Virginia jury instructions includes this as an element.

The Court: Well in some manner offering aid or consent to its commission. Certainly his sharing in the criminal intent, I don't think —

Mr. Gilliam: Well consenting to commission of crime is also erroneous. Just to consent to commission of crime does not constitute one principle in the second degree.

The Court: Maybe the words "will consent" should come out of that. I will take it out. Otherwise, I will grant it.

Mr. Gilliam: Note my exception for the reason stated.

DEFENDANT'S INSTRUCTIONS

The Court: Have you any objections to A, Mr. Horan?

Mr. Horan: No objection to A.

The Court: Mr. Gilliam, you are sort of piling up here on presumption on innocence and burden of proof. I think you are entitled to one real strong reasonable doubt instruction and B, C, D —

Mr. Gilliam: G and C?

The Court: Yes.

Mr. Gilliam: C sets out the elements of the crime.

Mr. Horan: Your Honor, could we pass over the reasonable

doubt? B and D certainly say essentially the
page 182] same thing in one part.

Mr. Gilliam: I withdraw D then.

The Court: B you want?

Mr. Gilliam: Yes, sir.

The Court: You say you want to pass over that? A and B both go into this business about mere suspicion and probability how strong not sufficient to convict them. You say the same thing twice.

Mr. Gilliam: Well B is an instruction on presumption of innocence.

The Court: Really isn't any difference but you're entitled to one of each but I don't think you can then go on and say the same thing. You have said about the suspicion, et cetera. Actually, as far as B is concerned, that's been said, that the law presumes the defendant innocent. I think we have said it in one.

Mr. Gilliam: I am entitled to an instruction in my own language.

The Court: You have got it in A. I am not going to repeat all you have got in B, you said in B. And it doesn't really make much sense to the jury to read them twice the fact the burden is upon the Commonwealth to prove beyond a reasonable doubt and this presumption goes with him throughout the whole case. I think the combination of A and one are adequate protection for you.

page 183] Mr. Gilliam: I think I am entitled to an instruction on presumption of innocence in my own words as opposed to the Commonwealth's words.

The Court: Most of B is repetition of A.

Mr. Gilliam: I withdrew D. I felt that cleared up any objection the Commonwealth attorney had any objection to.

The Court: You can reconsider your withdrawal of D, if you want D and A.

Mr. Gilliam: I need an instruction on presumption of innocence. Let's see what I can strike out of that instruction. How about striking out the seventh line beginning with "It is your duty to acquit him" and then leave in — strike the rest of that and then ask for Instruction D. That takes care of the fact there is suspicion, et cetera, in both of those instructions and then ask for Instruction D. That wouldn't be repetitious, would it?

The Court: I will grant D but I will refuse B.

Mr. Gilliam: I have to object to that based on the fact no instruction in the Defendant's language as to presumption of innocence and certainly that is material.

The Court: That is C, any objection to that?

Mr. Horan: As to C, the amount admitted to is $72.

The Court: That $125 was amended to $72?

Mr. Horan: Yes.

And, also, in that Item 1 there where is says

page 184] and also that — would take from the person, and I think the words should be in there "or in the presence the sum of $72" the last part of the first sentence. You don't have in his presence as to money of Kenneth Blunt. Number one of the Instruction C, you say "took $75 of Stutz' money from his person or in his presence," and he also took $71 of the owner's money.

The Court: Blunt's money from his person or in the presence?

Mr. Horan: I don't think Item 2 is the law, Your Honor. I think it is all the owner that could have consented Mathews get the money and I still don't think Mathews can go to the custodian of that money and present a firearm to get it as long as it is consent of the person who is in custody of that money, that is sufficient. I don't think it is a material element.

The Court: Supposing Blunt had told this man to go to his motel and pick up the money?

Mr. Horan: I think if he just walked in under circumstance he did and presented the firearm and took the money, I think the fact Blunt consented to it would be no defense to the robbery charge.

The Court: It may not be the right way to go get the money, but I am not so sure it is an offense of robbery. What concerns me about this instruction is there seems to be a possibility the jury might find one of the takings was an offense but the other one was not.

page 185] For example, the wallet, suppose they disregard the confession, then the jury might find that wallet disappeared some other time. There is a gap there.

Mr. Gilliam: The only thing I can go by is what is charged in the indictment. If you allege certain facts in the indictment and do not prove it.

The Court: I think he could have alleged six robberies in the indictment and the fact he didn't prove but five, that is

the only thing, because the taking of the wallet was probably not against the will of Blunt. He probably couldn't care less about the taking of the wallet, yet, under this instruction if they don't prove the taking of the wallet against the will of Blunt, I imagine this ends up you find him not guilty.

Mr. Gilliam: Of course, the thing that makes it hard to draw this instruction is the fact that the Court is instructing the jury as to robbery by other means. See what I mean?

The Court: Well, I am not going to give this instruction in its present form.

Mr. Horan: I think the fifth part of it is also defective. I don't think you have to prove that the firearm was capable of discharging a bullet.

The Court: It could have been empty or it could have been defective.

page 186] Mr. Gilliam: Let me ask the Court on this. Do you think it is armed robbery if the weapon used was, in fact, a 38 revolver; let's suppose that 38 revolver wasn't a deadly weapon.

The Court: I don't have to pass on that.

Mr. Gilliam: That's the point I am trying to make in the instruction, there has to be proof this was, in fact, what you might refer to as a firearm and I think a firearm is something you could say was capable of discharging a bullet if loaded. *Idon't* think under the statute as written a toy gun if it appeared to be a firearm — if the Court is of this view, I realize the instruction not granted in its present form, I can change that, but I take exception a firearm should be defined as one capable of discharging a bullet. What if we present a toy pistol. I am going to argue there is no proof it was a firearm, only something the man got a glance at and said it was a firearm. I think the Court has to pass on that.

If you fail to instruct in this area it would be, in effect —

The Court: I am going to tell them they have to believe the taking was by threat of firearm. Now, that is something they can understand. You can argue this wasn't a firearm.

page 187] Mr. Gilliam: Wouldn't you think it would be clear to the jury, it says firearm in the statute, now I am asking for an instruction, it says firearm in the statute means a weapon capable of discharging a bullet if loaded. If, in fact, that is what it means and that is the Court's view on it, then I want an instruction on that. The weapon has not been introduced and it is a very material

thing here, really the crux of my defense.

The Court: They have to prove it was a firearm.

The Gilliam: Then I would like to have a definition of firearm if the Court is of the view a toy pistol will suffice.

Mr. Horan: I think if he did it with a toy pistol that would be another mode. The jury has to sit there and find just what the Legislature meant by firearm.

The Court: Well, I think it has to be to the extent this instruction will be applicable to that portion of the crime which will support a higher conviction, that is, threat of firearm. I think a firearm is just what everybody thinks a firearm is, that is, something that will fire and I don't think a toy gun would meet that test.

Mr. Gilliam: If we put in the words "if loaded" then the indictment would be right, wouldn't it? Anything wrong in telling the jury what a firearm is. Put in a firearm is capable of discharging a bullet if loaded. I am not *contend* you have to prove it is loaded. I think a 38 revolver is

page 188] a 38 revolver whether it is loaded or not.

The Court: All right, I will give an instruction a firearm is this. But I will refuse this because I think it mixes up the two offenses. I think it is confusing so far as that is concerned.

Mr. Gilliam: You are going to refuse this instruction?

The Court: Yes, sir.

Mr. Gilliam: Would you tell me wherein it is wrong so I could correct it overnight?

The Court: Well in the first place I think paragraph 2 makes a requirement of the finding of guilt, the prior finding by the jury that the takings were against the will of Blunt, and I don't think that the — that there has been any proof or need there be any proof that the taking of the wallet was against the will of Blunt. That would be all right though, no, I am wrong on that. That is all right, because Blunt did not own the wallet. I think paragraph 5 is the only one.

Mr. Gilliam: What would you say that the alleged taking was by threat of firearm?

The Court: *Suppse* they find it was not a firearm. Suppose they find it was a toy gun. Then it would be robbery, wouldn't it, but by the other means? But they wouldn't necessarily find him not guilty. They might find him guilty of robbery by other

means. Suppose they found it was a toy gun?

page 189] Mr. Gilliam: That is true. There were other facts. It is hard to draw this instruction when you are dealing with possible conviction under an alleged offense, an offense that is not alleged. What about if I continued on with that instruction and said: "However, if you find that the robbery was accomplished by the other means not by the presenting of a firearm." Then — whatever you have in this other instruction is reverted.

The Court: What you are going to run into increasingly, though, is you have got a lesser offense in here, really, by other means is a lesser offense in a way. Then you have got grand larceny, then you have got assault, haven't you? They might not find a lot of these things but there could be sufficient findings to support a determination of guilt of some of these lesser things.

Mr. Gilliam: Well, I agree with you. I think you are right, but it makes it awfully difficult to draw these instructions and I do want an instruction on those points.

The Court: Wouldn't it be better that if you start this out, "that in order to find the defendant guilty of robbery they have to find these things."

Mr. Gilliam: Of robbery by threat of firearm.

The Court: Your first paragraph only defines higher offenses of robbery. You see, it doesn't define — you have already defined robbery broadly, too broadly ac-

page 190] cording to you, but instruction number three seems to me could stand. We could leave out the first paragraph.

Mr. Gilliam: The Court instructs the jury that it is incumbent upon the Commonwealth to prove —

The Court: Right. It seems to me the rest of your instruction, even paragraph 5, would be all right.

Mr. Horan: I still object that proving beyond a reasonable doubt that there was an actual firearm capable of discharging a bullet. I think that is misleading to the jury. If they find it was a firearm, that's enough.

The Court: It could have been a defective firearm.

Mr. Horan: You could have had no firing pin in it, but it could still be a firearm. I think when you impose on the Commonwealth of burden to —

The Court: That renders it a little more than a toy gun if it has no firing pin.

Mr. Horan: But it is still a firearm and that is all the statute says.

The Court: If you eliminate discharge of bullet that would be all right.

Mr. Horan: I would go along with capable of *discharing* a bullet if loaded and not defective.

The Court: I do not want to put the burden on them to show the gun was not defective or it would have been capable of firing a bullet if it were not defective and that page 191] is what they would do.

Mr. Horan: I think when you use the words "actual firearm" —

The Court: Not something that looks like a firearm.

Mr. Gilliam: How about putting that in something that appeared to be a firearm?

The Court: I am going to leave that in. "Threat of actual firearm." I refuse C.

Mr. Gilliam: I will offer that again tomorrow with the corrections.

The Court: Then I won't refuse it. I will just lay it aside and you can redraw it. We are to E now.

Mr. Horan: Next to the last line I don't follow "and subject to" if it does not appear from the evidence —

The Court: Subject to which I think it means. Shouldn't there be another "which" in there? Under which and subject to which. Is entitled to an actual if that is what they believe.

Mr. Gilliam: Under this evidence, Your Honor, that is what it is. General rule if confession is made freely and voluntarily then it is the duty of the jury to disregard it.

The Court: Yes.

Mr. Gilliam: If you then assume that finding the confession not made freely and voluntarily and they do follow the Court's instructions and disregard it, then the page 192] evidence is insufficient as a matter of law and they would have to acquit it. Only as evidence contradictory, I think, goes to the weight in a civil case but proved beyond a reasonable doubt I think you would have to set that verdict aside. If I came back on a motion to set aside the verdict, it seems to me the jury has disregarded the instructions, if I am arguing that point I think I would have a really strong argument the verdict should be set aside.

I agree with the Court in a normal situation it would be disregarded given no weight, whatsoever, assuming other

sufficient weight, but if you consider the evidence produced today, let's say the confession was kept out and I came in with a motion to set aside this verdict, it seems to me this this verdict would have to fall.

The Court: I don't agree with you except maybe as to the wallet. I think there is ample to go to the jury on the question of money in that cash drawer. I think you pretty well watered down Stutz' testimony, but I don't think that renders it incredible.

Mr. Gilliam: Let's say these boys never made a confession. Stutz says he identifies absolutely this defendant being the man who was there. They took this defendant to a line-up closer period of time than today and dressed him in the same manner and he picked up two other boys supposed to have been seen in the car. Now take that testi-
page 193] mony and it seems to me on the face of it if the jury finds this confession was not voluntarily made they would have to disregard it with the other evidence considered insufficient evidence of proof beyond a reasonable doubt that this defendant committed the crime.

The Court: I will not disagree with you if you want to stand on the instruction you can and otherwise I will grant it with the deletion, "You will disregard it in its entirety."

Mr. Gilliam: I have an alternative instruction to submit.

The Court: Then I will refuse E.

Mr. Gilliam: I take exception to that on the reasons stated.

The Court: I will mark this one O. Any objection to 0?

Mr. Horan: I have no objection, Your Honor.

The Court: F?

Mr. Gilliam: I assume the same ruling will stand in regard to F?

The Court: Yes.

Mr. Gilliam: I will take exception to that for the reasons stated. I have an alternative instruction to offer.

The Court: P I will call this. I will refuse P.

Mr. Gilliam: On what grounds is that refused on?

The Court: Well, I don't think it is the law.

Mr. Gilliam: Possibly I would like to correct it overnight.

page 194] The Court: It is your *Thompson* case, isn't it? I don't think sections of the *Thompson* case are applicabble to this case. I think it went on to show upon the threat there must be colored people standing there and

on that presumption there was a showing that continued.

Mr. Gilliam: I will have to take exception to that showing.

The Court: I think I will adjourn the arguing of instructions until tomorrow morning. We can start at 9:30 if that's convenient.

(Whereupon, at 6:30 o'clock p.m., the settling of instructions was recessed until 9:30 o'clock a.m. the following day, June 15, 1965.)

page 195]

* * * * *

Fairfax, Virginia
June 15, 1965

The above-entitled matter came on for further trial, pursuant to recess, before the Honorable Albert V. Bryan, Judge, Circuit Court of Fairfax County, Virginia and jury in Courtroom No. 1, Fairfax County Courthouse commencing at 9:30 a.m.

APPEARANCES:

On behalf of the Commonwealth of Virginia:
ROBERT F. HORAN, JR., ESQ.
On behalf of the Defendant:
J. WILLIAM GILLIAM, ESQ.

page 196] PROCEEDINGS

(The proceedings were resumed in the Judge's Chambers, out of the presence of the jury and in the presence of the Court, both counsel and the court reporter.)

The Court: Instruction C?

Mr. Horan: No objections.

The Court: Instruction 4, which we thought we agreed on last night, I, in reflection over the evening, thought we ought to take out the suggestion Mr. Gilliam made last night, and it didn't sink in, may not be an important thing, but where we had in the presenting of firearms, I have eliminated from

4 the words "presenting of firearms" and made it "by threat of firearm" to conform to the indictment.

All right. That gets us to G, which is the same as D.

Mr. Gilliam: I realize that I did withdraw D and we had the same instruction twice.

The Court: Rather than retype D, which I had marked "withdrawn" I will just grant G.

Now we get to H.

Mr. Horan: No objection to H.

The Court: Well, the only thing is we are back to this. Although we just say the crime of robbery has not been proven.

Mr. Gilliam: We could say that the crime of
page 197] robbery by threat of firearm has not been proven.

Mr. Gilliam: We could say that the crime of robbery by threat of firearm has not been proven beyond a reasonable doubt and you agree to acquit the defendant of robbery.

The Court: I think just elimination of by threat of firearm will do it and I —

Mr. Gilliam: Well, would that be telling the jury they could find the man guilty of larceny if they didn't find him guilty by threat of firearm or would robbery be one of the modes?

The Court: Well, they can acquit him of either robbery or —

Mr. Horan: In other words, they have to find that no robbery was committed before they can get to larceny?

The Court: Right. Because the other means would catch him if he just went up to the man and took his money with this toy gun we have been talking about.

I will grant H with the deletion of the words "by threat of firearm."

Mr. Horan: I object to I, Your Honor, since there are lesser included offenses, the exact crime charged in the indictment. This instruction tells the jury that unless robbery was committed, there is no crime.

The Court: I will refuse I, Mr. Gilliam.

Mr. Gilliam: Well, I would like to get an in-
page 198] struction along that same line. Could we make a correction in that instruction to show beyond all reasonable doubt that a crime has been committed, or the crime as defined in other instructions of this Court has been

committed or something like that? I think that would be a correct statement of the law, then.

The Court: Have you any objection to that, Mr. Horan, if we say a crime as defined in other instructions of the Court has been committed. This is just the *corpus delicti.*

Mr. Horan: I would have no objection to that.

The Court: I have deleted the words "charged in the indictment" and made it read "that a crime, defined in other instructions, has been committed." No objection to that, Mr. Horan?

Mr. Horan: No, Your Honor.

The Court: All right. J?

Mr. Gilliam: Your Honor, I would like to give this instruction now. It goes along with the same line of — it's an assault instruction.

The Court: All right. Call this Q.

Mr. Gilliam: Admitted you want to take out "by threat of firearm," I assume.

The Court: Yes.

I guess they can in theory find him guilty of both assault and larceny, can't they? I don't know whether they can under this indictment, though.

page 199] Mr. Gilliam: He is charged with "did make an assault and then did steal and take and carry away."

Mr. Horan: I think if they find both assault and larceny, that is robbery if they occur at the same time?

The Court: What worries me about this is we have one instruction on the larceny, "if you do not believe from the evidence beyond a reasonable doubt he committed robbery that you shall find him guilty of larceny."

Well, I think this is all right.

Mr. Horan: Striking the words "by *threar* of firearm."

The Court: Yes. Any objection to that, Mr. Horan?

All right. Now, J.

Mr. Horan: Your Honor, I don't necessarily think this is — let me put it this way — I think this is misleading to a jury, because if the jury is satisfied this is only man could have been there, only man could have done it, this leaves them to further consider the mere fact we didn't disclose anybody else who could have done it. I think the reasonable hypothesis of the instruction says essentially the same thing that is being said here.

Mr. Gilliam: Well, this case, *Ottenson* v. *Commonweatlh,* says it is reversible error not to give this instruction.

The Court: I will grant J.

All right. K.

page 200] Mr. Horan: I have no objection to K.

The Court: Off the record.

(Discussion off the record.)

The Court: L?

Mr. Horan: Once again, the words "by threat of firearm." In both places. I would have no objection to it otherwise.

The Court: All right.

Any objection to M?

Mr. Horan: Once again, "by threat of firearm."

The Court: He should be not guilty of robbery or assault because there is no evidence of any assault as a principal in the first degree, is there? He never touched this man or threatened him, is *thatright*? Isn't that correct, Mr. Horan? So, I will delete by threat of firearm and add to it "by robbery or assault." Is that agreeable, Mr. Gilliam?

Mr. Gilliam: Yes.

The Court: How about N?

Mr. Horan: I don't think there is any evidence at all in the case upon which to base this instruction.

The Court: I don't either.

Mr. Gilliam: In North Carolina there is, Your Honor.

The Court: What evidence is there?

Mr. Gilliam: By the mere fact there is testimony he was held in North Carolina for ten days or more

page 201] and no showing when he was taken before a Commissioner in North Carolina. I think you can infer from that.

Mr. Horan: That would have to do with the North Carolina robbery. No evidence once he was brought up here he wasn't immediately brought before a committing magistrate.

The Court: I will refuse N. I don't think there is sufficient evidence to *warant* it.

Mr. Gilliam: Note my exception to it.

The Court: How long do you gentlemen want to argue the case? Mr. Horan?

Mr. Horan: I would like to have it to the jury before noon.

The Court: I would hope so. I would think a half hour a

side would be enough.

Mr. Gilliam: I think my argument would be in the neighborhood of a half hour.

The Court: If you can keep it close enough I won't ring the bell on you, because I think it is sufficient.

Mr. Gilliam: It is sufficient for me.

(Whereupon, at 9:50 a.m. the settling of instructions was concluded.)

page 202] (Court was reconvened at 10:00 a.m. in Courtroom No. 1 on June 15 and instructions of the Court to the jury by the Court:)

The Court: The record shows who is present. The defendant is present. And all other parties.

Members of the jury, now you have heard the evidence and the time has come to instruction you as to the laws governing the case and to apply that law to the facts as you find them from the evidence before you. You are not to single out any one instruction alone as stating the law and neither are you to be concerned with the intent of any rule of law regardless of what you feel the law ought to be, and these are the instructions which you will be allowed to take with you to the jury room.

Preliminarily, I would tell you there are five possible verdicts which you may render in this case. The first, of course, is a verdict of not guilty.

Secondly, there are two definitions of robbery; one, through threat of firearm or violence to the person and one of robbery, committed by any other means. So there are two definitions of robbery and the minimum punishment in both is the same. However, robbery through threat of firearm carries a higher maximum punishment. In addition to those, if you so find, you also may find a verdict of guilty of grand larceny or a verdict of guilty of assault. They are the
page 203] five verdicts which you may render. There will be a form of verdict for each finding which you will be allowed to take with you to the jury room.

This will be developed further as the instructions are read to you.

page 204] INSTRUCTION NO. 1

The Court instructs the jury that the Defendant is presumed to be innocent and that this presumption goes with him through all the stages of the trial until the Commonwealth, upon whom the burden of proof rests, has shown beyond a reasonable doubt that the Defendant is guilty. A doubt engendered by sympathy or by a dislike to accept the responsibility of convicting the Defendant is not a reasonable doubt. The law does not require proof amounting to absolute certainty, nor proof beyond all possibility of mistake. If, after carefully and impartially hearing and weighing all the evidence, you reach the conclusion that the Defendant is guilty with such degree of certainty that you would act upon the faith of it in your own most important and critical affairs, then the evidence is sufficient to warrant a verdict of guilty.

INSTRUCTION A

The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged against the defendant. It is sufficient that the jury may believe his guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction, but the evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go out-
page 205] side of the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the defendant and unless you believe, upon a consideration of all the evidence before you, that guilt of the defendant has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find the defendant not guilty.

INSTRUCTION G

The court instructs the jury that if, upon the whole case, there is any reasonable hypothesis consistent with the innocence of the accused, they must find him not guilty.

INSTRUCTION I

The Court instructs the jury that the burden is on the state in this case to show beyond all reasonable doubt that a crime, as defined in other instructions, has been committed as the first indispensable fact, for if there be no crime, there cannot possibly be a criminal; and further the evidence must show beyond all reasonable doubt that the defendant, James J. Mathews, committed the crime for though it be ever so certain that crime has been committed, no one can be punished for it unless the evidence singles him out from all other persons beyond all reasonable doubt as the guilty agent.

page 206] INSTRUCTION NO. @

The Court instructs the Jury that the Jury are the sole judges of the credibility of the witnesses; and in determining the weight given to the testimony of the witnesses the Jury may consider the appearance and demeanor of the witness on the witness stand; their manner of testifying; their apparent intelligence or lack of it; their interest or lack of it in the outcome of the case; their temper, feeling or bias, if any has been shown; their opportunity for knowing the truth and having observed the things concerning which they testify; and from these and all other surrounding circumstances at the trial; the Jury are to determine which witnesses are more worthy of credit and give credit accordingly.

INSTRUCTION NO. 3

The Court instructs the jury that the crime of robbery is the taking, with intent to steal, of the personal property of another, from his person or in his *presnece*, against his will, by violence or intimidation or the presentation of a deadly weapon.

INSTRUCTION NO. 4

The Court instructs the jury that if they believe beyond a reasonable doubt that the defendant, James Mathews, did commit robbery, by violence to the person of John C. Stutz, or by threat of firearms, you shall find him guilty and fix

his punishment at death, or by confinement in
page 207] the penitentiary for life or for any term not less
than five years. If you believe beyond a reasonable doubt that the defendant committed robbery of John C. Stutz in any other mode, or by any other means, you shall find him guilty and fix his punishment at confinement in the penitentiary not less than five years nor more than twenty years.

INSTRUCTION C

The court instructs the jury that in order to find the defendant guilty of robbery by threat of firearms it is incumbent upon the Commonwealth to prove beyond a reasonable doubt the existence of each and every one following elements in order to sustain a conviction and therefore you must find and believe beyond a reasonable doubt:

1. That James J. Mathews did take from the person, or in the presence of John C. Stutz the sum of seventy-five dollars ($75.00) and that the same was good and lawful currency of the United States of America the goods and chattels of John C. Stutz and also that James J. Mathews did take from the person or presence of John C. Stutz the sum of seventy-one dollars ($71.00) in good and lawful currency of the United States of America the goods and chattels of Kenneth Blunt, Jr.

2. That the said takings were against the will of the owners of said property;

3. That John C. Stutz was in fear of his physical well being
and not of the possibility of loss of property;
page 208] 4. That James J. Mathews did intend, at the
time of taking, to permanently deprive the owners of the aforesaid sums of money;

5. That the alleged taking was by threat of, not what may have reasonably appeared to be a firearm, but by the threat of an actual firearm.

If after a consideration of the evidence you have a doubt of the guilt of the defendant upon the whole case, or a doubt as to the evidence as to any fact essential to prove his guilt beyond doubt, it is your solemn duty to give the defendant the benefit of the doubt and to find him not guilty of robbery by threat of firearms.

INSTRUCTION H

The Court instructs the jury that upon an indictment for robbery, the jury may acquit the Defendant of robbery and convict him of larceny.

Therefore, if you believe from the evidence that the crime of robbery has not been proven beyond a reasonable doubt, then it is your duty to acquit the Defendant of robbery. However, if you believe from the evidence beyond a reasonable doubt that the Defendant took and carried away the property of another and of a value of fifty dollars ($50.00) or more, against the will of the owner or without his consent and with felonious intent to permanently deprive him of his ownership thereof, then you shall find the Defendant guilty
page 209] of grand larceny and fix his punishment at confinement in the penitentiary not less than one (1) or more than twenty (20) years, or by confinement in jail not exceeding twelve (12) months or by a fine not exceeding one thousand dollars ($1,000.00), either or both.

page 210] INSTRUCTION Q

The court further instructs the jury that upon an indictment for robbery the jury may acquit the defendant of robbery and find him guilty of larceny or of assault. If you believe from the evidence beyond a reasonable doubt that the defendant attempted with force or violence to do some bodily hurt to John Stutz coupled with the present ability to inflict bodily hurt upon John Stutz and with the intention either of inflicting bodily hurt or placing John Stutz in fear of bodily hurt, and you do not believe from the evidence beyond a reasonable doubt that the defendant committed robbery, then you shall find the defendant guilty of assault and fix his punishment by confinement in jail not exceeding twelve months or by the fine not exceeding one thousand dollars ($1000.00), either or both.

page 211] INSTRUCTION O

If you believe from the evidence that a confession was made by the Defendant, then the burden of proof is upon the Commonwealth to prove beyond a reasonable doubt that such confession was not obtained by any threats or any force or

any undue influence or that it was not made under the influence of hope of advantage or fear of injury, excited in the mind of the Defendant by a person of authority, or with the apparent sanction of such a person and that it was made freely and voluntarily, and if you believe from the evidence that such were not the circumstances under which this confession was made, or if it does not appear from the evidence beyond a reasonable doubt that such circumstances did not exist at the time the confession was made, then in either event it is your duty to reject it and give it no weight whatsoever.

page 212] INSTRUCTION NO. 5

The Court instructs the Jury that principals in the first degree are those who are the actual or immediate perpetrators of the crime. Principals in the second degree are those who did not with their own hands commit the act which constituted the crime, but who were present, aiding and abetting in its commission. The test for a principal in the second degree is whether he was encouraging or inciting the commission of a crime by words, gestures, looks or signs, or in some manner offering aid to its commission.

The Court further instructs the Jury that principals in the second degree are liable to the same punishment as principals in the first degree.

page 213] INSTRUCTION M

The mere presence of a person at the scene of commission of a crime is not sufficient to constitute him a principal in the second degree, nor is his mere consent to the commission of a crime sufficient. And unless you believe from the evidence beyond a reasonable doubt that the defendant was not only present but that he was present, aiding and abetting James L. Williams in the commission of robbery and that he shared in the criminal intent of the said James L. Williams, then you must find the Defendant not guilty of robbery or assault.

INSTRUCTION L

There can be no such thing as a principal in the second degree to a crime unless there is a principal in the first

degree to its commission. And while it is not necessary for the Commonwealth to prove that any particular person is guilty as a principal in the first degree, or that there has been a conviction therefor, it is necessary that the Commonwealth prove that robbery has been committed. And unless you believe from the evidence beyond a reasonable doubt that robbery has been proven to have occurred, then you cannot find the Defendant guilty as a principal in the second degree thereof.

page 214] INSTRUCTION J

The failure of the evidence to disclose any other criminal agent than the Defendant is not a circumstance which may be considered by the jury in determining whether or not he is guilty of the crime with which he is charged.

INSTRUCTION K

Failure of the Defendant to testify creates no presumption against him; and in considering his innocence or guilt, his failure to testify is not a circumstance which the jury is entitled to consider.

page 215] CLOSING ARGUMENT BY MR. HORAN

Mr. Horan: Ladies and Gentlemen of the Jury, I would like to review with you the evidence which has been shown in this case.

I might say at the outset that you are the sole judges of the facts in this case. Your memory is the memory which counts. What you remember as the facts, they are the facts.

I think without any shadow of doubt there are in this case certain events that occur that there can be no question about. There can be no question that approximately 5:15 in the morning of April 7, 1965, two Negro males entered the Traveler's Motel on No. 1 Highway. There can be no doubt of that. There can be no doubt at the time the two Negro males entered only one person was present and that was Mr. Stutz. He was alone in the motel. He was the only one in that office. The two Negro males entered and that there is no question that they commenced a conversation by requesting

instructions on how to get to Route 95. Immediately subsequent to that event a robbery occurred.

At this point I don't want to concern myself with who committed the robbery. I want to concern myself with the facts of the robbery which did happen. One Negro male pulled a gun and stuck it in Mr. Stutz's stomach. Can there be any doubt of that? Mr. Stutz said on the wit-
page 216] ness stand it was a 38-caliber revolver. There was a suggestion he couldn't tell, but I submit to you, Members of the Jury, that reasonable people can't believe that this man didn't know he had a gun in his stomach. He said it was a 38-caliber revolver. The Negro male asked him for his money and at that time commenced to push him to the side in the vestibule, if you remember the evidence.

At this time the other member, and this is an unassailable fact, the other male went behind that counter and began rummaging through the area in back of that counter. I ask you, can there be any doubt there was a cash drawer back there, can there be any doubt that there was $75 or $76 in currency in that cash drawer? Mr. Stutz on the stand said $75 or $76. It makes no difference which one of the two it was, there was United States currency in that drawer. That was an unassailable fact. Mr. Stutz's wallet was also behind that counter with $75 in it. That became an unassailable fact when you consider in the defendant's confession he said he took $75 out of that wallet and threw the papers away and kept the wallet. While that second man behind the counter did not hold the gun, but he was present aiding and abetting the robbery. He is a robber, that second man. *he* was part and parcel of the presentation of the firearm by the first man and he successfully collected the proceeds of the acts of the first man.

page 217] Now, Mr. Stutz said one very interesting thing when counsel for the defense asked him was he afraid of losing his property. "No, sir," he was not afraid of losing any property, he was afraid of losing his life. And that makes it robbery by presentation of a firearm, putting that complaining witness in fear of his life. I think there can be no question that a robbery by presentation of a firearm did occur.

We then come to the question as to who did it. Who actually committed the robbery. Now, presented in evidence — Your Honor, might I say the confession — presented in evidence

is a statement given by the defendant on April 17, 1965, in Nash County, North Carolina. You will take it back to the jury room with you and I ask you to read it very closely and ask you to ask yourself the questions. Could someone that was not there possibly make this confession? There facts stated in that confession that only someone present at the commission of that robbery would know about.

Question by the detective: How much money did you get? Answer by the defendant: Well, I took $75 from the wallet. I took the other papers and I threw them away.

How could any man, unless he was the man who committed that crime, possibly know there was $75 in the wallet? There was no question asked by the detective about the $75. The question was "How much money did you get?" And he said "After we bought beer and other things we still

page 218] had $179." So he still had more money in addition to the $75 he took out of the wallet. This man Mathews went into that cash drawer. Now, the question will be raised as to whether this confession is voluntary. What evidence do you have? Detective Baker went to North Carolina and talked to the defendant Saturday night, talked to him again personally on Sunday morning, and on Sunday morning he asked the questions in this confession and the defendant answered questions. The confession was reduced to writing, upon being reduced to writing it was signed by Mathews. In fact, you will note on the front of it where there are erasures, smudges, on the confession and Mathews initialed it. There is not one scintilla of evidence that confession was anything but voluntary. In reading the confession and in listening to the detective testify, you notice, number one, he identified himself, "I am Detective Baker," number two, "You don't have to make any statement. Any statement you make can be used against you. Do you know these rights?" And the defendant answered "Yes, I do." He was advised of his rights, rights to counsel at that point in time and he made no request for counsel.

There is no evidence this was other than a voluntary statement on Mathews' part as to what occurred in the Traveler's Motel.

I submit to you, Members of the Jury, that only Mathews, the man who was there, could have been the one

page 219] who made that confession.

Now, one of the instructions you get is the

instruction on principal in the second degree, that only Mathews, the man who was there, could have been the one who made that confession.

Now, one of the instructions you get is the instruction on principal in the second degree. Now, in order to be a principal in the second degree, the requirement of the law, the only test is whether or not he is present aiding and abetting the crime, whether he was present at the time aiding and abetting the man who held the gun and said, "Give us your money." If he was, the second man, he is a principal in the second degree and he receives the same punishment as the man who committed the crime. The man who presented those firearms and took that money under threat of the firearm can receive from five years to death or life as you see fit and the principal in the second degree, Mathews, is *sujec* to the exact same punishment.

Now, when we talk in terms of punishment it may seem somewhat shocking when you hear the term death used in a robbery case. I mention this particular item to try to stress to you the inherent danger, the inherent violence that exists in every robbery case. Our Legislature has seen fit to give our legal system a severe penalty for robbery by threat of firearm and having very reasonable purpose. The page 220] crime itself is by its nature so dangerous anything can happen. Here you had an elderly man confronted at 5 o'clock in the morning by two persons who, one of whom, had a gun. We don't know, we will never know what possibly might have happened had he resisted, made any attempt to stop them, especially the man standing there in the condition he was in. It is a crime of violence, pure and simple. Without him being hit, without him being struck, it was violence. When he looked at that 38-caliber revolver, he was looking at death. It is a very dangerous crime and I submit to you, ladies and gentlemen of the jury, upon the evidence there can be no question and there can be no mere shadow of a doubt, Mathews was the man who rifled the drawers and got the money, aiding and abetting the robber who stood there with the firearm. He has committed the crime of robbery, he is a robber and he should be punished for it.

CLOSING STATEMENT OF MR. GILLIAM

Mr. Gilliam: Ladies and Gentlemen of the Jury, Mr.

Horan's opening remarks, I believe, he said that the evidence is beyond a shadow of a doubt and that there can be no question. I remind you of the instructions which the Court has just previously read to you. This is what the evidence has to amount to. The defendant, any defendant, is presumed to be innocent until found guilty. He is entitled to have all twelve members of the jury deliberate at the same time. The Court told you the proof here must be clear and
page 221] convincing beyond a reasonable doubt. If there is a reasonable doubt as to any element, then the defendant must be given the benefit of that doubt and you must acquit him.

The Court has instructed you there are five possible verdicts. I want to go over all five verdicts. On the first verdict, the Judge told you you could bring back a verdict of not guilty. There are four other possible verdicts to prove any of those crimes. He has to be proven guilty beyond a reasonable doubt. The Commonwealth must overcome the presumption of innocence as written into the law.

Now, the law we can understand the Commonwealth's case against two men, originally charged four men, and then the Commonwealth's case boiled down to two men. One of these men is alleged to be the defendant.

Now, when I refer in my argument to the men who were in the particular Traveler's Motel, I am going to refer to the first man and the second man, the first man being the man who actually supposedly mistreated Stutz. The second man being the one who stood by the door.

Now, the position which this defendant is alleged to occupy is the position of the second man. Now, I would like to take a look at the Commonwealth's case from the point of view of the evidence produced before you. Now, Mr. Stutz, of course, was the night manager of the Traveler's Motel. And he was the Commonwealth's first witness. I have never
page 222] really heard any more positive witness in his testimony and when I begin on cross examination he was the type man who picked up a story and stuck to it. He said "This is what happened." There couldn't be any doubt, and so forth.

Now, let's consider what he had done previous to this. Let's consider this was also a time closer in point of time to the actual occurrence than his testimony today, his recol-

lection, his ability to relate the facts would have been better at that time than they are today.

Now, I gave the witness Stutz the ample opportunity to correct any errors in his testimony he had made on direct examination, yet he did not. He stated and told the jury he made positive identification of the defendant as the second man. He also told us how the defendant was dressed. He also told us his height, also told us what he approximated his weight to be. I can't remember, I know we were in a hassle over what the weight was, something he had derived from the line-up. I don't remember those facts. You will have to be the judge of the fact of the weight.

Now, when Detective Wayland took the stand, Detective Wayland told the jury the defendant in this case was dressed in the same or similar clothes to the clothing which was described by Stutz as was worn by the man who occupied the second position in the Traveler's Motel and there were only five men in the line-up, all Negroes. The men that page 223] Stutz picked out were two men who were charged with this crime and whose cases have been dismissed. Yet Stutz has told you yesterday on this stand that he made a positive identification of this man. Detective Wayland has told you he did not. That the results were negative. Now, I asked Mr. Stutz about glasses. He said at the time he wore glasses, reading glasses. He didn't have them on the night of April 7th. He didn't have them on at the time of the line-up. He said the lighting in the motel was dark. There was a lamp and in that lamp there were four bulbs, only one bulb which was burning. From Mr. Blunt we understand the wattage of that particular bulb was somewhere between 40 and 60 watts, so you are dealing with a very dimly lighted room.

Now, the man who occupied the second position there was, according to Mr. Stutz, in his testimony here before you, a man who was not wearing glasses. But yet he told Detective Wayland that subject No. 2 was wearing glasses, reading glasses, I suppose, large rims, and he was round-faced.

Now, you might ask why did I spend so much time on Mr. Stutz's testimony. The jury is at this point maybe thinking we have a confession, our job is all done, we are going to read this confession and this makes our job easy. But I submit it doesn't make your job easy. Now, I will explain that to you later why I think your job is still hard, but let me go into

one other point here. Stutz said the first man
page 224] placed what he testified to be a *39*-caliber revolver and Stutz' testimony, the only testimony we have in the whole case as to what has been used. He has been mistaken. I have here at least six times he was mistaken. As to positive identification he was mistaken. As to glasses, he was mistaken. As to the amounts of money he was mistaken. Now, isn't it also possible, is there proof beyond a reasonable doubt when you have to rely on this type of testimony that there was, in fact, a firearm used.

Now, instruction C sets forth at least five elements of this crime and five elements state alleged taking was by a threat *of* of what may have reasonably appeared to be a firearm but by threat of an actual firearm. Now, Members of the Jury, take Stutz's testimony. Contradictory as it is, he had ample opportunity to change it, and the Commonwealth by Detective Wayland's testimony as to what he had told Detective Wayland shortly after, and I submit that you cannot believe. You don't have to say that Stutz is lying. I think you can say he is mistaken because of the lighting, the fact he is the type of individual who wears glasses and he, himself, admitted he only had a momentary glance at what was pointed at his stomach. He only once had a momentary glance at this instrument, whatever this instrument was, it has not been displayed before us here. There *isno* evidence, no tangible evidence that you can consider or that I have seen as to what was used. There may have been a black stick. If so, it was not a firearm.

page 225] Now, I just say I think this is important. I want to go over this again. "What may have reasonably appeared to be a firearm, not what may have reasonably appeared to be a firearm, but by threat of an actual firearm." And there is no proof, no proof whatsoever this was an actual firearm.

Now, with regard to what has been termed a confession. I think you have got to say that your job is really hard in regard to this confession. Of course, I know in all probability you would like to accept it, but you have got to consider the instruction given to you by the Court. Now, this instruction tells you you must believe beyond a reasonable doubt that the confession was not obtained by threats or any force or any undue influence or was not made by inducements given to excite the mind of the defendant by a person of authority.

Now, it is important, therefore, to know the words "by a person of authority." Now, in this situation we have at least three persons in authority who were present. Two other people present when Detecive Baker was present. We have High Sheriff of Nash County, Glen Womble. We have Officer King and Detective Baker. The only testimony you have as to who didn't offer inducements, who didn't make threats, is Detective Baker. A different man than who had had him in custody. We have something like, I know, at least six or seven days, I know it was April 8 since they had been in custody in North Carolina. I think you have some nine days. I don't know what happened in North

page 226] *North* Carolina for those nine days. We don't know, the jury doesn't know, what pressures Sheriff Womble brought to bear. We do know the reason Detective Baker and the reason Officer King went to North Carolina because they were told they had the subjects there and they had confessed to armed robbery here. Not two, but four, four subjects had confessed. Now, what happened in those nine days I don't know. There is no testimony whatsoever as to what happened. And the law is this is the only reason where there is more than one confession, which is what happened here, then can't you, isn't it reasonable to assume that the production of the second or subsequent confession is a production under the same circumstances which were used in the first? Isn't that true?

Now, with regard to this instruction, keep it in mind, what I just said. The Court has instructed you it is your duty to disregard it if it does not appear from the evidence beyond a reasonable doubt that such circumstances did not exist at the time the confession was made. There is a number, at least two or three confessions, and the only testimony you have is with regard to the last confession. What happened to one and two. What happened? What did Sheriff Womble do, do you know? I would say Sheriff Womble should be here to testify before you today, because he is not, the Court has seen fit to instruct if it does not appear from the evidence beyond a reasonable doubt — and I submit there is no

page 227] evidence, none whatsoever — the burden is not upon us to prove, but the burden is upon the Commonwealth to prove beyond a reasonable doubt that there were no undue influences, no inducements, no threats, no hopes held out to this defendant in North Carolina. When

you take that into consideration with the fact there were four, not just these two, but four, then I think that the jury can say it has not been proven beyond a reasonable doubt that Sheriff Womble, we just don't know what Sheriff Womble did.

Now, one other reason, leaving out the fact of successive confessions, assuming the situation where there was only one confession. Then take that into consideration. This instruction of the Court where the Court has said "Threats, any force or undue influence — by a person of authority." Now, suppose you only had one confession, but suppose that this particular individual was surrounded by more than one police officer, in this case Sheriff Womble, we have testimony from Detective Baker that he did not, he personally did not offer any threat, any hope or assert any undue influence. Remember, ladies and gentlemen, just one confession. I submit to you where the law is where the accused individual has been in charge of a person of authority other than who he confessed to, other than who the confession was made to, then by this instruction of the Court you must find this other person also did not assert any undue influence on this individual. Is there any evidence he did not? I submit there is none. Not having brought forth this evidence, this confession is en-
page 228] titled to no weight whatsoever and it is your duty to reject it.

Now, that leaves you as I said Stutz's testimony that I went over originally. Now, take the Commonwealth's instruction No. C and consider what they have proved. It is alleged they stole $75 and $71. Stutz has said $75 or $76. He is not sure about that. That was alleged and this has to be proved beyond a reasonable doubt, that it was good and lawful currency. Good and lawful currency of the United States of America. Is there any proof of that, any proof beyond a reasonable doubt. Sure, we can assume what was in the drawer was good and lawful currency of the United States of America, but is there any proof that it was? Have we seen any money?

Now, was the instruction of the Court it says it must be proven the taking was against the will of the owner. Yet the only proof, the only person who testified with regard to the $71 was Kenneth Blunt, Jr. When he testified he said he and his father were partners. I don't know what the will or desire of his father was. How can we assume a fact not in evidence he was robbed against the will of his father when

his father had not told him this. This is an assumption. You have to take this assumption. It is incumbent upon the Commonwealth to come forth and prove this which it has not done. It has not carried the burden.

And, of course, always in a crime of robbery by threat of firearm there must be proof of a firearm and page 229] there is, in fact, no proof this was a firearm. I have been over that, I think, thoroughly.

Now, the Court has also given you other instructions in which the Court has said you may find the defendant guilty of assault and battery or, excuse me, merely assault without a battery. And the reason, I think, for that is the fact whoever the second man was in the place he didn't commit a battery and if he is guilty of anything it would be only an assault because battery emphasizes the actual taking and assault is putting in fear of actual touching.

Now, the Commonwealth has told you that a principal in the second degree is one who is present aiding and abetting the commission of the crime. This is not true. A principal in the second degree must also share in the criminal intent of the principal in the first degree. If you consider Mathews' confession, there is nothing in it about his lack of knowledge that there was, in fact, a gun, that he said there was a gun according to Baker. This isn't in the confession but according to Baker there was a gun in the car but Mathews didn't know No. 1 had it. Now, I submit he did not share in the criminal intent, having no knowledge of the fact that the No. 1 man had a gun.

Now, Mathews told Baker about the gun in the car. Now, Mathews, you can see, had no opportunity, according to his own statement, if this statement can be accepted page 230] by you as made voluntarily. Not, whether it is true or false, but the fact it was made voluntarily. It is not a question of its truth or falsity; that is another finding you have to make. Mathews doesn't know. He may have known about the gun in the car, but Mathews doesn't know, can't know, what the No. 1 man used, the fact it was a firearm or not, because he doesn't know. The fact he was a good distance away and there is no testimony he ever looked. Detective Baker hasn't told us about Mathews knowing that there was a gun, if there was a gun, in operation at the time of this alleged robbery.

Now, the Court has also instructed you that the taking

may have occurred, must have been from the person or in the presence of the owner of the property. Now, I submit there can be no question that the first of those possibilities is out the window because Stutz didn't testify there was any taking by anybody from his person. The question is, was it in his presence? That's where the position of Stutz becomes important because sufficiently removed from this property it would not have been taken in his presence. You will have to put it on that ground alone.

Now, I would also like to also have you consider the type of man you sit in judgment on today. Mr. Mathews' wife took the stand to testify they had known each other for about three years; had met in Philadelphia; had been married seven months; Mathews had a second grade education; page 231] had apprenticed himself out to several trades, bricklayer to paperhanging. She testified he was employed, held two jobs, worked part time at the Post Office when they would call him, took up tickets at night. Here's a man out trying to support his family. Now, what else did he do? His wife testified because of his job, because of the hours of the work, he didn't attend church regularly but certain problems of religion were bothering him and he enrolled in a Christian Science program, received a correspondence course. She helped him read them in an attempt to further better himself. This is the type man you sit in judgment on today. And I think your duty is to consider very carefully the evidence before you, consider the fact the presumption of innocence goes with him throughout the trial and the fact that the burden of proof in every essential of this crime is always upon the Commonwealth and must be proven beyond a reasonable doubt. It is not our burden to come forth and disclose who the criminal agent was. It is the Commonwealth's burden to prove this man was of criminal intent. Four men and two already have been acquitted, so, I submit you should acquit this man also.

CLOSING ARGUMENT OF MR. HORAN

Mr. Horan: I wonder if the jury really uses the word "suppose?" "Suppose Sheriff Womble hadn't done this, suppose the money was not United States Currency." Counsel is

asking you to indulge in fantasy. He is asking
page 232] you to create an Alice in Wonderland. That con-
fession brands Mathews for what he is. He got out at the Traveler's Motel and he got that money. He wasn't getting that money to support his family. He was going in that Traveler's Motel to rob it. His confession says exactly what Stutz says happened. They went in and asked, "Where's Route 95?" Mathews says in his confession while they were going down the road he took the $75 out of the wallet and threw the papers away. He kept the wallet. How can counsel ask you to be so naive as to believe there was no criminal intent? Does counsel want you to believe they were going to make a loan at the Traveler's Motel at 5 o'clock in the morning? This is utter nonsense.

Here's a man trying to support his family. Sure, he was trying to support his family. His family was up in New York. He was on his way to North Carolina. Why, we don't know. He sure wasn't collecting that money from that motel to support his family. He was supporting the other three men in the car.

Ladies and Gentlemen of the Jury, the supposes you are asked to believe cannot and are not reasonable doubt. Counsel wants to create a fox and hounds story. The Police Departments are the hounds and poor Mr. Mathews is the fox. The hounds have all the odds. The hounds do have the confession which says exactly what the witness says happened in that motel. So counsel is asking you to create a supposition, some
possible fantasy around which you can believe
page 233] this defendant didn't to this thing.

I submit to you, ladies and gentlemen, there is no evidence to support this. This is a deadly serious business. When I say deadly, when his companion walked in there, pulled that gun, it became a deadly serious business. Counsel suggests to you there is no evidence other than Mr. Stutz's that this was a gun. Well, that may well be, but Mr. Mathews said "After we got inside we talked with the man about the best way to get to North Carolina and how to get on Route 95. Just about that time, Williams pulled out his gun, held it against the man, said 'Give me your money.'" While Williams was holding the gun he went behind the counter and took the money box from one of the drawers. Can there be one iota of doubt that was a gun? Can there be one iota of

doubt that was good and lawful currency of the United States?

Mr. Stutz said he got $75. Mr. Stutz said that he counted the bills, the currency in the drawer and Mr. Mathews says he took $75 out of that wallet and Mr. Mathews said he took money out of the cash drawer. It may have been Chinese or Japanese, but I don't think you people are going to believe that. That was good cold, hard American money and anything else would be pure fantasy.

Counsel also tells you you don't know what Womble might have done in this confession and we don't really know what fantasy he wants to create about what Womble

page 234] said. You do have evidence as to confession No. 2. Confession No. 2 took place in the jail on the Saturday night Detective Baker arrived, on the night of the oral statements with Womble present advising them of their rights and telling Baker in their presence "They have been cooperative with me and I think they will be cooperative with you." Then Sheriff Womble went through the offenses and the offenses admitted by James Johnnie Mathews. Is there one scintilla of evidence there was undue influence in that jail? There was none on Saturday night and there was none Sunday morning when he talked to Baker and for counsel to suggest there was, counsel must of necessity ask you to indulge in fantasy because there is no evidence in the trial there was anything but voluntariness.

Counsel talks about four confessions. There were not four confessions. There is no evidence there were four confessions by four men that they were in the Traveler's Motel and robbed it. You don't have that evidence because there is no such thing. Two confessions by two persons in there. The other two were in the car outside. So it is misleading to think there were four men confessed they were in the Traveler's Motel. There is no evidence of such confessions. There is no evidence there were such confessions.

Of course, there is one further fantasy counsel might want you to believe, and that is that it is possible Mr. Blunt consented to his money being taken. That is probably

page 235] the apex in fantasy. Blunt took the stand. He didn't say why Mr. Mathews was out doing this. He doesn't even know Mathews, but he does know Mathews took his money and I am sure if Mr. Blunt's father had consented to Mathews having taken his money, Mr. Blunt's father would be here testifying for the defense.

Ladies and Gentlemen of the Jury, in all seriousness can there be any doubt that Matthews committed the crime? I ask you to read that confession. I ask you to ask yourselves the question, could a man who was not there describe the events which occurred in the Traveler's Motel on April 7, 1965? Could a man who had nothing to do with this crime ever have been so minutely in detail, so close to what Mr. Stutz said as to what happened in that motel?

We do not rely on Mr. Stutz's identification. It was my question of Mr. Stutz as to what the lighting was in the room. I asked the question because I knew the room was dim. It was my question about Mr. Stutz's condition after the police officers examined him after the robbery. He knew the man was nervous and upset and in fear of his life. He was really not capable of adequately describing what happened, but when Mr. Stutz, in reflection, comes in and states on the witness stand, testifies to what happened and then that *testimoney* is corroborated by the defendant's own confession, I submit to you, Ladies and Gentlemen of the Jury, beyond a reasonable doubt James Johnnie Mathews committed this
page 236] crime of violence and he should be punished for it.

The Court: Members of the Jury, you may retire now to consider your verdict. You will take with you the exhibits and instructions and the five forms of verdict submitted to you. Your first duty will be to select a foreman and after you have selected your foreman and made your deliberations, when you reach your verdict the foreman will sign your verdict which must be unanimous.

(Thereupon, the jury was retired to the jury room at 11:15 a.m.)

CERTIFICATE OF REPORTER

COUNTY OF FAIRFAX

ss:

COMMONWEALTH OF VIRGINIA

I, Marleane Rea, a shorthand reporter employed by Ward and Paul, 917 G Street, N.W., Washington, D. C., do hereby certify that the foregoing is a true record of my stenographic

notes of the proceedings had on *July* 14 and 15, 1965, in the case of *Commonwealth of Virginia* versus *James Johnnie Mathews,* Criminal No. 12750.

MARLEANE REA, Reporter

Tendered the 23rd day of November, 1965, both volumes, consisting of 236 pages; and signed this 23rd day of November, 1965.

A. V. B., JR.
Judge

Received and filed this 23rd day of November, 1965.

EDWARD E. YOUNG, Deputy Clerk
Circuit Court, Fairfax, Virginia

6/15/65
page 3] VERDICT IN THE CASE OF

COMMONWEALTH OF VIRGINIA

vs.

JAMES JOHNNIE MATHEWS

Filed Cr. 12750 JUL 13 1965
THOMAS P. CHAPMAN, JR.,
Clerk of the Circuit Court of Fairfax County, Va.

The Bailiff: Remain seated and come to order, please.
The Court: All right.
The Bailiff: Ladies and gentlemen of the Jury, have you reached a verdict?
The Foreman: We have, sir.
The Bailiff: Is it unanimous?
The Foreman: It is.
The Bailiff: We, the Jury, in the case of the *Commonwealth of Virginia* versus *James Johnny Mathews,* case number 12750, find the defendant guilty of robbery by violence and threat of firearms, and fix his punishment at twenty years.
The Court: Any objection to the form of the verdict?

Mr. Gilliam: Your Honor — I take exception. I don't think the form of the verdict is in the form of the indictment. I take that objection to it.

The Court: Other than that, do you have any objection to the form of the verdict?

Mr. Gilliam: No, sir. I don't have any further objection. Oh — I would like to have the Jury polled.

6/15/65 page 2] The Court: All right. The Jury will answer when their name is called — whether it is your individual verdict that was just read, as well as the collective verdict.

The Bailiff: Charles W. Walker.
Mr. Walker: Yes, it is.
The Bailiff: Mrs. Jeanne S. Bott.
Mrs. Bott: Yes.
The Bailiff: Fred Parnell.
Mr. Parnell: Yes.
The Bailiff: H. J. Trees.
Mr. Trees: Yes.
The Bailiff: Ruth C. Pusey.
Mrs. Pusey: Yes.
The Bailiff: Elsa S. Woodaman.
Mrs. Woodaman: Yes, it is.
The Bailiff: Ester Ham.
Mrs. Ham: Yes.
The Bailiff: Raymond Fridley.
Mr. Fridley: Yes, it is.
The Bailiff: George Fortune.
Mr. Fortune: Yes, it is.
The Bailiff: Burrel James.
Mr. James: Yes, it is.
The Bailiff: Francis L. Decker.
Mr. Decker: Yes.

6/15/65 page 3] The Bailiff: And Frank Rideout.
Mr. Rideout: Yes.

The Court: Before discharging the Jury, I think you should know that Mr. Gilliam, the defendant's attorney, was court appointed. He was not retained. The fee that he will receive from the State of Virginia for his appointment is hardly commensurate with the amount of work he did, or the energy with which he represented his client.

In his capacity as court appointed attorney, it is not his

duty to determine the guilt or innocence of his client, but merely to see that the Commonwealth bears its burden of proof of proving beyond a reasonable doubt that the defendant is guilty, and that the defendant receives a fair trial.

He has acquitted his duty with admirable vigor, and the Court wants to express its gratitude to him for it.

The Jury is released and discharged, and the Court wants to thank you for your service.

(The Jury retires.)

The Court: If the defendant will stand.

Does the defendant have any statement he wants to make in his own behalf at this time?

The Defendant: No, your Honor.

The Court: Is there any reason why the Court should not, now, impose its sentence?

The Defendant: No, sir.

6/15/65 page 4] The Court: All right. Based on the Jury's verdict, then, it is the sentence of the Court that you be confined in the Penitentiary for a period of twenty years.

While you and Mr. Gilliam are here, the Court wants to advise you as to your rights concerning appeal. In the event you desire to appeal this conviction, you must, through your attorney or otherwise, notify the Court and assign your reasons for the appeal within sixty days from the day the sentence is imposed — that is, within sixty days from today.

In the event you are financially unable to pay your attorney's fees, costs or expenses incident to an appeal — if you make an affidavit to this effect, the Supreme Court of Appeals of Virginia will order the payment of reasonable counsel fees and the expenses of appeal.

In the event you desire to be furnished, for the purposes of an appeal, a copy of the transcript of the evidence and incidents of trial, you must make application therefor far enough in advance of the expiration of the sixty day period to allow the transcript to be typed up.

Mr. Gilliam, your services will be continued as an appointee for the purpose of advising the defendant as to his rights of appeal.

The defendent is committed to the custody of the Sheriff.

(Whereupon, at 12:45 o'clock p. m., June 15, 1965, the proceedings in the above-entitled matter were concluded.)

Tendered and signed this 23rd day of November, 1965.

A. V. B., JR.
Judge

Received and filed this 23rd day of Nov. 1965
EDWARD E. YOUNG, D. C.
Circuit Ct. of Fairfax

9/3/65
page 1]

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Filed SEP 16 1965
THOMAS P. CHAPMAN, JR.,
Clerk of the Circuit Court of Fairfax County, Va.

Fairfax, Virginia
Friday, September 3, 1965

The above-entitled matter came on for hearing on motion pursuant to section 53-272 of the 1950 Code, as amended, before Honorable Albert V. Bryan, Jr., Judge of the Circuit Court of Fairfax County, Virginia, in Courtroom No. 2, Fairfax County Courthouse, at 4:25 p.m.

APPEARANCES:

On behalf of the Commonwealth:
ROBERT F. HORAN, ESQ.

On behalf of the Defendant:
J. WILLIAM GILLIAM, ESQ.

9/3/65
page 2] PROCEEDINGS

(The reporter, DEAN C. LEASURE, was duly sworn to stenographically report this and other matters before this Court this day.)

The Court: *Commonwealth of Virginia* versus *James Johnnie Mathews,* No. 12750.

Let the record show the Commonwealth is represented through its attorney, Mr. Robert Horan, and that the defendant is present in person and through his attorney, Mr. William Gilliam.

All right, Mr. Gilliam, on your motion.

Mr. Gilliam: Yes, Your Honor.

This motion is made pursuant to section 53-272 of the 1950 Code, as amended, which provides for the placing of the convicted prisoner who has not actually been committed to the Virginia State Penitentiary, provides or places the power in the Court either to suspend all or part of the sentence or to deal with the matter of probation.

Your Honor, of course, is familiar with this case, having heard the evidence, and the case was tried with a jury. And the evidence, to relate it briefly, showed that the defendant was convicted by that evidence of robbery by force and violence, and sentence was imposed in the amount of 20 years.

9/3/65 page 3] To review that evidence, Your Honor, we say that it actually started off with four possible defendants. Two were *nol prossed.* The third man and principal case is still awaiting trial.

I represented the fourth individual, Mathews. As I say, he stood trial and has been convicted.

The Commonwealth's evidence, Your Honor, under which he was convicted clearly shows that the defendant was a principal in the second degree and was not the instigator of this crime; he did not hold the gun. This gun was admitted into evidence. The jury found the robbery was accomplished by *forearm.*

Under all the evidence introduced, a man other than the defendant was the principal in the first degree, and I think this conviction stands on the basis that he was aiding and abetting and sharing.

Dealing with the defendant himself, I think the evidence also shows, Your Honor, that the defendant has a very limited education. He was born in North Carolina, and subsequently to the North where he married and his wife was a high school graduate and native of South Carolina. He returned to North Carolina at the time this offense took place.

I think the evidence also shows that he and his wife were

only married a short period of time. The defendant was supporting a five-year child born to his wife of another marriage.

I would also like, Your Honor, to consider in
9/3/65 this the question of the defendant's age.
page 4] The Court: How old is he?

Mr. Gilliam: Age 31, born in 1935, Your Honor.

Your Honor, I think it is certainly important to consider the defendant's part in this armed robbery, the fact that he was a principal in the second degree and not the person who perpetrated the crime, but his part, I think, is certainly less than the man who held the gun.

Then, you have a situation of no actual violence. There is no testimony here today, as there was in the case I listened to, where the boy said the man became aggressive and struck him with the gun and cut the man on the side of the head. There was no evidence of that in this case.

I even discussed this case with Mr. Stutz afterwards. He took the viewpoint that the man had been hit harder than he expected, or something similar to that.

I don't think Mr. Stutz after talking with him, bears the same degree of ill-will to this defendant as towards Thompson, the man who was tried.

Of course, this did not come out in trial, but I think possibly the evidence shows that the defendant may have been in this motel, and Thompson, the man with the gun, began the perpetration of armed robbery. The defendant stood there, and Thompson may have said "Get the money." Some people

reason — "Well, here I am, what else can I do?"
9/3/63 Some people do not understand.
page 5] If they had stopped then, they wouldn't be guilty.

As I understand, Your Honor, if you read the confession, this is clear to what is the confession, but I believe this is what actually happened.

Also, in consideration of the jury's verdict here, there are certain things that, frankly, I do not like to mention even, but we do live in a time which is certainly charged with some emotion, and I think possible some of the emotions have been created by other currents, and so forth, which may have influenced any jury in this day and age in the reaching of their verdict.

Certainly, another thing I think is very important, Your Honor: I believe this appears on page 171 of the record,

towards the end of the trial, as the defendant's wife had testified —

The Court: 171?

Mr. Gilliam: I believe so, Your Honor, in the wife's testimony, on page 170, bottom of the page, and continuing on 171, where the question was asked of the defendant's wife, whether or not the defendant had ever told her that he had been convicted of grand larceny. I do not remember the answer, but at that time, of course, the answer is in the record. At that time, I made an objection which the Court sustained, and I think, Your Honor, this may have had a great deal of bearing on the deliberations of the jury in arriving at the verdict they reached in this case. I think that is certainly due to have consideration.

9/3/65
page 6]

The truth of the matter, as I understand it, and as was brought out on my examination of the defendant, was that he had been convicted of attempted arson in North Carolina and served a sentence in the penitentiary for this, but it is my understanding this is the only offense. He has never been convicted of grand larceny. I do not know the basis for such a question. I am sure the Commonwealth had a basis, but from my conversations, I am led to believe, Your Honor, that the defendant has never been convicted of grand larceny. He has been convicted of attempted arson and of no other criminal charge. That is the defendant's past criminal record. That, of course, could be substantiated by investigation and report, if the Court so desires to order it.

Certainly, this was considered, I think, by the jury, and it was a very poor aspect.

Your Honor, in closing, I would like to say that I don't imagine there are any two cases just alike, but it would seem to me that the sentence — although the legislature has seen fit to provide for a wide span in this type of case, Your Honor, the verdict could have been acquittal, a fine of one dollar, or it could have been death in the electric chair. That, of course, gives the jury a lot of leeway. I think, Your Honor, the jury was possibly actuated by — Naturally, it did not have a complete understanding of the defendant's prior criminal record. I think they were misled in that respect.

9/3/65
page 7]

Certainly, the era in which we live and the times we live in should be considered, and also I think the Court has sat

on a number of this type of cases, and I think the jury's verdict is disproportionate to the norm.

Thank you.

Mr. Horan: Your Honor, counsel has seen fit to go outside the record. I will not go outside the record. That jury verdict must stand on the record in the case, not counsel's opinion as to what might have happened or counsel's opinion as to what the record may be. It is what appeared before the jury when the case was tried.

The question on page 171 of the transcript, the question about his discussions, whether he had ever discussed with his wife *is* larceny conviction, that question was asked by me in absolute good faith, and it was asked by me because I felt his character had been placed in issue.

She testified to nothing concerning the robbery itself. She testified to nothing about his acts, prior or after the robbery. She testified to no statements of his concerning the armed *roberry*. I felt at that time she was on the witness stand purely to show that James Mathews is a good guy.

9/3/65 page 8] I asked the question in absolute good faith, because I felt at that time — I may be getting in deep water, and I feel now his character was in issue, but it was ruled on by the Court. The Court sustained the objection, and the question was never answered.

The law in Virginia is clear in most of the cases that arise out of argument of counsel, but I think the same rule applies that where counsel makes an improper argument, at that time the burden becomes on the defense because of the nature of trial tactics; the burden becomes on the defense, at that time to except and to ask the Court for a ruling and instructions to the jury to disregard, and the only case I can find where it is grounds for a new trial or reversible error is where the counsel objects and the Court overrules his objection or refuses to instruct the jury.

I think the case of *Harris* versus *Commonwealth* pretty much lays the guidelines in Virginia for grounds for a new trial because of conduct by the prosecutor. And in this case, the Supreme Court of Appeals said a new trial would be granted when it plainly appeared the statement of Commonwealth attorney was highly prejudicial to the accused, and the trial court refused to instruct the jury to disregard it.

Every case I have found involves a refusal by the trial court to instruct the jury to disregard the remarks.

In this case, I feel, No. 1, there was no intention on my part to prejudice this defendant's rights. There
9/3/65 was no deliberate overbearing on a prior court's
page 9] ruling, or anything like that. In good faith, I asked the question. Once the question came in, the Court ruled on the question as objectionable and sustained counsel's objection. No exception was taken by him to my statement. There was no request for a mistrial made by counsel and, furthermore, made to the Court to instruct the jury to disregard.

I don't think he has his cake both ways. He cannot sit and let it go and say "I will wait until I see what the jury does." He has to make the decision at that point, in time.

Therefore, I submit, first of all, there was not such misconduct as would entitle him to a new trial under Virginia decisions; and secondly, if there was such misconduct, his burden at that time was to make a decision as to whether he wanted to do it and request the Court to instruct.

I don't think we have that situation here.

The second point: Mr. Gilliam makes a point there was no violence in this robbery. I, of course, cannot think of anything more violent than standing with a gun in someone's stomach. The jury was faced with that. There was one man that had a gun in his stomach, and the fact that there was no violence was no fault of that. If the man had made an attempt to stop the robbery, it might have been completely different.

This man was a perpetrator and assisted in the armed robbery. Maybe I would not give James Mathews 20 years in the penitentiary and maybe Mr. Stutz wouldn't
9/3/65 give Mr. Mathews 20 years in the penitentiary,
page 10] and probably even Your Honor would not give him 20 years, but this defendant requested that this case be tried by a jury, and 12 men sat in that box for a day and a half and listened to the evidence. Those 12 men have decided, and I feel that I would be remiss as a prosecutor to come in now and say I think they were wrong. Those 12 men, by our system of judicial process, are the voice of his peers, and his peers have said to him that this crime is worth 20 years, and I do not feel I can quarrel with it, whether it is what I would do now, sitting here and saying what I would do. I think that is totally immaterial. The jury said it was 20 years.

The jury trial was requested by the defendant, and I feel

the jury's verdict, because of that, should stand.

Mr. Gilliam: Your Honor, I would like to, in reply, say that I am not here for a motion for a new trial. I am merely pointing out the fact that this did occur.

Mr. Horan: Excuse me. The motion says: "Motion to Set Aside Verdict and Award a New Trial."

Mr. Gilliam: There are two motions filed.

The Court: Are you arguing now —

Mr. Gilliam: I a motion to suspend a part of the sentence, Your Honor. I am here on a motion to suspend the sentence, and I bring that to the Court's attention, because I feel, Your Honor, that certainly this was, and could not help but be, an improper influence on the jury in reaching the verdict, and I think it goes to the quantity of the punish-
9/3/65 ment.
page 11] With regard to the fact that the case was tried with a jury, that cannot be denied. But the fact of the matter is that the verdict, to set aside, the awards are reduced. The plaintiff is put on terms, and things like that. Even though the Virginia Constitution says that in civil cases, you shall not do that in a civil verdict. If the plaintiff is put on terms, the Court is not doing this. The plaintiff does it himself by accepting the terms.

If we can do that in a civil case, and we have a statute dealing with it in criminal cases, and the statute takes into consideration the fact that the Court may be aware or the Court may have a completely different viewpoint than the jury, and, certainly, it is well within the power of the Court to closely look at the jury's verdict. So many things come up, Your Honor, which are said. For instance, suppose that the jury in this case had been instructed to disregard it. It's hard for a person sitting as a member of the jury to completely disregard the fact that the defendant's character had been brought in. As a matter of practicality, try as hard as they may, I say it is an overwhelming task for any member of the jury to disregard this.

The Court: Well, that jury deliberated and were just as conscientious about the amount of punishment as I might have been. They may have come up with a different figure than I might have, but I do not think there was anything
9/3/65 in the trial, even including the question referred
page 12] to, Mr. Gilliam, that would indicate their verdict was based on anything but a conscientious follow-

ing of the instructions.

I cannot say, as a matter of law, that the punishment is disproportionate to the crime. For that reason, your motion to suspend part of the sentence or all of it is denied.

There is pending your motion for a new trial.

Mr. Gilliam: Yes, sir, Your Honor. It will have to be heard 21 days from September 7, I believe, the way the order reads now.

The Court: Yes. We will set it down for sometime —

Mr. Gilliam: Some Friday.

The Court: September 24; is that not an agreeable date?

Mr. Horan: That would be fine, Your Honor. I do not know what my position will be at that point, in time, however.

The Court: We can set it earlier.

Mr. Horan: I do not know whether I could argue a motion for a new trial at that time.

The Court: When do you terminate?

Mr. Horan: On the 15th. I assume there would be no objection. I would have no objection to the 24th.

The Court: I can hear it any Friday between now and the 24th except the 17th of this month when I will be in Alexandria on a case.

Mr. Gilliam: That would only leave the 10th.

The Court: Is that an agreeable date?

9/3/65 page 13] Mr. Gilliam: Your Honor, that would only give me a week to read the transcript.

The Court: Well, we will put it on the 24th, then.

Mr. Gilliam: Your Honor, I notice that the record — the transcript — is in the Court's files. Is there another copy available?

The Court: There are two copies in the file.

Mr. Gilliam: Is it possible I could take one of them out?

The Court: Yes. Just give the clerk a receipt for it.

The record seems to be incomplete. There is no transcript of the verdict in here.

Mr. Horan: Your Honor, I think the transcript of the verdict is in the case file itself. I know the poll of the jury is there.

The Court: I think it is complete.

The case will be continued for argument on motion for a new trial or to set aside the verdict until September 24.

Mr. Horan: At 2 o'clock, Your Honor?

The Court: Yes.

(Whereupon, at 4:50 p.m., a recess was taken in the above-entitled matter until 2:00 p.m., September 24, 1965.)

9/3/65
page 14] CERTIFICATE OF REPORTER

I, DEAN C. LEASURE, the stenographic reporter who was duly sworn to well and truly report the foregoing proceedings do hereby certify that they are true and correct to the best of my knowledge and ability, and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest, or their counsel.

IN WITNESS WHEREOF I have hereunto set my hand this 13th day of September, 1965.

DEAN C. LEASURE,
Reporter for Ward & Paul, Inc.

Tendered and signed the 23rd day of November, 1965.

A. V. B., JR.
Judge

Received and filed this 23rd day of Nov. 1965.
EDWARD E. YOUNG, D. C.
Circuit Court, Fairfax, Va.

9/24/65
page 1]

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Fairfax, Virginia
Friday, September 24, 1965

The above-entitled matter came on for the taking of testimony before the Honorable Albert V. Bryan, Jr., a Judge of the Circuit Court of Fairfax County, Virginia, commencing at 2:30 o'clock, p.m.

APPEARANCES:

On behalf of the Commonwealth of Virginia:
ROBERT HORAN.

On behalf of the Defendant:
J. WILLIAM GILLIAM.

9/24/65
page 2] PROCEEDINGS

The Court: *Commonwealth* versus *JAMES JOHNNY MATHEWS*, No. 12750.

Let the record show that the Commonwealth is present through its attorney, Mr. Robert Horan, and that the defendant is present in person and through his attorney , J. William Gilliam. This is a motion to set aside the verdict. All right, Mr. Gilliam:

Mr. Gilliam: I would like to state that I would bring up several points in this Motion to Set Aside the Verdict without a waiver of any of my previous objections stated during the course of the trial which I ask the Court to take notice of and I don't feel at this time I wish to argue on those points, but I do wish to reserve them.

First, I would like to proceed directly on the question of whether the Defendant has admitted to the written statement that was admitted in this case. I have, of course, reviewed the record, the transcript, and I might say I consider that transcript to be in its present form quite inadequate and contains a lot of inaccuracies. But, as it is, I reviewed that transcript. I called that to the attention of the reporter and I think they are attempting to review those notes and see whether or not they can be brought more closely to conforming to the evidence that was presented.

9/24/65
page 3] Now, as I remember the evidence, Detective Kimberley Baker of the Fairfax County Police Department, arrived in Nash County, North Carolina, on April 16, 1965, at about 7:00 o'clock, p.m. The Defendant, Mathews, together with three other parties, had been arrested on, I think the 8th, the morning of the 8th of April or the night of the 8th of April, and were taken into custody of the North Carolina authorities by the High Sheriff of North Carolina, Sheriff Wamble. They were questioned, I believe the Defendant was questioned, the next morning, at which time he did not make any admissions initially to High Sheriff Wamble but upon discussion of the case with

High Sheriff Wamble and the fact he brought up something concerning a cigar box, a question concerning a Fairfax County robbery in connection with the North Carolina robbery, the Defendant made an oral admission to Sheriff Wamble.

Pursuant to those admissions, Sheriff Wamble advised the Fairfax County *Policd* authorities and they responded, Detective Baker, I believe, Officer King, arrived on the 16th of April, 1965. At which time, that was about 7 p.m., at which time they went to the lock-up, Sheriff Wamble was there, Officer King was there, the Clerk of the Court was there, possibly several other people. Sheriff Wamble then proceeded to relate in the presence of the Defendant and three other co-defendants at that time what the defendants alleged to have told him earlier.

9/24/65 page 4] Detective Baker, according to his statement, did not proceed to interrogate the suspects at that time but came back the next morning and later on he obtained a written statement from the Defendant. During all of the hearings, the time that all this took place, Sheriff Wamble was present. Now, also present was Officer King.

Now, I think that the law in this area, one of the primary considerations in this area, was to determine whether or not such confession was voluntary. Now, in the argument of this case I, of course, referred to the *Thompson* case, 20 Grafton 731. Now that clearly lays down the rule, Your Honor, that it is incumbent upon the Commonwealth to prove that a confession is voluntary. It is also a case dealing with successive confessions. In that case the defendant has given a confession and the circumstances surrounding that were that he was about to be lynched, I think, by a Negro mob if he didn't confess, and the Court said conceivably that this confession was involuntary and then laid down the rule, I think I may best refer to the written opinion here, *prima facie,* the undue influence will be considered as continuing.

Now, we are dealing with the presumption, dealing with the first rule the Commonwealth has to prove it is voluntary. And, the second rule, that a second subconfession flowed from the same circumstances which surround this one first. Now, taking a case from another jurisdiction, Your

9/24/65 Honor, I think the rule of law is that where the

page 5] defendant produces evidence that a confession was obtained by coercion, all the persons who had control over the defendant or are alleged involved in the use of the coercion should be produced, if possible, before and examined before the confession is admitted.

The Court: What is the citation of that?

Mr. Gilliam: Cited, Your Honor, *People* versus *La Coco* — that's two words, *La Coco,* 94 NE 2d 178 at page 183.

The evidence, Your Honor, in this case is that a confession was given to High Sheriff Wamble, certainly a person in authority, the Defendant had been arrested in North Carolina, charged with a North Carolina bank robbery, this person was in a position to either help or hurt the Defendant, and the confession that he gave, according to the Defendant and it is amply supported by the record and unrebutted by any Commonwealth testimony, that this confession was brought on as a result of coercion, undue influence, promises, promises of concurrent sentences, promises of lighter treatment, promises to speak to the Judge. According to the Defendant, High Sheriff Wamble actually did speak to the Judge in North Carolina. It is also instrumental and it is also important to note that the North Carolina and the Virginia happenings, the discussions that were had with Sheriff Wamble related to both of them and it cannot be separated from, as the Commonwealth has tried to do, cannot be separated by merely saying whatever in-
9/24/65 ducements or promises were given to the De-
page 6] fendant related solely to the North Carolina, to an inducement to confess to the North Carolina robbery. This is something that I don't think factually can be separated as the Commonwealth has tried to do.

As a matter of fact, when the Defendant took the stand on his *voire dire* he was asked the question by the Commonwealth Attorney: "Did these, did this continue?" says: "Now did anybody say anything to get you to sign this?" I'm on page 119 of the record your Honor.

Question by the Commonwealth Attorney:

"Now, did anybody say anything to you to get you to sign this statement?"

"Answer: 'Yes, sir.' "

"Question: 'What was said by whom?' "

"Answer: 'By the Sheriff. Caused me into signing that statement telling him what he wanted to know about every-

thing else, by promising me a lot of things, or promising me things would go better up here, which they didn't.' "

"Question: 'What were the promises?' "

"Answer: 'Some promises I would get a break in his County and up here. If I got a light sentence I would be home early, in which case I wouldn't get time down there because I didn't do nothing up here or down there which isn't proved.' "

Now, the record is, Your Honor, is replete where the Defendant has made allegations which are not refuted in the testimony whatsoever that the confession here that was admitted into evidence was brought on by promises, promises of concurrent sentences, promises of parole, that also he would speak to the Judge. That actually occurred. If that was false, that could have been disproved. The Commonwealth could have produced witnesses. The Commonwealth has offered no excuse for not producing witnesses. All the witnesses are in North Carolina and there has been no showing those North Carolina authorities would not have cooperated and appeared at this trial from North Carolina for cross examination to see whether or not, in fact, the commonwealth could bear its burden of proving that this confession was, in fact, voluntary, which is their burden.

9/24/65 page 7]

Now, if the rule of law is, Your Honor, they must have proof a confession is voluntary, I contend that when the defense has brought into evidence the fact that there was a previous confession made and given, that because of the then presumption of law that whatever influence brought about the first confession are deemed to continue unless it is proven by extensive proof that this is not the case, then those circumstances which produced the first confession have got to be brought to the attention of the Court. This is something that the Defendant is entitled to, to cross examine the witnesses, to be confronted by this person, to have him on the stand and ask him the questions.

The Court: He's assuming the first confession was not voluntary. Can't the authorities by proper advice to the Defendant prior to the second confession dispell what would otherwise be a continuing presumption of undue influence? Undue influence may not be the proper term, of course.

9/24/65 page 8]

Mr. Gilliam: Your Honor, coercion may be, yes; but I

deem a promise to be a continuing thing. Now, a promise made for a prosecution still outstanding, then I think in order to show this promise didn't form a part of the inducement to give a second confession, at least you have got to have very clear convincing total proof. I think that we're entitled, Your Honor, to an examination of all parties that had anything to do with this transaction where the first confession was given, because if the Court rules in that respect it's ruling in the blind, because it doesn't know, it doesn't know what Sheriff Wamble's testimony would be. I don't know what that testimony would be. He may state on the stand something that as a mater of law could not be dispelled.

In *People* versus *La Coco,* Your Honor, it says when the Defendant raises this issue then these witnesses have got to be produced because this has got to be overcome, and in this case it has not been overcome.

I don't think the Court can completely disregard the Defendant's testimony because he is on the stand. Certainly he has a large interest in the case. But in this case it appears to me the Court has completely disregarded the charges and accusations he has made concerning Sheriff Wamble and other persons in authority in North Carolina and this has not been rebutted by the Commonwealth. To me it has to stand as a factor in the case and it is only on those facts, Your Honor, that a decision can be rendered concerning this confession because those are all facts before the Court.

9/24/65 page 9]

For those reasons, Your Honor, and I think that is one of the reasons the confession is *inadmissable.*

Now, moving into a second reason, and this ruling, I think, applies regardless of successive confessions. I have cited in argument before the authority I think substantiates this particular rule. Where a person is in the custody of people in authority, more than one, in order to prove that a confession is voluntary, it is incumbent upon the Commonwealth not only to prove that a confession was not the result of undue influences, promises, or what have you, from one of those individuals, but it is incumbent upon the Commonwealth to come forward with the people who were present there and had the inherent ability by their promise, by their authority, to offer these undue influences. My position is, Your Honor, if there are two police detectives interrogating a suspect,

kind of a Mutt and Jeff technique, if one says to the Defendant: "You better come on and tell me all you know and things will go lighter with you," and then he says: "I'm going to get a drink of water, go ahead while I get a drink water, Detective Jones is coming in, go ahead

9/24/65 and he'll take your statement."

page 10] Well, Detective Smith may have made that promise, this would be the inducement. Now, Detective Jones takes the stand and testifies, Your Honor, what he testifies to, what he did or did not do. Not as to what the other detective did or did not do. I say that proposition is sustained by the cases that when a person is in the custody of more than one person of authority, and the Commonwealth has already showed the confession is voluntary, it must show that the inducement did not come from any of those parties.

Now, moving into the question of whether or not the confession was, in fact, whether or not the Commonwealth has carried the burden of proving this, that the confession is voluntary, Your Honor, this is the case in 17 Grafton at page 580. Reading from that opinion, Your Honor, the confession was made while the prisoner was in the custody of Humpfrees, the constable, who together with Lyle, prosecutor and owner of the shop and goods, was taking him to jail after he had been committed by the Magistrate. While on the road Humpfrees said to the prisoner: "You had better tell all about it." After the parties had gone about a mile further and without, it appears, any other remarks having been made by any one of them, the prisoner said to Lyle: "I will tell all about it," and proceeded to make a confession which was given in evidence. The confession though — this is the holding of the Court — the

9/24/65 confession though not made immediately after

page 11] the remark by Humpfrees to the prisoner, seems evidently to have been induced by him. The form of the prisoner's first remark to Lyle indicates that it was made with reference to what Humpfrees had said to him and as a result of his reflection in the interim, this reflection of the remarks of *Humpfree's* seems to have led him to the conclusion that it would be better for all to tell all about it.

And, therefore, he proceeded to do so. Humpfrees was a person in authority within the doctrine established by this Court in *Smith's* and *Shiftlet's* case that such a remark

as that made by Humpfrees preceding from a person in authority will render a confession induced by it, and this is well established by the English cases and recognized in the opinion of Judge Moncur in the *Shiftlet's* case which all you other judges concur in citing to the authority. And that case was reversed, Your Honor. That evidence was that you had better tell all about it, went along for about a mile, no other remarks were made, the defendant says I will tell all about it. That confession given under that inducement, Your Honor, as reported by our highest Court is held to be inadmissible.

Now, the testimony in this case, to say the least, is substantially stronger than in that case. And this case brought about a reversal.

Now, does the Court have any questions?

9/24/65 page 12] The Court: Now, you are talking at this point about the first of the successive confessions in this case, aren't you?

Mr. Gilliam: No, Your Honor, I say that leaving aside the question of whether one, two or three confessions that, isolate any confession you want to, any case where they — any case where there might be three confessions, isolate the final or third confession, in that situation I contend, Your Honor, the defendant who confesses is in the custody of people with the inherent ability, as the Virginia report said, persons in authority.

When this defendant, in the custody of several people who are persons in authority, then in order for the Commonwealth to bear its burden of proof that a confession is voluntary, it must come forward with evidence no inducement came from any of those persons in authority. So take the statement here in this case, take the statement made in the presence of Detective Baker and Officer King, King was also present, I believe. But, just take Officer King, an officer here in Fairfax, in our jurisdiction, there is absolutely no testimony, Your Honor, none whatsoever offered by the Commonwealth to show that Officer King did not tell the defendant to go ahead and tell Detective Baker what happened, I'll see if I can speak to the Judge for you, or get you a little lighter punishment.

The Court: You mean if Baker, as he testified, told the defendant of his right to counsel, of his right

9/24/65 to remain silent, advised if he made a statement

page 13] it could be used against him, that everybody there in the room have to tell the defendant the same thing?

Mr. Gilliam: No, I don't say that, Your Honor, at all. They don't have to say a word. They don't have to say that they said a thing, that they advised the defendant of any of his constitutional right. I'm just saying that Officer King, as he testified, placed him in the position in the room, or having been in the room, or a person of authority, placed him in that room, showed that he was there, that he was a person in authority, then I do not contend that he has to advise him of all his constitutional rights, but I do contend that if Officer King offers the defendant an inducement and the defendant later confesses to Detective Baker, that in order to prove a confession is voluntary, once it has been shown Officer King was in a position to do this, and in order to carry the burden of proof of voluntariness, it is incumbent upon the Commonwealth to come forward and put Officer King on the stand and have him say under oath: "I offered no promises, or no inducements to this defendant as a result of which gave a confession to Detective Baker." I think this is something the Commonwealth has to do, Your Honor. It applies to successive confessions but it applies to separate and apart from successive confessions. It is not cured by the fact that later on Detective Baker might have come in and said: "You know you have a right to remain silent, you know you have a right to

9/24/65 counsel."

page 14] Promises, if made, could very well still be operative. Strength of the promise may not be dispelled, very likely is not dispelled by some person in authority saying: "Yes, you have a right to counsel, and so forth." A right to counsel may not be nearly as important to the defendant as a lighter sentence or concurrent sentences. He would probably rather give up his right if he could be assured of a lighter sentence or concurrent sentences.

The second point, Your Honor, I want to refer to is the question by the Commonwealth Attorney when the wife of the defendant was on the stand. After examination of her, the Commonwealth Attorney asked her whether or not the defendant had ever been convicted of larceny. The objection

right there, your Honor, was sustained, but I contend that substantial damage and considerable prejudice was done to the defendant in that respect right then, and right there. I think that is sufficient grounds to set aside this verdict and order a new trial.

The Court: Well, didn't his wife take the stand for the purpose, as Mr. Horan indicated, of showing what a fine person the defendant was?

Mr. Gilliam: I don't think so, Your Honor.

The Court: What else did she testify to?

Mr. Gilliam: She testified that the defendant was employed and she also testified as to his age.

The Court: She testified to what — Gainfully
9/24/65 employed?
page 15] Mr. Gilliam: In that respect the objection was overruled as an improper question. I mean, the objection was sustained.

The Court: Well, there was some doubt at that time, but I am wondering whether his character hadn't been put in issue by *hiw* wife's testimony.

Mr. Gilliam: Well, if the court is of that opinion, Your Honor, the Court is of that opinion, it is also, I think, an improper question because I don't think the defendant has ever been convicted of larceny. It's my understanding it was arson. I think the defendant had already been examined and this is one part where the record is, according to my recollection, erroneous. But according to the record, the defendant on *voir dire* concerning his confession was asked questions concerning arson, was asked whether or not he told his attorney who represented him in the larceny charge whether or not he had told him the whole story and the defendant said yes, he told his lawyer what had happened.

The Court: You asked him on direct, I believe, whether he had been convicted of arson, and then later on on cross, Mr. Horan evidently thought you said larceny because I see I went back and changed larceny to arson, and this was out of the presence of the jury.

Mr. Gilliam: I remember that, Your Honor. But I think it's also a point in my favor because the defen-
9/24/65 dant there admitted that he had not been con-
page 16] victed of arson. And then later on in the examination, when it was made more clear to him, he said no when Mr. Horan asked him whether or not he had

consulted with an attorney on the charge of larceny and he said: "Yes, he had." He said, "Were you convicted?" He said: "No, I was not."

The Court: All right.

Mr. Gilliam: I think, Your Honor, the Court erred, substantially erred, in cutting short my *examinationof* Detective Wayland. That's on page 83, Your Honor. I was attempting to show by Detective Wayland that Sheriff Wamble had, in fact, told him certain things that had gone on down there. I took the position then, they would be declarations against him. Now, with regard to the detainers and so forth, I assume the objection was sustained as hearsay because I think that was the basis of the objection. But, if Sheriff Wamble, who was not here and of all these people should have been here, it seems to me the least that should have been permitted was extensive cross examination of a Fairfax County Police Officer who had been in contact with Sheriff Wamble. This examination was cut short, Your Honor. And if I could have shown by Detective Wayland that facts existed concerning the failure to lay, lodge detainers against this subject, then I think the Court could possibly draw an inference that this would show the defendant was not going to be extradited from North Carolina, and this was one of the promises made by Sheriff Wamble and this was one of the things I wanted to go into.

9/24/65
page 17]

My examination of Detective Wayland was shortened considerably and I wanted specifically to go into the conversations he had with Sheriff Wamble which was, of course, denied. I think evidence could have been brought out through Detective Wayland to show that Sheriff Wamble was guilty of some impropriety in dealing with these subjects in North Carolina. It's on page 83 of the record.

Your Honor, one other thing I would like to go into is the question of Mr. Horan of Detective Baker, his own witness on page 63 of the record.

"Mr. Horan: 'Will you tell the Court what, if anything, you did in order to induce him to make a statement to you?' "

Beginning at the bottom of page 62 and top of page 63. I asked him if he would be willing to give me a statement of his own free will.

"Question: 'Isn't it a fact you threatened him at the time in order to get this statement from him?' "

I objected, he's cross examining the witness. Mr. Horan: Mr. Gilliam doesn't want — the Court: Objection overruled.

I take exception to that. I think he's leading the witness. Next question:

"Isn't it a fact you threatened him in order to get the statement from him?"

"Answer: 'No, sir.' "

9/24/65 page 18] "Question: 'What, if anything, did you do in order to induce him to give you the statement?' "

"Answer: 'I just asked if he wished to give me a statement.' "

Skipping on down to the bottom:

"Question: 'Isn't it a fact that in the course of your conversation with him that you told him it would go easier on him if he were to give you a statement?' "

"Answer: 'No, sir.' "

I asked for a continuing objection to that line of questioning and I think that is Commonwealth's own witness cross examining, certainly leading the witness.

The Court: Well, what led up to that, though, Mr. Gilliam, if you will recall, what Mr. Horan was leading the witness. You didn't tell him it would go easier with him, did you, and you objected to questions of a like manner and you objected to that.

Mr. Gilliam: That's right.

The Court: So I assume his point of putting it in the form that he did; that is, isn't it a fact that in the course of the conversation you told him it would go easier with him if he were to give you a statement, was to get around your objection that you were putting the answer into the *witnesses* mouth.

Mr. Gilliam: I don't think two wrongs make a right, Your Honor. Asking leading questions, that is error and if you cross examine your own witness, that is error.

9/24/65 page 19] The Court: It's just a question of whether there are two wrongs or not.

Mr. Gilliam: I understand. I contend that is cross examination. For instance, he had asked him some proper questions in here and then reverted to other questions. For instance, in this question on page 63. "What, if anything, did you do in order to induce him to give you a statement? I don't see anything wrong with that question. Certainly it's not leading. Would have been a proper line

of inquiry. But you certainly can't lead a witness who is testifying concerning circumstances that surround the giving of a confession and you certainly can't cross examine. In both areas, I think that that's wrong.

Now, the last point I want to refer to today, Your Honor, and I would like to have it read into the record, if I might, the instruction I offered on confessions which was denied.

The Court: I don't recall its number off hand.

Mr. Gilliam: I think it's M. Perhaps I could read that into the record after. The one where it says: if you find this confession is not voluntary and agree to acquit the defendant. The instruction was denied and I offered an alternative instruction.

The Court: There are two or three instructions on that and I don't know —

Mr. Gilliam: The point I am trying to make with regard to the refusal of that instruction, the instruction said essentially if the jury found that this confession was not voluntary or if it didn't appear from the evidence it was not voluntary, then it was the duty of the jury to acquit the defendant. It was based on the pure fact situation of this case. I contend and contended then, that without that confession, if this case had gone to the jury without that confession, if it had ever gotten that far, and the jury had returned a verdict the Court would have set aside that verdict because based on the other evidence, Your Honor, I think it is incredible that the jury could have convicted him.

9/24/65 page 20]

Certainly, I think the verdict would have been set aside because the only evidence dealing with identification was Stutz evidence which was completely exploded. Stutz identification was not something upon which proof beyond a reasonable doubt to the satisfaction of my mind, certainly couldn't have been positive and even the Commonwealth Attorney, in his closing argument, page 235, Your Honor, and in counsel for the Commonwealth's last closing paragraph amply substantiates my contention in this respect wherein he says:

"We do not rely on Mr. Stutz' identification."

Taking that position, Your Honor, which is really the only position they could take, if the jury found that this confession was involuntarily given and this verdict was perpetrated upon obeisance of the instructions of this Court

having found the confession involuntary, if this verdict was based on the meager evidence that was left after the exclusion of that confession, based on that meager evidence, then I think the verdict would have been set aside.

9/24/65 page 21]

Now, the way the instructions went to the Court, the way the evidence developed, at this point in time I can't answer at this time whether or not the jury disregarded that confession or whether they didn't disregard that confession.

Now, I contend that if this instruction that I offered, if the jury had found, would have called for an acquittal of the defendant because it is in fact and in law, not substantial proof to support a conviction. And that's the reason that instruction was drawn and the last paragraph of it says:

"It is your duty to acquit the defendant."

And, the Commonwealth Attorney evidently agrees with that contention because on page 235 of the transcript the Commonwealth Attorney in his closing argument to the Jury says:

"We do not rely on Mr. Stutz' identification."

Thank you.

Mr. Horan: Your Honor, I ask the last point, of course, that's taking a little bit out of context, but the argument of the defense by Mr. Gilliam was to the effect it was a bad identification and that that meant something in the case. Of course, with the confession it meant nothing. We didn't have to rely on the identification, but I do submit there was certainly enough evidence to go to the jury because Mr. Stutz did sit in the witness chair and say: "That is the man that committed the robbery on me." Now, whether because of the lighting, the other factors involved, the excitement of the thing, whether or not the jury wanted to believe that is something else again, but it is still there was still sufficient *prima facie* evidence so that the jury might find him guilty without the confession and I don't think it would have been grounds enough to set aside the verdict.

9/24/65 page 22]

I won't go into the question of leading the witness because it is my recollection, which is somewhat the same as Your Honor's, Mr. Gilliam objected and excepted to my putting the words in the *witnesses* mouth: "Did you make him any promises?" He didn't like it that way. And for that reason,

it is very tough to arrive at a negative from a witness. You can't examine him as to what didn't you do in the room that day. The witness doesn't know what you are talking about when you request it that way. And because he objected to my putting the words in the witness' mouth, at that point in time, I did it in the negative and suggested that he did something wrong in the room. I don't think he can have it both ways. Evidently today he wants it the other way.

As to Detective Wayland's testimony, I do not remember from the record there being any tender of Mr. Gilliam as to what proof he wanted to elicit from Mr. Wayland. Mr. Wayland was not in North Carolina. Wayland originally had this case and then took sick and I don't believe he ever was connected with this case again. Baker had the case from then on.

9/24/65
page 23]

The Court: The questions were concerning the communications Wayland might have had from Wamble in North Carolina.

Mr. Horan: I thought we went past that point in time where he finally got cut off. In any event, there was no tender of proof on the part of counsel as to what he intended to show by this witness. My recollection is that he was cut off when he got to the point of what his conversations were.

As to the misconduct of the Commonwealth Attorney, I say, again, Your Honor, that the question of the witness was asked and in bonafide good faith by me as the Commonwealth attorney. I think if you will check the record you will find that on the *voir dire* on the concession in my question to Mr. Mathews: "Have you ever been convicted of larceny," he said "yes" to me and the next question was grand larceny and he said "no," not grand larceny. Now, he did say yes to me and that's in the record, but in any event, regardless of what the claim was, I asked the question in good faith on the theory that his character was in evidence. And, regardless of what Mr. Gilliam may say, that witness got on the stand to testify, Jimmie Mathews was a good guy. There was no other reason. She didn't see him for some five or six days prior to this robbery. She had no connection with the robbery. She had no communications from him concerning the robbery. She testified that he read the Bible and he studied electronics or some such thing. My question to her wasn't has he ever been convicted of a felony or of larceny, that was not

9/24/65
page 24]

the question. I asked her in the record whether in the course of all these many conversations that she and her husband used to have, I asked if *she* ever told *him* about his larceny conviction. The question was never asked or never answered. An objection was made and the objection was sustained. We went no further on that point. Your Honor, of all the cases I have seen in Virginia involving this particular question as to whether a question is prejudicial by its nature, every case I've seen involves a situation where a Commonwealth Attorney asks a question that is either inflammatory or prejudicial to the defendant. The defense counsel objects to it. The Court allows the question to go or that's one classification of it. One that comes up. The other classifications comes up where the Commonwealth attorney asks an inflammatory question and counsel objects. The Court sustains the objection and then the Court refuses to instruct the jury that it was inflammatory. We don't have that here. We have an objection. The objection was sustained and that's the end of it.

I submit that the Court, in this particular instance, certainly was giving James Mathews the benefit of every doubt. Because in Virginia the point in time where character becomes an issue is a very slight one. In the *Lock* case in Virginia, the mother of the rape defendant got on the stand and the only thing she said that had something to do with character, she said something like my boy's never been in serious trouble. And at that point in time character was in issue. In the *Colvin* case, the *Colvin* case involved malicious wounding. The witness for the state, and the witness for the state, counsel said something to the effect, what kind of a guy is he when he's drunk. The witness comes back and says he's wild and crazy when he's drunk. The commonwealth took the position then that by inference that witness was really saying when he's sober he's a good guy. And, of course, the evidence in the case was he was sober. The Supreme Court appeal in the *Colvin* case said: by inference his character got in issue at that point because the witness by saying he's bad when he's drunk, necessarily by inference said he's good when he's not drunk. And the Commonwealth at that point in time was allowed to inquire into the character and bring out evidence of prior crimes by the defendant.

9/24/65 page 25]

I submit, that either way, in this case, I submit, number one, there has been no showing that that was, the question

was prejudicial. There has been no showing that, or there is not in this record any request that the jury be instructed to ignore the comment. And, number two, I submit under the law in Virginia, the question very possibly was valid in the first place. I know I, in good faith, asked the question because I felt the character was in issue.

9/24/65 page 26] On the question of the condition — on the question of the confession, I think the Court ruled when the case was tried and correctly so, that the *Thompson* case would not be a controlling case in this instance. The *Thompson* case, as I recall it, was a lynch case where the lynch mob was outside and while the lynch mob was outside the Sheriff said something like I'm going to let you go outside if you don't tell me what happened. The defendant at that point told him what happened. They didn't try to get that confession in evidence. They tried to get the later confession in evidence. And all the *Thompson* case stands for is that once it's affirmatively shown that undue influence caused this first confession then the later confession, the Commonwealth has the burden showing that undue influence did not continue.

Now, we don't have that here. Mr. Gilliam says there is irrefutable testimony in the record as to coercion or undue influence. The only testimony in this record as to undue influence or suggestion of leniency comes from James Mathews who is the very witness who on the *voir dire* did not tell the truth in this Court about his ability to read and write. He sat in that witness chair and looked at the confession and said: I can't read and write. And his own wife took the stand and said: Oh, yes, we used to sit home many times at night and read the Bible. Did he read the Bible? Oh, of course, he read the Bible. He can read and write, can't he?

9/24/65 page 27] Oh, yes, he can read and write. He brought home electrician manuals. He could read those.

Now, on the face of the record itsef, James Mathews did not tell the truth about his reading and writing. I think his wife can be believed on that one. She was not in the court room. She didn't hear him testify. And there would be no reason for her to lie about his ability to read and write. So we do know that's one lie he told on the *voir dire*. There can be no question about that.

Secondly, we have got this situation that Sheriff Wamble was interested in Mathews because of the North Carolina robbery. That was the whole purpose of his original examina-

tion of Mathews. The North Carolina robbery. He examined all four of the participants in that robbery. Now, I believe it is in the record Mathews was sleeping in the car. Wamble did not want him because Wamble knew he was sleeping in the car. They didn't have an identification on Mathews. So Wamble had no interest in him. But Wamble in all his discussions about Mathews — but Wamble in all his discussions with Mathews was necessary and involved with the North Carolina robbery, and even if we believe Mathews that Wamble said we aren't going to do much with you here, Wamble was telling the truth because Wamble had nothing on him there. I think Mathews, in answer to me said, yes, he was asleep. Mathews, in answer to my question, said, yes, the Sheriff knew I was asleep. Now, that's his testimony. But on the question of undue influence or coercion or suggestion innocence, I don't believe we have in this record any suggestion that anybody offered them anything to confess to a Fairfax crime.

9/24/65
page 28]

When we get to who had them in custody, as I get Mr. Gilliam's theory, everybody in the police station is going to have to come in on every confession case and say: I didn't offer him anything. I don't think that's the law. I hope to God that's never the law.

But, we point out in the record there were three confessions. The first confession was to Sheriff Wamble in North Carolina. Now, this is on the *voir dire*. We didn't use it in front of the jury. Now, the first confession was to Wamble. And that confession arose because they had too much money from the North *Carloina* robbery and then he got scouting around and learned of the Fairfax robbery. That confession was all. That was to Wamble. The evidence is that Wamble got in touch with the Fairfax authorities and Detective Baker went down. He interrogated all four of the suspects in front of Wamble, and the County Clerk and whoever else was there. This was on a Saturday night. They were all present and there was a confession by all four. And then on Sunday morning, my recollection of the record is that Baker was in there alone with all four of them. This was again when the rights were explained. This was again when the confessions were typed up. This is when he brought the confession to him and Detective Baker, there is no evidence he lied on the witness stand, Detective

9/24/65

page 29] Baker said he had him confess to him and when he got all finished he said: is that the truth. And according to Baker's testimony, Mathews said that is the truth and he signed the confession. Now, Mathews, on the other hand, says I can't read and write. He didn't know what he was signing. They had promised me a lot of things. When you boil the whole thing down, the trial judge sits as a tryer of facts on that confession.

Prima facie, is that voluntary. And the trier of fact in this case and in every case must consider the credibility of the witnesses who are testifying. And on this record I think the trial judge has been adequate, has been substantiated, of who he should believe in his consideration by the fact that Mrs. Mathews got up there and told us that her husband lied about one thing anyway. It comes down to credibility on that confession issue and I think there is ample evidence to indicate that the confession was voluntary.

The only other thing I would say, Your Honor, is that I have not been made aware of the fact that there are errors in that transcript, and I do think that the Commonwealth Attorney should be made aware of any request or any attempt to change that transcript. I read it and I don't find those ample errors in there. I think the Commonwealth should be advised if an attempt is made to change it.

9/24/65 page 30] Mr. Gilliam: Your Honor, I would like to reply first to a few things Mr. Horan said quoting the record without having the record in front of him, but when he refers to the fact that objection was sustained in regard to Detective Wayland, the question was had you had any communication from Sheriff Wamble with reference to detainers lodged against these defendants. The answer: "Yes, I have." Question: "What did Sheriff Wamble say?" I objected to that, Your Honor, that is definitely hearsay. Anything Sheriff Wamble said is hearsay. He's not available to be cross examined.

I agree with that 100 per cent. He should have been here.

Then I say, Your Honor, if I could show this witness Sheriff Wamble's statement to detainers, possible lifting of detainers, possible — then to show Wamble had in fact — this is where the record — that would show Wamble had, in fact, any statement Wamble made about detainers in Virginia incriminated him and would be a declaration against the interest and used as a possible inducement. Certainly, if

I had been allowed to go further that question that was objected to with regard only to detainers, the whole area of exploration would have been with regard to any inducements that Sheriff Wamble might have offered. But certainly with regard to that one particular question, that is sufficient offer of proof.

When Mr. Horan quoted me he said that I said that the defendant's testimony was irrefutable. If I said that, I didn't mean to say it. What I meant to say was that it was not refutable.

9/24/65 page 31] Under *People* versus *La Coco* stated where the defense produces evidence that a confession was obtained by coercion, all persons who are in control of the defendant, who are allegedly involved with the use of coercion should be produced, if possible, and examined before this confession is admitted. That cites also two other cases, Your Honor.

With regard to whether or not Mathews could read or write and as to whether he said on the stand he could not read or write, I think a reading of the transcript will disclose that Mathews says he could read or write a little. I think when his wife testified, she said that Mathews had been raised on the Bible, in the church and with regard to the Bible, and that she had a high school education. When these pamphlets, et cetera, came in they studied them together and she helped him. When the confession was handed to him I said, now, what does this say right here? He says, I can read a few of these words, but there's a few words in this line I don't understand. I don't think that's improper. I think we have pretty well covered it, Your Honor, except to say I do firmly believe my position is correct in regard to the confession.

I think if the Court refers to the case I cited dealing with the confession where a boy was in the custody of the constable and prosecutor, the complaining witness, and the statement was made: you better tell us all about it, and along about a mile later without any other remark he made the statement: I think I will tell all about it. At that time he gave a confession which was submitted into evidence, which confession the Virginia Supreme Court reversed the case. That this confession was induced from the defendant and the confession, therefore, was not voluntary, and the case was reversed.

9/24/65 page 32]

Going back to the *Thompson* case, it seems to me that Commonwealth with regard to successive confessions has tried to

shift the burden of proof. As the proposition stands in the *Thompson* case, there is a continuing, the presumption is the continuing influence or that the defendant first confessed to robbery and then a continuation of those things which brought about his first confession, then I think in order to prove as a necessary part of the Commonwealth's proof, it must come forward and show there were no untoward inducements to bring about the first confession.

Otherwise, Your Honor, I think the burden of proof shifted, the burden of proof being for us to come forward to show the circumstances, under which the first confession was obtained, that in the fact of the law in this jurisdiction whatever those circumstances are they deem to continue. And I think even under that, even if you concede that point, we have come forward certainly with sufficient evidence to at least make it incumbent upon the Commonwealth to refute it if they can. To bring these witnesses here that have offered these inducements and give counsel for the defendant the right to
9/24/65 confront these people with proper questioning and
page 33] cross examining, or else explain their absence.

Certainly, when Officer King was in the presence of this defendant, it cannot be said that he made or offered inducements or promises. We do not know. This is a definite gap in the evidence. Certainly he is in this jurisdiction and could have been produced. He could have been made to sit up there on the stand and say under oath, I offered no inducements in this case. Had he done this, this objection would not be raised. I think that is the law when dealing with confessions, when in the custody of people of authority. I am not saying every person in the Police Department, I am not saying the people that are interrogating him, people that are in a position to help or hurt him, it is certainly a minimum burden to have these people duly come forward and tell what happened, or else we really never know.

Also, Your Honor, I object to the fact, I object to it, I don't agree to it, but it is the law in the jurisdiction, I contend we have a situation here where Detective Wayland admitted, the only way we would ever know what happened, what was in that statement, what was in his mind. Admittedly, there are a lot of other things transpired. This didn't take place in the bare 16 minutes listed on that statement, it took to obtain that statement — this took place from April 8 to April 16.

Twenty-four hours in every day. Every hour a
9/24/65 man's in jail, he can be subjected, even if he's not

page 34] subjected, let's bring the evidence forward, let's find out. Certainly, Officer King should have been here, should have told.

Thank you.

The Court: Well, I don't believe that the *Thompson* case is applicable here at the trial of this case. There, as you have indicated, there was affirmative proof that there had been a situation in existence at the time of the first confession, and that was presumed to continue. There has not been anything here to continue in my opinion. And even if there were, I think the advice given to the defendant prior to taking his confession that was offered and received in evidence was adequate to dispell any prior feeling that the, or should have been any way, adequate to dispell any prior feeling that the defendant had that he was compelled to say anything. I don't believe that we are required to accept his evidence even though it is uncontradicted and there is no uncontradicted evidence so far as the confession that was introduced in evidence is concerned. There may be some uncontradicted evidence in so far as the prior statement made to Wamble, but even that is, I don't think the Court is required to accept it as conclusive of that issue in the absence of testimony. Nor do I feel that the absence of King's testimony, even though he may have been present during the interrogation, compelled to find an an inducement.

9/24/65 The mention of the larceny conviction, as I pre-
page 35] viously indicated, I do not believe it was in error. At the time I felt, I was doubtful about it, and I felt that I should resolve it. I'm not so sure that the testimony was not admissible. But the defendant, I don't believe, can complain of that because I did sustain the objection and I don't think it was sufficient to *warrent* setting aside the conviction.

I have already indicated my feeling with regard to cross examination of Wayland was curtailed. I don't believe his statement made at the time was technical requirement of declaration of the man's interest to warrant the admission and I think the instructions adequately protect the defendant on the question of voluntariness of the confession.

That is just one piece of evidence. It always reaches that stage in any case if the jury does not believe so much of the evidence that there is not left a sufficient evidence to convict, but I don't think the Court ought to point out to the jury at what point or what evidence, if not believed, should compel

an acquittal and I do think in any event that the testimony of Stutz would have been sufficient to indicate to the jury even without the confession.

Motion for a new trial and to set side the verdict is denied and the sentence previously imposed will be ordered in execution.

Do you know, Mr. Horan, when the *Williams* case is set for trial?

9/24/65 Mr. Horan: October 7, Your Honor.

page 36] The Court: I would like, if possible, to keep this defendant here in the County Jail until that trial is over. Once he goes to the penitentiary I lose all control over him. If there is any great disparity in the sentences, Williams and Mathews, I would like to still be able to have control over him. I will appreciate your advising the Sheriff's office that the defendant should not be transported to the penitentiary until the conclusion of the *Williams* case.

Mr. Horan: Yes, sir.

Mr. Gilliam: I except to the denial of the motion.

The Court: The defendant is committed to the csutody of the Sheriff.

(Thereupon, at 3:35 o'clock, *p.*, the hearing was adjourned.)

REPORTER'S CERTIFICATE

I, Marlene Rea, the shorthand reporter who reported the foregoing proceedings, do hereby certify that the foregoing is a true and correct record of the proceedings had in Docket No. 12750.

WARD & PAUL
By: MARLEANE REA

Tendered and signed this 23rd day of November, 1965.

A. V. B., JR.
Judge

Received and filed this 23rd day of Nov. 1965

EDWARD E. YOUNG, D. C.
Circuit Ct. of Fairfax, Va.

★ ★ ★ ★ ★

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Notice of Violation	2
Warrant	2
Order for Appointment of Attorney — April 21, 1965	5
Request for Court Appointed Counsel	5
Indictment for Robbery	6
Indictment — Armed Robbery	7
Jury List	8
Agreement signed by Defendant	8
Voir Dire Examination	9
Order — June 14, 1965	9
Judgment — June 15, 1965	12
Verdict of Jury Forms	13
Verdict of Jury	14
Instructions	14, 143, 161
Order — July 6, 1965	27
Motion to Suspend Sentence	27
Order — September 3, 1965	28
Order — September 17, 1965	28
Judgment — September 24, 1965	29
Notice of Appeal and Assignments of Error	30
Proceedings	31, 68, 83, 87, 109, 126, 142, 160, 166, 180, 191
Witnesses:	
John C. Stutz	37
Kimberly D. Baker	69
Detective Robert J. Wayland	84
James Johnnie Mathews	93
Detective Kimberly D. Baker	110
Kenneth Blunt, Jr.	121
Detective Robert J. Wayland	126
Mrs. Curlev Mathews	138
Certificate of Reporter	179
Verdict of Jurv	180
Certificate of Reporter	191
Certificates	213