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Record No. 6907

In the Supreme Court of Appeals of Virginia at Richmond

GLEN D. BLEVINS

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. 6907

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 1st day of March, 1968.

GLEN D. BLEVINS, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Fairfax County
William G. Plummer, Judge

Upon the petition of Glen D. Blevins a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Fairfax County on the 28th day of July, 1967, 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

* * * * *

page 17 } INSTRUCTION NO. 4

The Court instructs the jury that in this case you may find any one of the following verdicts:

1. That the defendant is guilty of murder in the first degree. Murder in the first degree is punishable by death, or by confinement in the penitentiary for life or for any term not less than twenty years.

2. That the defendant is guilty of murder in the second degree. Murder in the second degree is punishable by confinement in the penitentiary not less than five nor more than twenty years.

3. That the defendant is guilty of voluntary manslaughter. Voluntary manslaughter is punishable by confinement in the penitentiary not less than one nor more than five years.

4. That the defendant is not guilty.

W. G. P.

* * * * *

page 20 } INSTRUCTION NO. 6

The Court instructs the jury that:

(a) Every homicide is presumed to be murder in the second degree.

(b) In order to elevate a homicide to murder in the first degree, the burden of proving the elements thereof is upon the Commonwealth.

(c) In order to reduce a homicide from murder in the second degree to manslaughter or excusable homicide, the burden is upon the defendant.

(d) It is your duty to consider all of the testimony, no matter by whom introduced, and ascertain therefrom if the defendant is guilty or innocent, and if guilty, of what offense.

W. G. P.

* * * * *

page 28 } INSTRUCTION NO. 13

The Court instructs the jury that if there is concert of action with the resulting crime one of its incidental probable

consequences, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by acts of every other person connected with consummation of such resulting crime.

W. G. P.

* * * * *

page 34 } INSTRUCTION NO. B

The Court instructs the jury that if it believes from all the evidence that Glenn D. Blevins, John Monroe or Belvin Penny struck the deceased and threw him to the ground, and that resulting injuries to the deceased were not sufficient to cause his death, and further believe that Blevins abandoned further conflict, and thereafter someone else, other than the defendant, inflicted the wounds which caused the death of Greer F. Holyfield, and that the defendant had not acted by concert of action with such other person or persons or by aiding or abetting them, as defined in other instructions, then the jury cannot find the defendant guilty in this case.

W. G. P.

* * * * *

page 47 } INSTRUCTION NO. R

The Court instructs the jury that upon the trial of a criminal case by a jury the law contemplates the concurrence of twelve minds in the conclusion of guilt before a conviction can be had. Each individual juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can, under his oath, consent to a verdict of guilty. Each juror should feel the responsibility resting upon him as a member of the jury, and should realize that his own mind must be convinced beyond a reasonable doubt of defendant's guilt before he can consent to a verdict of guilty. Therefore, if any individual member of the jury, after having duly considered all the evidence in this case, and after consultation with his fellow-jurors, should entertain such reasonable doubt of defendant's guilt as is set forth in certain other instructions in this case, it is his duty not to surrender his own convictions simply because the balance of the jury entertain different convictions.

Refused. W. G. P.

* * * * *

page 78 }

* * * * *

This 28th day of July, 1967, came the Commonwealth, by her Attorney, and the Defendant, GLEN D. BLEVINS, who stands convicted of a felony, to-wit: murder in the second degree, appeared agreeably in accordance with his recognizance of bail; also appeared Roy A. Swayze, Counsel for the said Defendant.

Thereupon, the Court Reporter was sworn.

Thereupon, the Attorney for the Defendant made a motion for a mistrial and a motion for a new trial and having filed with the Court his memorandum in support of the aforesaid motions and the Attorney for the Commonwealth having filed his memorandum in response to the motions, whereupon, the Court, in consideration of the memorandums filed, the Court does deny the motion for a mistrial and the motion for a new trial and to the action of the Court in denying the said motions the Attorney for the Defendant noted his exception.

Thereupon, it was demanded of him, GLEN D. BLEVINS, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that GLEN D. BLEVINS 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.

page 79 } Thereupon, the Attorney for the Defendant indicated his intention to appeal the conviction in this case and moved the Court to suspend execution of the sentence imposed in this case to permit the Defendant to apply to the Supreme Court of Appeals of Virginia for a writ of error, which motion the Court granted and execution of the sentence imposed in this case is hereby suspended for a period of sixty days and for such time thereafter as the Supreme Court of Appeals of Virginia may require to act upon the aforesaid application.

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

Thereupon, the Attorney for the Commonwealth made a motion that bond in this case be increased, which motion the Court after hearing argument thereon, denied and bond in

this case is to remain in the amount of $10,000.00. And the Defendant is released on bond.

WILLIAM G. PLUMMER, Judge

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page 80 }

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ASSIGNMENTS OF ERROR

The following errors are assigned:
The Court erred:

1. In altering Instruction B, and thereby giving the jury an incorrect statement of the law of abandonment.

2. In changing Instruction B after summation by counsel for defendant and after the jury had retired to consider its verdict, and found it necessary to ask clarification of the instructions; because:

A. Defendant's attorney had centered his defense upon the instruction as originally given; and

B. The instruction as modified by the Court eliminated defendant's principal defense; and

C. Resolved a debate which had developed in the jury room, adversely to those jurors favorably inclined toward the defense.

3. In allowing the Commonwealth to reopen its case in order to introduce 18 U.S. Code 1705, after all the evidence was in and both the Commonwealth and the defendant had rested their cases.

page 81 } 4. In granting Instruction No. 4 and No. 6 because there was no evidence before the jury which would sustain a finding that defendant had delivered a mortal wound to the deceased, or aided or abetted another in so doing.

5. In overruling Defendant's motion to strike the Commonwealth's evidence made at the close of Defendant's case and renewed after all the evidence was in, because the evidence submitted by the Commonwealth was insufficient as a matter of law to support a finding of guilt under the indictment.

6. In refusing Instruction No. R submitted by the Defendant.

7. In allowing the Commonwealth to introduce Exhibits 10 and 14 consisting of photographs of the corpse.

ROY A. SWAYZE
Counsel for Defendant

Filed Sep. 11, 1967.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

* * * * *

page 23 }

* * * * *

Whereupon,

EMMET M. BARRETT was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:

Q. Will you tell the jury your name and address, please?

A. Emmet M. Barrett. My address is Box 13, Clifton, 7203 Main Street.

Q. Sir, would you keep your voice up so the jurors back here can hear you?

A. Yes, sir.

Q. Now, are you a member of the Clifton Fire Department?

A. Yes, sir.

Q. And were you on duty on the night of September 23rd, September 24th of 1966?

page 24 } A. Yes, sir.

Q. And in the course of your duties that evening, did you have occasion to respond to a car fire on Kincheloe Road?

A. Yes, sir.

Q. Now, what time was it?

A. Around 2:00, 2:11.

Q. When the call came in, or when you left?

A. That's when I left.

Q. All right, now, tell the jury what you found on your arrival on Kincheloe Road to the car?

A. Well, we got in the ambulance and left the firehouse and we went back on Kincheloe Road and we come up on this car, and I went on by the car and stopped and got out and was walking back up towards the car and some gentleman in his driveway said, "Don't go too close because there's ammunition in it going off." So, we went on up real slow and looked in the car. I got within about five feet of it and looked in it and couldn't see anybody in it, so a few minutes later, why, police came and we got a fire extinguisher and shot it into the car, got up close enough to tell that there wasn't nobody in the car.

Q. Now, would you tell the jury why you responded in the ambulance to the scene?

A. Well, it was a person called up, some lady called up—

Mr. Swayze: Your Honor, I don't think why he responded has any relevance here, and he may be repeating hearsay.

page 25 } The Court: Sustained.

By Mr. Horan:

Q. What were you looking for when you got to the car in the ambulance?

A. We were looking for people in the car. That's why we were there, call come in that the car was on fire and there was some people in it. That's why we were in the ambulance.

Q. Would you describe how the car was burning?

A. Well, it was fire inside, just blazing, and it was just coming out of the back end of it, back down in the bushes.

Q. Now, did there come a time when you left the scene where the car was?

A. Not until the police arrived and the fire truck arrived.

Q. All right.

A. Then we—the Chief told us to report back to the station, so I started to turn the ambulance around and he said instead of moving all these trucks and cars, he said, just go on out the other way.

Q. I think if we could move this blackboard over here, I think the jury could see it better. Would you come to the board, Mr. Barrett? Now, could you step to the side so the

jury can see? Now, do you recognize the area that is shown on the map?

page 26 } A. This area right here.

Q. Would you point out the Town of Clifton?

A. Clifton is—I'm not too good at reading maps here. It's right in this area right here.

Q. OK. When you responded to the scene, would you point out to the jury—step back now so that all the jury can see.

A. I come up 641 going on across up Kincheloe Road and I don't know on the map where the car was on the map, but I think the car was right in this area right here.

Q. All right, now, will you show the jury which direction you went when you left that scene where the car was?

A. I come on down 641 here and was going down Kincheloe Road and we discovered the body right about there, just a few feet below a driveway, laying there dead, sir.

Q. What did you do at that time?

A. Well, I drove on by the body before I seen it, the lights shining on it, and then I stopped and me and the other rider got out and come back and checked it.

Q. Will you describe that body to the jury?

A. Well, he was—his short was torn open and he had on a green shirt, green pants, and a sort of like jacket. His shirt had just been pulled open like that, and one of his shoes was off and gone.

Q. And anything else you can describe to the jury about his appearance?

page 27 } A. Well, he was—looked like his throat had been cut and there was, I don't know whether it was just blood on his chest or whether he had been poked with some object or something.

Q. Now, you mentioned a driveway—

Mr. Swayze: Your Honor, I would have to move to strike that last statement, "Somebody poked him." He couldn't possibly know that.

The Court: I agree. The jury will disregard his statement that somebody poked him. Just describe what you saw, sir, don't give your conclusion on how he got that way.

By Mr. Horan:

Q. Now, you say this was near a driveway?

A. Norman Longerbeam's driveway.

Q. Did you notice anything with reference to the mail boxes at that driveway?

A. Yes, there was a mail box there that had a hole slashed in the side of it.

Q. And—you may resume the stand, Mr. Barrett. Now, what did you do with reference to calling for assistance?

A. Well, we found the man, why we called the Police and Fire Chief, and the arrived, why—

Q. Who is "they"? Did there come a time that the police officers arrived on the scene?

A. Yes, uh huh.

Q. Do you know who he was?

page 28 } A. I can't remember his name.

Q. Had you seen him before that night?

A. No.

Q. You don't know?

A. No, I don't know.

Mr. Horan: Mr. Swayze, you may inquire.

CROSS EXAMINATION

By Mr. Sawyze:

Q. Mr. Barrett, are you a volunteer fireman?

A. Yes, sir.

Q. And on this occasion how did you learn that there was a fire?

A. Well, there was a lady called up over the fire patrol, and they called the Clifton Fire Department and I was on duty.

Q. You were on duty at the firehouse?

A. Yes.

Q. And you drove the ambulance?

A. Yes, sir.

Q. You went directly from the Clifton Firehouse to the scene where this fire was?

A. Yes.

Q. Now, you say that there was a citizen at the scene of the fire when you arrived?

A. He was standing at his driveway.

Q. A citizen was standing in his driveway there?

page 29 } A. Uh huh.

Q. Do you know that man's name?

A. No, I don't.

Q. Did you ask him his name?

A. No.

Q. Then you say the man made some remark to you about ammunition?

A. Yes, he told me there was ammunition in the car and it was going off.

Q. Did you hear it going off?

A. Yes, I heard, well, approximately eight or ten.

Q. Were these loud reports?

A. No, not loud.

Q. And in what area of the car was this ammunition?

A. I couldn't tell.

Q. To what extent was the car aflame when you arrived?

A. To what extent?

Q. Yes, sir. How badly was it burning?

A. It was burning, well the back seat and the front seat both was on fire and they was some coming out from under the back.

Q. Did you make any attempt to put the fire out?

A. Yes.

Q. What did you do?

A. We used a fire extinguisher.

page 30 } Q. What type of extinguisher did you have?

A. I don't know what type it was, it was a powder like fire extinguisher.

Q. Was anyone with you at the time?

A. Tommy Riggles.

Q. Did Mr. Riggles also have an extinguisher?

A. No, we only had one on the ambulance. We also used the fire extinguisher on the police car when he—

Q. Was the police car there when you arrived?

A. No.

Q. How long after you arrived was it before the police car arrived?

A. Oh, approximately three minutes.

Q. Now, the police also had an extinguisher?

A. Uh huh. Yes, sir.

Q. How many?

A. I only saw one.

Q. How many policemen?

A. A couple, I think.

Q. Did you recognize the automobile?

A. No.

Q. What type of an automobile was it?

A. It was a '62 Ford.

Q. Was it in the middle of the road or on the side of the road, or where was it?

page 31 } A. It was backed down in the fence. The front

end of it was out in the ditch, sort of it was backed down in the fence.

Q. Now, was any part of it on the roadway?

A. Maybe the bumper sticking out in the road or something like that.

Q. Essentially the car was off the road, then?

A. Yes.

Q. How long did you stay at the scene of the fire?

A. Thirty minutes.

Q. Now, where did you go from the scene of the fire?

A. I went on out to 641. The Chief told me to take the ambulance back to the station, so—

Q. Now, it was on the way that you discovered the body?

A. Yes, sir.

Q. How did you happen to see the body, Mr. Barrett?

A. Sir?

Q. How did you happen to see this body?

A. Well, I was driving along and when I got up close enough to see it so the lights were shining down the edge of the road, why me and Mr. Riggles saw it about the same time, so I stopped as quick as I could.

Q. Did you stop in such a manner that your lights were on the body?

A. No, sir.

Q. Did you have a flashlight?

page 32 } A. I had a spotlight.

Q. And did you put the spotlight on the body so that you could see?

A. We shined the light all the way around it.

Q. Pardon?

A. We shined the light around him, yes.

Q. Now, is this a portable spotlight or one of the fixtures to your equipment?

A. It was on the equipment.

Q. How far were you apart from the body when you examined it with the light?

A. Ten feet.

Q. And you shined it all around the body to see what you could see?

A. Uh huh.

Q. Now, will you explain to the jury where in reference to the side of the road the body was located?

A. Well, it was located I'd say about approximately 50 feet, maybe, from Mr. Longerbeam's mail box. He was laying

Emmet M. Barrett

in the ditch with his back and the lower part of his legs laying in the ditch. His shoulders and head was sort of up on the bank, just stretched out.

Q. Well now, was any part of the body in the roadway?

A. Just his feet.

Q. Did you notice any objects around the body?

page 33 } A. There was a gun stock and a small piece of metal.

Q. Where was that located?

A. The gun stock was laying just below him, a few feet, and the piece of metal was on out in the middle of the road about 15-20 feet.

Q. Did you look around for any objects around the body? Did you make any particular search?

A. No, we found this when we shined the light around him.

Q. Did you move any of these things?

A. Not until the police came. We called the police and they came. We saw something black laying down the road, and he said, "What's that down there?" I told him I'd go see and I went and I just touched it a little bit.

Q. What was this thing you touched?

A. A little piece of metal.

Q. Did you leave it there?

A. Yes.

Q. Now, did you examine the man to see whether he was living or dead?

A. No, I didn't know. I didn't examine him. Well, I didn't see no signs of life, but I called the police, they called the doctor and everything.

Q. Did you move the body in any way?

A. No, sir.

Q. Did you touch the body?

page 34 } A. No, sir.

Q. Was there any blood around the body when you observed it?

A. Yes.

Q. Where was this?

A. It was all over him and had run down beside him.

Q. All right, is that the only place on the ground there?

A. That's the only place I saw.

Q. Did you see any blood on the roadway or around the scene anywhere?

A. No, sir.

Q. Did you look for any?

A. No, sir.

Q. Now, you say that there was a mail box nearby? Whose mail box was it?
A. It was Norman Longerbeam's.
Q. How did you ascertain that?
A. Well, I knew where Norman Longerbeam lived, and that was the only mail box there.
Q. Now, did it have any numbers or any name on it?
A. I don't remember whether it had his name on it, or not.
Q. Have any numbers?
A. I don't remember.
Q. But you do remember you said that it was slashed?
page 35 } A. Yes.
Q. Cut? Do you know how that happened?
A. Well, it had been hit by some object it looked like. I don't know.
Q. Do you know when that may have happened?
A. No.
Q. Do you know what type of object may have hit it?
A. No.
Q. So then what did you do after you observed that?
A. Well, we helped the police rope off the place and then we left.
Q. All right, sir.

Mr. Horan: No questions, Your Honor.
The Court: May this witness be excused?
Mr. Swayze: Yes, Your Honor.
The Court: You are free to go.

(Witness excused.)

Mr. Horan: Thomas Riggles.

Whereupon,

THOMAS R. RIGGLES was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:
Q. Will you tell the jury your name?
page 36 } A. Thomas R. Riggles.

Thomas R. Riggles

Q. Where do you live?
A. Fairfax Station, Virginia.

The Court: You will have to speak up a little louder.
The Witness: Fairfax Station, Virginia.

By Mr. Horan:
Q. And are you a member of the Clifton Volunteer Fire Department?
A. Yes, sir, I am.
Q. Were you on duty in the early morning hours on September 24th last year?
A. Yes, sir, I was.
Q. And, did you have occasion to respond to a report of a car fire on Kincheloe Road?
A. Yes, sir, I did.
Q. Was there anyone with you?
A. Yes, sir.
Q. Who was that?
A. Jack Barrett.
Q. And were you—will you describe to the jury what you observed with reference to the car fire?
A. We responded from the firehouse. The fire control called us and said we had a 9-I and it was on fire.
Q. What does that mean?
A. That means there was somebody in it. There
page 37 } was an accident with somebody in it and the car was on fire. So we took the ambulance first because we figured we would probably save them if we got down there, and they could bring the wagon on down after us. So, we got there and used the extinguisher on it, and we didn't see nobody in it.
Q. And, do you recall what time you arrived at the car?
A. It was some time after 2:00 a.m.
Q. And did there come a time that the police arrived?
A. Yes, sir, it did.
Q. Do you know who that officer was?
A. Officer Cooper.
Q. How long did you stay at the scene of the car fire?
A. Around 20-25 minutes.
Q. And you then left?
A. Yes, sir. The Chief told us we could go ahead back after we checked all around to see that there wasn't nobody laying out in the field or in the woods anywhere, and he said to take the ambulance back to the station.

Q. All right, now, did anything unusual occur when you were on your way back to the station?

A. Yes, it did. When we come in—we come in—well, the road goes this way.

Q. Could you come to the board, Mr. Riggles?

A. Yes, sir.

Q. Now, stand back so the jury can observe you,
page 38 } and tell the jury if you recognize the area portrayed by that map?

A. I don't know—it is—

Q. This is the Town of Clifton.

Mr. Swayze: I would have to object to Counsel showing him anything.

Mr. Horan: I will withdraw.

The Court: Sustained.

By Mr. Horan:

Q. Do you or do you not recognize that map?

A. This is Kincheloe Road.

Q. Will you tell the jury how you came from the town of Clifton?

A. Yes, sir. It is all right to stand over here? We come out of Clifton and on down over 614 and on down along in here somewhere is where Kincheloe Road is. Mr. Longerbeam, by his house. Then we come in this way, the wagon come in behind us. It's a one-way road so we couldn't get back this way, we had to go ahead and come out and come on the other way on 612, so this is when we found Mr. Holyfield.

Q. Where was that?

A. That was around this curve in here.

Q. Are you sure of that?

A. No, not positive because I don't know the road too well myself.

Q. Will you return to the stand?

page 39 } A. Yes, sir.

Q. Now, will you describe to the jury what you observed when you saw Mr. Holyfield?

A. Well, when we arrived where we found Mr. Holyfield, he was laying in the ditch with his head down in the ditch and blood all over the place, and there was pieces of gun laying around, and so I immediately called for Mr. Cooper. He was on the scene of the fire, so I called and asked him to

send a cruiser up right away because when we run across a case like that, we are supposed to have a cruiser in there.

Q. And did Officer Cooper respond?

A. Yes, sir, he did.

Q. And when you observed Mr. Holyfield—

Mr. Swayze: Wait a minute. There has been no identification here at all.

The Court: I don't believe there has been any identification.

Mr. Horan: Your Honor, the witness testified while he was standing here in the words that he was down at Mr. Holyfield's.

Mr. Swayze: No, he didn't.

The Court: If he did, I didn't hear it. I don't remember.

By Mr. Horan:

Q. Did you testify to that?

page 40 } A. Yes, sir. I said, "That's where we found Mr. Holyfield laying."

The Court: If there is any question about it we will go back in the record and check it.

Mr. Swayze: If he says he knows the man, please identify him.

By Mr. Horan:

Q. Now, when you observed him, were there any signs of life?

A. Not to my knowledge, but I couldn't pronounce him dead because I'm not no coroner or nothing. We're not allowed to say he is dead. That's the reason I called for the officer's help.

Mr. Horan: That's all.

CROSS EXAMINATION

By Mr. Swayze:

Q. Do you know the man whose body you found there?

A. What was that again, sir?

Q. Did you know the man?

A. Yes, sir, I knew him by working down at Bull Run Marina.

Q. So you recognized who it was?

Thomas R. Riggles

A. I didn't know him familiar. I have seen him from time to time.

Q. But you knew his name?

page 41 } A. Yes, sir.

Q. And there was no doubt in your mind that was the man?

A. Well, I wasn't too positive of it, but I have heard his name. Like I said, I have seen him from time to time and knew him, you know—

Q. But, as it turned out, you were correct in your preliminary identification?

A. Right, sir.

Q. Now, you say you saw some blood?

A. Yes, sir.

Q. Where was this?

A. Well, his head was laying in the ditch and there was blood all around, it was all over his face and all down through here. (Indicating.)

Q. Was there any blood other than in the immediate area where the body was?

A. Up on the bank.

Q. How far from the body?

A. Oh, three-four feet, something like that.

Q. How much blood did you observe in that location?

A. Well, spots of blood. It wasn't heavily, but it was spots of blood, you could see it.

Q. Was there any sign of any struggle around the area?

A. Yes, sir, it was.

Q. How large an area was encompassed in this

page 42 } disturbed condition?

A. Roughly around 15-20 feet, something like that. I am not positive.

Q. Where was this area?

A. It was at the driveway of Paul Longerbeam.

Q. Was it in the driveway?

A. It was right near the driveway on the other side of the mail box.

Q. Now, what is the nature of that neighborhood?

A. It's all woodland as far as I know.

Q. And how many houses are around there?

A. About three.

Q. Do you know who lives in them?

A. Mr. Longerbeam lives in one. I don't know the others.

Q. How close are the other two houses to where Mr. Longerbeam lives?

Thomas R. Riggles

A. About half a mile apart.

Q. So the closest house would be the Longerbeam house, right?

A. Yes, sir.

Q. And how far was the body from the Longerbeam house? The house itself?

A. I wouldn't know that, sir. I don't know how far his house is off the road.

Q. Could you tell us whether it was in sight of the road?

page 43 } A. I don't believe it is.

Q. The house is not even in sight of the road?

A. No, sir, I don't think it is.

Q. It is a long driveway that goes back in there?

A. Right, sir.

Q. And are there trees between the house and the road?

A. Yes, sir.

Q. Is any other house in sight of the area where you found this body?

A. No, sir.

Q. Is there any light, was there any light in the area when you arrived?

A. No, sir, there wasn't.

Q. No street light or anything like that?

A. No, sir, nothing like that out there.

Q. How did you observe the body?

A. You mean how did we run across him?

Q. No, I mean how did you go about looking around the scene?

A. Well, I started looking at him first to see if he was dead or anything, you know, and then we seen the gun laying there and Jack touched a part of the gun part, and I figured we better call the police up because it looked like it was more than we could handle.

Q. Did you touch the body?

page 44 } A. No, sir.

Q. Did you touch any of the objects on the scene?

A. No, sir, I didn't.

Q. When you were at the scene of the fire, Mr. Riggles, did you hear any ammunition exploding?

A. Yes, sir, I did.

Q. How many rounds did you hear?

A. I heard about four or five times myself after I got there.

Q. Was there anyone on the scene when you arrived?
A. Yes, sir. The people that called it in.
Q. Do you know who they were?
A. No, sir, not right off, I don't.
Q. And Officer Cooper, I think you said, responded to the original call there?
A. Yes, sir.
Q. What time was it when you found the body?
A. Well, we got the call about two o'clock and it was somewhere between six and seven minutes after two when we got there. And, that was at the car scene.
Q. Then, when did you find the body? What time?
A. I don't really know how long it was after we left the scene. It was somewhere around 25 or 30 minutes.

Mr. Swayze: All right, that's all.

Mr. Horan: Nothing further. Your Honor, may page 45 } he be excused also?

The Court: Do you have anything further of this witness?

Mr. Swayze: No.

The Court: You are free to go, sir.

(Witness excused.)

Mr. Horan: Officer Cooper.

Whereupon,

CHARLES A. COOPER, was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:
Q. Will you state your name and occupation, please?
A. Charles A. Cooper, Policeman, Fairfax County Police Department.
Q. And were you so employed on the 24th day of September of last year?
A. I was.
Q. And calling your attention to approximately two o'clock that morning, did you have occasion to respond to Kincheloe Road near the town of Clifton?

Charles A. Cooper

A. I did.

Q. And what were you responding to, sir?

page 46 } A. I was advised by the police radio to respond to what was believed to be an auto accident with personal injury, believed someone in the auto on Kincheloe Road between Route 615 and Route 612.

Q. And, will you describe what you saw upon your arrival at that alleged accident?

A. A Ford sedan completely on fire. As I was traveling toward the spot, it was on the right-hand side of the road with the rear end of the vehicle off the gravel portion of the road, back into a fence line.

Q. And was there anyone in it?

A. At this particular time I couldn't get close enough to ascertain whether anyone was in the vehicle or not.

Q. Why was that?

A. It was completely engulfed in flames. The main part of the flame was confined to the interior, but there were flames over the entire vehicle.

Q. Did you hear any discharges or small noises?

A. There were several noises, bangs or snaps, which would indicate something was exploding in or about the vehicle, yes.

Q. And what did you believe was the noise coming out?

A. I thought it was ammunition exploding.

Q. What type of ammunition?

A. It sounded similar to what would be .22 caliber ammunition, but this was never ascertained whether it was

page 47 } or not.

Q. Now, what time did you arrive at that location?

A. 2:20 a.m.

Q. And who was there that you know upon your arrival?

A. There were two volunteers from the Clifton Rescue Squad that had driven an ambulance to the scene. They were Thomas Riggles and Emmet Barrett.

Q. And did there come a time when the fire truck came?

A. Yes, sir. Approximately three or four minutes after my arrival a fire truck from Clifton arrived to extinguish the blaze.

Q. And did there come a time the ambulance departed?

A. They did.

Q. Do you recall what time that was?

A. It was approximately 2:55.

Charles A. Cooper

Q. And subsequent to their departure did there come a time that you left also?

A. Yes, there was.

Q. And where did you go when you left, Officer?

A. I continued, it would be southbound on Route 641, which is Kincheloe Road, headed toward Route 612.

Q. And would you come to the board, Officer? Now, would you stand so the jury can see you, and indicate to the jury the location of the automobile fire? Are you familiar with the area?

page 48 } A. Yes, sir. I am just looking for 612.

Q. Take your time.

A. The approximate location of the auto fire was in this area off Route 641, which is Kincheloe Road.

Q. And when you left, in which direction did you travel?

A. It would be south toward Route 612.

Q. And where did you next stop after you left?

A. In this section of Kincheloe Road. (Indicating.) I don't know the hundred block, but it was in this section of Kincheloe Road.

Q. You may resume the stand. Now, will you tell the jury what you observed when you stopped on Kincheloe Road?

A. There was the ambulance parked there with the two occupants and a body of a white male lying on the edge of the roadway.

Q. And did you recognize who that was?

A. Yes, I did.

Q. And who was it?

A. It was Mr. Holyfield.

Q. And what did he look like lying there in the road?

A. He was—there was a large amount of blood on his person. There were, I believe, two cuts on his neck or wounds on his neck, open spots, and there was a large amount of blood next to the victim, next to the victim's head on the ground.

Q. And in what county in Virginia was this

page 49 } where he was lying?

A. Fairfax County, Virginia.

Mr. Horan: Your Honor, I have some exhibits which I would like marked for identification.

The Court: Fifteen pictures will be numbered 2 through 16, Commonwealth Exhibit for identification.

Charles A. Cooper

(Whereupon, Commonwealth Exhibits 2 through 16 were marked for identification.)

By Mr. Horan:

Q. Now, Officer Cooper, what time did you arrive where the body was?

A. At 3:05 a.m.

Q. And what did you do in your official duties when you were there?

A. I immediately notified the Police Dispatcher by radio of the situation and got out to examine the scene.

Q. And how long were you at that location, Officer Cooper?

A. Several hours.

Q. Did there come a time that Corporal Hubbard arrived there?

A. Yes, there was.

Q. And you were present on the scene the entire time until he arrived there?

A. Yes, sir.

page 50 } Q. And — now, Officer, I show you Commonwealth's Exhibit 4, 9, and 10 through 15 and ask you if you recognize what is portrayed on those photographs?

A. Yes, sir.

Q. Now, Commonwealth's Exhibit No. 4, does that adequately—

Mr. Swazye: Your Honor, I would like to see the pictures.

The Court: Certainly you may, sir. Show them to the attorney for the defense.

Mr. Swayze: May we approach the bench, Your Honor?

The Court: These haven't been offered in evidence yet, Mr. Swayze.

Mr. Swayze: Well, there is one question I have on them.

The Court: Sir?

Mr. Swayze: He is going to question this witness about some of these pictures.

The Court: He is going to identify the subject matter. These haven't been offered yet. Do you have some motion you would like to bring up? I'll be glad to hear it.

Mr. Swayze: Two of them I would object to.

The Court: Bring it up when he offers them into evidence.

Mr. Swayze: All right.

page 51 } Mr. Horan: Do you have any objection to these particular exhibits, Mr. Swayze?

Charles A. Cooper

Mr. Swayze: No, these are all right.

Mr. Horan: Your Honor, I would like to offer these. He has no objection.

The Court: Exhibit 4, 9, 11, 12, 13, and 15 will be received in evidence without objection by the defendant.

(Whereupon, Commonwealth's Exhibits 4, 9, 11, 12, 13 and 15, previously marked for identification, were received in evidence.)

By Mr. Horan:

Q. Now, sir, I show you Commonwealth's Exhibit No. 10 and No. 14 and I ask you, sir, if those photographs adequately depict what you observed on that scene that evening with the exception of any individuals that happen to be standing there?

A. Yes, sir.

Mr. Horan: I would offer these in evidence, Your Honor.

Mr. Swayze: Your Honor, I must object. I would like to make a motion out of hearing of the jury.

The Court: All right, sir.

The jury can retire to the jury room for about ten minutes while we take up this question. Please do not discuss the case while you are in the jury room.

(Whereupon, the jury retired to the jury room.)

page 52 } Mr. Swayze: May it please the Court—

The Court: I haven't seen the pictures yet that are being offered.

Mr. Horan: Commonwealth's 10 and 14.

The Court: All right.

Mr. Swayze: Your Honor, I have not objected to the introduction of any of the photos except those two, and my grounds of objection is that they would be highly prejudicial and inflammatory for the jury. I don't think it is necessary to obtain a conviction here to literally wipe the face of the jury with blood. And that's all these pictures are calculated to do. They have no probative value. We have admitted without objection the general views of the scene showing the location of the body and the area around the body. We have shown the body. In fact, there are two photographs already in. These have added nothing further to it except to incite

passion and prejudice against this defendant, and I think this is highly important to the outcome of this case. I have some authority here.

The Court: All right, sir.

Mr. Swayze: Under the subject of Evidence in American, 29 American Jurisprudence 2d, I would like to read the controlling rule.

"Photographs are merely calculated to arouse sympathy or prejudice of a jury are properly excluded, par-
page 53 } ticularly if they are not substantially necessary or constructive to show material facts or conditions. If the photographs which disclose a gruesome aspect of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflamming the minds of jurors and prejudicing them against the accused, they should not be admitted into evidence."

Now, there is no doubt that poor Mr. Holyfield is dead. There is no doubt there is some blood. But it does no good to exhibit this and wave it in front of the jury except to incite passion and prejudice in the minds of the jurors. Those are gruesome and horrible pictures, and if admitted they will be very prejudicial to this man. I think that the only thing that could possibly be in issue here is the general location of the scene and the location of the body and the car, and so forth. We have not objected to that.

I would like to conduct this trial on fair principles and, therefore, I have not objected to those photos. But, I do strenuously object to those bloody pictures.

Mr. Horan: Your Honor, if it please the Court, I don't believe—I believe what Mr. *Swazey* has quoted from is a matter of general principle. I would like to call the Court's attention to the *Timmons* case in 204 Virginia in which pictures of a rape, murder-rape pictures were introduced, and I would like to call attention to the *Westry*
page 54 } case in 206 Virginia in which a disinterred body was—pictures of that were produced. The Court was saying, if I may paraphrase without a direct quote, that where we have a situation such as this, the jury is entitled to know the malice with which the act was committed on the victim and that if the photographs go to serve that purpose, that they are admissible. And, I certainly would ask that

the Court look at these authorities before making its determination.

The Court: I do want to see these cases.

Mr. Horan: I have the cases available.

The Court: I think it is time the reporter had a very short break, so why don't we take a five-minute break.

Mr. Swayze: I would like to be heard on those cases, Your Honor.

The Court: Surely, I would want to look at them before we hear any more on the cases. We will recess for about five minutes.

(Short recess.)

(Conference in Judge's chambers.)

Mr. Horan: We are talking about Exhibit 10 and 14.

The Court: Which numbers are we on?

Mr. Horan: 10 and 14, sir.

The Court: Those were up on the bench. Let's get into the argument on the *Timmons* case, Mr. Horan.

page 55 } Mr. Horan: Your Honor, I call the Court's attention to Note 2 in Paragraph 2. I just want to call it to your attention, in which the court cites *Martin* versus *Commonwealth,* 184 Virginia, and it says that particular photographs show no more than would be disclosed by a view of the objects, it is making a more accurate description of appearance, nature, and condition of the objects than a mere visual description dependent upon memory. And it also quotes in that paragraph: "Admissibility of photograph of a corpse—strike that—

Paragraph 3 I am referring to: "Photographs of the victim are relevant to show the degree of atrociousness of the crime with the malice with which it was committed, the state of disarray of the deceased, his clothes and so forth." The photographs clearly and simply show more than any witness, save the defendant, actually saw at the time of the killing.

The Court: What is the one on 206?

Mr. Horan: *Westry* 508, 206 Virginia 508. Again this was a case in which the body was buried by the defendant and I believe it was several months later when it was disinterred. And, paragraph 4, Your Honor, the court, the Supreme Court of Appeals again quotes from *Martin* vs. *Commonwealth* and

it cites *Timmons* versus *Commonwealth* and repeats the language that they were admissible to show the degree of atrociousness of the crime with the malice with which it was committed.

Now, I think, Your Honor, that on these grounds the Supreme Court appears to me to be uniformly
page 56 } taking the position that the pictures of a body, a deceased's body should incite no more sympathy or prejudice than exhibiting a live person with wounds and scars and things of that nature.

The Court: Mr. Swayze.

Mr. Swayze: Your Honor, in both the *Timmons* case and the *Westry* case, the wounds on the body were relevant, material factors. Now, bear in mind that both these cases are based on the decision in *Martin* vs *Commonwealth* which is cited in the *Timmons* case and quoted. The manner in which Martin was shot, the disarray in which he was shot and where the shots entered his body were all relevant and material to the issue. Now here, there is no such thing. I don't see that there is any materiality as far as this case is concerned as to those close-up photos of the body.

The Court: Wouldn't it go to the extent to which the man was beaten? I mean, in your opening statement apparently the defendant's position is that all the man when he saw him was a bloody nose. Now, I think this would tend to refute this was all that the man had and would show the extent of beating he received that night.

Mr. *Swazey*: But, not at the hands of the defendant.

The Court: That has yet to be seen whether he was responsible for it. Certainly the Commonwealth can show the extent to which the man was beaten, which allegedly resulted in his death.

page 57 } Mr. Swayze: I am not arguing, but simply reasoning here a minute. To show the jury these pictures at this stage of the case is certainly going to excite somebody. Now, there is no connection whatsoever between this defendant and that beating at this point. It might be far more appropriate to consider this again if it is shown that that is the state that he was left by this defendant, but if it turns out that some other party inflicted the beating which the photos depict, it would be highly prejudicial to this defendant to show the jury these photographs now.

The Court: Not if he is legally responsible for it.

Mr. Swayze: Perhaps he is not.

The Court: That is something to take up on motions though.

Mr. Swayze: Once you show these pictures to the jury they are going to erase it from their minds, and if the Court be of the opinion at the appropriate time that this defendant is not responsible for the subsequent beating of this man, the jury has already been shown the pictures, it would be more appropriate to consider it then.

The Court: But, if I find that he is not responsible in any manner for this death, the jury isn't going to be deciding the case except possibly on an assault.

Mr. Swayze: Right. Exactly so.

The Court: But, the Commonwealth has the right to put on the evidence that they have to attempt to prove the
page 58 } crime that they believe they can prove. He is indicted for murder. I am going to rule now that the pictures are inadmissible although he may ultimately only be guilty of assault or maybe not. I don't find that these pictures are any more upsetting than as the cases said. There is a considerable amount of blood around his head, but the picture number 14 discloses a wound on the right front of his neck, discloses the disarray of his clothing, the shirt being nearly pulled off. I think it has probative value and I don't think it would incite the jury. I believe on the basis of the *Westry* case and the *Timmons* case that they are admissible to show or tend to show the malice with which this man was beaten. The question of whether or not the defendant is responsible for the end result is a legal question really which will be considered at the end of the Commonwealth's evidence and again at the end of the Defendant's evidence if it goes that far.

Mr. Swayze: I would like to respectfully note an exception to the Court's ruling and state my ground for it.

The Court: Surely.

Mr. Swayze: I would consider that the introduction of those pictures at this point could do nothing more than inflame the minds of the jury against this man. There has been no connection whatsoever with the beating that the pictures depict and this defendant. I doubt that the Commonwealth can prove that this defendant inflicted those
page 59 } wounds nor that he is legally responsible for them, and I anticipate that in the course of this case it will be reduced down to a question of assault. Those pictures are going to reflect adversely on the matter of assault and in a jury's mind inflame them against him, and

for that reason I must respectfully object to the introduction of them. I take exception to the Court's ruling on that.

The Court: Mr. Swayze, if I follow your objection, I wouldn't allow the pictures in until the defendant's motion to strike is heard. I would have to wait until I make the decision whether or not they have carried the burden of proving manslaughter or anything above simple assault, and I don't see that I can wait until that point to rule on the admissibility of the evidence. It is all subject to be struck at the appropriate time if the evidence does not legally bind up the defendant with the death of this man.

Mr. Swayze: I think the pictures should be kept out until that happens.

The Court: I couldn't keep it out until after the motion to strike is heard.

Mr. Swayze: You can keep it out until the proper foundations for them have been laid.

The Court: I believe a proper foundation has been laid at this point of this being the man who was found dead at the scene and depicts the extent of injuries he received on that evening.

page 60 } Does the Commonwealth have any objection to withholding the showing of these to the jury until such time as further evidence is in?

Mr. Horan: Your Honor, I think Mr. Swayze is basically taking the posture, which he is entitled to do, that this boy is innocent. But, if one follows this thing to a logical conclusion, we couldn't put on any evidence at any time until we tied the boy in. There has to be a place to start with the evidence, and I certainly want to say that I feel the Court's ruling is one way or the other. I think it is correct in the light of the cases that we have brought to the Court's attention, and we have got to start someplace. I certainly think that we are entitled to build our case as we see fit within the rules of evidence, and I think Mr. Swayze is just trying to say that we haven't proven our case, therefore, we shouldn't put in any evidence.

The Court: I will allow the pictures in at this time. They will be received as Commonwealth's Exhibit No. 10 and 14, and Mr. Swayze's exception is noted.

(Whereupon, Commonwealth's Exhibits 10 and 14, previously marked for identification, were received in evidence.)

The Court: Now, are you going to offer these other pictures?

Mr. Horan: Your Honor, I may offer them through another witness.

page 61 } Mr. Swayze: I wonder if we could attack the problem of pictures now, so we won't have to have another meeting.

The Court: Let's look at the pictures now to see which ones you want to offer now, and we will note them. We will be able to go to them without argument.

Mr. Horan: Your Honor—Mr. Swayze, you may examine these.

Your Honor, these are photographs of the deceased that were taken at the morgue. I certainly feel—well, let's let the Court examine them.

The Court: Certainly the one of him entirely disrobed—I think these two pictures of him entirely disrobed are not necessary with ladies on the jury.

Mr. Horan: Very well, Your Honor. I'll withdraw 5 and 16. And, I have some—

The Court: Well, do you object to the pictures number 7 and 8?

Mr. Swayze: Words almost fail me, Your Honor, to object strongly enough to those pictures. To my mind those pictures couldn't be more inflammatory and show less.

The Court: Let me give you my feeling on them. If there is a question of identity of the body examined by the doctor, I would let these in to prove that it is the same man.

Mr. Swayze: Oh, no question.

The Court: If the defendant is in a position to

page 62 } stipulate that the body was examined by the doctor is Mr. Holyfield, I'll deny the picture.

Mr. Swayze: I certainly would stipulate.

The Court: I think it is cumulative as far as showing the extent of injury of Mr. Holyfield and would only tend to overemphasize the point. But, is that so stipulated by the Defense?

Mr. Swayze: It is, Your Honor.

The Court: Do you agree with that, sir?

Mr. Blevins: Yes.

The Court: Anything else to bring up concerning pictures?

Mr. Horan: If it please the Court, I have here 2, 3, and 6, which are merely depicting the area where the objects were found in the woods.

Mr. Swayze: May I see the picture?

Mr. Horan: Yes, I am sorry, Mr. Swayze.

The Court: So I understand, what pictures are not in that we have already numbered?

Mr. Horan: Pictures 5 and 16.

The Court: Those are the two of the gentleman without any clothes on?

Mr. Horan: I'll withdraw those.

The Court: 7 and 8 are denied on the ground that Mr. Holyfield is the man on which the doctor made the examination.

page 63 } Mr. Swayze: I have no objection to those photographs that Mr. Horan has handed me.

The Court: All right, pictures number 2, 3, and 6 have already been received as—

Mr. Horan: Commonwealth's Exhibit 2, 3 and 6 by agreement.

The Court: Anything else, gentlemen?

Mr. Swayze: No, Your Honor.

(Whereupon, Commonwealth's Exhibits Nos. 2, 3 and 6, previously marked for identification, were received in evidence.)

(Whereupon, Commonwealth's Exhibits Nos. 5 and 16, previously marked for identification, were withdrawn.)

Mr. Horan: Your Honor, if this is the proper time, I don't know how the witnesses will progress, but I have Dr. Cooper on call, and I was wondering if Mr. Swayze would have any objection if we put Dr. Cooper on at the resumption of the case this afternoon.

The Court: Two o'clock.

Mr. Swayze: No objection, Your Honor.

The Court: All right, fine.

Mr. Horan: May I notify my secretary of that, Your Honor?

The Court: I planned to recess at one o'clock until two o'clock, so that will make a natural breaking point.

Mr. Swayze: May I make a phone call to my office?

page 64 } The Court: Yes.

Let the record show that the defendant has been present in person during this conference in chambers.

(Whereupon, the conference in Judge's chambers was ended

and the following proceedings were held in the hearing of the jury.)

The Court: All right, sir, go ahead.

DIRECT EXAMINATION (Resumed)

By Mr. Horan:

Q. Now, Officer Cooper, I show you Commonwealth's Exhibit No. 4 and ask you what that scene depicts?

A. This is where the body was found on Kincheloe Road. This is the cruiser in which I was operating that evening and where I parked it upon arrival at the scene.

Q. Was there a driveway?

A. It was parked right blocking the driveway.

Q. And that is the way that mail box appeared when you were on the scene?

A. That's correct.

Q. Now, Officer, I show you Commonwealth's Exhibit No. 15, which depicts the automobile. Now, I want you to tell the jury if that was—had been moved from the first time you arrived on the scene?

A. Yes, sir,it had. It had been backed—

Q. Hold it up and show the jury.

page 65 } A. The vehicle, when I first arrived upon the scene, the rear end of the vehicle was in this portion of the picture backed in toward—to the foliaged area here. It had been moved by the wrecker in front when this picture was taken.

Mr. Horan: I have no further questions of this witness, Judge.

The Court: Mr. Swayze?

Mr. Swayze: I have no questions of the officer.

The Court: Is the officer free to go?

Mr. Swayze: I have no objection.

Mr. Horan: No objection, Your Honor.

The Court: You are free to go.

(Witness excused.)

Mr. Horan: Your Honor, I would like the jury to examine those pictures for a few minutes.

The Court: We will take a minute or two for the jury to examine the pictures.

Mrs. Helen Holyfield

Mr. Horan: Mrs. Holyfield.
The Court: Why don't you wait until they finish with the pictures, and then call her.
Mr. Horan: Your Honor, if I may be excused for one minute, I wish to get an exhibit from my office.
The Court: All right, sir.
Mr. Horan: Your Honor, I would like this exhibit marked for identification. It is the mail box.
page 66 } The Court: Have you seen this?
Mr. Swayze: No.
The Court: Put it on the table.
Mr. Swayze: All right.
The Court: The cardboard box and its contents will be marked as Commonwealth's No. 17 for identification purposes.

(Whereupon, the article referred to above was marked Commonwealth's Exhibit No. 17 for identification.)

The Court: All right, you may call your next witness.
Mr. Horan: Mrs. Holyfield.
The Court: Have you been sworn?
Mrs. Holyfield: Yes, I have.

Whereupon,

MRS. HELEN HOLYFIELD was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:
Q. Will you tell the Court your name, please?
A. Helen G. Holyfield.
Q. And where do you live?

The Court: Just a minute, please. You are going to have to speak up as loud as you can, please.
The Witness: Mrs. Helen G. Holyfield.

page 67 } By Mr. Horan:
Q. Where do you live?

Mr. Swayze: I am sorry, I did not catch the last answer.
The Witness: Holyfield.

Mrs. Helen Holyfield

By Mr. Horan:
Q. Where do you live, ma'am?
A. Where do I live now?
Q. Yes.
A. I live at 312 Manassas Drive, Manassas Park.
Q. And where did you live on September 24th, 1966?
A. I lived on Route 1, Clifton.
Q. And was that route also known as Route 612 or Yates Ford Road?
A. Yes.
Q. Now, calling your attention to one o'clock or thereafter on the morning of the 24th, were you at home at that time?
A. Yes, sir, I was.
Q. And who was there with you?
A. My husband and my little boy.
Q. And did anything unusual occur?
A. Well, about a quarter of two a noise woke me up and I got up and looked out the window, and I heard this banging noise, it sounded like somebody was changing tires—and then I didn't pay any attention to it and then it woke
page 68 } Greer up and I—

Mr. Swayze: Just a moment, Your Honor, I would object to any statement that she may have heard.
The Court: I thought all she said that it woke Greer up.
Mr. Swayze: I think she was going to say something that he said.
The Court: Do not say anything that was said to you.

By Mr. Horan:
Q. All right, *no* did you do anything then?
A. Yes, sir.
Q. What was that?
A. I told him that there was somebody changing a tire or there was noise out there. And he looked out the window and—
Q. Where was this noise located with reference to your property?
A. Out next to our mail box.
Q. All right now, did Greer do anything?
A. He got up and looked out the window and he said—

The Court: Don't say what he said.

Mrs. Helen Holyfield

By Mr. Horan:

Q. What did he do then?

A. He got up and he went downstairs, or he took the gun and he went down the stairs and he went out and

page 69 } I guess shot up over their heads.

Q. Do you know if he shot?

A. Yes, sir.

Q. Then what did he do?

A. Then he came back in the house and he asked me which way they went, and I said, "Down the dirt road." And he went out and followed them, and about a couple of minutes after that I heard another shot.

Q. And would you come to the board, please? Do you recognize this area?

A. Yes, sir.

Q. Would you indicate, standing over here so the jury can see you, indicate where your house was?

A. I'm not too familiar with it.

Q. Take your time. That's all right.

A. This would be where we lived and—I am not—I don't know—I am not good at reading maps.

Q. All right. If you don't recognize it, return to the stand. That's all right.

A. OK.

Q. Now, you say he went up the dirt road?

A. Yes, sir.

Q. Was that the road that intersects, like at a "T" intersection?

A. Yes, it is.

page 70 } Q. All right, and how long after he left was it that you heard the shot?

A. I'd say a couple of minutes.

Q. A couple of minutes?

A. Yes.

Q. And what did you do after he left, ma'am?

A. Well, I stood at a window by my son's bed at the end of it was right at the window, and we had the window open. So I sit there and I guess it was until around four o'clock and then I heard the sirens going off at Clifton and then after that I guess six o'clock, 5:30 or 6:00, Detective Sanders and one of the policemen come to the house and told me.

Q. Now, I show you this exhibit marked as Commonwealth's Exhibit No. 17. Do you recognize this, ma'am?

A. Yes, sir, I do. It's our mail box.

Mrs. Helen Holyfield

Q. Now, would you tell the jury what the condition of that mail box was the last time you saw it on the 23rd?
A. It was in perfect condition.
Q. Now, I show you Commonwealth's Exhibit No. 13, 15, and 9, which depict an automobile. Do you recognize that automobile?
A. Yes, sir. That's his car.
Q. Whose car?
A. Greer Holyfield's car.
Q. Now, one more question, ma'am. Did you have your marriage with Mr. Holyfield solemnized before a
page 71 } preacher or anything?
A. No, sir.

Mr. Horan: No further questions.
The Court: Mr. Swayze.

CROSS EXAMINATION

By Mr. Swayze:
Q. Did I understand that your answer to that was, "No, sir"?
A. No, sir.
Q. Then if I understand, you are not his wife?
A. Not legally.
Q. All right. Mr. Holyfield was employed by the Fairfax County Park Authority?
A. Yes, sir.
Q. What was his position, Mrs. Holyfield?
A. He was a caretaker or park ranger.
Q. Did the County furnish him a telephone?
A. No, sir.
Q. Was there a telephone in your house?
A. No, sir.
Q. Did the County furnish him a vehicle?
A. No, sir.
Q. Did he have a car?
A. He had that car.
Q. Whose car was that?
page 72 } A. That was his car.
Q. Did he have a radio in the car?
A. Yes, sir. He had a citizens band radio.
Q. This is a two-way radio?
A. Yes, sir.

Q. Now, pictures of the vehicle indicate an antenna standing up on the back?
A. Yes, sir.
Q. Would this be in connection with that two-way radio?
A. Yes, sir.
Q. Was this in operating condition?
A. Yes, sir.
Q. He could call outside?

Mr. Horan: I am going to object to that, Your Honor. I don't know whether this witness could testify to what someone else could or could not have done.
Mr. Swayze: She knows.
The Court: If she knows the condition of it, I don't know at this point—I don't know if she is capable of testifying on that point, or not.

By Mr. Swayze:
Q. Do you know whether he could have called out on that radio?
A. It was a house to a car radio. He could call my house or he could call other people's houses that had one
page 73 } like it.
Q. Now, do you know if it was in operating condition?
A. Yes, sir.
Q. Do you know whether he made any attempt before he left to call on the radio?
A. No, sir, I don't. I had my radio on at the house, but he didn't call.
Q. You didn't hear anything at all on the radio?
A. No, sir.
Q. Where was the closest telephone?
A. About a half a mile.
Q. And where was that, ma'am?
A. It would be down to the Marina to where he worked.
Q. Did he have access to that telephone?
A. He could get to it, yes.
Q. As a matter of fact, he was in charge of it, wasn't he?
A. No, he wasn't—he wasn't in charge of the whole thing, no.
Q. Now, who owned the house where you lived?
A. Mr. Thomas Dugan.
Q. And you rented the house?

A. Yes, before the park took it.

Q. Now, when the park took it, then it was on park property?

A. Yes, sir.

page 74 } Q. So, it belonged to the County?

A. Yes.

Q. On this particular evening, and the mail box likewise?

A. I don't know about that.

Q. Well, do you know where the mail box could have come from?

A. What do you mean, "come from"?

Q. Well, it was there when you arrived to live there, was it not?

A. One was but we replaced it.

Q. Well then, where did that particular mail box come from?

A. We bought that one.

Q. When did you buy that one?

A. Oh, I guess in '63.

Q. And it had been standing out front ever since?

A. Yes, sir.

Q. Now, do you know who it was that was making this noise out front of your house?

A. No, sir, I don't.

Q. Do you know who it was that damaged your mail box there?

A. No, sir.

Q. Now, when you were first aroused by this noise outdoors, you were the first one to get out of bed and

page 75 } look out of the window?

A. Yes, sir.

Q. It was very dark?

A. Yes, sir.

Q. And did you see anything out there, Mrs. Holyfield?

A. I could see a car, a glimpse of a car. He had his lights, front lights on and his tail lights on.

Q. The headlights were burning?

A. The headlights were burning.

Q. And that's all you saw?

A. And that's all I saw.

Q. Now, you say your husband got out of bed and he obtained this .22 rifle?

A. Yes, sir.

Q. Where was the gun?

A. It was right over the stairs as you go down the stairs.

Mrs. Helen Holyfield

Q. And you say he fired the gun?
A. Yes, sir.
Q. Where was he when he fired the gun?
A. On the porch.
Q. Is this the front porch?
A. It is—well, it's a side porch because we didn't use the front when we went out of the house.

Q. Could you see the mail box, the area of your
page 76 } mail box from the side porch where he was?
A. Yes, sir.

Q. How far would it be from the mail box to the side porch?
A. I don't know the distance.
Q. Could you show us something?
A. No, I don't guess I could.
Q. Would it be further than the length of this room?
A. Yes, sir.
Q. Twice as far?
A. Well, I'd say about three times.
Q. And, did you go down with him to the porch?
A. No, sir, I didn't.
Q. And you don't know in which direction he may have fired that weapon?
A. No, sir.
Q. He just fired it one time?
A. He fired it twice. He fired it once there and once after he left.
Q. But I'm talking about when he was on the porch.
A. Yes, sir.
Q. Now, are you familiar with this gun?
A. I think so.
Q. Can you tell us what caliber gun it was?
A. It was a .22 caliber.

page 77 } Q. Is this a single shot or a repeating type rifle?
A. It was an automatic.

Q. Did it have a telescopic sight, by chance?
A. Yes, sir.
Q. Do you know what type of ammunition *you* husband may have had?
A. Outside of regular .22 bullets, I don't know whether they were short or the long. He had all sizes.
Q. Do you know how many rounds he may have carried with him?
A. No, I think he usually kept five shells in the gun.
Q. Do you know how many he had this evening?

Mrs. Helen Holyfield

A. No, sir.

Q. Do you know whether he may have had a store or stock of ammunition in the car?

A. Yes, sir.

Q. Where did he keep this ammunition?

A. In the trunk of his car.

Q. And this was .22 ammunition?

A. Well, he had various because he had several other guns.

Q. Did he keep other weapons in the car?

A. I think at that time he only had the .22 with him, unless he had a small pistol or something. I think maybe he may have had that.

Q. Do you know whether he did have a small pistol?

page 78 } A. I don't know that, whether he had one with him. I think, he had two and I only found one.

Q. And that was a .22 rifle?

A. That he had with him?

Q. Yes.

A. Yes.

Q. So that the last that you saw of him, he left the house with the .22 rifle in his hands?

A. Yes, sir.

Q. Now, you testified, I believe, that after he had fired that shot off the porch he came back upstairs?

A. He came back in the house. He didn't come upstairs.

Q. Was he clothed at that time?

A. He got dressed before he went downstairs. But, he didn't take time to put his sox on, I found out later.

Q. What did he put on?

A. He put on his park uniform.

Q. And what was that comprised of?

A. I don't know. I guess that was about all that he had on.

Q. Well, what was the—what did the uniform consist of?

A. Well, it was dark green pants and a light green shirt, and he had badges or patches, rather, on the shoulder, and he had his name over here, I guess. (Indicating.)

Q. And he had those badges on when he left?

page 79 } A. He had—they're patches. They are sewed on. And he had his regular park badge with him.

Q. Where was that?

A. I don't know whether it was on him or in his pocket because when the police gave it to me it was in a bag.

Q. But he did have in his possession a badge?

Mrs. Helen Holyfield

A. Yes, sir.

Q. Where did he customarily wear the badge?

A. On his pocket, on his shirt pocket.

Q. Now, was your husband a policeman?

A. I don't know whether you call it a policeman or what, but his badge said, "Special Park Ranger."

Q. It said, "Special Park Ranger"?

A. Yes, sir.

Q. Do you have the badge?

A. Yes, I do, at home. Not here.

Q. Now, as far as you know, his employment was as a caretaker for the park down there?

A. Yes, sir.

Q. How large a park was it?

A. It was a hundred acres.

Q. Do you know if this man ever patrolled areas outside of the park?

A. Not outside the park.

Q. His job was essentially to take care of the park?

page 80 } A. Yes, sir.

Q. Now, you say he put on his shoes and not his sox?

A. Not his sox.

Q. Did you watch him put on his shoes?

A. No, sir, because I was upstairs.

Q. I see. You don't know when he left whether his shoes may have been untied?

A. Well, they probably were untied because he didn't usually tie them.

Q. I see. Now, you say it was a few minutes later that you heard another shot?

A. Yes, sir.

Q. Was this on your property?

A. I don't know whether it was or not. I wasn't with him so—

Q. Well, was it remote? You were standing at an open window, I believe?

A. Yes, sir.

Q. Was it remote from your property or did it sound as if it came from a short distance away?

A. Well, where they tore the other mail boxes down is about a half a mile maybe, not that much.

Q. Well, could you tell where the shot came from?

A. I could tell that it came from that direction, yes.

Q. It did come from that direction?

page 81 } A. Yes, sir.

Q. And other than that, that's all you know about this?

A. Yes, sir.

Mr. Swayze: All right.

RE-DIRECT EXAMINATION

By Mr. Horan:

Q. You say that you purchased this mail box, you and your husband?

A. I think he did. I wasn't with him.

Q. You used it for the collection of your mail every day, didn't you?

A. Yes, sir.

Q. And how tall was your husband, ma'am?

A. How what?

Q. How tall?

A. Oh, about five feet six, I think. I'm not sure about it.

Q. He was short then?

A. Yes, sir.

Q. How old was he on September 24th?

A. He was 48.

Q. Forty-eight? And how old were you on that date, ma'am?

A. I was 21.

Q. And how long have you been man and wife?

page 82 } A. For about six years.

Q. About six years? You say you had a son?

A. Yes.

Q. What is his name?

A. Billy Wayne Holyfield.

Q. And how old is he, ma'am?

A. He's five.

Mr. Horan: That is all I have of this witness.

Mr. Swayze: No other questions.

Mr. Horan: Your Honor, I would move to introduce this mail box as being her mail box at this time.

The Court: Mr. Swayze.

Mr. Swayze: Well, Your Honor, I must say at this time

I have no objection for it being marked for identification, in fact, it already is. But, I certainly object to it being introduced as an exhibit until it is connected in some way with this case and this defendant.

Mr. Horan: Your Honor, I am back to the same problem. She says it's her mail box and I want to introduce it for the purpose of—

The Court: It has been identified for that purpose, but I think we should wait until a more appropriate time and then introduce it when there is more evidence in the case.

Mr. Horan: Very well, Your Honor.

The Court: I am not denying its admissibility
page 83 } ultimately. I am saying wait until there is further ground.

Mr. Horan: I have nothing further of this witness then. Your Honor, may she be excused?

Mr. Swayze: No objection.

The Court: You may be excused.

(Witness excused.)

Mr. Horan: Norman Longerbeam.

Whereupon,

NORMAN LONGERBEAM was called as a witness on behalf of the Commonwealth, and having been previously duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:

The Court: Mr. Longerbeam, were you sworn earlier?

Mr. Longerbeam: Yes, sir.

The Court: All right. Have a seat, please.

Mr. Horan: Your Honor, could we have this marked for identification as Commonwealth's No. 18?

The Court: There is a tag on it, sir.

Mr. Horan: Mark it on this tag?

The Court: Just mark it on there.

(Whereupon, a mail box was marked Commonwealth's Exhibit 18 for identification.)

page 84 } By Mr. Horan:

Q. Will you tell the jury your name, sir?

A. My name is Norman F. Longerbeam.

Q. Where do you live, sir?

A. 8218 Kincheloe Road.

Q. In Fairfax County?

A. That's right.

Q. Now, sir, I show this object marked as Commonwealth's Exhibit No. 18. Would you step down, sir, and examine it and tell the jury if you recognize that?

A. Yes, sir. This is definitely my mail box.

Q. Now, were you at home on a Friday the—the evening of Friday the 23rd of September of last year?

A. We left at 6:00 p.m., and we didn't return until Sunday evening about 8:00 p.m.

Q. You didn't return until Sunday?

A. Until Sunday about 8:00 p.m.

Q. And did you notice your mail box at any time on the day of the 23rd?

A. Not really, only to get the mail out of it.

Q. And do you recall its condition at that time?

A. It was in good shape.

Q. Now, I show you this photograph and ask you if you recognize what this portrays?

A. Yes, that's my driveway with a police car
page 85 } in it and my mail box.

Mr. Horan: Your Honor, this is Commonwealth's Exhibit No. 4.

By Mr. Horan:

Q. Will you tell the jury what the condition of your mail box was, if it was like that when you left, sir, on that day?

A. Well, it wasn't like this. It was in perfect shape. It was just an ordinary mail box settin' in a horizontal position.

Mr. Horan: I have no further questions.

Mr. Swayze: I have no questions.

The Court: May he be excused?

Mr. Swayze: Yes, sir.

The Court: You are free to go, sir.

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Mr. Horan: Your Honor, in the interest of orderly procedure, I have Sergeant Blamer from the Identification Bureau of the Police. It was his responsibility to check this evidence and things of that nature. I would like to put him on now for the purpose of introducing certain items of evidence at this time to show the custody thereof, and subject to recalling him later on to introduce other evidence, and I think it is just too confusing to try—it is more orderly and logical. What I am referring to specifically are items of clothing and a vial of blood.

Mr. Swayze: I would not object in any way.

The Court: I believe the defendant, through his counsel, has admitted that the blood on his person and clothing was the blood of the deceased, so I don't think you will have any problem there.

page 88 } Mr. Swayze: No.

The Court: I mean, perhaps this clothing and the vial of blood can be introduced without objection.

Mr. Swayze: Yes.

The Court: In view of that—

Mr. Horan: OK, Your Honor.

The Court: I mean, is there any other evidence you wish to put on?

Mr. Horan: The second item would the chain of custody of the mail boxes.

Mr. Swayze: I have no objection to that. I notice that the boxes have been cut. You will have something about that?

Mr. Horan: We will have testimony with reference to that.

The Court: The boxes are not in evidence at this point, but it is stipulated and agreed that they are the boxes belonging to the parties and they are in the same condition as they were taken by the Police that evening.

Mr. Swayze: No, I think they have been cut since then.

The Court: You better go through the whole thing then.

Mr. Horan: Your Honor—

The Court: They were taken by the Police?

page 89 } Mr. Swayze: Yes.

Mr. Horan: Your Honor, if I may interject, we will introduce evidence by the person who cut them for purposes of making an analysis of them, and I think what Mr. Swayze is saying—he can have the witness and bring him on.

Mr. Swayze: Who had the boxes over a period of time makes no difference.

Mr. Horan: What I want to do is to introduce this evidence as to the boxes, introduce them subject to a determination of what manner they were cut.

Mr. Swayze: I would object on the ground that they have not been linked to this defendant.

Mr. Horan: Well, in any event, we are not going to require that we put on the police officers to establish the chain of custody?

Mr. Swayze: No.

The Court: The chain of custody of the boxes is agreed and stipulated to, but the condition is not?

Mr. Swayze: That's correct.

The Court: All right.

Mr. Horan: Very well, Your Honor.

(Whereupon, the bench conference was ended and the following proceedings were held in the hearing of the jury.).

Mr. Horan: Sergeant Blamer.

Whereupon,

page 90 } LOREN JOE BLAMER was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:

Q. Will you state your name and occupation to the jury, please?

A. Sergeant Loren Joe Blamer, Fairfax County Police.

Q. And were you so employed on the 24th day of September, 1966?

A. I was, yes, sir.

Q. And what shift were you working that day?

A. Twelve to eight.

Q. That is 12:00 midnight to 8:00 in the morning?

A. Yes, sir.

Q. Calling your attention to approximately four or thereabouts the morning of that day, you were—do you recall where you were at that time?

Loren Joe Blamer

A. Yes, sir.

Q. And where was that?

A. Braddock Road, Fairfax County.

Q. And in what part of Braddock Road were you at approximately 4:10?

A. At 4:10 a.m., I was at the phone booth at
page 91 } Blevins store on Braddock Road.

Q. And who was there at that time?

A. Mr. Blevins here and Roger Watson.

Q. And, what did you do at that time?

A. I pulled into the lot due to the unusual hour and two boys in the phone booth. I stopped to see what the trouble was. As I approached the phone booth I saw the two boys inside the booth and upon—in the light of the phone booth and the light from my vehicle and the lights in the area I could see what was apparently blood on Mr. Blevins' clothes, hands.

Q. Would you tell the jury where that blood was on his clothing and person?

A. On his clothing was the right sleeve of the shirt was considerable blood, the right pants leg, and on his sneakers he had on, tennis type shoes.

Q. Sergeant Blamer, I show you these objects and ask you if you can identify them?

A. All of these clothing are marked in one way or another. This right here is my initial on the shirt tail.

Q. And what is that shirt?

A. I would call it, it was a faded green, shirt, called a faded green or a gray shirt.

Q. Was that shirt worn by the defendant?

A. That was the shirt, yes, sir, that I obtained from him later on, yes, sir.

page 92 } Q. And this object here?

A. This is the pair of pants that he had on at the time identified by my initial on the inside of the belt.

Q. And these items?

A. These are the sneakers, tennis type shoes he had on identified by my initials on both of them on the soles of the shoes.

Mr. Horan: Your Honor, I would like these marked for identification, and I would move their introduction into evidence at this time.

Mr. Swayze: No objection.

The Court: Is there a stipulation to be entered into? Mark them all together as the clothing of the defendant. It will be received as Commonwealth's Exhibit No. 19, the shirt, the pants, and the sneakers as a group.

(Whereupon, the items referred to were marked for identification as Commonwealth's Exhibit No. 19 and were received in evidence.)

Mr. Horan: Your Honor, it is my understanding that Mr. Swayze will stipulate to these, that these were in Police custody during the interim period of time until the date of trial.

Mr. Swayze: That is correct.

The Court: Was there a further understanding?

Mr. Swayze: We would also admit, Your Honor, page 93 } that the blood on there is from the body of the deceased.

The Court: All right. It will be received as the clothing of the defendant with certain markings of blood being the blood of the deceased.

By Mr. Horan:

Q. Now, Sgt. Blamer, did you indicate—would you indicate to the jury where this blood was?

A. It was on the right sleeve of the shirt.

Q. Whereabouts on the right sleeve, sir?

A. Right down here along in this area here. (Indicating.)

Q. And anywhere else?

A. On the right—well, there were spots of blood elsewhere on the shirt, but the concentration of blood was down on the right sleeve, on the right upper part of his pants legs, and on the tops and sides of his tennis shoes.

Q. All right now, what occurred after that, after you observed the defendant there?

A. I talked to him about the presence of blood on his clothing and his statement was that he had been involved in a fight. On closer examination, the backs of his hands on both hands was covered, caked with blood and he claimed that he had a nose bleed. Upon looking at his face, he had no blood whatsoever on his face. I asked him what—how he accounted for the blood on his hands and not on his face and none on the front of his shirt, and his statement page 94 } was that he washed in a mud puddle. I asked

Loren Joe Blamer

him why he didn't wash the blood off his hands if he washed it off his face and he didn't have any answer.

Q. And where did you go after that?

A. I talked to Mr. Blevins and Mr. Watson at the phone booth. Momentarily, as I pulled up, I called another car as I pulled up to assist me that was supposed to be in the area, and at this time another vehicle drove up to the phone booth and Mr. Watson got in the car with the woman, I presume his mother, to go home. Mr. Watson was dressed in dark clothing and his clothing wasn't deranged in any way.

Q. And did there come a time when you left Blevins store?

A. Yes, I talked to Mr. Blevins and I asked him if he would mind going to the scene of this murder with us where a man had been beat to death and he stated he had nothing to hide and he would be glad to go with me.

Q. And did he, did he go with you?

A. Yes, sir. We rode down to Kincheloe Road.

Q. Did there come a time you took him home?

A. Yes, sir. After talking to Detective Sanders and myself there, and he agreed to let us have his clothing for chemical analysis. He said he had nothing to hide in the line of the blood on his clothing. At this time I brought him back

page 95 } home. He stepped inside the door nearest to Braddock Road and handed me back out his clothes which I, in turn, put in a plastic and turned over to our identification officer, Lee Hubbard.

Q. Did he tell you how this nose bleed happened?

A. Yes, sir. This nose bleed was supposed to be the result of a fight on Ruby Drive.

Mr. Swayze: Your Honor, I think we have already gone over it twice.

The Court: What is the purpose?

Mr. Horan: I don't recall him saying where the alleged fight took place. I agreed that he testified with reference to the nose bleed resulting from a fight, but I don't think I have gone into where this occurred.

The Court: I don't believe he has.

Mr. Swayze: If he wants to ask him where it was, I have no objection.

By Mr. Horan:

Q. Where did you say?

Loren Joe Blamer

A. Allegedly this fight took place on Ruby Drive, which is almost in front of the location where I picked him up.

Q. Did he tell you any particular location on Ruby Drive?

A. He said he didn't know exactly where, no, on Ruby Drive.

Q. And isn't it a fact that Ruby Drive intersects with Braddock Road at a T intersection?

page 96 } A. That's correct, sir. Almost across from where the phone booth is that he was in.

Mr. Horan: No further questions, Your Honor.

CROSS EXAMINATION

By Mr. Swayze:

Q. Mr. Blamer, you left Mr. Blevins at what time?

A. At his home, sir?

Q. Yes, sir.

A. I would say at approximately 5:30.

Q. This was in the morning?

A. Yes, the a.m.

Q. When you observed the boy in the phone booth, could you tell whether or not he had any alcohol on his breath?

A. The subject had apparently been drinking, yes, sir.

Q. Was he able to talk clearly to you at that time?

A. Yes, sir.

Q. Now, you invited him to get in the cruiser and go with you?

A. That's right.

Q. And he was not put under arrest?

A. No, sir.

Q. And you took him on down to the scene?

A. That's right, yes, sir.

Q. Did you take him out of the cruiser at the scene?

A. No, sir. He was never out of the cruiser.

page 97 } Q. Did you show him the area where the body was at that time?

A. He was 150 to 200 feet from the scene with a panel truck and two other trucks parked right in front of him, and he was never able to view the scene, no, sir.

Q. Did you ask him to get out of the cruiser at any time?

A. No, sir.

Q. Did you attempt to interrogate him any further at the scene?

Loren Joe Blamer

A. Other than the blood on his clothing and the fight, that was what I interrogated him about, yes, sir.

Q. You asked him those questions back at the phone booth, I take it?

A. Yes, sir.

Q. Did you attempt to interrogate him any further at the scene where the body was?

A. We talked to him about the presence of the same blood on his clothes, Detective Sanders and myself, and that's where in the presence of Detective Sanders he agreed for us to take his clothes for blood-alcohol analysis. Detective Sanders advised him orally of his rights to an attorney and so forth, and he stated again that he had nothing to hide and we could have the clothes.

Q. And he did give you the clothes?

page 98 } A. That's correct.

Q. And he was not uncooperative with you?

A. No, sir.

Q. Now, what time was it that you saw him again on the same day?

A. When I reported back to duty at approximately 3:30 that day over at Police Headquarters.

Q. And what time was it that you went to Mr. Blevins' home?

A. Which—

Q. Didn't you go again to the defendant's home?

A. Not after I took the clothes from him in the morning, no, sir.

Q. You didn't see him any more?

A. Well, I have seen him at the trial and I have seen him at the store.

Q. You didn't see him that day any more?

A. Over in the police building when he was over there, yes, sir.

Q. What time was that?

A. Well, I had a short change that day. I got off at eight o'clock in the morning and back at four that evening, and when I was coming back on at four that evening, he was there along with the other four involved.

Q. Now, he was brought into police headquarters

page 99 } then, in your presence, on the same day that this affair took place?

A. I was present, yes, sir. I'll put it that way.

Q. What officer of the Fairfax County Police brought Mr. Blevins to headquarters?

A. I have no idea, sir. I wasn't on duty.

Mr. Swayze: All right, that's all.

RE-DIRECT EXAMINATION

By Mr. Horan:

Q. How long from ten minutes after four was it until you took him home was defendant in your company?

A. I would say approximately an hour or an hour and a half.

Q. And when he was at the scene, did he recognize anything down there?

A. He made no other statement to us other than he still maintained that he was in a fight with somebody in a dark car on Ruby Drive, and this is where the blood and all came from.

Mr. Horan: No further questions.
Mr. Swayze: I have no further questions.
The Court: Is he free to go?
Mr. Swayze: Yes, sir.
The Court: You are free to go, sir.

(Witness excused.)

Mr. Horan: Would Your Honor indulge me for one moment?

page 100 } Dr. Cooper will be my next witness.
The Court: Swear the witness, please.

(Whereupon, the witness was duly sworn by the Clerk of the Court.)

Whereupon,

CLAUDE EVERETT COOPER, M.D. was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:

Q. Doctor, would you state your name and occupation, please?

Claude Everett Cooper, M.D.

A. Claude Everett Cooper. I am a Doctor of Medicine.

Q. And have you any connection with Fairfax County?

A. I was appointed as a County Medical Examiner in 1951 and have been acting in that capacity ever since.

Q. Now, Doctor, would you tell the jury some of your schooling and experience with reference to your capacity as a medical examiner?

Mr. Swayze: Your Honor, I will admit to Dr. Cooper's qualifications. He is certainly qualified to speak on the subject.

The Court: All right.

By Mr. Horan:

page 101 } Q. Now, Doctor, calling your attention to the early morning hours of September 24th, 1966, did you have occasion to go to Kincheloe Road, Route 641, south of Clifton, in the County:

A. Yes, sir.

Q. Will you tell the jury what you observed at your arrival on the scene?

A. I was called by the Police about 2:00 a.m. stating there was a body in a roadway out toward Clifton. I arrived there about 3:00 a.m. On the way there I passed a burning car, probably a mile or so from the body. When I got there, the decedent was identified to me as a Greer Franklin Holyfield.

Q. And later on that day, did you have occasion to perform an autopsy on the body of the deceased?

A. Dr. Enos autopsied the body. I was present at the autopsy.

Q. Now, I show you this, Doctor, and ask you if you recognize that?

A. That is a copy of the original autopsy report.

Mr. Horan: I would offer this into evidence at this time, Your Honor.

The Court: The report of the autopsy—is there any objection?

Mr. Swayze: No, Your Honor.

The Court: It will be received as Common-
page 102 } wealth's Exhibit No. 20.

(Whereupon, the report referred to was marked for identi-

fication and received in evidence as Commonwealth's Exhibit No. 20.)

By Mr. Horan:

Q. Doctor, will you tell the jury what the results were, what determinations you made as a result of the autopsy?

A. The prime, the immediate cause of death was multiple lacerations or tearing of the brain, secondary to many compound comminuted fractures of the skull. In other words, the skull was crushed in many pieces and then as a result of the forcing blows, the brain had several lacerations down it which were incompatible with life.

Q. Now, Doctor, what were the physical characteristics of this man, *he* height and weight?

A. He was approximately 64 inches tall, weight about 150 pounds, had black hair and blue eyes.

Q. And what—you say these lacerations, Doctor, how many lacerations did you find on his person?

A. He had five good-size lacerations over the scalp area. He had another laceration on the right side of his neck, and then he had one more laceration just below the shoulder bone on the right side. Then he had multiple lacerations compatible with finger nail scratches on his face that were not actually lacerations as such.

page 103 } Mr. Horan: You may inquire, Mr. Swayze.

CROSS EXAMINATION

By Mr. Swayze:

Q. Doctor, was there any injury to the man's chest and the region below the head?

A. Yes, he had a laceration two and three quarters inches to the right of the mid-line, just below the right clavicle, collar bone, measuring one and a half by a half inch.

Q. Would that be compatible with an object being punched into the man?

A. I would think so, or striking, being struck with a blunt instrument.

Q. Had his throat been cut?

A. He had a gaping laceration of the neck on the right side, two and a half by—inches by one inch.

Q. Could you show us about where that was, Doctor?

A. Yes, sir. If the chin is here, the laceration was roughly in this area here on his neck. (Indicating.)

Claude Everett Cooper, M.D.

Q. About how long was it again?
A. Two and a half inches.
Q. Would that be again a blunt instrument?
A. Sir?
Q. Would that have been caused from what you were able to observe by a blunt instrument?
A. I would say so, yes, sir.
page 104 } Q. Now, all of these lacerations that you say would be compatible with a blunt instrument?
A. Yes, sir.
Q. It didn't appear that a knife had been used?
A. No, sir.
Q. Now, I believe the autopsy report indicates that there had been an injury to the nose?
A. Yes, sir. He had a fractured nose.
Q. Now, the type of injury you saw to his nose, would that cause bleeding?
A. Oh, yes, sir.
Q. As a matter of fact, it might cause profuse bleeding?
A. Yes, sir.
Q. Would the blow to the nose have been a fatal blow, Doctor?
A. No, sir.
Q. The fatal blows were the blows, were the ones—
A. The ones on his scalp, yes, sir.

Mr. Swayze: That is all I have.

RE-DIRECT EXAMINATION

By Mr. Horan:
Q. Doctor, those other blows would cause bleeding, too, would they not?
A. Sir?
Q. The blows to the top of the head would
page 105 } cause bleeding too, would they not?
A. Oh, yes, they would cause profuse bleeding. Scalp wounds always bleed very profusely.

Mr. Horan: Nothing further.
The Court: You are free to go.

(Witness excused.)

Mr. Horan: Mr. Stack. He hasn't been sworn.

(Whereupon, the witness was duly sworn by the Clerk of the Court.)

Mr. Horan: Your Honor, may I have a short recess? I have one exhibit that I don't have here. I apologize to the Court.

The Court: It is in your office?

Mr. Horan: I hope so. It might still be in the Property Room.

The Court: OK, get it as quick as you can, please.

Mr. Horan: Your Honor, it is at Headquarters in the Property Room. I have sent for it. I think if the Court will allow me, I'll proceed, and if it is not here on time, will you give me a recess until it can get here?

The Court: You ordered it to be brought up?

Mr. Horan: Yes, sir, Your Honor.

The Court: It should only take about five minutes to get here. Do you need this witness to prove the exhibit?

Mr. Horan: Yes, Your Honor. I'll need this page 106 } witness, but I can proceed.

The Court: Go ahead.

Whereupon,

MORICE J. STACK, JR. was called as a witness on behalf of the Commonwealth, and having been previously duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:

Q. Will you tell the jury your name and occupation, please?

A. My name is Morice J. Stack, Jr. I am a Special Agent at the Federal Bureau of Investigation.

Q. And, how long have you been with the Bureau?

A. Approximately six years.

Q. And what are your duties?

A. I am assigned to the laboratory maintained by the Federal Bureau of Investigation in Washington, D. C.

Q. And what do you do at the laboratory?

A. My specific assignment is in the physics and chemistry section of this laboratory where I conduct tool mark examinations on evidence.

Morice J. Stack, Jr.

Q. Will you tell the jury of what tool mark examinations consist?

A. Well, when you look at a tool it has a
page 107 } specific form, shape, whether it be a pry bar or
a monkey wrench or whatever it might be, this particular shape was given to it during a number of machining operations or operations of one sort or another to produce the particular form. Each of these operations leaves an indelible, and individualistic character to this particular too. It is individual because the very tools which are shaping the object are themselves changing continually. By that I mean that in the final operation of sharpening a tool where an individual craftsman is sharpening a file or a grinding stone, this file or this grinding stone is changing through the wear that is produced simply in performing the function it was made to do. In other words, you could take a man from one of the large tool plants who actually operates the sharpening of a tool, and you could give him this room full of steel bars and he could no more reproduce microscopically the same marks twice than fly. It is just not possible for this tool to reproduce the same marks.

So, the object itself changes from object to object. Coupled with this is the use and abuse to which this tool is given, whether it is dropped, whether it is banged, how old it is, how many times it has been employed in the specific duty it was made for, and all of these tend to give it an individual character such that when this tool is used on another object it will leave on that object a mark which can be identified
with that tool to the exclusion of every other
page 108 } too. It is a mark that is made by one particular
tool and the determination that is possible is that this particular tool made this particular mark to the exclusion of all other tools.

Q. Now, sir, what is your educational background?

A. I have a degree in civil engineering from the University of Kansas. When I was assigned to the laboratory I underwent a year's training under the direct and daily supervision of an examiner with 25 years' experience in this particular field of tool marks identification. I have conducted hundreds of examinations on my own responsibility in this field, testified in state and Federal court as to the results of my examinations.

Q. Now, would you, sir, step down here and examine Commonwealth Exhibit No. 18 and No. 17? That's Common-

wealth No. 17, and 18. (Indicating.) Now, do you recognize that object?

A. Yes, sir, I do.

Q. Now, from whom did you receive those?

A. I personally received these from Corporal D. L. Hubbard of the Fairfax County Police Department on September the 27th of last year, 1966.

Q. And would you describe to the jury the condition of each exhibit, 17 and 18, when you first saw them?

A. They were not in this condition. I removed the door, and I cut out this portion that you see here in

page 109 } order to facilitate the laboratory examination. It was necessary for me to use rather specialized pieces of optical equipment and this just will not fit under it. It is a normal laboratory practice to cut out and remove those areas which have, in the examiner's opinion, marks of value so that they may be compared under the optical equipment.

Q. And you have referred to Commonwealth's Exhibit No. 18. Now, Commonwealth's Exhibit No. 17, will you tell the jury what the condition of that mail box was when you first saw it?

A. At the time I received this particular exhibit this piece was in place, the end was not firmy attached, but it was still attached. I pulled this off manually. I didn't have to cut it off, but it was in somewhat of a state of disrepair at the time I received it. However, this portion that is missing was cut out by me in the laboratory.

Mr. Horan: Your Honor, I would ask that this be marked for identification as Commonwealth's exhibit at this time.

Mr. Swayze: You can so mark it.

The Court: It will be Commonwealth's Exhibit No. 21 for identification purposes.

(Whereupon, Commonwealth's Exhibit No. 21, which is an ax, was marked for identification purposes.)

By Mr. Horan:

Q. Now, sir, I show you this, Commonwealth's

page 110 } Exhibit No. 21, and ask you if you recognize that?

A. Yes, sir. Commonwealth's Exhibit 17 and 18 I recognize externally based on the laboratory designation K3 which I placed as well as my initials on the wrapper.

The Court: You are speaking of 21 now?

The Witness: Yes, sir. I also received this particular object which I have identified as K3 MS, Commonwealth's Exhibit No. 21. I received this from Corporal Hubbard on the 27th of September, 1966.

Mr. Horan: Your Honor, at this juncture I move to introduce all of these items into evidence, 21, 17 and 18. I understand that you have no objection to the custody of these, Mr. Swayze?

Mr. Swayze: No objection as to the chain of custody. However, I do object to the introduction of this evidence until such time as they are shown to have some connection with this defendant.

The Court: I think the chain of custody has been stipulated to. The chain of condition has been testified to as to both of these boxes and their parts. I will allow both of those into evidence. However, as far as Commonwealth's Exhibit No. 21, the ax, there is no chain as yet as to where it was obtained from, from whom.

Mr. Horan: Your Honor, I will—may I then introduce these at this time subject to being tied in later?

page 111 } The Court: Well, why not do it at that time?

Mr. Horan: Very well, Your Honor.

The Court: I'll allow 17 and 18 as to the chain of custody and condition having been proved.

(Whereupon, Commonwealth's Exhibits Nos. 17 and 18, previously marked for identification, were received in evidence.)

Mr. Swayze: Your Honor, let the record show my exception to that on the grounds that it has not been adequately tied into the defendant.

The Court: Ultimately it may not be, Mr. Swayze. But at this point I have to move that it has been proved, the chain of custody and condition of the items.

By Mr. Horan:

Q. Mr. Stack, I would ask you to tell the jury what examination you made of these objects and what results or conclusions you arrived at?

A. May I ask you a question, sir?

Q. Yes.

A. Inasmuch as the ax has not been introduced, may I refer to it?

Mr. Horan: Your Honor, at this time can we have him refer to the subject in connection with all of these?

The Court: All of this is going to be subject to connecting it up. I will allow him to testify as part of the chain of evidence of what he did.

page 112 } The Witness: The tool mark type of examination I conducted on Commonwealth Exhibit 17 and 18, the two mail boxes, specifically directed to determining if there are any marks on these mail boxes which can be specifically identified as having been produced by the ax which was submitted along with them, Commonwealth's Exhibit 21, I performed such an examination on various marks on these two mail boxes and my conclusion was that the damage to these mail boxes—that there were marks present produced by this particular ax, Commonwealth's Exhibit 21.

Mr. Horan: I have no further questions.

Mr. Swayze: I have no questions.

The Court: You have no questions?

Mr. Swayze: No further.

The Court: Do you have any further need of this witness?

Mr. Horan: No, sir.

The Court: You are free to go.

The Witness: Thank you, sir.

(Witness excused.)

The Court: Call your next witness, please.

Mr. Horan: Mr. Johnson.

Whereupon,

page 113 } JEROME P. JOHNSON was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:

Q. Have a seat up there, Mr. Johnson. Will you tell the jury your name and address?

A. What's that?

Q. Your name and address?

A. Jerome Johnson, Fairfax, Lincoln Park.

Q. Say that again.

Jerome P. Johnson

A. My name is Jerome Johnson. I live at Lincoln Park, Fairfax.

Q. Is that out near Blevinstown?

A. Yes, sir.

Q. Do you know the defendant, Glen Blevins?

A. Yes, sir.

Q. Now, how long have you known him?

A. Well, I don't know exactly, but quite a while.

Q. Quite a while?

A. Yes.

Q. And on the 24th of September, which was a Saturday morning, at about three in the morning, were you at home?

A. Yes, sir.

Q. Did there come a time that Mr. Blevins came to your house?

page 114 } A. Yeah, he was there.

Q. And tell the jury what happened, what he said.

A. When he come by and he said—

The Court: Will you turn and face the jury? They can't hear you.

The Witness: He said that he had been down to Clifton to a party and some guy got after him with a rifle and he said he take the rifle and hit him with it and he come by and asked me would I take him to Seven Corners, he wanted to pick up some money. I told him I didn't have any car and my son had to go to work with it the next morning and I didn't have no way to take him.

By Mr. Horan:

Q. Did you say he said someone had shot at him with a rifle?

A. No, he said some guy come out with a rifle.

Q. Come out with a rifle?

A. Yeah.

Q. Then he took the rifle?

A. And hit him. That's what he said.

Q. And hit him?

A. Yes.

Q. Did you notice anything unusual about his clothing, Glen's clothing?

A. Well, not a whole lot, no, sir.

page 115 } Q. Did you see anything on his clothing?

A. Well, he had some blood on his clothes, blood on his clothes.

Q. He had blood on his clothes?

A. Uh huh.

Q. And did he leave your house? Do you recall Glen leaving?

A. He was—when I went back to bed he was out there in the car talking to another boy.

Q. Pardon me, I didn't understand.

A. When I went back to bed he was out in the car talking to another boy. I don't recall what time he left.

Q. Was there anyone with Glen?

A. Yes, another fellow with him. I didn't know the other fellow.

Q. You don't know the other fellow?

A. No, sir.

Q. Did any cars come past?

A. Only the one, and they stopped in the yard.

Q. And they stopped in the yard?

A. Yes, sir.

Q. And did he say why he wanted to go to Seven Corners?

A. He said he wanted to get some money down there from a friend.

Q. Get some money from a friend? Did he say page 116 } what else he was going to do?

A. No, sir, he didn't.

Q. All right, did you say—strike that—how long was he at the house, Mr. Johnson, while you—before you saw him go out to the car? How long had he been at your house?

A. Oh, he didn't stay there more than an hour, an hour and a half, or something like that, if that.

Q. And all he said was that—

Mr. Swayze: Now, Your Honor, I object to Counsel continuing to rephrase what he said. The jury heard what he said.

The Court: Sustained.

Mr. Horan: Very well, Your Honor.

By Mr. Horan:

Q. Did he say whether or not the man was alive?

A. No, sir, he did not.

Q. Did he say anything at all about that?

A. No, sir.

Jerome P. Johnson

Mr. Horan: You may inquire, Mr. Swayze.

CROSS EXAMINATION

By Mr. Swayze:

Q. Mr. Johnson, how old are you?

A. Fifty-six.

Q. And how long have you known this boy?

A. Well, I wouldn't know right offhand. But

page 117 } I have known him most of his life since he was a right small fellow.

Q. He was a little fellow?

A. Yes.

Q. Do you know his daddy?

A. Yes, sir.

Q. You know the whole family, don't you?

A. Yes, sir.

Q. As a matter of fact, you don't live far away from where they live?

A. No, sir, I don't.

Q. You both live in the same community then?

A. Yes, sir.

Q. Now, how many people live at your house?

A. Nine of us.

Q. Nine?

A. Yes, sir.

Q. And how many rooms in your house?

A. Six.

Q. Now, on this particular night, how many people were there at your house?

A. I think about three of my boys was out that night. I'm not sure. There was two that had to go to work, the rest of them was out, but wasn't more than four or five of us home at the time.

Q. Four or five people there?

page 118 } A. Yes.

Q. Were they all men?

A. No. I mean, just my wife and daughter was there, and two of the boys.

Q. All right, you, your wife, your daughter and two boys.

A. Yes.

Q. That would be five people?

A. Yes.

Q. Was anybody sleeping out in the yard?

A. No, sir.
Q. In a car maybe?
A. Oh, was a boy come in—a boy come in while he was in the house and he didn't get out of the car, he was sleeping in the car. He didn't get out.
Q. Was that one of your boys?
A. No, sir. That was a boy that worked with my boy.
Q. Now, where you sleeping on that night, Jerome?
A. I was in my bedroom, in bed that night.
Q. Is that on the first floor?
A. Yes.
Q. This is a one-story house, isn't it?
A. Two stories.
Q. Two stories?
A. Yes.
page 119 } Q. All right, there came a knock on the door, is that right?
A. Yes, sir.
Q. Who went to the door?
A. My son.
Q. And did you hear the knock?
A. No, I didn't hear the knock, but I heard them talking and I got up to see what it was all about.
Q. Now, when you went to the door, what did you see?
A. Well, he was talking to my boy at the time, and then he come in the room where I was and sit down and talked with me.
Q. You are talking about Glen came into where you were?
A. Yes.
Q. And did you get out of bed?
A. Yes, sir.
Q. Now, was there anybody in the room other than you and Glen when this conversation took place?
A. Just him and his friend.
Q. All right, would you know that friend again if you saw him?
A. Yes, sir.
Q. You don't know what the man's name is now?
A. No, sir, I don't know his name. Never did know his name.
page 120 } Q. Was it a young white boy?
A. Yes, sir.
Q. And what was it he wanted you to do for him?
A. He asked me did I have any transportation I could

Jerome P. Johnson

take him down to Seven Corners. He said he needed some money and could get some down there if I could get him down there.

Q. Was there any discussion about gasoline for the car?

A. Well, he told me he had run out of gas and I guess that was why he was walking.

Q. He said he had run out of gas?

A. Yes, sir.

Q. Did he say where he left his car?

A. He didn't say exactly where he left it.

Q. Did he ask you for a can or a hose?

A. No, sir.

Q. Did he ask you for any gasoline?

A. No, sir.

Q. Just asked for some money?

A. Just asked me to take him to Seven Corners so he could get some money.

Q. Oh, he said that you would take him to Seven Corners and he would get some money?

A. Yes, sir.

Q. What was he going to get the money for?

A. What is that?

page 121 } Q. Why was he going to give you some money?

A. He wanted me to take him to get some money himself.

Q. He wanted you to take him to Seven Corners to pick up some money, is that it?

A. That's what he said, yes.

Q. What did you tell him about that?

A. I told him I didn't have no car and my boy had to go to work in a few minutes and I couldn't use his car.

Q. And what did he say?

A. Well, I told him to talk to my boy and it was up to him, and the boy wouldn't answer him when he called him.

Q. So he wasn't trying to hold you up or anything like that, was he?

A. No, sir.

Q. Perfectly friendly call?

A. Yes, sir. Yes, sir.

Q. You weren't angry with him?

A. No, sir.

Q. Now, you noticed some blood on his clothes, is that correct?

A. Yes, sir.

Jerome P. Johnson

Q. Did you ask him about that?
A. No, sir, I didn't.
Q. He just told you?
A. No, he didn't say anything about the blood
page 122 } being on his clothes. He just talked to me about going to Seven Corners and he told me about hitting the man. He didn't say anything about the blood.
Q. Well, how did it happen to come up that he told you that he had been in this fight?
A. I asked him what was wrong and he said he had to go down to Seven Corners to get some money, that he had got in some trouble, and I asked him what was wrong and he told me.
Q. He said what?
A. I asked him what was wrong.
Q. Yes?
A. And he up and told me that somebody had brought a rifle on him and he taken and hit the man with it.
Q. Now, had anybody been drinking at your house that evening?
A. Well, I couldn't say that because my boys had come in—well, hadn't been in too much longer before he come in, and one of them drinks, but I wouldn't say for sure whether he was or not.
Q. A couple of your boys had been drinking?
A. Yes. But, I don't know that for sure because I was in bed when they come in.
Q. Were you drinking any that night?
A. No, sir.
Q. None at all?
page 123 } A. No, sir, I wasn't drinking anything.
Q. Had Glen been drinking any that night?
A. Well, he—I couldn't tell it on him. He didn't act as if he was.
Q. Now, you say Glen said he got into a fight with this man that had the rifle?
A. Well, I asked him and he said—he didn't say nothing about the fight, he said he had taken the rifle and hit him.
Q. He took the rifle and hit him?
A. That's what he told me, yes.
Q. You are sure that's what he said and all he said?
A. That's what he said, that's all he said to me.
Q. No more?
A. Yes, sir.

Q. All right.

Mr. Swayze: That is all.
Mr. Horan: No further.
The Court: Can this witness be excused?
Mr. Swayze: Yes, Your Honor.
Mr. Horan: Yes, Your Honor.
The Court: You are free to go.

(Witness excused.)

The Court: Call your next witness, please.
Mr. Horan: Would Your Honor indulge me with a short recess?
page 124 } The Court: We will take a five-minute recess.

(Short recess.)

page 125 } The Court: Let the record show the defendant is present in person with his attorney and the Commonwealth by her attorney.
Mr. Horan: Roger Watson.

Whereupon,

ROGER A. WATSON was called as a witness for and on behalf of the Commonwealth, and having been previously duly sworn was examined and testified as follows:

The Court: Have you been sworn?
Mr. Watson: Yes, sir.

DIRECT EXAMINATION

By Mr. Horan:
Q. Will you tell the jury your name and address, please?
A. Roger Watson, 11401 Popes Head Road, Fairfax.
Q. Do you know the defendant?
A. Yes, sir.
Q. He is a friend of yours, isn't he?
A. Yes, sir.
Q. Were you with him on the night of September 24th, 1966?
A. Yes, sir.

Roger A. Watson

Q. And what time of night was it when you first met him?
A. Oh, around 8:00 or 9:00. I am not sure.
Q. Where was this?
page 126 } A. This was at Joyce Farmer's house.
Q. Where is that located?
A. On Braddock Road.
Q. Braddock Road?
A. Uh huh.
Q. In the vicinity of the Blevins store?
A. Yes, sir.

The Court: Will you talk in that direction for the jury?
The Witness: Yes, sir.

By Mr. Horan:
Q. Now, did you go with him someplace after that?
A. Yes, sir.
Q. And where did you go?
A. To Fairfax Bowling Alley.
Q. And who was with you?
A. Belvin Penny and Glen Blevins.
Q. And when you got to the bowling alley, did you meet anyone there?
A. Yes, sir. Doc Gadd and John Monroe.
Q. And who else?
A. John Monroe.
Q. All right, and where did you go after that?
A. To the drug store, Drug Fair.
Q. And what did you do at the Drug Fair?
page 127 } A. Got a case of beer.
Q. And whose car were you in?
A. Glen's father's.
Q. What kind of a car was it?
A. Rambler station wagon.
Q. All right. After you left the Drug Fair, where did you go?
A. Top's Drive-In.
Q. Which Top's?
A. Fairfax Circle.
Q. All five of you?
A. Yeah.
Q. All right, then after you left Top's, where did you go?
A. Social circle.
Q. And what happened at the social circle?
A. Well, we got into a little scrape up there, so we left.
Q. All right. And after you left, where did you go?

Roger A. Watson

A. Just riding around, I don't remember exactly where.
Q. Did there come a time when you went by your house?
A. Yes, sir.
Q. I show you this ax, do you recognize it?
A. Yes, sir.
Q. Is that your ax?
page 128 } A. This is my father's ax.
Q. It is your father's ax?
A. Yes, sir.
Q. Did you pick that up that night?
A. Yes, sir.
Q. And put it in the car with you?
A. Yes, sir.

Mr. Horan: I would like to offer this into evidence, Your Honor. It would be Commonwealth's Exhibit No. 21 at this time.

Mr. Swayze: No objection.

The Court: All right. It will be received as Commonwealth's Exhibit 21.

(Whereupon, the ax referred to was received in evidence as Commonwealth's Exhibit 21.)

By Mr. Horan:
Q. After you picked up the ax, where did you go?
A. Just riding around old back roads.
Q. By Clifton?
A. Up by that way, yes, sir.
Q. All right now, did there come a time when you went down to Bull Run Marina?
A. I don't remember that, sir.
Q. You don't remember that?
A. No, sir.
page 129 } Q. Did there come a time when anyone came along while the car was stopped, Glen's car?
A. Yes, sir.
Q. All right now, tell the jury what happened when he came along.
A. Well, a car pulled up in back of us and a man standing next to the window with a gun pointed and told everybody to get out of the car into the headlights.
Q. Now, when you were stopped there, why were you stopped?

Roger A. Watson

A. Some boys had to urinate.
Q. Who was driving the car when you stopped there?
A. Glen.
Q. Glen Blevins?
A. Yes, sir.
Q. And did there come a time anyone got out of the car?
A. Yes, sir. Glen, and Rudolphus Gadd and Penny got out.
Q. Where were they seated in the car when you first stopped there?
A. In the front.
Q. And who was in the back?
A. Me and John Monroe.
Q. All right, Penny and Gadd and Blevins got out of the car?
A. Yes, sir.
page 130 } Q. All right, and then you say this man came along?
A. We were back in the car when he came along.
Q. Where were you seated when he came to the car?
A. Under the steering wheel.
Q. Well, did you get out of the car?
A. No, I went over the front seat and got underneath the steering wheel.
Q. And this was while the other people were out of the car?
A. Yes, sir.
Q. Do you know what they were doing while they were out of the car?
A. Urinating, I guess. I don't know.
Q. You don't know what they were doing?
A. No, sir.
Q. Now, this man came up to the car and you said he had a gun, a rifle?
A. Yes, sir.
Q. And what happened?
A. He ordered everybody out of the headlights, so everybody got out and we went to the headlights, and except for John Monroe. He was on the right-hand side in the back seat and he was having trouble getting out. He was pretty well loaded and he was stumbling in getting out on that side and the man walked around to the back of the car
page 131 } and everybody was in the headlights, so when he started around the right-hand side at the back, the gun went off.

Roger A. Watson

Q. And where was Monroe when the gun went off?
A. He was just getting out of the back door.
Q. Are you sure of that?
A. Sure as—

Mr. Swayze: Your Honor, he already answered the question. If he is trying to impeach him.

The Court: I think we will approach that when we get there.

Mr. Swayze: Well, he answered the question. He asked the question and he got an answer.

The Court: He is just asking him whether or not he is sure.

By Mr. Horan:
Q. All right, and what happened?
A. The gun went off and I run down through the woods.
Q. Now, you say the man was standing by the driver's window in the car, right?
A. At the start. When the gun went off he was at the right rear bumper.
Q. What kind of car was that?
A. Rambler station wagon.
Q. What year, if you know?
A. '59, I believe.
page 132 } Q. O.K. And you say you went off into the woods?
A. Yes, sir.
Q. Did you hear anything?
A. Yes, sir.
Q. What did you hear?
A. I heard fighting and I could tell there was scuffling up there and then I could hear, "I have had enough," by the man because I knew their voices.
Q. You knew their voices?
A. Yes, sir.
Q. The man said, "I had enough"?
A. Yes, sir.
Q. All right. And what happened? Did there come a time when you went back to the car?
A. Yes, sir. I went back to the car. And soon as I got back to the car I started to get on the driver's side and Glen and Penny, David Penny, were just getting in—in the front seat.
Q. Was anything said at that time?

Roger A. Watson

A. Yeah, Glen said, "We beat the hell out of him."
Q. Did he say anything else?
A. I don't recall. I don't think so.
Q. Then what happened? Strike that—

Mr. Horan: Your Honor—you may inquire, Mr. Swayze.

page 133 } CROSS EXAMINATION

By Sr. Swayze:
Q. Mr. Watson, how old are you?
A. 21.
Q. And where do you live?
A. 11401 Popes Head Road, Fairfax.
Q. Are you employed in some way?
A. Yes, sir. I work for Site Engineering.
Q. Site Engineering?
A. Yes, sir.
Q. On this particular occasion, say the night before this thing happened—
A. Yes, sir.
Q. —what day of the week was it?
A. I don't know.
Q. Was it a Saturday night?
A. It could have been.
Q. You don't remember?
A. I don't remember.
Q. Who did you start the evening off with?
A. Glen, and this was at the party.
Q. Now, whose party was that?
A. Joyce Farmer's.
Q. And where did that take place?
A. Braddock Road.
page 134 } Q. What place on Braddock Road?
A. Just up from the store, Blevins Store, about two blocks from the store.
Q. Now, when you went to that party, what time was it?
A. I don't know for sure. Eight or nine o'clock.
Q. Just you and Glen went to the party together?
A. No, they were at the party. I come to the party by myself.
Q. I see. Who was at the party that you later wound up with?
A. Well, there was Glen, Penny, Joyce Farmer, and a few girls and a couple of other people.
Q. Did you have anything to drink before you went to the party?

Roger A. Watson

A. Yes, sir.
Q. How much had you had to drink before you went to the party?
A. Well, I had been drunk for about three days before that.
Q. Now, when you went to the party, would it be fair to say that you were intoxicated?
A. Yes, sir.
Q. Did you have anything to drink at the party?
A. Yes, sir.
Q. What did you drink there?
page 135 } A. We drank two quarts of wine.
Q. Did you drink two quarts of wine?
A. No, not by myself. Me, Glen, and Penny.
Q. Whose wine was it?
A. I don't know whose wine it was. It was at the party.
Q. How long did you stay at the party?
A. About 30 minutes.
Q. Now, when you left the party where did you go?
A. To get Glen's dad's car.
Q. Just a short distance away from the party?
A. Yes, sir.
Q. Now, who took the car?
A. Glen.
Q. And where did you go in the car?
A. Fairfax Bowl America.
Q. Did you have anything to drink at the bowling place?
A. I'm not sure. I think we had a couple of beers there, though.
Q. Did Glen have anything?
A. I believe so.
Q. Now, where did you go from the bowling alley?
A. To the Drug Fair, Fairfax Circle.
Q. Why did you go to Drug Fair?
A. To get a case of beer.
Q. How much beer did you buy?
page 136 } A. One case.
Q. How many cans in that case?
A. 24.
Q. Were they the regular size beer cans, or large size, or what?
A. Regular 12-ounce.
Q. How many boys were with you at that point?
A. Five.
Q. Will you give their names and their ages as you go along?

Roger A. Watson

A. I'm not sure about the ages. Rudolphus Gadd, 22; Glen Blevins, 19; Belvin Penny, 24; John Monroe, 21; myself, 21.
Q. What did you boys do with the beer?
A. Drank it.
Q. Where did you meet up with Gadd and Penny?
A. At the Bowl America.
Q. And how about John Monroe? Where did he come from?
A. Bowl America.
Q. Were these boys drinking when you met them?
A. Yes, sir.
Q. Were they drunk?
A. They were getting that way.
Q. Now, what did you do with the 24 cans of beer that you bought at Drug Fair?
page 137 } A. Drank it.
Q. Did all of you drink it?
A. All of us.
Q. Where did you go from Drug Fair?
A. Social Circle.
Q. How long were you at Social Circle?
A. About 15 minutes.
Q. That's a dance hall up here near Centerville?
A. Yes, sir.
Q. Now, you say you got in some kind of scrape up there?
A. Yes, sir.
Q. Were you involved in that?
A. No, sir.
Q. Who was involved in that?
A. Glen Blevins and Tom Monroe.
Q. Who?
A. John Monroe's brother Tommy and Glen.
Q. Did they have a fight?
A. No, it was more or less an argument.
Q. And then you left?
A. Then we left.
Q. Did you have anything to drink up there other than the 24 cans of beer?
A. No, sir.
Q. Where did you go from Social Circle?
page 138 } A. Went riding around, I don't know exactly where, just old back roads.
Q. Who was driving?
A. Glen.
Q. What was his condition by that time?
A. Drunk.

Roger A. Watson

Q. How do you know he was?
A. Well, he was running off the road all the time, he couldn't drive.
Q. How many times did he run off of the road?
A. I don't know, a lot.
Q. Did that matter to you?
A. Not a whole lot.
Q. Well, whose idea was it to go to your house?
A. All of us, I guess.
Q. What is it you wanted to get at your house?
A. Ax.
Q. What did you want to pick that up for?
A. We were going to chop a tree down across the street.
Q. So, what did you do when you got the ax?
A. We put it in the car and we decided we better not because we thought we might get in trouble. We put it in the car and kept drinking.
Q. Kept drinking?
A. Yeah.
page 139 } Q. Drinking what? The 24 cans you started out with?
A. Yes.
Q. Why were you going to drop this tree in the road?
A. Beats me. Just for fun I guess.
Q. So, did you have an encounter with a mail box along the way?
A. Not as I recall, no.
Q. Did the car strike a mail box perhaps?
A. Perhaps. Maybe, I don't know. We run in a ditch a few times. I don't know.
Q. Do you remember anything about somebody shooting at you?
A. Not until we—just that one time down at the car when—
Q. Before you got to that place, was there a time when someone shot a gun at you?
A. Not as I recall, no, sir.
Q. Do you remember going anywhere near a place where Mr. Holyfield lives?
A. I don't know where he lives.
Q. Do you know this man?
A. No, sir.
Q. Greer Franklin Holyfield?
A. No, sir.

Roger A. Watson

Q. Were you involved in chopping up any mail
page 140 } boxes with this ax?
A. No, sir.
Q. Did any of the boys in the car chop any mail boxes?
A. I couldn't say. I don't know.
Q. Why is it you wouldn't know?
A. Probably passed out in the back seat.
Q. What was the next thing that you remembered?
A. The man with the gun, I guess.
Q. Now, the car was stopped at that time?
A. Yes, sir.
Q. What were you doing just prior to the time the car stopped?
A. Getting in the front seat.
Q. Well, before the car stopped?
A. Before the car stopped?
Q. Yes.
A. I guess I was just down in the back seat sleeping or passed out.
Q. Well, do you know what the boys did when the car stopped?
A. Got out to urinate.
Q. Well, were you passed out at that time?
A. I was just waking up then. I was getting up because the car was stopped.
Q. Did you hear anybody chopping anything with the ax?
page 141 } No, sir.
Q. The first thing you remember is the man with the gun?
A. Yes, sir.
Q. And were you getting into the front seat?
A. I crawled over the front seat and was underneath the wheel.
Q. When he came up?
A. When he came up.
Q. Is that a two-door or a four-door car?
A. Four door.
Q. Were the windows down?
A. I don't know for sure.
Q. So the man came to where you were sitting and pointed the gun at you?
A. Yes, sir.
Q. Are you sure he pointed it at you?

Roger A. Watson

A. Well, he pointed it at all of us, but he had it on me sometimes, yes, sir.
Q. Pardon me?
A. He was pointing at all of us more or less.
Q. How *as* he holding the gun? Show us.
A. Like so. (Indicating.)
Q. What did he say exactly?
A. "Everybody out of the car and into the lights."
Q. Did this man have a badge on?
page 142 } A. No, sir.
Q. Did he have a uniform on?
A. No, sir.
Q. Did you see any name plates or any patches on his shoulders?
A. No, sir.
Q. Did he identify who he was or what he wanted?
A. No, sir.
Q. What did you do when he told you to get out of the car?
A. Got out of the car.
Q. What about your hands? What did you do with them?
A. My hands?
Q. Yes, sir.
A. I don't know. I—
Q. Did he tell you what to do with your hands?
A. I don't think he did.
Q. You marched around in front of the headlights?
A. Yes, sir.
Q. Where was his car?
A. It was right in back of ours.
Q. Did he have his headlights on?
A. Did he have them on?
Q. Did he have them on?
A. Yes, sir.
page 143 } Q. What happened next?
A. Well, all of us were in the front of the car except for John Monroe. He was falling out the other side, and the man walked around the back of the car, and when he got to the rear bumper there the gun went off.
Q. Do you know why the gun went off or in which direction?
A. No, sir.
Q. Were you looking in that direction when it went off?
A. Yeah, I seen the fire fly from the gun.
Q. Could you tell from the flash which way the gun might have been pointed?

Roger A. Watson

A. It was pretty close to where I was pointed. Down there somewhere.

Q. Where was Monroe when it went off?

A. I didn't see him. I guess he was laying on the ground or still in the back seat, or something.

Q. Did the scuffle start after the gun went off?

A. Yes, sir.

Q. And who went back there to start the scuffle when the man shot the gun?

A. I don't know that. When the gun went off I run on the other way. I had my back to them.

Q. You ran?

A. Yes, sir.

page 144 } Q. And where did you run to?

A. Down to the woods to the right.

Q. How long were you gone?

A. Two or three minutes, four minutes, something like that. Not long.

Q. Could you see around the car from where you were?

A. No, sir.

Q. But you say you heard some sounds down there?

A. Yes, sir.

Q. Fighting?

A. Yes, sir.

Q. Do you know where Rudolphus Gadd was during this period?

A. No, I don't.

Q. What made you decide to come back to the car?

A. Well, I could tell by the voices that they had got the best of him because he said he had had enough. So,—

Q. And you went back to the car?

A. Yes, sir.

Q. Did you get in immediately?

A. Yes, sir.

Q. Now, did you see Blevins here at that time?

A. Yes, sir.

Q. Where was he when you saw him?

A. He was just getting in the car up front.

page 145 } Q. Would you say that he arrived at about the same time you did?

A. Just about, yes, sir.

Q. Was anybody with Blevins?

A. Penny.

Roger A. Watson

Q. All right, Blevins and Penny were coming back at about the same time you were?

A. Yes, sir.

Q. Where did Mr. Blevins get in the car?

A. Up front in the front seat.

Q. And Penny?

A. Up front in the front seat.

Q. And what about Mr. Monroe and Mr. Gadd, where were they?

A. I guess they were still in the back seat somewhere, I don't know.

Q. What do you mean in the back?

A. In the back of the car somewheres. I don't know.

Q. They were not in the car?

A. No, they weren't in the car.

Q. Could you still hear any sounds?

A. Yes, there were sounds.

Q. What?

A. Moaning and the man was hollering, "I have had enough. Stop." Moaning and carrying on and scuffling.

page 146 } Q. Did anybody in the car say anything? That is, to the boys still outdoors?

A. Glen said, "We beat the hell out of him."

Q. Did anybody—did either one of the three of you say anything to the boys who were still outside?

A. Yeah, we hollered at them to come on.

Q. Who did?

A. I don't know, all of us I imagine.

Q. Then you were all hollering, "Come on"?

A. This was after John was in the car.

Q. John Monroe?

A. John Monroe.

Q. Before John Monroe got back in the car, did anybody holler, "Come on"?

A. I don't think so, no, sir.

Q. How long had you been back in the car before Monroe came?

A. I don't know. When I looked in the back seat he was back there.

Q. Where was Rudolphus Gadd?

A. I don't know.

Q. Did you see him outside the car at any time?

A. No, sir.

Q. Did Mr. Gadd—you called him Doc?

A. Yes, sir.

Roger A. Watson

page 147 } Q. Well, did Dock get in the car with you boys?
A. No, sir.
Q. What did Doc do?
A. He got in the man's car and started it up and drove on down the road.
Q. How long was it after you had gotten in the car before you heard this other car start?

Mr. Horan: Your Honor, if we may approach the bench at this point.
The Court: All right.

(Whereupon, counsel approached the bench for a conference out of the hearing of the jury, and the following proceedings were had.)

Mr. Horan: Your Honor, I think Mr. Swayze at this point is going beyond the scope of direct examination. I don't care if he makes him his own witness at this point, but I think he should be limited as to leading questions, as to this new information he is bringing from the witness.
The Court: I can't agree with you, sir. I'm sorry. In the Commonwealth's direct testimony evidence was brought out concerning when Mr. Blevins and another man came back to the car, and I think this is a fair area of cross examination as to when other people came back to the car. Now, if you want, I would agree with you if it goes past the point of this immediate scene and goes on to other places. In page 148 } that case, then Mr. Swayze can make the witness his own. The Commonwealth may then have the right of cross examination on that. As far as the present questions are concerned, at the present I feel they are proper questions of cross examination.
Mr. Horan: All right, Judge.

(Whereupon, the bench conference was ended and the following proceedings were had in the presence of the jury.)

By Mr. Swayze:
Q. Mr. Watson, I asked you previously how long it was from the time that you got back in the car to the time you heard Gadd start Mr. Holyfield's car?
A. Oh, about a minute or so. It wasn't long at all.
Q. During this interval, I want you to describe for the jury whether you heard any sounds of combat back there?

A. Yes, sir.
Q. What did you hear?
A. Like I heard rocks and gravel on the road. I could hear the rocks moving around, and hollering.
Q. Did you hear the sound of any blow?
A. No, I didn't. I didn't notice.
Q. Pardon?
A. I didn't notice. He may have. There was a lot of scuffling going on.

Mr. Swayze: Will the Court indulge me just a moment?

By Mr. Swayze:
page 149 } Q. What became of the man's gun?
A. I don't know.
Q. Where was it when you last saw it?
A. In the man's hands.
Q. And when you returned to the car, did you see the man any more?
A. No, sir.
Q. You got behind the wheel I remember you saying?
A. Yes, sir.
Q. Did you drive the car away?
A. Yes, sir.
Q. And had Mr. Gadd already started the other man's car in motion?
A. No, we moved about ten or fifteen feet and then he come around us in the other car.
Q. And what did you do?
A. Followed him down the road.
Q. How far did you follow him?
A. Approximately a mile.
Q. Then what happened?
A. Well, he wrecked the car and went in the ditch and—
Q. You are speaking of Mr. Gadd?
A. Yes, sir.
Q. All right.
A. We drove on by him a little bit, a hundred
page 150 } yards or so and stopped to pick him up, and he come back and got in the car.
Q. Did you see anything about a fire?
A. No, sir.
Q. Do you know how it happened that Mr. Holyfield's car burned?
A. No, sir, I don't.

Roger A. Watson

Q. Who drove away from that scene?
A. I did.
Q. Now, did you hear Gadd say anything about beating this man?
A. He said he killed him.
Q. When did he say that?
A. When he got in the car.
Q. Did he say how he killed him?
A. He took the gun and beat him to death.
Q. What if anything did Mr. Blevin say about that?
A. Well, didn't none of us believe it. I don't remember him saying anything himself, but none of us believed him.
Q. How far did you boys go in the car?
A. All the way back to Braddock Road.
Q. What did you do when you got to Braddock Road?
A. Ran out of gas.
Q. Then where did you go?
A. Started walking.
page 151 } Q. Who walked?
A. All of us walked down to this colored section. Glen was going to get this colored guy to give us a ride to Seven Corners.
Q. Whose idea was it to go to Seven Corners?
A. I don't know.
Q. Do you know anybody at Seven Corners?
A. My brother.
Q. Is that where you wanted to go?
A. Yes, sir.
Q. What were you going to your brother's place for?
A. Stay all night.
Q. Did you want any money?
A. Money?

Mr. Horan: Your Honor, I am going to object.
Mr. Swayze: I withdraw the question.
The Court: Sustained.

By Mr. Swayze:
Q. Did you go to the colored man's house?

Mr. Horan: I am going to object. That is a leading question.
Mr. Swayze: I don't think that's leading.
The Court: Mr. Swayze, you have made him your witness?
Mr. Sawzye: Yes, sir. That's leading?

Roger A. Watson

page 152 } The Court: Yes, sir.

VOIR DIRE

By Mr. Swayze:
Q. Did you go with Glen to *Gerome* Johnson's house?

Mr. Horan: I object, Your Honor.
The Court: He is going to get to it sooner or later. I will allow it.

By Mr. Swayze:
Q. Did you go to *Gerome* Johnson's house?
A. Yes.
Q. Who went with you?
A. Glen.
Q. Did you hear any conversation in there?
A. There was a lot of talk, but I didn't pay any attention to what it was.
Q. Did you tell Johnson anything about the night?
A. No, sir, I didn't.
Q. Did you hear Blevins tell him anything about the night?

Mr. Horan: Objection, Your Honor. That's leading.
Mr. Swayze: That couldn't possibly be leading.
The Court: I will allow it.

By Mr. Swayze:
Q. Did you hear Blevins tell Johnson anything about the night?
A. No, sir, I didn't.
page 153 } Q. Did you see—who did you see there at Johnson's house?
A. Well, I don't know who they were. There was a bunch, about three or four people sleeping there on the floor or something.
Q. On the floor?
A. Yes, sir.
Q. Did you see anybody that appeared to be intoxicated?

Mr. Horan: I object, Your Honor. Now, that's leading.
The Court: Sustained.
Mr. Swayze: All right. That's all I have.
The Court: Any further questions?
Mr. Horan: One question.

Roger A. Watson

RE-DIRECT EXAMINATION

By Mr. Horan:
Q. What time was it when you were at Tops?
A. I don't have any idea.
Q. Did you see anyone at Tops when you were there?
A. The security man is all that I knew.
Q. You mean the security man at Tops?
A. Yes, sir.
Q. And after that you said you had 15 minutes at the Social Circle?
A. Approximately. I don't know for sure.
Q. And the rest of the time you were just riding around?
page 154 } A. Yes, sir.
Q. And you say that you didn't hear all of the conversation that was going on in Johnson's house?
A. No, sir, I didn't know what it was.

Mr. Horan: No further questions, Your Honor.

RE-CROSS EXAMINATION

By Mr. Swayze:
Q. Mr. Watson, when you were seated in the car, you came back to the car and Penny and Blevins were seated beside you, you testified that you heard some noises?
A. Yes, sir.
Q. And Mr. Gadd was still outside the car?
A. Yes, sir.
Q. At that point did either of the three of you that were in the car say anything to Gadd outside?
A. No, sir.
Q. When was it that you say you hollered for him to come on?
A. This was when the car started.
Q. Which car?
A. Holyfield's.
Q. Prior to that time, had you said anything to him at all one way or the other?
A. No, sir.
Q. Did you see Blevins do anything after you
page 155 } got back in the car in connection with his fist?
A. No, sir.

Mr. Swayze: All right, that is all.
The Court: Any further questions of this witness?
Mr. Horan: No, sir.
The Court: Is he free to go?
Mr. Swayze: Yes, sir.
The Court: All right, you may go.

(Witness excused.)

page 156 } Whereupon,

LEE HUBBARD was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:
Q. Will you tell the jury your name and occupation?
A. Lee Hubbard, Identification Officer for the Fairfax County Police Department.
Q. Now, what are your duties with the Police Department?
A. Photography and general fingerprint work within the Police Department.
Q. Now, were you called out in the early morning hours of September 24th, 1966, to Kincheloe Road?
A. Yes, sir, I was.
Q. And on your arrival at the scene, did you find certain items near a body?
A. Yes, sir, I did.
Q. And do you have some of these items with you here?
A. Yes, I do.
Q. Will you—
A. Should I open them?
Q. Will you open them, please? If you will leave that one like that. Thank you. Now, what are those items?
page 157 } A. These are a telescopic sight from a gun, broken portions of a gun stock, and the trigger assembly and trigger guard and the bridge of a .22 caliber rifle and—
Q. And these items were all—where were they?
A. These items were found on Route 641 adjacent to the deceased person.
Q. Now, I show you Commonwealth's Exhibits 11 and 4 and ask you if you recognize those scenes?

Lee Hubbard

A. Yes, sir. I took these photographs.

Q. Will you indicate to the jury where on that view, Commonwealth's Exhibit No. 11, that you found the stock?

A. The stock was just a few feet east of Route 641, the major portion of the stock, that is, of where the deceased was lying in the road ditch.

Q. Now, the scope.

A. The scope was up in the edge of the woods and the receiver portion was right along in the road ditch.

Q. And the trigger mechanism?

A. I don't actually recall.

Q. You don't recall that?

A. No.

Q. Well, do you have with you the barrel of the gun?

A. Yes, sir, I do.

Q. Do you know where that was found?

A. I did not find it.

page 158 } Q. Do you know where it was found?

A. I received — I took this myself from the Police Department Property Room, and it was placed there by Detective Sanders and myself.

Q. And you didn't—

A. I did not actually find it at the scene, no, sir.

Q. You don't know where it was found at the scene, do you?

A. Sir?

Q. Do you know where it was found at the scene?

A. No, sir, I do not.

Mr. Horan: I would like to introduce the items with the exception of the barrel into evidence at this time, Your Honor.

The Court: Any objection?

Mr. Swayze: No.

The Court: You have got a bag? You can put them all in, put them all back in one bag if you can, and we will mark them as one exhibit, all the parts of the rifle with the exception of the barrel will be received as Commonwealth's Exhibit No. 22.

(Whereupon, Commonwealth's Exhibit 22 was marked for identification and was received in evidence.)

Mr. Horan: Mr. Swayze:

Lee Hubbard

CROSS EXAMINATION

page 159 } By Mr. Swayze:

Q. May I—I hate to ask you to do this, but I would like to see the exhibit there before you tie it up.

Corporal Hubbard, I have the metal parts that have been introduced here. I believe the other is the stock. Would these metal parts be all of the parts to this particular weapon, or are there some missing parts?

A. Well, considering these right here, the barrel and the magazine tube are missing.

Q. The barrel is missing?

A. From that exhibit there, yes, sir.

Q. Do you know where the barrel may be?

A. Yes, sir.

Q. Where is it?

A. Right here.

Q. Good. Now, do I hold in my hand all of the metal parts of the gun?

A. As far as I know, yes, sir.

Q. There are no parts to the gun that are missing?

A. Not as far as I know.

Q. You could put these metal parts back together and make a gun out of them?

A. I think not in the condition they are now.

Q. That was my next question, are they damaged to the point that you could not put the gun back together?

page 160 } A. In my opinion, yes, sir.

Q. Will you show the jury where the metal parts are broken?

A. Yes, sir.

Q. All right, the gun is not loaded, I take it?

A. No, sir.

Q. And there is no way for it to discharge?

A. Yes, sir. Is it all right for me to unwrap this?

Mr. Horan: Ask the Judge.

The Court: Do you wish him to unwrap it?

Mr. Swayze: Yes, unwrap it.

The Court: Go ahead.

Mr. Horan: Do you want to introduce that barrel?

Mr. Swayze: Yes, I would like to introduce it.

The Court: You have no objection?

Mr. Swayze: No.

The Court: The barrel will be received as Commonwealth's No. 23.

(Whereupon, the object referred to above was marked Commonwealth's Exhibit No. 23 for identification and was received in evidence.)

Mr. Swayze: Your Honor, it could be stipulated that the barrel was found in the woods near the scene by the police.

The Witness: This is the receiver portion of the rifle and it is broken just ahead of the loading port on the page 161 } right side. The metal itself is actually broken off, the receiver is broken from the barrel.

By Mr. Swayze:

Q. Where would this part fit?

A. It would fit beneath. It is held together by the stock. The trigger would fit into the receiver mechanism like this.

Q. Is that part broken?

A. It doesn't appear to be broken. It appears to have been pulled loose from the wood.

Q. Is that the trigger?

A. No, sir. The trigger is still in the trigger housing.

Q. What is this piece here?

A. Frankly, I don't know. Yes, I do. I do know. It is the bolt handle. This is the semi-automatic rifle and the *bold* would be in place here, and the piece down here, and this is the activating handle to allow you to manually pull the bolt on here.

Q. Is that broken?

A. It doesn't appear to be.

Q. Is the bolt broken?

A. That's the bolt, and in my opinion it is not broken.

Q. And this is the telescopic sight?

A. Yes, sir.

Q. Where would that go on the rifle?

page 162 } A. This type rifle has a bridge receiver, dovetail groove which accepts this in this manner. (Indicating.) The clamp goes into the dovetail.

Q. Now, what is that? Is that broken?

A. Apparently not. It just pulled loose from the dovetail.

Q. So, essentially the gun is broken in half at the place where the chamber joins the barrel?

Lee Hubbard

A. Yes, sir.
Q. Now, in how many pieces is the stock broken?
A. Three large pieces and there are some smaller ones.
Q. Splinters?
A. Splinters. I'd say in three major portions.
Q. Now, were these parts broken in the fashion that they now appear to be when you first saw them?
A. When we picked them up, yes, sir.
Q. They were scattered around the road?
A. Yes, sir.
Q. How far was the barrel from the magazine when you saw it?
A. I don't know, I didn't find the barrel.
Q. I see. How much would you say that the metal parts weighed all together, approximately?
A. I'd have to guess. I'd say four pounds.
Q. And the whole gun as an assembled weapon, how much?
page 163 } A. Not over six, I would think.
Q. Are there any indications of blood on this weapon?
A. There was at the time we picked them up at the scene, yes, sir.
Q. Will you please indicate to the jury where the indications of blood were?
A. Right on the rear portion in the jagged broken part.
Q. On any other place?
A. Not that I recall. I do recall there was some blood on the wood, but I do not recall where exactly.
Q. All right.

Mr. Swayze: You may examine if you want to. Otherwise, I'll put those back.
Mr. Horan: We can put them back, Mr. Sawyze.

RE-DIRECT EXAMINATION

By Mr. Horan:
Q. One question with reference to it. Was there any hair, human hair that you found on the barrel of the gun?
A. Yes, sir.
Q. And where was that located?
A. It was in the broken rear portion.
Q. I see.

Mr. Horan: I have no further questions.

The Court: I don't remember—where was this page 164 } portion of the gun found?

The Witness: It was found right within a few feet of the deceased.

Mr. Swayze: I have no other questions.

The Court: May this witness be excused?

Mr. Horan: Yes, if Your Honor please.

The Court: You are free to go, sir.

The Witness: Thank you.

(Witness excused.)

Mr. Horan: Your Honor, at this juncture I would move to introduce the mail boxes.

The Court: We already have, sir.

Mr. Horan: And, Your Honor, I think we have tied them in.

The Court: I believe they have already been admitted into evidence, both of the mail boxes and their parts, and the ax were already admitted.

Call your next witness, please.

Mr. Horan: If Your Honor will indulge me for a moment? Mr. Herrman.

The Court: Were you sworn earlier?

Mr. Herrman: Yes, sir, I was.

The Court: Have a seat, please.

Whereupon,

page 165 } PAUL D. HERRMAN was called as a witness on behalf of the Commonwealth and, having previously been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horan:

Q. Tell the jury your name and address.

A. Paul D. Herrman, 7819 Bridgewood Drive, Annandale, Virginia.

Q. What is your occupation, sir?

A. I work for the Sheriff's Department, Fairfax County.

Q. And did you have another job?

Paul D. Herrman

A. I have had, yes, sir.

Q. Did you have another job on the 24th of September, 1966?

A. Yes, sir, I did.

Q. And what was that?

A. Working security part time at Tops Drive In.

Q. Which particular Tops Drive In?

A. Fairfax Circle, sir.

Q. What hours did you work on September the 23rd-24th?

A. From 10:00 p.m. to 2:00 a.m. in the morning.

Q. Did there come a time on the evening of the 23rd that you saw the defendant in the company of others at Tops?

A. I did, yes, sir.

page 166 } Q. What time was this?

A. It was after 11:00 o'clock, I would say. Approximately 11:30, sir.

Q. And who was he with, if you know?

A. He was with several boys, sir, but only one I recall his name, and he was Roger Watson.

Q. He was Roger Watson?

A. Yes, sir.

Q. And how do you recall that he was there?

A. Because he was inebriated, sir, and I had run him off a couple of months prior to this and banned him from coming to Tops because of his actions.

Q. Was he in the building?

A. No, sir, he wasn't.

Q. Was he in a car?

A. Yes, sir.

Q. Do you recall what kind of a car that was?

A. No, sir, I don't.

Q. Do you know who the driver of that car was?

A. No, sir, I don't recall, sir.

Q. Was he driving it?

A. He was standing out. No, sir, I don't believe he was.

Q. There was no one behind the wheel?

A. Not at the time. I really don't recall.

Q. What time of night?

page 167 } A. After 11:30. Eleven o'clock or eleven-thirty.

Mr. Horan: That is all.

Mr. Swayze: No questions.

The Court: May this witness be excused?

Mr. Horan: Yes, Your Honor.

The Court: You are free to go.

(Witness excused.)

Mr. Horan: That would be our evidence, Your Honor.
The Court: All right, sir.
Mr. Swayze: Your Honor, I would have a motion to make without the presence of the jury.
The Court: Gentlemen, have you any idea how long it would take?
Mr. Swayze: Your Honor, I estimate 30 minutes.
The Court: All right, we will recess at this time and take up a legal matter. The jury will please retire to the jury room. Do not discuss the case among yourselves, and the estimate is 30 minutes. If it goes much longer than that, we will you back and recess you for the day.

(Thereupon, the jury retired to the jury room.)

(Conference in Judge's chambers.)

The Court: Let the record show both attorneys are present and the defendant is present in person.
All right, sir.
Mr. Swayze: At this time I would like to move
page 168 } to strike the Commonwealth's evidence on the grounds that, taken at its face value the evidence cannot support the charge made against the defendant in the indictment. I would like to argue that as briefly as I can.
The charge here, of course, is murder. And, under the law in Virginia this is presumed to be a homicide, a murder in the second decree, and thus it is elevated, first, by the Commonwealth's evidence into a premeditated malicious murder, which brings it into the category of murder in the first degree. I think the evidence at this point, Your Honor, viewed in its most favorable light, will not enable the jury, if all the evidence were believed, to find the defendant guilty of any homicide. The evidence is uncontradicted at this point and certainly the testimony of the witnesses that were called by the Commonwealth set the limit beyond which their case cannot rise. They cannot depend upon a conviction for something that may later come in the case. We have to view the case now as it appears on the evidence that we have.
The evidence of the last witness, Roger Watson, and it

wasn't the last witness, but essentially so, constitutes the only eye-witness account of what happened at the scene. Mr. Watson testified in some detail about what happened at the scene. Just to briefly recount that, Your Honor, it appears that the boys had been out by the car, whether it was to chop a mail box or urinate it makes little difference,
page 169 } they had all gotten back in the car and were departing when the deceased appears at the window with a gun in the dark and demands that the boys get out of the car and move around in front of the headlights at gunpoint. Now, at this point one of the men was a little slow in getting out and the deceased went around to the back of the car to see about that, and in the process the gun discharged and Watson said he saw the discharge of the gun. At that point the scuffle started, and I think it is uncontradicted and believable that the defendant engaged in that scuffle with the deceased. Mr. Watson went off in the woods and he didn't see what happened. However, he only gone two or three minutes and he came back to the car at about the same time as the defendant was arriving at the car with Penny.

Now, after that is the significant part of this case. Gadd was out there somewhere and Monroe was out there somewhere with the deceased.

The Court: I thought he said Monroe was in the front seat with him?

Mr. Swayze: No, Monroe appeared in the car later. I don't know when he got in, but he appeared in there later. Only three of them were in the front seat at the beginning, but at some point along the line Monroe got in the back seat of the car, as I remember the testimony. At any rate, Monroe and Gadd were outside the car at the beginning. He could hear sounds, he said, of a scuffle going on back
page 170 } there and moaning and scuffling indicating that a fight was going on. The defendant did nothing whatsoever to aid, abet, or to assist in the commission of the offense that was going on outside the car.

Now, the question is what offense had occurred, if anything, prior to this point. At the most, Your Honor, there is no evidence that this man died of any injury that could have been inflicted prior to that point. Dr. Cooper testified that the deceased died of wounds that were suffered to the top of his head, caused by a blunt instrument. The officer produced the gun. We saw the gun, how it was broken, and the metal parts were broken, and the stock was shattered. There was no question but what this man was clubbed and this man

was clubbed across the head with the gun and this caused his death. There is no evidence whatsoever that the defendant used that gun on the man. The evidence is that he did not.

The Court: Isn't there evidence from the witness, Jerome Johnson, that the defendant came to him and said he took the rifle from him and hit him with it.

Mr. Swayze: No, sir. I wrote that down and asked Johnson specifically what he said because he was not always clear in his speech. Johnson's speech was very grabled and he said this rapidly the first time and so I asked him carefully what did the man say, and I wrote it down. He said a fellow in Clifton came after him with a rifle and took the
page 171 } rifle away from him and hit him. Now, I said, "Is that all he said?" And he said, "Yes, that's all he said." He took the rifle and hit him."

The Court: I didn't hear it quite the same way. In fact, I think the Commonwealth Attorney phrased it to him and said, "And took the rifle and hit him with it." I think the witness said, "Yes, sir." You objected the second or third time that was said, but this was one of the earlier times. My understanding of the witness's first statement was that he took the rifle from him and hit him with it, and I was sitting a little closer to him than you, and I believe I have a clear recollection that when the Commonwealth Attorney at that point rephrased it to him again he said yes.

Mr. Swayze: If you will remember my question of the witness, I asked him that same question and repeated it twice. He took the rifle and hit him.

The Court: That is a question for the jury to decide whether he was correct one time or the other time. He could be correct on both occasions.

Mr. Swayze: Be that as it may, I think that the whole case rests on Johnson's testimony, what the man said.

The Court: That is up to the jury, not up to me as to the credibility of a witness.

Mr. Swayze: What I want to point out is it is perfectly obvious at this point in the case, Your Honor,
page 172 } that this man died because either Monroe or Gadd came out with a rifle and clubbed the man over the head with it. All the evidence shows that Blevins did was to tussle with the man and scuffle with him at the beginning.

The Court: "Beat the hell out of him," according to the Commonwealth's evidence. And accordingly, again, I am just taking the evidence in the best light, in favor of the Com-

monwealth, but the evidence is that the defendant told Watson that he beat the hell out of the deceased. Evidence is that he told Johnson that he hit him with the rifle. There was additional evidence of someone else beating him up, too, and somebody else beating him up subsequent to the time he beat him up. It sounds like that, but there is no eye witness of him being hit on the head subsequent to the defendant returning to the car.

I would like to hear some discussion of the question of whether or not he isn't still responsible for what Gadd and Monroe did when it is all one concerted effort to begin with.

Mr. Swayze: All right, there is a case on this thing. This is *Nelson* versus *Commonwealth,* Your Honor. It is 153 Virginia, Page 909. This is a 1929 case in which a number of colored people are gathering together in a country store and an altercation took place between the deceased and two Nelson brothers. A fight broke out in the store and

page 173 } these two began fighting with the deceased. They went in the fight out of the door and into the darkness outside. A short time later the accused came back in the door and the deceased was dead outside. In that case the Court approved this instruction: "The Court instructs the jury that if the defendant, Wilbur Nelson, struck the deceased, Roger Nelson, with an iron poker while they were in the store and that said blow was not sufficient to cause death, and after Roger Nelson left the store someone else other than the defendant inflicted the wounds which caused the death of Roger Nelson, then the jury cannot find the defendant guilty in this case and the Court instructs the jury that they should find the defendant not guilty."

Apparently in this *Nelson* case, it could not be told how the fight ended. Obviously, when they went out the door the deceased was living and fighting. The deceased was still living and fighting outside the car when the defendant got back in the car and did nothing further from that time on.

The Court: The only evidence is that he was someplace. I don't know whether he was still fighting at that point, or not. There is evidence that the deceased said, "I have had enough, I have had enough." I don't believe there was any evidence as to whether he was flat on his back or what.

Mr. Swayze: He wasn't dead.

The Court: I think that's a fair observation.

Mr. Swayze: Somebody must have killed him.

page 174 } The Court: He could have received a blow prior to that that ended up killing him.

Mr. Swayze: Could have. It could have been that this

defendant in the *Nelson* case received such injuries, but the Court—

The Court: Did the Court of Appeals say it is a matter of law, or did they just approve that instruction?

Mr. Swayze: Approved the instruction.

Well, in fact, they reversed it because the Court didn't give it.

The Court: We are not concerned with jury instructions. We are concerned with whether I can find or have to find as a matter of law that this defendant did nothing that contributed to causing the death of the deceased.

Mr. Swayze: In order to find him guilty you would have to find that he had aided or abetted some way in the commission of the crime which was the killing of the deceased. Now, let's assume for a moment that all Blevins did was tussle with the man and did not inflict a mortal wound on him. The question you are asking now is is he guilty nevertheless having been with the crowd.

The Court: Having been an active participant in the assault.

Mr. Swayze: Participant. Well, the principle in the second decree are those who did not with their own hands
page 175 } commit the act which constitutes the crime, but who were present aiding and abetting in its commission. In the second degree it is whether he encouraged or incited the commission of the crime with words, gestures, looks, or actions or in some manner aided or consented to its commission.

That's what we have to find, and I asked Watson when he went to the stand if the defendant did anything at all after he got back in the car, and he said, he indicated he did not, he just sat there. Now, I think that absolutely indicates that he did not aid, abet, or encourage, or do anything to incite this. He didn't say, "Hit him again;" or, "I'll hold him;" or, "Hit him again."

The Court: Couldn't possibly his silence be consent this thing, participating in it? What if you have three or four men and each one of them takes a turn at slugging him and finally number one just stands back and watches while the other three slug him enough times to kill him? He doesn't say a word about it but just stands there and watches. Isn't he a principal in the second, or possibly in the first?

Mr. Swayze: Yes, because they are all together beating on the man, but there, I think Blevins walked to the automobile. He wasn't standing watching the fight. He was getting out of there, he quit.

The Court: He stopped hitting the man, yes.

Mr. Swayze: He walked away from the scene.

page 176 } That's important.

The Court: I don't know exactly how far away from the scene the body was to the ditch. It's right next to the side of the road and just a few feet from the edge of the road.

Mr. Swayze: He walked away from the scene enough to get into the car, which I think is a sign that he got away from the fight, he was no longer involved in the fight, he got in the car, and neither was Penny and neither was Watson. None of them were involved in the fight.

The Court: I agree that Watson ran off in the woods. It would be a pretty far stretch of the imagination to tie him in with the others being there.

Mr. Swayze: He never did anything.

The Court: He never participated at all.

Mr. Swayze: Except holler, "Come on," to Gadd. "Let's go," and Gadd did not come, he drove off. They hollered when Gadd was administering the death blows with the weapon and there is not one shred of evidence at this point which ties this defendant in with that gun and the blows.

The Court: There is only one bit of evidence so far as to anyone hitting the defendant with the rifle, that is, hitting the deceased, and that is the defendant.

Mr. Swayze: No, Your Honor. There is one other evidence you remember that Gadd's statement was when he got in the car that he killed him with the rifle. Beat him.

page 177 } The Court: I don't think he said with the rifle. He just said, "I killed him."

Mr. Swayze: I thought he also said he hit him over the head with the rifle.

Mr. Horan: I think he said he killed him.

The Court: Do you have any citations you would like to bring to my attention?

Mr. Horan: Just the *Spradlin* case, 195. 195-523, 79 Southeast 2d 443. That is an interesting case, Your Honor. It is *Spradlin* versus *Commonwealth,* but it was conceded that this was, I believe, it started out as a malicious wounding or maiming case and it was conceded that Spradlin was guilty, but the case went to appeal on behalf of the defendants, Richards, and the Defendant, Johnson. Now, the Court in that case says, and I quote: "If there is concert of action with the resulting crime one of the identical, probable consequences then, whether such crime was originally contemplated or not, all who participate in any way in bringing it

about are equally answerable and bound by the act of the other persons connected with the consummation of the resulting crime."

The Court: What did Richards and Johnson do in that case?

Mr. Horan: Your Honor, this was a case, I believe, in which Spradlin came up to a booth in which a person named Hamilton was sitting, and I think he asked the
page 178 } person why he cursed him and a fight ensued and four or five men, I believe, including the defendant, went out in the parking lot and joined in pushing Hamilton and Richards, and there was a fight outside and this fellow Richards was beaten and left in the parking lot of this restaurant, and the person left and that was the case, Your Honor. And on that evidence they held that Johnson—I believe I told you Richards and Johnson—I think Richards was the victim—on that evidence Johnson was convicted and he took all—all he could show was that he took part in the scuffle and the Court held that—

The Court: Let me see it, please.

Mr. Horan: Yes, sir.

The Court: This case, among other things, says if the statute makes an act criminal, it imposes on all persons who are present purposely giving aid or cooperation along with the person criminally responsible, they are equal to that of their own doing. It goes into many, many examples, but apparently in the *Spradlin* case, Spradlin was positively identified as having knocked one of the complainants down and that there were just a lot of fists flying and this other fellow was among the defendants in question, was along with them.

Mr. Horan: Your Honor, if the Court please, I don't feel that at this juncture that Your Honor has to reach that point, because I feel from the evidence—

The Court: I don't have to reach that point at
page 179 } all. I don't have to reach the point of worrying about whether it is principal second or principal first. I think there is sufficient evidence, taking the Commonwealth's case in its best light, to say that the Commonwealth has put on a *prima facie* case. There is evidence that this man died of blows to the head. There is evidence that the defendant told one witness that he beat the hell out of him. There is evidence also that he hit him with a rifle, and it is certainly clear evidence that he was at the scene. There is no question about this, that he was involved in an altercation with the deceased. I have to say at this point that the Commonwealth has carried the burden in proving the case as alleged in the indictment.

Mr. Swayze: I would like to note my exception to the Court's ruling on that point, Your Honor, and state my grounds for it.

The Court: Surely.

Mr. Swayze: I believe that the evidence indicates, at the most, the presence of the defendant at the scene at the time when fatal blows were being administered by another person. He had completely abandoned any assault and he did not share in any criminal intent, murder or homicide or serious harm to the deceased. That is the reason, the rationale behind the case you just read, was that all the parties who were charged were sharing the same intent to do the deceased harm. But, this man had abandoned any intent at all to fight the man, to harm him, or to have anything further to do with him at the time when the fatal blows were being administered. There is no question the man was living and fighting at the time.

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The Court: I don't think there was any evidence that he was fighting at all. There was evidence that he was alive at the time the defendant returned to the car because of identification of Watson of voices of the man saying, "I have had enough." I don't think there is any evidence of the deceased fighting at that point. In fact, at this point there is no evidence of the deceased fighting at all, at any time. To my knowledge or recollection, I don't think there is in evidence that the deceased fought anyone.

Mr. Swayze: He was alive.

The Court: Yes, sir. I agree with you, the evidence does disclose that he was alive at the time the defendant returned to the car.

Mr. Swayze: So, it would be my thought that this man, the defendant here, was doing what he had a lawful right to do, that is, to resist what apparently was an unlawful citizen's arrest, which is another element that I don't think I have had an opportunity to mention yet and I think should be mentioned in this motion.

The Court: Go ahead, sir.

Mr. Swayze: The evidence is that this man worked for the Park Authority. He had authority as a ranger or a caretaker on the park property. Now, this does not constitute him a conservator of the peace as a matter of law, or special policeman of any kind. He had no more authority than any other citizen to effect an arrest.

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Now, the law is that you can arrest for a misdemeanor committed in your presence or a felony committed in your presence. You can also arrest on suspicion of a felony not

committed in your presence as long as you get the right party. Now, none of these things were known to the deceased. He had no authority to make that arrest. He came out into the night and poked the gun in the face of five men in a car on a dark road. He had no authority to make that arrest, and certainly Blevins was within his rights in defending himself against that attempted arrest, and he used only such reasonable force as would be necessary under those circumstances to repel that arrest. Now, I think that he had a right to do this, to repel an unlawful arrest. This man was no policeman, and having done that, he abandoned any further conflict with the man. He never intended any criminal intent of homicide on the man and didn't. I think that ought to be considered by the Court.

The Court: I will consider it, but I think the evidence is nearly conclusive at this point that he disarmed the deceased and that everything after that was excessive. There is no evidence that the deceased did anything after the point when the rifle was taken away from him.

page 182 } Mr Swayze: Well, there is—no.

The Court: And that the force used was only that necessary to prevent what you described as an unlawful arrest. The motion is denied. I believe the Commonwealth has established a *prima facie* case and your exception is noted.

* * * * *

page 225 } Whereupon,

BELVIN LEWIS PENNY was called as a witness for and on behalf of the defendant, and having been previously duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Swayze:

Q. Will you tell the Court your name and address, please?

A. Melvin Lewis Penny, 11519 Warren Lane, Fairfax, Virginia.

Q. What is your age, please, Mr. Penny?

A. 24.

Q. Do you know the defendant here, Glen Blevins?

A. Yes, sir.

Belvin Lewis Penny

Q. How long have you known Mr. Blevins?
A. About 15 years.
Q. You are a particular friend of his, I believe?
A. Yes.
Q. Now, calling your attention to last September, did you have occasion to be with Glen Blevins in his automobile or his father's automobile?
A. Yes, I did.
Q. I believe the date is September 24th, Mr. Penny. Did you go to a party?
A. Yes, sir.
page 226 } Q. Where was this party?
A. Up on Braddock Road in Blevinstown.
Q. And who went to that party with you?
A. Myself and Glen Blevins.
Q. What did you do at the party?
A. Just sat around and drank.
Q. What were you drinking?
A. Wine.
Q. How much wine did you and Mr. Blevins have to drink?
A. Four or five bottles.
Q. Where did you go from the party?
A. We went up and got Glen Blevins' car and went to another party.
Q. Whose car was it?
A. Glen's father's car.
Q. What kind of car was it?
A. A Nash station wagon.
Q. And where did you go after you got the car?
A. Down to Fairfax Circle.
Q. What did you do there?
A. Went to the Foxcroft Apartments to another party that was supposed to be there.
Q. Was there a party at the Foxcroft Apartments?
A. No, when we got there it was already over.
Q. What time was it then, if you remember?
page 227 } A. Close to around eleven, I think.
Q. I'm sorry, I didn't get your answer.
A. Close around eleven o'clock.
Q. Was this at night?
A. Yes, sir.
Q. What did you do after you left the Foxcroft Apartments?
A. Went over to the bowling alley at Fairfax Circle.
Q. What did you do there?

A. We sat around in there and met up with Gadd and Monroe. And we left and went and bought a case of beer.
Q. Did you do any drinking at the bowling alley?
A. I don't think we drank any there.
Q. What did you get at Drug Fair?
A. Bought a case of Budweiser beer.
Q. How many cans?
A. Twenty-four.
Q. Where did you go from there?
A. Went riding around.
Q. Do you recall where you went to from Drug Fair?
A. Not right offhand, no.
Q. Did you see a man named Watson?
A. Yes.
Q. Where did you meet him?
A. At the party at Blevinstown.
Q. What is his first name?
page 228 } A. Roger.
Q. Roger Watson?
A. Yes, sir.

The Court: Can the jury back there hear? Speak up a little louder.

By Mr. Swayze:
Q. Mr. Penny, will you have to talk louder. Who was in the car at this point then?
A. Myself, and Glen Blevins, and Roger Watson, and Doc Gadd, and John Monroe.
Q. What did you do with those 24 cans of beer?
A. Drank them.
Q. Didn't you stop anywhere and pick up something?
A. I think we did. I'm not sure.
Q. What do you think you picked up?
A. I think it was an ax.
Q. What?
A. An ax.
Q. Where did you get that?
A. At Roger Watson's house.
Q. Do you know why you got the ax?
A. No, sir, I don't.
Q. Did you have anything to do with getting the ax?
A. No, sir.

Belvin Lewis Penny

Q. Where did you go after you left Roger Watson's home?

page 229 } A. Riding down the back roads, Fairfax.

Q. Do you know where you may have gone to?

A. Just back roads. I don't know.

Q. Do you recall anything that happened as you went along the road?

A. Yes, we hit a couple of mail boxes with the automobile.

Q. Who was driving the automobile?

A. Glen Blevins.

Q. Where were you in the car?

A. I was sittin' in the front seat in the middle.

Q. Do you know where he was when he ran into these mail boxes?

A. No, sir.

Q. What happened after that?

A. Well, we rode around.

Q. Speak up, please.

A. We rode around and I guess we ran into some more mail boxes.

Q. With the car?

A. Yes.

Q. Then where did you go? Or what happened, what is the next thing you remember?

A. I—that's all I remember.

Q. Pardon?

page 230 } A. The next thing I remember?

Q. Yes.

A. It was being down there on a dirt road with a man down there with a gun telling us to get out of the car.

Q. Can you possibly speak any louder? I am sure the jury is having trouble hearing you.

A. Yes, sir.

Q. Make an effort to talk louder. What happened to the 24 cans of beer?

A. We drank all of them.

Q. Now, you say a man appeared with a gun?

A. Yes, sir, while we were stopped along the road.

Q. Do you recall why you were stopped?

A. Yes, sir.

Q. Will you tell the jury what it was?

A. We were going to the bathroom.

Q. Had you already done that when the man appeared?

A. Yes, sir.

Belvin Lewis Penny

Q. Where were you when he did appear?
A. I was sitting in the car.
Q. Where?
A. In the front seat in the middle.
Q. Who was behind the wheel, if anyone?
A. Roger Watson.
Q. And tell the jury what you recall about this
page 231 } man with the gun.
A. Well, he was standing away from the car there ordering us to get out of the car, pointing the rifle at us.
Q. Pardon me?
A. Pointing the rifle at us.
Q. All right. What happened when he did that?
A. He was ordering us to get out of the car.
Q. And what did you do?
A. I got out of the car and like he said—
Q. Where did you go?
A. To the front of the car.
Q. What did you do when you got to the front of the car?
A. Stood there.
Q. Who went around to the front of the car with you, if anyone?
A. Glen Blevins and Roger Watson and Doc Gadd.
Q. Do you know where Mr. Monroe was?
A. He was still trying to get out of the car.
Q. And will you tell the jury what happened then?
A. Well, when he was slow about getting out of the car the man with the rifle came around behind the car, and when he got around behind the car Monroe was almost out and he got around there and he fired the gun, and Monroe jumped him.
Q. What did you do?
A. I stood there for a minute or a second or
page 232 } two. Me and Glen went to the back to see what was going on.
Q. You say "me and Glen." You mean Glen Blevins?
A. Yes, sir.
Q. All right, what did you do when you got to the back of the car?
A. Well, they were struggling back there and we started struggling along with them.
Q. What were you trying to do?
A. Protect myself, I reckon.

Belvin Lewis Penny

Q. Who had the gun?
A. I don't know who had it then.
Q. How long did you struggle there?
A. Not very long.
Q. What happened?
A. Well, we was back there struggling and the man was—fell to the ground and then I turned around and went back to the car.
Q. Did you hit the man?
A. No, sir. With the—
Q. Pardon?
A. Did I hit him?
Q. Did you hit him?
A. With my *first* or—
Q. Yes.
A. I don't know if I hit him or Glen or Monroe. I swung.

page 233 } Q. Did you hit the man with the gun perhaps?
A. No, sir.
Q. You are sure about that?
A. Positive.
Q. Did you see anybody hit him with a gun?
A. No, sir.
Q. Did you see Glen Blevins hit him with a gun?
A. No, sir.

Mr. Horan: Your Honor, he is leading the witness.
The Court: Sustained.

By Mr. Swayze:
Q. Did you see what happened to the gun?
A. No, sir, I did not.
Q. When you left there did the man have the gun in his hand?
A. I don't recollect.
Q. Now, you said the man went down?
A. Yes.
Q. Where did he fall?
A. On the ground.
Q. Was he bleeding at all?
A. Not to my knowledge.
Q. Did the man say anything?
A. When he went down?
Q. Yes.

page 234 } A. I didn't hear him say anything to anyone.

Q. Could you tell whether he was living or dead?

A. I—yes, sir.

Q. Which was it?

A. He was living.

Q. How do you know?

A. Well, there was still wrestling.

Q. Who was wrestling when you left?

A. Monroe and the man.

Q. To what extent was Mr. Monroe engaged in wrestling with him?

A. On the ground wallowing around together.

Q. Could you tell whether the man was fighting or not?

A. I couldn't tell, sir.

Q. What did you see just before you left?

A. Just back there scuffling around, wallowing around on the ground.

Q. Could you tell who was on top of who?

A. No, sir.

Q. Well, what did you then do, Mr. Penny?

A. I went back to the car and opened the door.

Q. And then what?

A. Well, I was getting ready to get in and Glen Blevins came up there to where I was.

Q. And what did he do?

page 235 } A. He got in the car and I got in and shut the door.

Q. Which seat did you get in?

A. In the front seat.

Q. Where did Mr. Blevins get in?

A. In the front seat.

Q. Then what happened?

A. Roger Watson came out of the woods and got in the car.

Q. All right, Mr. Watson got in the car and then what happened?

A. Then while he was sitting there trying to get it started, Doc Gadd came by the car and came to the car and went on back to the back of the car.

Q. Who was trying to start the car?

A. Roger Watson.

Q. Now, where did Mr. Gadd come from?

A. In front of the automobile.

Q. Did you see where—could you tell where he had been or where he was coming from?
A. Just up the road, just in front of the car.
Q. Did he—how close did he pass to the car?
A. Two or three feet, I reckon.
Q. Did he get in the car?
A. No, sir.
Q. Where did he go?
A. He went to the back of the car.

page 236 } Q. Now, while you were seated in the automobile, did you hear anything outside?
A. Just the scuffling sound, that's all.
Q. Did you hear any voices out there?
A. I think I heard someone say, "I have had enough," or something.
Q. Do you know who said that?
A. No, sir.
Q. Somebody said, "I have had enough"?
A. Yes, sir.
Q. Where was Mr. Monroe at that time?
A. In the meantime he had came and got back into the car.
Q. Now, was Mr. Monroe in the car or out of the car when you heard this voice say, "I have had enough"?
A. I don't remember if it was in the car or out.
Q. Where was Mr. Gadd at that time?
A. He was in the back of the car.
Q. And what did you then hear after you heard the voice say, "I have had enough"?

Mr. Horan: Your Honor—strike that.
The Witness: Just scuffling sounds, that's all.

By Mr. Swayze:
Q. When you heard this scuffling sound, where was Mr. Gadd?

page 237 } A. I guess he was still in the back of the car.
Q. Did you hear anything else in the back of the car? I want you to think carefully and tell the jury anything you may have heard in the back of the car at that point.
A. No, that was about all I heard. Just scuffling sounds.
Q. Did anybody in the car say anything, shout or anything?
A. Shout?

Q. Yes.
A. I don't remember if anybody shouted or not.
Q. Did you say anything to anyone outside the car?

Mr. Horan: Your Honor, I am going to object—I'll withdraw it, Your Honor.
The Witness: No, sir, I did not.

By Mr. Swayze:
Q. Did Glen Blevins say anything to anyone outside the car?

Mr. Horan: Your Honor, he has said he doesn't remember whether or not anything was said. He has already said that. Now he is going down each person and inquiring. I think it is repetitive and I would object on those grounds.
The Court: I will sustain it.

By Mr. Swayze:
Q. All right, what did Mr.—did Mr. Gadd get page 238 } in the car?
A. No, sir.
Q. What happened?
A. He got in the other car, the man's automobile, the other man's car.
Q. What happened then?
A. We started ours and started to pull off and the car behind us shot around us and went on up the road.
Q. And what happened?
A. We went up the road a little ways and backed it off in a ditch and we passed him and stopped. Then we hollered for him to come on and get in the car and he come up and got in the car and we drove off.
Q. Did you see any fire?
A. No, sir.
Q. Now, did you hear Mr. Gadd say anything in the car?

Mr. Horan: Object, Your Honor. Anything Mr. Gadd says is hearsay.
The Court: Sustained.
Mr. Swayze: Hearsay, Your Honor? It certainly was made in the presence of the defendant and all the boys present. I don't see any hearsay to that if Mr. Gadd says anything.

The Court: Was it in the presence of the Commonwealth?

Mr. Swayze: Presence of the Commonwealth?

The Court: I mean a representative of the Commonwealth?

page 239 } Mr. Swayze: The Commonwealth wasn't on the scene when any of these events occurred.

The Court: I will have to rule that that is hearsay, Mr. Swayze, anything Mr. Gadd said after he got down the road.

Mr. Swayze: Your Honor, I will have to take exception to that ruling.

The Court: All right.

Mr. Swayze: May we approach the bench, Your Honor?

The Court: Sure.

(Whereupon, counsel approached the bench for a conference out of the hearing of the jury.)

Mr. Swayze: Your Honor, at this time I would like to make a proffer of testimony, that had he been permitted to answer, that this witness would say that Mr. Gadd said he killed the man with the gun. We would offer this testimony as part of it, just that it was a statement made immediately after the event, only a few minutes elapsed.

The Court: I don't think we have established how long it was.

Mr. Swayze: The proffer would be the man, Gadd, stated to the other boys that he killed a man with the gun.

The Court: How long after the alleged killing took place?

Mr. Swayze: They drove the man's car a mile or a mile and a half.

page 240 } The Court: I remember during the Commonwealth's testimony that when this was offered there was no objection to it. Does the Commonwealth have objection at this point? It is already in evidence at this point.

Mr. Horan: Your Honor, I think under the circumstances, but I certainly don't want to end up in Blevinstown with what he said.

The Court: I will make an exception because it is already in evidence anyway.

Mr. Horan: Yes, sir.

Mr. Swayze: Thank you, Judge.

(Whereupon, the bench conference was ended and the following testimony was given in the presence of the jury.)

Belvin Lewis Penny

By Mr. Swayze:

Q. Mr. Penny, when Mr. Gadd got in the car, did you hear him say anything?

A. Pardon?

Q. When Mr. Gadd got into the car with you boys, did you hear him say anything?

A. Yes, I did.

Q. What did he say?

A. He said that he killed the man.

Q. Did he say anything else?

A. No, that's all.

Q. All right. Where did you go from there?

page 241 } A. We went back over to the town of Clifton and back over to Braddock Road.

Q. Back where?

A. To Braddock Road.

Q. What happened then?

A. We got on Braddock Road up next to Shirley Gate Road and ran out of gas.

Q. Did you do anything about that?

A. Did I do anything about it?

Q. Yes.

A. No, sir.

Q. Did you get out of the car?

A. Yes, I got out of the car.

Q. Where did you go?

A. I walked back down the road to Lincoln Park.

Q. Do you know where you went in Lincoln Park?

A. I went down the road that goes to Lincoln Park and turned around and went back to the car.

Q. Did you go in anyone's house?

A. No, sir.

Q. What did you do when you got back to the car?

A. I laid down and went to sleep.

Q. What time was it when you woke up, if you know?

A. I don't know what time it was.

Q. Was it light or dark?

page 242 } A. It was light.

Q. Where was Glen Blevins?

A. Glen Blevins and his father were pulling in behind us with some gas.

Mr. Swayze: I believe that is all, Your Honor.

Belvin Lewis Penny

CROSS EXAMINATION

By Mr. Horan:

Q. When you got back in the car, Mr. Penny, did you have any blood on you?

A. Just on my hands.

Q. Just on your hands?

A. Yes, sir.

Q. Now, when you got back in the car and were still at the scene, did he say anything?

A. Not to my knowledge.

Q. You didn't hear him say anything?

A. Not at the scene. Not at the scene.

Q. Did Monroe say anything when Gadd got in the car?

A. Yes.

Q. What was that?

A. He said that he tore the man's eyeballs out.

Q. What did he say, exactly, if you recall?

A. He saiw, "I just tore the man's eyeballs out."

The Court: Repeat the answer. The jury didn't hear you.

page 243 } The Witness: He said, "I tore the man's eyeballs out."

By Mr. Horan:

Q. This is Monroe that said that?

A. Yes, sir.

Q. And you don't know when exactly Monroe got in the car?

A. No, sir, I don't.

Q. Will you tell the jury about the ride from when you got the beer and when you got the ax and went on a ride? How many mail boxes do you remember being run over or chopped with that ax?

A. I don't know how many—I don't remember how many it was.

Q. Was it ten, or twenty?

A. I couldn't say for sure.

Q. Was it more than ten?

A. I don't think so.

Q. Who was driving the car during that ride?

A. Glen Blevins.

Q. And who was driving the car when you parked on the dirt road?

A. It was Glen or Roger Watson, one of the two.

Q. Now, do you recall Roger when you were stopped on that dirt road climbing over the seat from the

page 244 } back to the front?

A. No, sir.

Q. Now, you said that when you were stopped there you were in the front seat and Roger was at the steering wheel?

A. I think it was at the steering wheel.

Q. Where was Glen?

A. In the back, I think, or the front, or—

Q. Now, what is the last thing you remember before you were stopped on that road?

A. The last thing?

Q. Yes, before that?

A. It was riding down the road.

Q. Where?

A. The road going towards Bull Run Marina.

Q. Do you know the name of the road?

A. No, I don't know the name of the road.

Q. And do you recall returning to Kincheloe Road?

A. No, sir, I don't recall.

Q. You don't remember that? When was the last time you stopped before you stopped here?

A. I think it was a big sign leading to a subdivision somewhere.

Q. Big sign?

A. Yes, with a subdivision name on it.

Q. What occurred there?

page 245 } A. I think the sign was chopped or something.

Q. With the ax?

A. Yes.

Q. Do you recall talking to Detective Sanders on the Monday after this happened?

A. Yes, I do.

Q. You do?

A. Yes.

Q. Over at the Town and Country Motel?

A. (No response.)

Q. Do you remember being there with Junior Blevins?

A. Yes.

Q. You do? Do you remember telling him that as you were leaving that fight scene, walking up towards the car, that Doc Gadd passed you and went down to where the other people were?

A. When I was walking back to the car?

Belvin Lewis Penny

Q. Yes, sir.
A. No, sir, I don't remember telling him that.
Q. Could you have told him that?
A. I probably could have, but I don't remember.
Q. You just don't remember telling him?
A. No.
Q. Now, you say that the man was on the ground?
A. Yes.
page 246 } Q. And somebody was on top of him?
A. Yes, or he was on top of somebody.
Q. Right. You don't know who that was?
A. No.
Q. Could it have been two people on top of him?
A. Could have been.
Q. Could have been? And you say you never saw the rifle after you went down there?
A. That's right.
Q. You don't know who had the rifle, do you?
A. No, sir.
Q. Did you testify that you don't know who was struck when you swung a blow?
A. Yes, sir.
Q. You don't know whether you hit the man or Monroe or Blevins, do you?
A. That's right.
Q. Now, do you recall telling Detective Sanders that you went to swing a blow and the man dropped like a sack of wheat, or words to that effect?
A. No, sir.
Q. Well, did you see the man when he fell to the ground?
A. Yes, sir, I seen him when he went to the ground.
Q. How did he fall?
A. I don't know how he fell.
page 247 } Q. Did he drop fast, suddenly?
A. No, he looked like he was rolled, pushed or rolled. Pushed down.
Q. You don't know who was doing the pushing?
A. No, sir.
Q. Now, you told Mr. Swazey that you went back there to protect yourself?
A. Yes.
Q. What did Watson do when you were all standing in front of the car?
A. What did he do?

Q. Right, when Monroe jumped this man?
A. He ran into the woods.
Q. What did Gadd do?
A. I think he ran up the road.
Q. Did you ever stop to see if this man required medical attention?
A. No, sir.
Q. Did you ever think to call and say there was an injured man on the road?
A. No, sir.

Mr. Horan: I think that is all I have, Your Honor.
The Court: Any further questions?

RE-DIRECT EXAMINATION

By Mr. Swayze:
page 248 } Q. Mr. Penny, when you were back of the car involved in the scuffle with Mr. Holyfield, did anyone in your presence touch this man's eyes?
A. No, sir. Not that I could see.
Q. Well, could you see the man's face?
A. No, sir.
Q. Well, do you know then that this didn't happen while you were there?
A. I—no, sir.
Q. What was the man's condition, if you know, when you left the scene; that is, when you walked away from it?
A. Still full of fighting.
Q. Why was it that you walked away from the scene, the fight?
A. The man was down and I didn't see no use to stay back there.
Q. What were you intending to do then?
A. Leave.
Q. All right.

Mr. Horan: Nothing further.
The Court: Is this witness free to go? He is not in custody, is he?
Mr. Horan: No, sir.
The Court: You are free to go.

(Witness excused.)

page 249 } The Court: Has Mr. Whisenhunt been located?
The Bailiff: Yes, sir, the Deputy has gone out.
Mr. *Swazey*: I would like to call John Monroe.

Whereupon,

JOHN MADISON MONROE was called as a witness by and on behalf of the Defendant, and having been previously duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Swayze:
Q. Will you tell the jury your name and age, please?
A. John Madison Monroe, 21.
Q. We couldn't hear your name.

The Court: Speak up real loud so that the last juror can hear you.
The Witness: John Madison Monroe, 21.

By Mr. Swayze:
Q. Mr. Monroe, did you, on September 24th, 1966, harm the eyes of Mr. Greer Franklin Holyfield?
A. I refuse to answer on the grounds that it may tend to incriminate me.
Q. All right, one other question. Do you know who killed Greer Franklin Holyfield?
A. I refuse to answer on the grounds it may tend to incriminate me.

page 250 } Mr. Swayze: That is all the questions I have.
The Court: Do you have any questions?
Mr. Horan: No questions.

(Witness excused.)

Mr. Swayze: I would like to call Mr. Gadd.

Whereupon,

RUDOLPHUS GADD was called as a witness by and on behalf of the Defendant, and having been previously duly sworn was examined and testified as follows:

Glen D. Blevins

DIRECT EXAMINATION

By Mr. *Swazey*:
Q. Now, will you tell the jury your name and age?
A. Rudolphus Gadd. I am 22.

The Court: You will have to speak up, please, so that the last juror can hear you.
The Witness: I am Rudolphus Gadd and I am 22.

By Mr. *Swazey*:
Q. Rudolphus Gadd, I ask you whether or not on September 24th, 1966, that you took this gun and struck Greer Franklin Holyfield on the head with it and killed him?
A. Sir, I refuse to answer any questions on the basis of it might intend to incriminate myself.
Q. All right.

Mr. Swayze: No other questions, Your Honor.

page 251 } CROSS EXAMINATION

By Mr. Horan:
Q. Did Glen Blevin hit Greer Franklin Holyfield with that gun?
A. I don't wish to answer any questions, sir.

Mr. Horan: No further questions.
The Court: You are excused.

(Witness excused.)

The Court: Bring the next witness.
Mr. Swayze: I would like to call the Defendant.
The Court: I don't believe he has been sworn, Mr. Swayze.

(Whereupon, the Defendant was duly sworn, by the Clerk of the Court.)

Whereupon,

GLEN D. BLEVINS was called as a witness for and on his own behalf, and having been previously duly sworn was examined and testified as follows:

Glen D. Blevins

DIRECT EXAMINATION

By Mr. Swayze:
Q. Will you tell the jury your name and age?
A. Glen Daniel Blevins, 19.
Q. Where do you live?
A. 1245 Braddock Road.
Q. How much education have you had, Mr. Blevins?
A. Tenth grade.
page 252 } Q. Where did you get that education?
A. Woodson High School.
Q. Are you working at the present time?
A. Yes, sir.
Q. What do you do for a living?
A. Installation work.
Q. And with whom do you live?
A. My father and mother.
Q. What is his name?
A. Albert Edward Blevins.
Q. What does your father do?
A. He's a carpenter.
Q. Does he have any other occupation?
A. He's a reverend.
Q. Pardon?
A. A reverend, minister.
Q. Mr. Blevins, calling your attention now to the 24th day of September, 1966, will you tell us when it was you first met up with any of the boys involved in this matter?
A. I met Belvin Penny at about eight o'clock that evening.
Q. Where did you meet Mr. Penny?
A. At Blevins Store.
Q. Where did you and Mr. Penny go, if anywhere?
A. Me and Sonny Penny and Wayne Jannel went to Fairfax and got some wine.
page 253 } Q. Who is the third man that you mentioned?
A. Wayne Jannel.

The Court: Excuse me, gentlemen. You are going to have to speak up a little louder so that the jury can hear you.
Mr. Swayze: You will have to make a real effort now to talk loud enough so that everyone can hear everything you say.

By Mr. Swayze:
Q. Who was it that went with you to the party?

Glen D. Blevins

A. Sonny Penny and Wayne Jannel.
Q. Wayne Jannel?
A. Wayne Jannel.
Q. And where did you go? Where was this?
A. On Ruby Drive off of Braddock Road.
Q. Whose party was it?
A. Joyce Farmer's.
Q. What did you do at the party?
A. Drank and danced.
Q. Pardon?
A. Drank and danced.
Q. What did you drink?
A. Wine.
Q. How much wine did you drink?
A. Two bottles before we got there and three while we was there.

page 254 } Q. What time did you leave the party?
A. Ten o'clock, I guess.

Q. What did you do then?
A. Went and got my father's car.
Q. Who is "we"?
A. Me, Sonny Penny, and Roger Watson.
Q. Where did you go in the car?
A. Went to supposed to be a party down at the Foxcroft Apartments.
Q. Who drove the car?
A. I did.
Q. Was there a party at the apartments?
A. No, sir.
Q. What did you then do?
A. Went to the bowling alley.
Q. Where?
A. Fairfax Circle.
Q. What did you do at the bowling alley at Fairfax Circle?
A. Drank a few beers, too.
Q. How long were you there?
A. Twenty minutes.
Q. Where did you go from Fairfax Circle?
A. To Tops Drive In.

page 255 } Q. What did you do there?
A. Got run off for standing outside the car.
Q. Who ran you off?

A. The security man there.
Q. Did that gentleman testify here yesterday?
A. Yes, sir.

Glen D. Blevins

Q. Where did you go from there?
A. Social Circle.
Q. What is Social Circle?
A. It's a dance.
Q. And what did you do there?
A. We stayed there and I got in an argument with John's brother about me taking him off.
Q. Will you say that again? I am sure the jury didn't understand it.
A. I got in an argument with his brother because I took John off with me.
Q. When you say "John", John who?
A. Monroe.
Q. Was there a fight?
A. No, sir.
Q. Did you have anything else to drink?
A. Yes, a beer.
Q. Where did you get the beer?
A. At the Drug Fair at Fairfax Circle.
Q. How many beers did you get?
page 256 } A. Twenty-four cans.
Q. Now, when you left Social Circle, where did you go in the car?
A. Rode around.
Q. Did you wind up anywhere?
A. Yes, over on Popes Head Road.
Q. And why did you go to Popes Head Road?
A. Just riding around.
Q. And where did you go on Popes Head Road?
A. Roger Watson's house.
Q. Did you do anything at Roger Watson's house?
A. Got an ax.
Q. Who got the ax?
A. Roger.
Q. What is the reason for getting the ax?
A. Somebody thought of chopping down a tree across the road. We decided we might get in trouble so we didn't do that.
Q. But you nevertheless took the ax?
A. Yes, sir.
Q. Now, where did you go from Roger Watson's house, and what time was it?
A. It was approximately a quarter of twelve, I guess.
Q. Where did you go?

Glen D. Blevins

A. Went down towards Davis's store.

Q. Where is Davis's store?

page 257 } A. Off 123.

Q. Can you give the jury any better idea of where Davis's store is than that?

A. Four miles from Clifton. Best I can do.

Q. What did you do when you got there?

A. Stopped *a* chopped a few mail boxes.

Q. Who did?

A. I don't know who chopped them, but Doc and Penny got out.

Q. Who got out?

A. Doc and Penny.

The Court: I don't think the jurors heard that last answer.

By Mr. Swayze:

Q. If I understand you correctly, you say that you made a few stops and chopped a few mail boxes?

A. Yes, sir.

Q. Now, who did this?

A. It was either Doc or Penny. I don't know.

Q. When you say "Doc", who do you mean?

A. Rudolphus Gadd.

Q. Why do you say it was those two men?

A. Because they got out of the car.

Q. But, did you see them chop any mail box?

A. No, sir.

page 258 } Q. How do you know they chopped a mail box?

A. I don't.

Q. Did you have any trouble driving the car?

A. Yes.

Q. What happened?

A. Went off the road.

Q. Was this some defect in the car or in you?

A. Me.

Q. Did you strike anything when you went off the road?

A. Mail boxes.

Q. What else did you do when you drove along the road?

A. Drove.

Q. Did you do anything else?

A. No, sir.

Q. Do you know where the park is down near Bull Run?

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A. Yes.
Q. Did you go near there?
A. Went by there.
Q. Did you make any stops in that area?
A. Not as I remember.
Q. What is the next thing that happened?
A. We stopped on the side of the road to urinate. I remember that and then—
Q. Where were you when you did that?
A. On Kincheloe Road.
page 259 } Q. Now, did you get out of the car?
A. Yes, for a time.
Q. Did everyone get out of the car?
A. Yes, sir.
Q. Did you see anybody chop a mail box in that area?
A. No, sir.
Q. What did you do then?
A. Got back in the car, got ready to leave.
Q. Did you get behind the wheel?
A. No, sir.
Q. What happened?
A. I got behind the driver's seat.
Q. And what happened?
A. A guy—I seen some lights coming and Roger couldn't find the gears of the car and I tried to put it in gear for him, but the guy come up behind us and got out with a gun.
Q. What seat did you get into when you got into the car?
A. Rear seat behind the driver.
Q. And who got behind the wheel?
A. Roger Watson.
Q. What kind of a car—what kind of transmission did this car have?
A. Automatic, push button.
Q. Now, did Mr. Watson get the car started?
A. No, he didn't.
page 260 } Q. Did he attempt to start the car?
A. Yes.
Q. What was it that you did?
A. You had to push the neutral to start it and he couldn't find the neutral button. He couldn't find the neutral button.
Q. Did you touch the neutral button?
A. No, I didn't make it that far.
Q. What happened?
A. When I leaned over the seat to push the button I seen the car come behind us so I sit back down.

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Q. Can you talk a little slower, please? What did you see?
A. I seen cars coming up from behind so I sit back down. I was leaning up over the seat trying to find the button.
Q. Now, how do you know it was a car?
A. Headlights.
Q. Did this car go by you or did it stop?
A. It stopped behind us.
Q. What happened then?
A. A man got out with a gun.
Q. What kind of a gun?
A. It was a rifle.
Q. What did he do?
A. Stuck it up to the window.
page 261 } Q. Which window?
A. He pointed it at the center post really, told us all to get out.
Q. What did you do?
A. I got out.
Q. Did he tell you where to go?
A. Yes, sir, he said, "Get in front of the lights."
Q. And what did you do?
A. I got in front of the lights.
Q. Who else got out and got in front of the lights?
A. Sonny Penny, Roger Watson, and Doc Gadd.
Q. Now, what did Mr. Monroe do?
A. He must have stumbled out the back door, I guess.
Q. Why?
A. I don't know. Apparently drinking heavily.
Q. And what happened then?
A. The gun went off.
Q. Did you see it go off?
A. No, sir.
Q. Did you hear it?
A. Yes, sir.
Q. What did you then do?
A. Turned around.
Q. What did you see?
A. Sir?
page 262 } Q. What did you see?
A. Scuffling in the back of the car.
Q. Who was scuffling?
A. John and the man apparently.
Q. Now, you mean John Monroe?
A. Yes, sir.

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Q. And who else?
A. Mr. Holyfield.
Q. What did you do?
A. Went around to the back.
Q. Did anybody go with you?
A. Mr. Penny.
Q. And what did you and Mr. Penny then do?
A. Tried to disarm the man.
Q. How did you try to go about it?
A. I grabbed the gun.
Q. All right. Tell the jury exactly what happened then.
A. I grabbed the gun and there was scuffling, all three of us was trying to get the gun. I don't know if they was trying to fight him or not.
Q. Talk slower, please.
A. I finally got the gun and Penny and Monroe were still fighting the man and I threw the gun down and went back because the man was trying to fight back to get the gun again, so I scuffled with the man and he fell down and
page 263 } got a bloody nose somewhere. I don't know who give it to him.
Q. Now, you say you went back to where the other two were fighting?
A. Yes. It was right beside me.
Q. Did you touch the man?
A. I don't know, I might have.
Q. What makes you think you might have?
A. We were scuffling.
Q. Was he bleeding in any way?
A. Yes, from the nose.
Q. Do you know how he got that bloody nose?
A. No, sir.
Q. Did you hit him in the nose?

Mr. Horan: I object, Your Honor. The witness is capable of telling his own story. I don't think Counsel has to lead him.
The Court: I think it is leading. Sustained.
Mr. Swayze: Your Honor, I just—well—

By Mr. Swayze:
Q. Did I understand you to say that you don't remember hitting this man? Didn't you say that a little while ago?
A. No, sir.

Q. "No, sir," what?
A. I don't remember hitting him.
Q. Well, did you knock him down?

page 264 } Mr. Horan: Objection, Your Honor.
The Witness: I might have.
Mr. Horan: Objection, he is leading the witness again.
The Court: Sustained.

By Mr. Swayze:
Q. All right, when you went back to the—after taking the gun away from the man, tell us once again what you did.
A. Took the gun away from the man, threw it down, and went back to fight the man because he was trying to fight back to get to the gun, apparently.
Q. Then what happened?
A. Then somehow he got a bloody nose and we were scuffling with him for a minute or two and somebody got knocked down.
Q. Where did he fall when he went down?
A. On the ground.
Q. Now, was anybody scuffling with him on the ground?
A. John Monroe.
Q. All right, what did you then do?
A. Me and Penny left.
Q. Where did you go?
A. Went back to the car and sat down.
Q. Did you see any one of the other boys at the time?
A. Roger was just getting in the front seat.
Q. Roger Watson?
page 265 } A. Yes, sir.
Q. Where did he come from?
A. Around the front of the car.
Q. All right, what did you three boys then do, if anything?
A. Sit in the car.
Q. At that point, did you hear anything?
A. Scuffling.
Q. Where was the scuffling taking place?
A. On the driver's side in the back of the car.
Q. Who was out there?
A. John.
Q. John Monroe?
A. Yes, sir.
Q. Anyone else?

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A. No, sir.
Q. Where was Mr. Holyfield, if you know?
A. Out there somewhere.
Q. Well then, the two of them were out there?
A. Yes, sir.
Q. All right, did you see Rudolphus Gadd?
A. Later on, 30 seconds maybe, a minute or something.
Q. Where was Mr. Gadd when you first saw him?
A. Coming out of the woods.
Q. Tell the jury what Mr. Gadd did.
page 266 } A. He walked down beside the car and went back there and then John came inside and the sounds became more intense.
Q. What was that now?
A. The scuffling was more intense.
Q. Did you hear any other sounds besides scuffling?
A. The guy was saying, "Let me up, I've had enough."
Q. Who was saying that?
A. Mr. Holyfield just before—
Q. Just before what?
A. Dock got back there.
Q. All right. Now, when Mr. Gadd walked back there, will you tell the jury what you heard?
A. Well, John come and got in the car and I heard a blow and the guy groan.
Q. Say that again, please, so the jury can understand you.

The Court: At any time the jurors do not hear an answer, especially from the Defendant, raise your hand and we will have the answer repeated.

By Mr. Swayze:
Q. Yes, will you repeat your answer?
A. I heard a heavy blow and I heard the man groan.

The Court: He said he heard a heavy blow and then he heard the man groan.

By Mr. Swayze:
page 267 } Q. Did you hear anything else after that?
A. A few more blows.
Q. Can you describe the sound that you heard?
A. Something hitting.
Q. Did you hear anything else after that?

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A. No, sir.
Q. Did anyone in the car say anything?
A. Me and Roger hollered for Doc to come on.
Q. When did you holler for Doc to come on?
A. After we heard the blows.
Q. Did he come?
A. No, he jumped into the guy's car.
Q. What did he then do?
A. Passed us.
Q. What did—who was driving your car?
A. My car?
Q. Yes.
A. Roger Watson.
Q. All right. Did you get your car going?
A. Yes, finally.
Q. And what happened?
A. We followed him.
Q. Where did you go?
A. Down the road.
Q. How far?
page 268 } A. Three quarters of a mile maybe.
Q. Will you tell the jury what happened?
A. Well, we seen the car door open and Doc—
Q. Say that again.
A. I seen the car door open and we passed Doc a little bit down the road, about 50 feet, and seen the lights come on inside of the car and Doc came on.
Q. Where did Gadd stop the car?
A. In the ditch.
Q. Was it on the road or off the road?
A. Partly in and partly off.
Q. And what—where did you stop your car, or where did Mr. Watson stop your car?
A. Fifty feet below it. A hundred maybe.
Q. Below, you mean on past him?
A. On past him.
Q. Did you see any fire?
A. No, sir.
Q. Now, Mr. Blevins, calling your attention to the period between the point where you left the scene where the fight took place and where you stopped your car again, can you tell the jury whether there was any conversation in the automobile between any of the boys?
A. After we left which scene?
Q. After you left the fight.

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page 269 } A. Between—before Doc got in the car or after?

Q. This is before Mr. Gadd got into the car.

A. No, sir.

Q. Nobody said anything?

A. No, as I remember.

Q. All right. When Mr. Gadd in the car what happened?

A. He got in the front seat and said he killed him.

Q. Nothing else?

A. No.

Q. Did anybody in the car say anything?

A. Not as I remember.

Q. Did you say anything?

A. No, sir.

Q. Did Mr. Monroe say anything?

A. I don't remember.

Q. Where did you boys go then?

A. Over to Braddock Road.

Q. Where?

A. Braddock Road.

Q. What happened there?

A. Ran out of gas.

Q. What did you then do, Mr. Blevins?

A. I knew some people who lived down the road there, so I decided to go and get some gas.

Q. Who did you know?

page 270 } A. Mr. Jerome.

Q. Mr. Who?

A. Mr. Jerome Johnson.

Q. Now, is he the colored gentleman that testified here?

A. Yes, sir.

Q. What time of the morning was it then?

A. Three o'clock, I guess.

Q. Who went with you?

A. Me and Roger Watson.

Q. Tell the jury what you observed when you went up to this house.

A. Well, I woke him up. There was people laying there on the floor, then he got up. The boys came to the door first and he got up and I asked him for a gas can and hose, which he didn't have, so Roger said to get some money to get some money to get us down to get some gas. So I went down there and treid to get him to take us somewhere.

Q. What did he say?

A. He said he didn't have a car.

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Q. And what did you do?
A. We sit around there and I waited. He had some boy supposed to come in and nobody came in. I talked to one boy but he was too drunk to drive.
Q. So then what happened?
A. We left the scene.
page 271 } Q. Where did you go?
A. Went over to Blevins's store, walked over to the phone booth.
Q. What did you do in the phone booth?
A. Called Roger's mother.
Q. While you were there, did you see Officer Blamer?
A. Yes, sir.
Q. Will you tell the jury what Officer Blamer did when he appeared?
A. Came up, stopped, shined his spotlight on me and asked me where did I get the blood on me at.
Q. Asked you what?
A. Asked me where I got the blood on me at.
Q. What did you tell Officer Blamer?
A. I told him I had been in a fight.
Q. Did you tell him anything else?
A. That's all.
Q. Did he ask you where the fight took place?
A. Yes, sir.
Q. What did you tell him?
A. Ruby Drive.
Q. Was that true?
A. No, sir.
Q. Why didn't you tell him the truth?
A. Scared.
page 272 } Q. And what did Mr. Blamer ask you to do?
A. Asked me to go with him.
Q. Where?
A. To a motor scene on Kincheloe Road.
Q. What did you tell him?
A. "I'd be glad to."
Q. Did you tell him you didn't have anything to hide?
A. I don't remember.
Q. All right. Did you go down to the scene?
A. Yes.
Q. Did you see anything down there?
A. No.
Q. Did you talk to Detective Sanders down there?
A. Yes, sir.

Q. Was any request made of you by either of the policemen?

Mr. Horan: I object, Your Honor. Again, he is leading this witness. He can ask him what happened and let the boy tell the jury as he sees it.

Mr. Swayze: Certainly I think I can ask the man a simple question like, "Was there a request made of you?" I don't think that is putting words in this man's mouth at all.

The Court: I will allow this question.

Mr. Horan: The four previous questions were leading and I didn't object. I think he can ask him what happened at the scene now.

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The Court: It is in the Court's discretion to allow some leading and not allow some leading. Restrain yourself, please.

Mr. Swayze: Yes, sir.

By Mr. Swayze:

Q. Did the policeman ask you to do anything?

A. Sir?

Q. Did the policemen make any request of you?

A. Yes.

Q. Tell us about that.

A. He told me my rights and he told me if—I told him I had been in a fight again.

Q. Did he ask you about your clothing?

A. Yes.

Q. What did he ask you?

A. "Where did you get the blood on you at?"

Q. Pardon?

A. Where did I get the blood on me at.

Q. Well, was anything—do you recall anything else the policeman may have asked you?

A. No, sir.

Q. Nothing else?

A. No.

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Q. Where did you go from there?

A. To my house.

Q. What for?

A. To take my clothes off.

Q. Why in the world would you want to take your clothes off?

A. They asked me to.

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Q. Oh, which policeman asked you to take your clothes off?
A. Blamer.
Q. Where was he when he asked you that?
A. At my house.
Q. Did you agree to do that?
A. Yes, sir.
Q. Did you give him your clothes?
A. Yes, sir.
Q. Now, the clothes that have been displayed here in evidence, are those your clothes?
A. Yes, sir.
Q. Now, whose blood is on those clothes?
A. Mr. Holyfield's.
Q. What did you do after Sergeant Blamer left?
A. Went to bed.
Q. And what time did you wake up?
A. Seven-thirty or eight o'clock.
Q. What did you then do?
page 275 } A. Went and got some gas for the car.
Q. Did you see your father?
A. Yes, sir. He took me to get the gas.
Q. Pardon?
A. He took me to get the gas.
Q. Did you tell your father what happened?
A. No, sir.
Q. Did you tell anyone?
A. No, sir.
Q. All right, when you went back to the car, what did you find?
A. Penny and Doc still in the car.
Q. What were they doing?
A. Sleeping.
Q. What did you then do?
A. Put the gas in the car.
Q. And then?
A. Started the car up.
Q. Where did you go?
A. Went to Roger's house.
Q. Why did you go there?
A. Wanted to see Roger.
Q. Did you see him?
A. Yes, sir.
Q. What did you then do?

page 276 } A. He got in the car and we went down to John's house.

Q. Who? To Monroe's house?

A. Yes, sir.

Q. Did you see him?

A. Yes, sir.

Q. All right, who was in the car at this point?

A. Before John's, or after?

Q. After.

A. Sonny Penny, Roger Watson, Doc Gadd, myself, and John Monroe.

Q. You were all together again?

A. Yes, sir.

Q. All right, what happened?

A. We went down and got something to eat.

Q. Where?

A. The Steak In A Sack at Bailey's Crossroads.

Q. Did you discuss what had happened earlier in the morning?

A. Yes.

Q. When was it you learned that Mr. Holyfield was dead?

A. Later on.

Q. When?

A. I read it in the paper.

Q. Did anybody tell you that he had been killed earlier than that?

page 277 } A. Yes.

Q. Who?

A. Mr. Blamer.

Q. Did you tell the boys?

A. Yes.

Q. Now, what did you do at breakfast?

A. Eat.

Q. Anything else?

A. No, sir.

Q. Where did you go after breakfast?

A. To Roger's brother's house.

Q. Did you discuss turning yourselves in?

A. Yes, sir.

Q. And as a result of discussing this, did you turn yourself in?

A. No, sir.

Q. Did you hear from your father at all that day?

A. Yes, sir.

Q. What time?
A. One o'clock and about five.
Q. At one o'clock, how did you communicate with your father?
A. I didn't talk to him.
Q. He talked to you?
A. He talked to my sister.
page 278 } Q. He talked to your sister?
A. Yes.
Q. And then did you talk to your father later on?
A. Yes, sir.
Q. What time?
A. About five o'clock.
Q. What did your father tell you to do?

Mr. Horan: Objection. That is hearsay.
The Court: Sustained.

By Mr. Swayze:
Q. As a result of that conversation, what did you do?
A. Come home.
Q. What time did you get home?
A. Twenty-five after—

The Court: Just a minute, they didn't hear the last answer.

By Mr. Swayze:
Q. What did you do as a result of a conversation with your father?
A. I went home.
Q. On Braddock Road?
A. Yes, sir.
Q. What happened? What time did you get there?
A. A quarter after five or twenty minutes after.
Q. Will you tell the jury what happened when
page 279 } you arrived home?
A. I got ready and was going to turn myself in.
Q. And what happened?
A. They come, the police came.
Q. Who came?
A. Mr. Sanders and Mr. Blamer.
Q. Did you say anything to either of these officers?
A. Yes, I told them I was there.
Q. What do you mean, you were there?

A. At the scene. They asked me if I was there.
Q. What did you tell them?
A. Yes, sir.
Q. Now, Mr. Blevins, did you ever strike Mr. Holyfield with the rifle?
A. No, sir.
Q. Did you do anything to encourage anyone else to strike him?

Mr. Horan: I object to his line of questions as leading.
The Court: The objection is sustained.
Mr. Swayze: All right, you may examine, Mr. Horan.
The Court: I think the Court will take a short recess prior to cross examination and let the court reporter have a little break. It will be about ten minutes.

(Short recess.)

page 280 } The Court: Let the record show that the Defendant is present with his attorney and the Commonwealth by her attorney.
Go ahead, sir.

CROSS EXAMINATION

By Mr. Horan:
Q. Now, Mr. Blevins, what time was it you left the Social Circle?
A. Twelve-thirty, I guess.
Q. Now, did you hear the man from Tops testify you were in Tops around eleven?
A. Yes, sir.
Q. Did you hear Roger Watson say you were at the Social Circle for about 15 minutes?
A. Yes, sir.
Q. Is that true?
A. Ten or fifteen.
Q. So, it would be closer to 11:30 or 11:45?
A. It's possible.
Q. Now, where did you go when you rode around the County? You were just riding?
A. Went down towards Kamp Washington and up 123 after we went by Popes Head Road.
Q. And then where did you go?

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The Court: The jury cannot hear you, sir. You page 281 } will have to speak up as loud as you can. It is in your best interest to have them hear your testimony, so speak up loud.

By Mr. Horan:

Q. Then where did you go?

A. After where?

Q. 123?

A. 123? Towards Davis's store.

Q. Do you say that's in the vicinity of Clifton?

A. Four miles, I guess, from Clifton.

Q. What road is it on?

A. I don't even know.

Q. Well, do you remember being on Yates Ford Road? 612?

A. I don't know which road it is.

Q. Do you know where Bull Run Marina is?

A. Yes.

Q. Will you come to Commonwealth's Exhibit No. 1 here? Do you recognize that area?

A. No.

Q. This is Gate Ford Road.

A. I guess that's where it is at.

Q. Do you know where Bull Run Marine is?

A. It would be back here. (Indicating.)

Q. Do you see the town of Clifton on there anywhere?

A. No. Oh, up here.

Q. Where is Davis's store in relation to that?

page 282 } A. Back in here. (Indicating.)

Q. How far is Davis's store from the Social Circle?

A. Eight miles.

Q. Do you remember being down, stopping the car in this area here? (Indicating.)

A. Yes, sir.

Q. Do you remember stopping the car when you came around this turn? (Indicating.)

A. I guess that's true.

Q. All right. Now, did anything happen with reference to the mail box right there?

A. I don't remember if I stopped there, or not.

Q. All right. Now, how about further along this road? This is where you stopped?

A. That's where we was urinating, I guess.

Q. Would you resume the stand, please? Now, what do you mean you guess?
A. Sir?
Q. What do you mean you guess?
A. I don't know for sure.
Q. Now, when you stopped to urinate you were driving?
A. Yes, sir.
Q. And you all got out of the car?
A. Yes, sir.
Q. All of you?
page 283 } A. Yes.
Q. Now, where did you go when you got out of the car?
A. In the woods.
Q. Were you all together?
A. The edge of the road. Sir?
Q. Were you all together?
A. They was around the car in that vicinity?
Q. Pardon?
A. In that vicinity somewhere.
Q. Did you see anybody with the ax?
A. No, sir.
Q. Do you know whether or not anyone had the ax?
A. I don't know.
Q. You don't know. Now, did you see the lights coming before everyone was back in the car?
A. No, sir.
Q. You were back in the car?
A. Yes, sir.
Q. And Roger was driving?
A. Yes, sir.
Q. How did it come about that he was driving?
A. I had run off the road so much.
Q. I couldn't hear.
A. I was too drunk, I guess. I mean, I wasn't handling the car right.
page 284 } Q. How about Roger, what was his condition?
A. He had been sleeping and passed out or something and woke up.
Q. All right, so you get out of the car and get in front of the lights, right?
A. Yes, sir.
Q. Now, you don't know what happened with Monroe and this man, do you?

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A. No, sir.
Q. You didn't see that?
A. No.
Q. You don't know whether Monroe jumped the man first when the gun went off or not, do you?
A. No, sir.
Q. Now, when that gun went off what did Watson and Gadd do?
A. Ran.
Q. All right, and you and Penny went to the man?
A. Yes, sir.
Q. Where was he in relation to the car, your car, the car you were in?
A. Who?
Q. Mr. Holyfield.
A. On the opposite the driver's side in the back.
Q. How far from the car?
page 285 } A. Ten feet, I guess.
Q. And how far away was his car?
A. Twenty feet.
Q. All right. And you and Penny ran back there, right?
A. Yes, sir.
Q. Who was first?
A. I don't remember.
Q. And what did you do when you got there, pile on top?
A. Sir?
Q. What did you do when you got there?
A. Tried to get the gun.
Q. You just stood back and tried to grab the gun?
A. I didn't stand back, I rushed in and tried to get the gun.
Q. You rushed in there, didn't you?
A. Yes, sir.
Q. What did Penny do?
A. He tried to get it too, I guess, or hit him or something.
Q. You don't know what Penny did?
A. I was concentrating on the man.
Q. All right. Now, did you ever strike the man?
A. I don't know, possibly.
Q. Did you ever swing at him?
A. Yes, sir.
page 286 } Q. He was a little man, wasn't he?
A. I guess. Not much littler than I was. Looked about the same size.

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Q. About five feet four? You're about five feet four?
A. Five foot five.
Q. He was an old man, too, wasn't he? Older?
A. He was old, he wasn't that old, though, I don't guess.
Q. Now, you don't know whether you hit him or not, is that what you are telling the jury?
A. Yes, sir.
Q. But you swung at him?
A. Yes, sir.
Q. You don't know whether you hit him or not?
A. I might have hit him or John or Penny either one. We was all in a huddle.
Q. Now, there came a time that he hit the ground?
A. Yes, sir.
Q. And when he was on the ground, you had the gun?
A. I didn't have the gun; it was on the ground. I threw the gun down before he fell down.
Q. Did you take the gun from him?
A. Yes.
Q. Or did somebody else?
A. I took it from him.

Q. All right. And he was standing up when
page 287 } you had the gun?
A. Yes, sir.

Q. And then he hit the ground?
A. After I threw the gun. I threw the gun down and Penny went back there because he was trying to fight his way to the gun or something.
Q. And then you swung at him?
A. Yes.
Q. Did you hit him?
A. I don't know whether I hit him or not.
Q. And at this time, when he was trying to get the gun, Monroe or Penny had him, didn't they?
A. Yes, sir.
Q. And you swung at him when they had him, didn't you?
A. Yes.
Q. When did the dead man first say he had enough?
A. After I got back in the car.
Q. That's the first time?
A. Yes.
Q. And he was bleeding before you got back in the car?
A. Yes.
Q. Where was he bleeding?
A. In the face.

Glen D. Blevins

Q. The face?
A. Yes.
page 288 } Q. Anyplace else?
A. No, sir, not that I noticed. It was sort of on his mouth.
Q. In the mouth he was bleeding?
A. Around his nose and mouth area.
Q. Did you ever wrestle with him?
A. Yes. They was wrestling. I was scuffling.
Q. He was bleeding when you were wrestling with him?
A. Yes.
Q. Where was he bleeding then?
A. He was bleeding from the mouth and nose.
Q. How about his eyes?
A. No, sir.
Q. Who was wrestling with him at the same time you were?
A. Penny and John. All of us.
Q. All three of you?
A. We were just scuffling.
Q. Were working on him?
A. Not workin' on him, just scuffling.
Q. Punching?
A. Yes.
Q. Punching and wrestling, three of you at one time?
A. Sir?
Q. Three at one time?
A. Yes, sir.
page 289 } Q. Now, what's this about how you got the blood on you?
A. Huh? I don't know how I got it on me.
Q. How did you get it on your shoes?
A. I don't know.
Q. You don't know?
A. No, sir.
Q. That blood was in here on your arm, wasn't it?
A. Yes.
Q. Did you ever remember having him by the head like that? (Indicating.)
A. No, sir.
Q. When he was bleeding?
A. No, sir. I don't know.
Q. As a matter of fact, before you got out of there that man was pretty well beaten, wasn't he?
A. Sir?

Q. Before you left there, he was pretty well beaten, wasn't he?
A. No, not that bad.
Q. Bad enough that he was bleeding?
A. Yes, sir.
Q. Or you wouldn't have left, would you?
A. Sir?
Q. You wouldn't have left, would you?
A. Yes, sir.
page 290 } Q. You wanted him incapacitated, didn't you?
A. No, sir.
Q. You wanted him out?
A. Yeah, I wanted—
Q. Now, you are telling the jury you just dropped that gun on the grounds, aren't you?
A. Yes, sir.
Q. You didn't bother to throw it in the woods or anything, did you?
A. No, sir.
Q. Why was that?
A. Because he was trying to fight towards me so I dropped it.
Q. All right. So you never went back towards the car and threw it in the woods, did you?
A. No, sir.
Q. Because you knew he was going to be out, didn't you?
A. I didn't know he was going to be out.
Q. You knew he was going to be hurt real bad, didn't you?
A. No, not really.
Q. Just bled a lot?
A. Maybe.
Q. Now, you get in the car, Penny gets in the car?
A. Yes, sir.
Q. It didn't work the other way?
page 291 } A. Sir?
Q. Didn't it work the other way?
A. Penny went and I followed him.
Q. Penny got in the car? Then you got in the car?
A. Yes, sir.
Q. Then Watson gets in the car?
A. Yes, sir.
Q. What was said?
A. Sir?
Q. What was said?
A. Nothing, as I remember.

Q. You didn't say, "We sure beat the hell out of him"?
A. No, sir, I don't remember.
Q. You didn't say, "He'll never do that again"?
A. No, sir.
Q. You never said that?
A. No, sir.
Q. Now, Penny and Watson were in the car with you, right?
A. Yes, sir.
Q. And you don't know where Monroe was?
A. Out there scuffling.
Q. When did he get in the car?
A. Sir?
Q. When did he get in the car?
A. A minute or two after I got in.
page 292 } Q. Well, when did Gadd come by the car?
A. Just before John got in the car.
Q. A minute or two?
A. Sir?
Q. A minute or two before John got in the car?
A. No.
Q. All right. Now, were the windows open in the car?
A. No, sir.
Q. The car was all closed up?
A. Sir?
Q. Was the car all closed up?
A. The door was open in the front. Roger was there.
Q. The door was opened?
A. In the front.
Q. And Roger was sitting in the door?
A. Yes, sir.
Q. Roger testified he didn't hear any sounds back there except scuffling. Did you hear him say that?
A. Sir?
Q. Did you hear Roger say that?
A. Yes, sir.
Q. All right. And he didn't hear anything. You heard him say that?
A. Yes, I heard him say that.
Q. Now, you are telling this jury that the three
page 293 } of you get in the car after the man was there with the gun, the man was jumped, you get in the car and nobody said anything?
A. Not as I recall.
Q. You just sat there? Nobody said anything?

A. Yes, sir.
Q. Nobody said anything?
A. Yes, sir.
Q. Are you sure of that?
A. Yes, sir.

Mr. Horan: I have no further questions.
The Court: Mr. Swayze, do you have any further questions?

RE-DIRECT EXAMINATION

By Mr. Swayze:
Q. Mr. Blevins, do you remember ever, at any point in this affair, saying, "I sure beat the hell out of him"?
A. No, sir, I don't.
Q. All right, sir.

The Court: Any further questions?
Mr. Horan: No further questions.
The Court: You may return to your seat.

(Witness excused.)

* * * * *

page 299 } The Court: Will both attorneys and the Defendant come over here for a minute. It has just come to the Court's attention that during the recess one of the jurors has told the bailiff that he would like to ask me a question. The bailiff, of course, would not receive the question and just told him he would have to wait until he told me and see whether or not I would receive the question. The Court at this time does not know whether it goes to the law or evidence, or if it goes to the juror's qualifications, but what would counsel like to do with this?
Mr. Swayze: I would like to have the juror propound the question.
The Court: Would you suggest that the question be propounded in chambers rather than in open court with all the other jurors present?
Mr. Swayze: That's correct.
The Court: It might go to his qualifications rather than to the evidence or facts in the case, and if that meets with

both counsel's approval, we will ask the juror to come back to chambers.

Mr. Horan: No objection.

The Court: If it has anything to do with the law or the evidence, I will advise him that he will be instructed on this later.

Mr. Swayze: I have no objection.

page 300 } The Court: All right.

Come on in and have a seat. What is your name?

Mr. Storrs: Storrs, Ernest Storrs.

The Court: And you are one of the jurors?

Mr. Storrs: Yes.

The Court: I understand you have a question. First, let me ask you if the question is one that is related to the facts in this case or the law to be applied to the facts in this case?

Mr. Storrs: The law to be applied in the case.

The Court: Let me advise you that all of you jurors will be instructed on the law at the end of the case and I may be able to answer your questions and everybody's questions.

Mr. Storrs: Well, I didn't want to ask anybody or disturb anything.

The Court: Right, sir. You will be instructed on the law to apply to the facts at the end of the case.

Mr. Storrs: Thank you, sir.

The Court: Thank you, sir.

(End of conference in Judge's chambers.)

The Bailiff: You may remain seated and come to order, please.

The Court: Let the record show that the defendant is present with his attorney and the Commonwealth by her attorney.

Mr. Swayze: Mr. Wisenhunt.

page 301 } The Court: Were you sworn yesterday?

Mr. Whisenhunt: Yes.

The Court: Take the stand, please.

Whereupon,

CHARLES WHISENHUNT was called as a witness by and on behalf of the Defendant, and having been previously duly sworn, was examined and testified as follows:

Charles Whisenhunt

DIRECT EXAMINATION

By Mr. Swayze:

Q. Will you tell the jury your name and address?

A. Delmer Charles Whisenhunt, 8900 Little River Turnpike, Fairfax.

Q. I am sure that the jury didn't hear that. Speak up, please.

A. Little River Turnpike, Fairfax.

Q. What is your age, Mr. Whisenhunt?

A. Twenty-two.

Q. Do you know Rudolphus Gadd?

A. Yes, sir.

Q. Calling your attention now to September 24th, 1966, did you have occasion on that day to see Mr. Gadd?

A. Yes, sir.

Q. Who was with you at that time?

A. Billy Blevins.

page 302 } Q. Now, is that Glen Blevins?

A. Yes, sir, that's Glen.

Q. Now, when you refer to Billy Blevins, is that the same person?

A. No, sir.

Q. Are they related?

A. I suppose they may be, I don't know.

Q. Now, did you have a conversation with Mr. Gadd in reference to this case?

A. Yes, sir, I did.

Q. Where were you when this conversation took place?

A. I was down in Vienna.

Q. Will you tell the jury how the conversation began?

A. He said he was—

Q. Who is "he"?

A. Gadd.

Q. All right.

A. He told me that he was over in Clifton on an old back road over there and this guy he said shot at him, and they went off up the road and then this guy followed them and stopped them and he got out and run, him and Roger Watson.

Q. Now, at this point, if any of the members are having trouble hearing, I wish they would speak up.

The Court: I am sure they will.

Charles Whisenhunt

By Mr. Swayze:
page 303 } Q. Go ahead.
A. Roger Watson ran when the guy stopped and he said that he come back and the guy was laying on the side of the road and he took a rifle and beat him to death with it.

The Court: Repeat the last answer.
The Witness: He said that he took the rifle and beat him to death with it.

By Mr. Swayze:
Q. Did he say anything further about the case?
A. Not as I can remember at this point.

Mr. Swayze: All right, you may inquire.

CROSS EXAMINATION

By Mr. Horan:
Q. He said the man shot at them first?
A. He told me that the man shot at them.
Q. Then the man followed them?
A. Yes.
Q. Did he say who was there?
A. He said Glen Blevins and Sonny Penny, and Roger Watson, and the Monroe boy.
Q. Did he say—strike that—he said that he and Watson ran?
A. Yeah, he said him and Watson ran.
Q. And did he say what the other people did?
A. No. He didn't say.
page 304 } Q. Did he say who was around when he came back?
A. He didn't say that either.
Q. So, you don't know if there was anybody there or not?
A. As far as I know, I don't know.

The Court: Speak up.
The Witness: As far as I know, I don't know.

By Mr. Horan:
Q. Did he say whether or not the man said anything to him when he was laying there?
A. He didn't say.

Charles Whisenhunt

Q. Did he say whether or not he was alive?
A. He didn't say that, either.

Mr. Horan: No further questions.
Mr. Swayze: No questions.
The Court: May this witness be excused?
Mr. Swayze: Yes, sir, Your Honor.
The Court: You are free to go.

(Witness excused.)

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The Court: Let's go into the Commonwealth's instructions first.

Instruction No. 1.

Mr. Swayze: I object to this instruction on the ground that there is no proof of the statute. This matter was discussed with the Court this morning and it was pointed out that the Commonwealth did not introduce the United States statute during the course of the case, and it is now too late to present that statute to the court.

The Court: It is your position that I cannot take judicial notice of a United States statute at this point or at the end of the plaintiff's evidence?

Mr. Swayze: That's correct. I think the Court could take judicial notice of the statute had it been offered before.

The Court: There is no question about that. As to the fact that the Court can take judicial notice, I mean.

Mr. Swayze: I don't believe the Court can take judicial notice of a statute in the same fashion in the United States as in the State of Virginia. There is a distinc-
page 307 } tion between the two, and our Code sections that have been cited this morning meet that distinction, I believe. It is too late for the Commonwealth to introduce the statute.

The Court: Well, the statute was offered after the Commonwealth had rested its case but before any evidence was put on by the defendant. Now, do you feel that this is cause for undue surprise or anything by the defendant that it was offered at this point?

Mr. Swayze: Well, it is a matter of some concern, Your Honor, to us. We feel that the Commonwealth had adequate opportunity to present the statute and did not do so. The fact that it came before we presented our evidence doesn't really become material. The truth is that the time to present it is passed, and that is the way the game of law is played.

The Court: It is not within the Court's discretionery power to reopen the Commonwealth's evidence to allow them to put on something of that nature? I mean, this is not something that would have to be given to the jury at any time. I mean, he could have turned to me and asked me to take judicial notice of Section so-and-so of the United States Code and I could have said, "Yes, I shall do so." And that would have been it. Isn't that correct, sir?

Mr. Swayze: Yes, sir.

The Court: Without even reading to the jury or anything else.

page 308 } Mr. Swayze: That would have been the procedure, but he did not do so, and I don't think it is up to the Court to correct errors or mistakes made by the Commonwealth. And in the court, in a case of this gravity, and the important of this particular statute, I think that it comes too late now for the Commonwealth to offer it.

The Court: Of course, we are going back to when it was presented. We are going back to the end of the Commonwealth's evidence. In fact, I believe you had argued, you had argued your motion to strike so that it was at that point really. Am I correct there?

Mr. Horan: Yes, sir.

The Court: But it was after the motion to strike was argued and denied. I don't know. We didn't go back into court at all, though, did we?

Mr. Swayze: No, Your Honor. It was taken up before we went into court this morning.

The Court: So that it was during a conference in chambers following the termination of the evidence by the Commonwealth but before the motion to strike.

Mr. Swayze: That's correct.

The Court: Do you have any—

Mr. Horan: Your Honor, I feel, of course, they interpret the statute one way and I interpret it another. But, the Court does not have to have some physical ma-

page 309 } terial introduced into evidence in order for the Court to take judicial notice of a statute. It is just a matter of statutory interpretation.

The Court: The only case that I can think of offhand

comes into the question of the discretion of the Court to reopen a case is a civil case, and it involved, I believe, the plaintiff forgetting to put in a life table.

Mr. Horan: Does Your Honor—excuse me. What is the law in criminal cases?

The Court: Yes, let me finish my comment on this. And this case, in this case the trial court I believe, it was at the end of all the evidence, allowed the plaintiff to reopen the case to put in something and asked the court to take judicial notice of a life table, and the trial court granted it. The court of appeals said it was O.K.

Mr. Horan: How does it apply in this case? *Freeman* versus *Commonwealth,* 107 Southeast 708.

The Court: Wasn't it a Virginia association?

Mr. Horan: This is the old one, Judge. It doesn't have the Virginia citation.

The Court: Let me see the case.

Mr. Horan: This case, Your Honor, note, was after all the evidence was in. It was murder, first degree murder, conviction upheld.

page 310 } The Court: This was a homicide case, Mr. Swayze. In fact, it was first degree murder, and it is the last notation in the case, the court of appeals said, "After the evidence was all in the case was adjourned to the next day to hear argument. The next morning the Commonwealth was permitted, over the objection of the accused, to introduce a witness as to the number and location of wounds on the person of the deceased, and this was assigned and error. Two witnesses for the Commonwealth had already testified on the subject. The order of introduction of testimony rests largely in the discretion of the trial court and in this case that discretion was not an abuse and the subject is fully discussed. See also *Burke* versus *Commonwealth,* 126 Virginia 769. They held the trial court was right in its ruling. In *Freeman* versus *Commonwealth,* 107 Southeast 707, decided June 29, 1921—

Mr. Horan: Your Honor, I have here the *Burke* versus *Commonwealth* case. Relative to this case is the footnote.

The Court: This next case is *Burke* versus *Commonwealth,* and I have already referred to it. This was decided in 1919 and involved some crime involving fish, catching fish in nets, and that case is as follows—it appears from one of the bills of exception—"that although the Commonwealth had introduced all of its testimony to the issue joined and the defendant declined to introduce any evidence, the case was being carried to the jury, and the Commonwealth had concluded

page 311 } its opening address to the jury and counsel for the defendant was addressing the jury and presented the argument that there was no evidence upon which a verdict against any of the defendants could be based because of the fact of the existence of a local law of Rockbridge County, it had not been legally proved by the records, the Board of Supervisors of Rockbridge County. Thereupon, it being conceded that the fact of such local law had not been proved the Court, over the objection of counsel for the defendant, suspended the arguments before the jury and permitted the attorney or the Commonwealth to produce certain records of the Board of Supervisors, et cetera." There was a question as to whether it was a legal ordinance, but they also decided that and the Court of Appeals stated further: "As to the action of the Court in permitting the arguments to be recessed and the record of the Board of Supervisors to be introduced at that stage of the trial, we think the exception is met by the familiar, general rule that the time and order of production of proof rests largely in the discretion of the trial court. The evidence thus introduced is evidently a vital part of the Commonwealth's case, but it was altogether documentary and was undisputed. No continuance was asked for and the record fails to disclose any reason for supposing that the defendants could have bettered their condition if it had been introduced at an earlier stage. The evidence was clearly admissible and we do not feel reversing the case for any irregularity."

page 312 } Do you have any cases contrary to that, sir?

Mr. Swayze: No, Your Honor.

Mr. Tydings: Neither one is exactly our case.

The Court: No, one is a murder case and the other is proof of an ordinance.

Mr. Swayze: The last one sounds a bit fishy to me.

The Court: I think the proof of an ordinance is even a little bit harder than taking judicial notice.

Mr. Horan: The amendment to 8270 was to facilitate the introduction of an ordinance, I believe.

The Court: As far as the Court taking judicial of the statute of the United States, unless there is reason brought to the Court's attention that this is not the valid statute, this is not the correct statute of the United States, I will take judicial notice of it and rule retroactively to the time it was offered in chambers following the Commonwealth's case. I will take judicial notice of that statute.

Mr. Swayze: May I see what they introduced, Your Honor?

The Court: Surely. Section 1705. That is being offered in support of No. 1.

Mr. Horan: Yes, Your Honor.

Mr. Swayze: Now, the Court has now taken judicial notice?

The Court: Yes, I have taken judicial notice of that.

page 313 } Mr. Swayze: The Court will please note our exception to your ruling in allowing the Commonwealth to reopen the case and introduce the statute.

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Mr. Swayze: Your Honor, we would like to object, then, to Instruction No. 4. Considering the evidence that is in, we do not feel that there is adequate evidence to support a finding of murder in the first degree. The evidence is clear that Blevins, together with Penny, left the scene of the conflict and went back to the car, and that the death occurred after they went back to the car. Now, I don't believe

page 319 } there is anything to go to the jury that would allow them to find this man guilty of murder in the first degree under these circumstances.

The Court: How about principal in a second?

Mr. Swayze: If there is evidence he was aiding and abetting.

The Court: Wasn't he present and comforting?

Mr. Swayze: I don't think he was, as a matter of law, present or comforting. There is no evidence of any such thing he did. All he did was sit in the car.

The Court: Again, we have to take the Commonwealth's evidence to see whether or not there is sufficient evidence to support the instruction in the first degree. Taking it in the best light against their evidence that he came back and said he beat the hell out of him. There is evidence that he hit the man with a rifle. There is evidence after he came back to the car he sat there and did absolutely nothing while hearing some thuds after the man had said, "I have had enough." Again the Court is getting back to your motion originally to strike. It appears to me that this is up to the jury to determine whether or not he was actually, by his silence and having participated in the assault, whether or not he was actually aiding and abetting in the commission of this crime.

Mr. Swayze: I have not been able to find any case that

goes so far as to hold mere silence as constituting aiding and abetting.

page 320 } The Court: How about a case where a man, taking Commonwealth's evidence, where he hit the man with the rifle and beat the hell out of him and someone else finishes him off?

Mr. Swayze: This gets into the question of concert of action. Here I believe the question is this thing is the criminal intent. In order to make two people guilty here as principals in the first degree there must have been a concert of action and intent, a criminal intent to kill.

The Court: That's to prove principal in the first.

Mr. Swayze: Which is what we are talking about.

The Court: Not necessarily.

Mr. Swayze: Well, Your Honor, I don't think there is any evidence that this man, Blevins, killed the deceased.

The Court: Principal in the first would be where he actually killed him. Principal in the second is where he is present and aiding and abetting.

Mr. Swayze: But, the thing is there is no evidence that Blevins had any criminal intent to kill or even had any notion.

The Court: Is there not evidence that he had intent to do this man serious bodily harm? I am not saying you agree with the evidence. I am saying is there not evidence to disclose that from the beating the hell out of him and hitting him with the rifle?

Mr. Swayze: I think this would support at page 321 } most maiming.

The Court: There is evidence to support maiming, and what if it results in death?

Mr. Swayze: If there is any showing that the maiming was the ultimate death, but the doctor was clear that the thing that caused the death here was not his eyes being gouged out, but damage to the head where the skull had been fractured in numerous places by the heavy object. So, there is the point, if the court feels that he was aiding and abetting Monroe in perhaps damaging the man's eyes, then the most he could be guilty of would be aiding and abetting Monroe in maiming, but under no condition is there any evidence here that he helped Mr. Gadd beat the man on the head with the rifle. I think the evidence is rather clear on this point.

The Court: There is evidence he hit him with the rifle. There is evidence by his statement, which he has denied, but which is in evidence that he said he beat the hell out of him.

It just strikes me that a group of men, two or three of them completely subdue a man and knock him to the ground; one of them says he beats the hell out of him and there is evidence that he hit him with the rifle, and because one of the other men in the group comes up and finishes him off, that the first man is not aiding and abetting the commission of the ultimate and that it was a death out of a continual beating.

page 322 } Mr. Tydings: Your Honor, the evidence was that Mr. Penny and Mr. Blevins, the defendant, came back to get in the car. Watson came out of the woods. At that point Mr. Monroe was still back there scuffling and Mr. Gadd never once had been in the struggle. OK, as they were going to the car, he walked by them. OK. Mr. Blevins, the defendant's action was in no way concerted with Gadd, what Gadd did after he went by him in the car.

The Court: This is your view of the evidence, that it was in no way concerted, but did not he say that he put the man in such condition that he was lying on the ground as found by Mr. Gadd and Gadd beat him to death with the rifle?

Mr. Tydings: We also assert that what he did do was to protect himself from a citizen's arrest, that it was reasonable under the circumstances, and that he was justified by what he did. If Gadd never came back, OK? If Gadd never came back behind the car, the most this man would be—there is no proof on the part of the Commonwealth that anything happened before that to cause his death. He may have had his eyeballs gouged out, but there is no proof that that caused the death of Mr. Holyfield, and so we take the position that OK, at the worst, he may have concerted with Monroe in maiming Mr. Holyfield and he may have assaulted him if his resistance was unlawful, but there is no evidence whatsoever that he concerted with Gadd in any manner whereby Gadd picked up the rifle and finished him off.

page 323 } The Court: The principal in the second can even be somebody just sitting there and keeping a lookout.

Mr. Tydings: There is no evidence he was keeping a lookout.

The Court: I don't think there is such evidence of it, but I am saying that is the extent you can go to. You don't have to be there egging him on.

Mr. Swayze: You have to have the common intent. Were the evidence sufficient to believe or present to the jury the issue of whether or not there was a common intent to kill this man, I think the evidence negatives that Blevins ever had such a criminal intent to kill.

The Court: Is it not the law that you are responsible for the consequences of your acts if you intend to do a man serious bodily harm and he dies as a result?

Mr. Swayze: If there is an intent by the act. Blevins didn't do anything to indicate such an intent.

The Court: By the evidence, as most favorably approached in the Commonwealth's view, he intended serious bodily harm to this man, and from this evidence he did serious bodily harm to this man. So, I mean, there is the intent from the evidence. Or, there is apparently from the evidence the intent to do serious bodily harm to this man, and he did it. Now, of course, he has testified and he has put on evidence that he didn't intend to hurt the man and that page 324 } he may have hit him, just scuffled, just did this or that, but this is for the jury to decide on this issue. I think there is sufficient evidence for this case to go to the jury on first degree murder, if not as principal in the first, second certainly, as principal in the second.

I agree there is indirect proof in evidence that the blows given directly by him to this man caused the man's death, but there is evidence that would show that blows given by him to the defendant could have contributed because there is evidence that he hit him with a rifle. The only blows on the body from the doctor's report were the cut on the neck, the cut on the chest, and of course, the skull. Apparently he was hit many, many times.

Mr. Tydings: There is no evidence that the man, Blevins, hit him on the head with a rifle.

The Court: No, I don't know where he hit him with the rifle, but we know that it was one of those places.

Mr. Tydings: The evidence at best was controverted because—well—

The Court: Does the Commonwealth have any further comment on this instruction on the question of first degree?

Mr. Horan: I think it is a jury question, Your Honor, under the facts.

The Court: Do you think there is sufficient evidence to argue he is principal in the first?

page 325 } Mr. Horan: I think the jury at a minimum will find principal in the second, judge, but I think the only evidence we really have that this man was definitely alive is the defendant's testimony.

The Court: There was Watson. I think Mr. Watson said that he heard the deceased say, "I have had enough." But, I think he said that he was in the woods when he heard that.

Mr. Horan: He did say that, Your Honor. I believe there

was some evidence when the three of them were in the car that they heard moaning. There is a lot of evidence about scuffling noises.

The Court: There is direct evidence by the defendant that he heard a thump, thump, thump.

Mr. Horan: It is the only direct evidence of that. But our position is that there were six lacerations, I believe Dr. Cooper testified to, to the skull. There is evidence that the defendant struck the man with the rifle.

The Court: There is an alleged admission that he beat the hell out of him, whatever that means.

Mr. Horan: Yes, Your Honor. There is sufficient evidence.

The Court: I think for the reasons I gave at the time I denied the defendant's motion to strike, that I will give the instruction on first degree murder. I think there page 326 } is enough evidence of concert of action and certainly the defendant being involved in it as a principal in the second degree.

Is there any objection to the form of the balance of the instruction?

Mr. Swayze: No, Your Honor.

The Court: Instruction No. 4 will be granted.

Mr. Swayze: Will you note our exception, please?

The Court: Surely.

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Which one are we on now?

Mr. Swayze: 6.

Mr. Horan: 6.

Mr. Tydings: Did we get 2 straightened out yet?

The Court: No, not yet. We'll get back to it.

Mr. Horan: That is a standard instruction, Judge.

The Court: 6 will be granted.

Mr. Tydings: We just renew our objection as to the same as the other instruction.

The Court: I assume your objection will run to anything that refers to first degree murder.

Mr. Tydings: Anything on murder or manslaughter.

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(Off-the-record discussion.)

The Court: Let's call this B-1, unless you want to withdraw B.

Mr. Swayze: Withdraw B and substitute B-1.

The Court: Well, we'll just call this B, then.

This is what I have written down, the fourth line from the bottom, that the defendant did nothing from that point on. Strike the word "thereafter". Put "the defendant did not by concert of action with such other person or persons or by aiding or abetting therein." Or, "did not aid or abet therein."

Mr. Horan: Judge, I would like—I think the Court's proposed amendment, if it started off, did not at any time act.

The Court: The Commonwealth has suggested "at any time by concert of action with such other person or persons did not aid or abet therein, as defined in other instructions." Then the jury can find the defendant guilty in this case. I think that his requesting that "at any time" does
page 346 } go back to prior to the time he abandoned. Let me read the whole instruction so that we all will know. This is the substitute Instruction B, the original B having been withdrawn.

The Court instructs the jury that if it believes from all the evidence that Glenn D. Blevins, John Monroe or Belvin Penny struck the deceased and threw him to the ground, and that the resulting injuries to the deceased were not sufficient to cause his death, and further believe that Blevins abandoned further conflict, and thereafter someone else, other than the defendant, inflicted the wounds which caused the death of Greer Franklin Holyfield, and the defendant did not, at any time, by concert of action with such other person or persons or—off the record for a moment.

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The Court: It would be by concert of action with such other person or persons or by aiding or abetting them, as defined in other instructions, then the jury cannot find the defendant guilty in this case, and the Court instructs the jury that they should find the defendant not guilty of murder or manslaughter.

Mr. Horan: Your Honor, I don't feel that the last sentence,

the Court instructs the jury it shouldn't find him guilty of murder or manslaughter, is necessary.

page 347 } The Court: We can strike that last portion.

Mr. Horan: Cannot find the defendant guilty in this case I think is sufficient.

The Court: I agree. We will make a period after that.

Mr. Tydings: The other thing here, the insertion there of "at any time by concert of action", there is a possibility of the jury finding that the defendant could, in fact, have abandoned the original concert of action and that with Gadd there was another concert of action. There are two separate and distinct possibilities of concert of action.

The Court: It seems to me it is all one continuous thing from the beginning of the fight right on through to the resultant death and the various people who took turns. But, I don't think there was any evidence there of a complete cessation of the fight or assault or whatever you want to call it. In fact, the evidence would appear to meet the—the evidence clearly shows that it started out when the first man swung and ended up when he was killed.

Mr. Swayze: Let us simply note an exception to the words "at any time" in this instruction.

The Court: On what basis?

Mr. Swayze: On the basis that it is in conflict with the abandonment theory that we have advanced in this instruction that Blevins abandoned any further conflict

page 348 } and walked away from it and thereafter did nothing further to aid or abet. To put "at any time" just eliminates the possibility that the jury could believe that the boy abandoned. I believe that is your point.

Mr. Tydings: Yes, that's right. That's the point, I think.

The Court: Why don't we strike out the words "at any time", and you can argue. We won't say thereafter, and we won't say—

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The Court: I think it will be clear. I will take out the words "at any time." I think you can argue that. I think this is something you can argue freely, this concert of action continuing up, and he could abandon it by just

page 349 } walking away and sitting in the car and he absolutely abandoned the whole thing. I don't think we preclude his defense that he quit from being argued to the jury, and I think the evidence is absolute that there was a concert of action to beat him up originally when the first

three started beating him up. I think it is going to be up to the jury and not up to us. I would rather take out the words "at any time" and let you argue that this concert of action was just one continuous thing and went on and on and resulted in his death, et cetera.

Mr. Horan: Well—

The Court: I have taken out the word "therefore" which includes everything to be a concert of action taken after he abandoned.

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R.

Mr. Horan: Your Honor, I certainly object to R. I think that is—

The Court: Let me read it first. What support do you have of this?

Mr. Swayze: *McCue* versus *Commonwealth,* 103 Virginia 87.

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Mr. Swayze: I think the instruction is a correct statement of law besides the fact it is not specifically mentioned in the *McCue* case. I don't think there could be any objection to it.

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The Court: What is the objection?

Mr. Horan: It is a hanging instruction such as has been condemned by the Court of Appeals in repeated cases. It originally started in the *Simms* case, the reference to this instruction. I am quoting from *Simms* versus *Commonwealth,* 134 Virginia.

The Court: Are you on his side or your side?

Mr. Horan: If the Court please, I misunderstood. I thought we were on R.

The Court: We are.

Mr. Horan: That *Hale* was cited on him.

The Court: I'll look at that later. Was R all right? Go ahead.

Mr. Horan: Where was I? 134 Virginia 736, 115 Southeast 382. The Court says, after setting forth this instruction: This instruction is substantially the same as Instruction No. 23 given in the *McCue* case but in that case the instruction was given at the instance of the prisoner without objection on the part of the Commonwealth. And no objection there was or could have been made at the Appellant Court by the Commonwealth. Now, Your Honor—

The Court: What does it say about the instruction in that case?

page 372 } Mr. Horan: I'll leave it to the Court. I believe there are—

The Court: What is the number?

Mr. Horan: 17.

The Court: This was the Court of Appeals in the *Simms* case? The last part sounds like the *Allen* instruction in the *Allen* charge.

Mr. Horan: Your Honor, I don't remember the *McCoy* or *Smith* cases in which this point comes up again and in which the Court of Appeals in very strong language said that, "We don't know why the defense attorney keeps requesting this instruction because we have repeatedly said—back to the *Simms* case—that we feel that this instruction is—it was attempting to be defined in the common language of the jurors and it is not something which should be attempted, that the Court should allow an attempt to define it.

The Court: Does this come in *Abbott* and *Solomon?*

Mr. Swayze: Yes, to the best of my recollection.

The Court: Do you have any other cases?

Mr. Swayze: No, Your Honor.

The Court: On the basis of *Simms* versus *Commonwealth,* I'll deny it. I think it would be inviting—

Mr. Swayze: Will the Court note my exception?

The Court: Surely. It would be inviting them to disagree, that is the *Simms* case.

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Mr. Swayze: Correct. Your Honor, I would like to renew my motion to strike all the Commonwealth's evidence on the grounds I have previously stated to Your Honor. I stated them at the close of the Commonwealth's case.

The Court: All right, sir. Although this isn't in the strictest of order, I certainly will allow the motion to be made at this time. However, I will deny it on the same basis.

Mr. Swayze: Will you note my exception to it?

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The Court: Members of the jury, I will now instruct you as to the law applicable to the facts in this case. Again, if you cannot hear me, please raise your hand. If I am not looking at you, say something. These are rather lengthy, and I will ask you to please pay careful attention.

The Court instructs the jury:

1. That murder in the first degree is the wilful, deliberate, premeditated and malicious killing of a human being, and if you believe from the evidence, beyond a reasonable doubt, that the defendant wilfully, deliberately, premeditatedly and maliciously killed the deceased, then you shall find him guilty of murder in the first degree.

2. That to constitute a wilful, deliberate, and premeditated killing, it is not necessary that the intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that such intention should have come into existence for the first time at the time of such killing, or at any time previously.

3. That in the absence of proof to the contrary, malice may be implied from the deliberate use of a deadly weapon, when used in a manner calculated to take the life of another human being.

page 383 } 4. That a mortal wound given with a deadly weapon, without any provocation or even with slight provocation, is *prima facie* wilful, deliberate and premeditated killing.

The court instructs the jury that murder in the second degree is the unlawful killing of a human being with malice and without premeditation and deliberation, and if you believe from the evidence, beyond a reasonable doubt, that the defendant unlawfully killed the deceased with malice but without premeditation and deliberation, you shall find him guilty of murder in the second degree.

The Court instructs the jury that voluntary manslaughter is the unlawful killing of another without malice, upon sudden heat of passion, upon reasonable provocation, or in mutual combat.

The Court instructs the jury that:

(a) Every homicide is presumed to be murder in the second degree.

(b) In order to elevate a homicide to murder in the first degree, the burden of proving the elements thereof is upon the Commonwealth.

(c) In order to reduce a homicide from murder in the second degree to manslaughter or excusable homicide, the burden is upon the defendant.

(d) It is your duty to consider all of the testimony, no matter by whom introduced, and ascertain therefrom if the defendant is guilty or innocent, and if guilty, of what offense.

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The Court instructs the jury that voluntary drunkenness is no excuse for crime. A person cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness.

Nevertheless if you believe from the evidence that the defendant was in such a degree of drunkenness as to render him incapable of forming a wilul, deliberate and premeditated purpose or intent to kill the deceased, then you cannot find the defendant guilty of murder in the first degree.

However, while voluntary drunkenness may be a legitimate subject of inquiry as between murder in the first degree and murder in the second degree, it is not material and cannot be considered as between murder in the second degree and manslaughter, and it is not a defense to either murder in the second degree or to manslaughter.

Sir, you will not have to take notes. You will have these instructions in the jury room. They will go with you to the room.

The Court instructs the jury that in this case the malice necessary to constitute a crime of murder may be either express or implied. The word "malice" in the foregoing definitions of murder is used in a technical sense, and includes not only anger, hatred and revenge, but every unlawful and unjustifiable motive. It is not confined to ill will to any one or more particular persons, but is intended to denote an action flowing from a wicked or corrupt motive, done with an evil minds and purpose and wrongful intention, where the act has been attended with such circumstances as to carry in them the plain indication of a heart regardless of social duty and deliberately bent on mischief; therefore, malice is implied by law from any wilful, deliberate and cruel act against another, however sudden.

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The Court instructs the jury that any object or instrument other than nature's weapons that is used in wounding or doing serious bodily injury to a person is a deadly weapon if it is likely to produce death or great bodily injury when used in a manner and under the circumstances in which it was used.

And if the jury find that the defendant used the rifle as a weapon against the deceased, then the jury are the judges of whether the rifle used by the defendant in this case was a deadly weapon when used in the manner and under the circumstances in which it was used as disclosed by the evidence.

The Court instructs the jury that principals in the first degree are those who are the actual or immediate prepetrators of the crime. Principals in the second degree are those who did not with their own hands commit the act which constituted the *crim,* but who were present, aiding and abetting in its commission. The test for a principal in the
page 386 } 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 or consent to its commission.

Principals in the second degree are liable to the same punishment as principals in the first degree.

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 others in the commission of murder and that he shared in the criminal intent of the others, then you must find the defendant not guilty.

In considering whether or not Glen B. Blevins is a principal in the second degree in this case, aiding, abetting, counseling, advising or consenting to the killing of Greer Franklin Holyfield, they may consider the acts and declarations of Glen D. Blevins before, after and at the time of the killing.

The Court instructs the jury that if there is concert of action with the resulting crime one of its incidental probable consequences, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by acts of every other person connected with consummation of such resulting crime.

page 387 } The Court instructs the jury that the defend-

ant is presumed to be innocent and that this presumption goes with him through all the *atages* 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 having carefully and impartially heard and weighed 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.

The Court instructs the jury that to constitue murder in the first degree the evidence must clearly and distinctly prove, beyond any reasonable doubt, that the defendant acting in concert with others or aiding and abetting them was not only incited to the killing of the deceased by malice, and desperate wickedness of heart; but such killing must have been a wilful, deliberate, and premeditated act on the part of the defendant acting in concert with others or aiding and abetting them; in other words, at the time of the killing the defendant acting in concert with others or aiding and abetting them must have distinctly understood what he or they willed and intended to do; he or they must have also page 388 } reflected, and deliberated, premeditated that he or they would kill the deceased, or do him some serious bodily injury, the probable result of which would be death. And if there be a reasonable doubt whether he or they had willed, and deliberated, and premeditated to kill the deceased, or do him some serious bodily injury, which would probably occasion his death, they ought not to find him guilty of murder in the first degree.

The Court instructs the jury that 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 defense 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.

The Court instructs the jury that the Commonwealth must prove from the evidence beyond a reasonable
page 389 } doubt every material fact and if the jury have a reasonable doubt as to the grade of the offense then they must resolve the doubt in favor of the defendant and find him guilty of the lower grade; to illustrate, if you have reasonable doubt as to whether he is guilty of murder in the first degree or second degree, you should find him guilty in the second degree; if you have reasonable doubt as to whether he is guilty of murder in the second degree or manslaughter, you should find him guilty of manslaughter; if you have reasonable doubt as to whether he be guilty at all, you must resolve that doubt in favor of the defendant and acquit him.

The Court instructs the jury that whoever wilfully or maliciously injures, tears down or destroys any letter box or other receptacle intended or used for the recipt or delivery of mail on any mail route shall be guilty of a felony and the Court instructs the jury that any private citizen may make an arrest without a warrant

1. Where a felony has been committed not in his presence and he has reasonable cause to suspect the person arrested.

2. Where it has been committed, is being committed, or is about to be committed in his presence.

The Court instructs the jury that the deceased Mr. Holyfield was not a police officer or conservator of the peace and if the jury believes from all the evidence that Mr.
page 390 } Holyfield was attempting to effect a "citizens arrest" at the time he was killed, and further that Mr. Blevins and those with him, had actually committed

(a) a felony or misdemeanor in Mr. Holyfield's presence, or

(b) a felony out of his presence, then, and only then, would Mr. Holyfield have been justified as a matter of law in attempting to effect the arrest without a warrant.

The Court instructs the jury that if Mr. Holyfield was justified as above set forth in attempting the arrest, then it was the duty of Mr. Blevins and those with him to submit themselves. However, if the jury finds that Mr. Holyfield had assumed authority he did not possess under the law, then Mr. Blevins was entitled to resist the attempted arrest by use of such force as may have appeared to him reasonable and necessary under the circumstances.

The Court instructs the jury that if they believe from the evidence that the deceased was not justified in attempting a citizens arrest and that the deceased did any act, or that the circumstances brought about by him were of such a character as to afford the defendant reasonable ground for believing that the deceased designed to kill him, or to inflict on him great bodily harm, and there was imminent danger of carrying such design into execution, under such circumstances defendant would be justified in defending himself page 391 } by the use of force that may reasonably appear to be necessary, although it may turn out that apperances were deceptive, and that there was no design on the part of the deceased to kill defendant or to do him great injury.

The Court instructs the jury that in passing upon the danger, if any, to which the accused was exposed, you will consider the circumstances as they reasonably appear to the accused and draw such conclusions from these circumstances as he could reasonably have drawn, situated as he was at the time; in other words, the Court instructs you that the accused is entitled to be tried and judged by facts and circumstances as they reasonably appeared to him and not by any intention that may or may not have existed in the mind of the deceased.

The Court instructs the jury that if it believes from all the evidence that Glenn D. Blevins, John Monroe or Belvin Penny struck the deceased and threw him to the ground, and that resulting injuries to the deceased were not sufficient to cause his death, and further believe that Blevins abandoned further conflict, and thereafter someone else, other than the defendant, inflicted the wounds which caused the death of Greer F. Holyfield, and that the defendant did not by concert of action with such other person or persons or by aiding or abetting them, as defined in other instructions, then the jury cannot find the defendant guilty in this case.

The Court instructs the jury that it is not page 392 } necessary that material facts be proven by direct evidence; they may be proven by circumstantial evidence, that is, the jury may draw all reasonable and legitimate inferences and deductions from the evidence adduced before them.

The Court instructs the jury that circumstantial evidence must always be scanned with great caution, and can never justify a verdict of guilty unless the circumstances proved are of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the accused's guilt beyond all reasonable doubt.

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 given credit accordingly.

The Court instructs the jury that if upon the whole evidence in the case, both for the Commonwealth and the accused, the jury, after a careful and deliberate consideration of the evidence and the arguments of counsel and a full and free conference among themselves, entertain a reasonable doubt as to the guilt of the accused, he cannot be rightly convicted and you must find him not guilty.

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The Court instructs the jury that when a witness declines to answer a question on the ground that his answer would tend to incriminate him, that refusal alone cannot be made the baisis of any inference by the jury, either favorable to the prosecution or favorable to the defendant.

The Court instructs the jury that in this case you may find any one of the following verdicts:

1. That the defendant is guilty of murder in the first degree. Murder in the first degree is punishable by death, or by confinement in the penitentiary for life or for any term not less than twenty years.

2. That the defendant is guilty of murder in the second degree. Murder in the second degree is punishable by confinement in the penitentiary not less than five nor more than twenty years.

3. That the defendant is guilty of voluntary manslaughter. Voluntary manslaughter is punishable by confinement in the penitentiary not less than one nor more than five years.

4. That the defendant is not guilty.

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CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

Mr. Swayze:

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I am going to show you that there is a defense in this case, a good, lawful defense under the instructions given to you by the Court. I am going to ignore much of what has been said because it is not necessary to rehash all of that grisly crime now. I think you members are most interested in what the law is here. How do we go about deciding this case? We know that it is wrong actually to say, "Well, this man has been killed; this boy was with them, off with their heads, lock them up, electrocute them." I know that you want to give more consideration than that to it, and I want
page 404 } you to get right down to the nub of this question.

It is not whether Glen Blevins is a good boy or a bad boy, whether he drinks or destroys mail boxes, whether he rides. That is not the issue. He is not being tried for any of those things. We have a very narrow, limited question for you members of the jury, and I want you to keep your eye on that because that is what you have got to decide.

There are several facts that jump right out at you in this case. The first one, and this is the most amazing thing—I have never had a murder case in my life where the facts are practically uncontradicted. There is not much dispute in what happened. We all know what happened. We have been going over it and over it now for two full days and we all know what happened out there, and I don't think there is a whole lot of factual dispute. The first thing that is not in dispute, I don't think, Glen Blevins did not kill Mr. Holyfield. Mr. Holyfield was killed by one Rudolphus Gadd. This is the man, Rudolphus Gadd took that gun, he came out of the woods, he found the gun on the ground, he saw Mr. Holyfield on the ground, and he took that gun and brutally beat

this man over the head with it, broke the gun over his head. Gadd killed Mr. Holyfield.

Secondly, Glen Blevins did not maim or disfigure Mr. Holyfield. That hideous act was performed by one John Monroe. I'm talking about his eyes now. It is difficult for me to talk about such a gruesome thing, and it is not involved in this case. He is not charged with maiming, but I
page 405 } mention it because I want to point out to you that Glen Blevins did not do that. That was done by Mr. John Monroe.

Now, here is the issue, and Mr. Horan has put his finger on it, too. Glen Blevins did not act in concert either with Rudolphus Gadd or John Monroe in the commission of their foul deeds. Furthermore, Glen Blevins did not aid or abet either Rudolphus Gadd or John Monroe in the commission of these deeds. This particular crime of homicide for which Mr. Blevins now stands indicted has clearly not been proved. And under the instructions of the Court, if I can show you now that it has not been proved, it is the duty of this jury to acquit Mr. Blevins regardless of how strong you feel that punishment is merited by other offenses, or merited by other persons.

Let's consider the first point now, that Glen Blevins did not kill Mr. Holyfield. I am going to dwell long on this, I just want to mention what the evidence is. First of all, Roger Watson testified that Mr. Penny and Mr. Blevins returned to the car about the same time as he did. Now, you remember Roger ran into the woods. He was afraid. Penny and Blevins went back to the man and scuffled with him. When he fell down into the ditch, they ran back to the car about the same time as Mr. Watson came out of the woods. At that point, Mr. Watson remembers hearing Mr. Holyfield hollering, "I have had enough, let me up." The man wasn't dead. He was there, he was living, he wanted up, he had
page 406 } had enough he wanted up. Who was back there with him? Mr. Monroe.

Now, according to Belvin Penny, Mr. Holyfield sustained a bloody nose in the fight back there by the car. He had been pushed down, and that's all that happened. He didn't see anything else happen. When Mr. Penny went back to the car, Blevins went with him. These boys did not kill Mr. Holyfield.

Now, there is corroborating witnesses we have produced for you here, and I think there was a very important witness that I think heard the Commonwealth's case, their theory in this case, worse than any other witness, and that is Mr.

Charles Whisenhunt. Mr. Whisenhunt testified that he talked to Mr. Gadd on the same day that the thing happened, and out of a mere discussion Gadd told him that he had had a fight and that he had taken a gun and killed a man with it. Now, you have heard Mr. Whisenhunt say that. And he did it. And he told Mr. Whisenhunt that Mr. Holyfield was lying on the ground and he took the gun and he killed him with it. Now, this is out of Gadd's own mouth by a witness who is not involved in this case whatsoever. Now, you've got to consider this, members of the jury.

Now, according to Roger Watson, there is another witness, and also Glen Blevins, when Rudolphus Gadd got back in the car after leaving Mr. Holyfield's car there, he had lighted it afire, Gadd stated in the car that he had told these
page 407 } boys that he had just killed this man with the gun. Again, out of Gadd's mouth. Now, if that's not enough for you members of the jury, we have Dr. Cooper's objective autopsy report, and I think that makes it rather conclusive that this man died of massive concussions. His skull was broken in many places. It was crushed by a heavy, blunt object. These were the fatal blows. The gun has been introduced into evidence with the blood on it. How can anything be clearer than Gadd took that gun and beat this man to death with it?

Now, I asked Dr. Cooper if the blow that the deceased received on his nose would be fatal, and he indicated that it would not. Now, this would adequately account for the blood on his clothes and blood on the hands.

Now, it is very dramatic and Mr. Horan has done a dramatic job of presenting to you that this defendant stands before you with the deceased's blood on his hands. Of course, that's very effective, but if the blood came from a bloody nose, it is a far cry from a situation of murder, and we ought not to allow that to convict this man, the fact that he had blood on him.

Against these very positive statements, what has the Commonwealth really done to show that this man killed Mr. Holyfield? Well, the only thing that Mr. Horan has mentioned to you here is that Roger Watson said that when they got back in the car Glen Blevins said, "We beat the
page 408 } hell out of him." Well, what in the world does that mean? Does that mean they killed him? Admittedly, they were tussling with the man, they were fighting with the man. Maybe he thought he was talking big, whisky talk, that he beat the hell out of him, but he is not charged with that, members of the jury, he is charged with something

far more serious. Against all of that, that's all the Commonwealth really has. Well, it's true that Jerome Johnson, the colored man who testified here, and I'm sure he did the best he could, if you could understand everything he said, said that Glen Blevins had come there that night and told him that he had a fight with a man over a gun and that he had hit the man with it. But, you know, you heard him testify, and I'm sure you saw how he mouthed his words, and it was difficult to understand him. Well, Glen Blevins is not a whole lot better. You have trouble understanding him, and when you get the two together quoting each other, it is not a very reliable source. I am sure that Jerome Johnson didn't understand clearly what this man said, and I'll bet you that Blevins doesn't talk as clearly as he does up on the witness stand when he has had a few drinks.

So, against all of this testimony that is so conclusive that Gadd killed Mr. Holyfield, that's all the Commonwealth has done.

Now, the second point I had was that Mr. Blevins did not maim Mr. Holyfield. Now, there is no evidence whatsoever that Mr. Blevins wrestled on the ground in a prone
page 409 } position with the deceased. Whatever conflict they had was in a standing position. Now, you don't tear a man's eyes out or gouge his eyes out in a standing position. The only man that was down on the ground with him was Monroe, and no one has even said in this case, no one has even said that Glen Blevins harmed the man's eyes. John Monroe was quoted by the boys when he got back in the car with saying that he tore the man's eye out, he tore them out. I don't think there is any use going over that any further. Mr. Blevins didn't have anything to do with that, didn't know it, he isn't responsible for what—for that terrible thing.

Now, the real issue in the case is whether Glen Blevins acted in concert with Gadd and Monroe in the commission of their crimes. Now, Mr. Horan has made reference to Instruction No. 13 that the Court has given you, and it is an important instruction. That instruction tells you that if there is concert of action—just remember that phrase, "concert of action"—with the resulting crime one of its incidental probable consequences, then whether such crime was originally contemplated or not all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime. What this means is that if you and I get into a little deal here, we are going to go out and beat somebody

page 410 } up and we go out and assault that person and I am standing there while you are slugging the person, it makes no difference which of us strikes the last fatal bolw. We are both involved, we are acting in concert and unity of purpose and unity of design, we know what is going on and I am responsible for what you do. * * *

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page 411 } Now, there is another instruction. That is the Instruction No. B: "The Court instructs the jury that if they believe from all the evidence that Glenn D. Blevins, John Monroe or Belvin Penny struck the deceased and threw him to the ground, and that resulting injuries to the deceased were not sufficient to cause his death, and further believe that Blevins abandoned further conflict, and thereafter someone else, other than the defendant, Blevins, inflicted the wounds which caused the death of Greer F. Holyfield, and that the defendant did not by concert of action with such other person or persons or by aiding or abetting them, as defined in other instructions, then the jury cannot find the defendant guilty in this case."

So, what is the crucial issue for the jury? The one word "abandon." Did Glen Blevins abandon the conflict when he went back to the car so that he could not be said to have been acting in concert with the two men who then came upon the scene and did this man in? That is the crucial issue. Now, that is not an irregular word, it is a very common, ordinary word and the definition isn't unusual. To give up absolutely, to walk away from, to abandon.

Now, what did this man do on the scene? He was fighting with the deceased. He could have stayed there and rooted for the others to come out of the woods and help him. He could have continued the assault. He could have done all kinds of things, but he didn't. He walked away

page 412 } from the man. He went back to the car. Now, what else could he do? He went back to the car. Now, that's as effective an abandonment as I could possibly imagine. He completely gave up any further effort at fighting Mr. Holyfield, and from that moment forward there isn't one tinsel of evidence here, members of the jury, that he did anything, either by word, sign, action, or otherwise to encourage Mr. Gadd to come out of the woods and do what he did or to encourage Mr. Monroe to do what he did. Mr. Blevins sat passively in the car. Now, I ask you, doesn't that constitute an abandonment? That's the issue

that you people have to try here and try it dispassionately and fairly without prejudice. Does that constitute abandonment? I think that it does. Glen Blevins did not intend to kill Mr. Holyfield. He wanted no part of it; all he wanted to do was to get away from there.

Now, aiding and abetting comes very close to this acting in concert, and the Court has instructed you that aiding and abetting consists of some sign, some gesture, some word, some deed, to encourage the other persons in the commission of a crime. And again, there must be union of intent, criminal intent. That's what he is up here for, criminal intent or homicide. Now, I think it is abundantly clear that Glen Blevins has not evidenced by what he says, because anybody can say anything, but by what he did out there on the scene,

page 413 } he walked away from the scene and that constitutes a clear abandonment, and there is no evidence that he did anything more after that.

Now, I think it would be grossly unfair to saddle this young man who is 19 with the hideous crime that has been committed in this case on that kind of evidence.

Now, you might believe, and it is questionable whether he did sit passively in the car, or you might believe it is questionable whether he may have been acting in concert. I don't know. But, if there is any question, then the instructions that this court has given to you concerning reasonable doubt come into play. This man, as every other defendant that comes into court, is presumed to be innocent until proved guilty beyond a reasonable doubt. If there is any question in your mind, members of the jury, you have got to resolve it in favor of the defendant, not in favor of the Commonwealth. You are not to speculate or guess or conjecture on this evidence and render a verdict of guilty. You have got to be certain of what you are doing. A man's life depends on this and you must be absolutely clear in your minds. If you have a reasonable doubt, as the Court has told you, it is your duty to resolve that doubt in favor of the defendant.

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Now, there are just a couple of more things that I want to mention to you, and I think I'll mention those by way of summary. Now, he is not here charged with destroying mail

boxes or disturbing the peace or fighting or assault and battery, any of those things. He is not charged with that. I hope that you will be able to clearly put your mind on the central issue in this case. There will be a lot of discussion when you get up in the jury room when you are rehashing all the facts and the testimony that you have heard here, but also I hope that you will bear in mind that our defense here is a defense of abandonment. Glen Blevins abandoned the conflict when he got back to the car, and if you believe that or you even have a reasonable doubt that it may be true, then you have got to acquit this boy. I just don't believe that the evidence of the Commonwealth is sufficient or has been sufficient here to prove beyond a reasonable doubt that he didn't abandon the conflict or he did.

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REBUTTAL ARGUMENT ON BEHALF OF THE COMMONWEALTH

Mr. Horan: Briefly, if I may, aiding and abetting, concert of action, that's the whole case. Did he walk away from it? When you look at the activity of this boy on that evening, when you look at the activity of the group, they were in it together, Blevins and Monroe were there, Monroe and Gadd were there, they go to the car, three of them get in. We don't know, there was no noise, but we don't know when Monroe gets in. He just appears there. We don't know when. But, what do they do?

The only thing said as far as this defendant is concerned is, "Come on, Doc." "Come on, Doc, escape awaits, jump in and let's go." They had two chances. Doc takes the car, but they follow him. One mile later, there again, according to the evidence, "Come on, Doc." Now, isn't that getting the team back together again? Isn't that getting the group back together again? They then talk about it. What we did. Monroe tears his eyes, Gadd with the rifle.

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When you consider abandonment, consider he never said anything to these other boys like, "Stop it, he's had enough, I'm getting out of here." He didn't do anything like that. "Come on, Doc." According to the defendant, from the time the attack started on that poor man nothing was said until, "Come on, Doc." Now, can you believe that? Here you are beating on a man, and you are claiming you are abandoning it, the entire thing, and you don't say anything, you don't communicate in any way.

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page 421 } (Thereupon, at 12:15 o'clock p.m., the jury returned to the courtroom and the following proceedings occurred:)

The Bailiff: Please be seated.

The Court: Let the record show the defendant and both counsel are present.

Members of the jury, I understand that you have a question you wish to ask.

The Foreman: The jury needs clarification on Instruction No. 13 and No. B. Instruction No. 13 seems to indicate that all who participate in any way in bringing the crime about are equally answerable, whereas the Instruction B indicates that if Blevins abandoned the conflict and thereafter someone else inflicted the wounds causing death and Blevins did not by concert of action or aid and abet them, then the defendant is not guilty. These instructions appear to be in conflict and we need some clarification.

The Court: All right, have you got that written out, sir?

The Foreman: It's written down. My handwriting is pretty poor.

The Court: Is this the question of all the jurors?

The Foreman: It is a question of a number of jurors, not all of the jurors.

The Court: Let me have the two instructions and the question on it, please. You are the foreman of the jury?

page 422 } The Foreman: I am the foreman.

The Court: I will ask you to retire to your room while the Court seeks counsel with counsel and we will see if we can give you an answer.

(Thereupon, the jury retired to the jury room.)

(Conference in chambers.)

The Court: Let the record show we are now in chambers and the defendant and all counsel are present.

Does the Commonwealth have a comment or suggestion?

First, let me read the written question of the jury.

"The jury needs clarification of Instruction No. 13 and No. B. The Instruction 13 indicates that all those who participate in bringing the crime about are equally answerable and Instruction B indicates that if Blevins abandoned the conflict and thereafter someone else inflicted the wounds causing death and Blevins did not by concert of action aid and abet them, then the defendant is not guilty."

They comment that the instructions appear to be in conflict. The written question is nearly the same as the question posed by the foreman.

It appears that we are getting back on the phrase "at any time." That we eliminated when we were drafting "B." Concert of action or aiding and abetting at any time.

Mr. Horan: Doesn't Instruction No. 13 have to do with concert of action, principal one, and doesn't Instruction B have to do with—

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The Court: B speaks of concert of action again.

Mr. Horan: Well, sir, as a matter of law, if they find an initial concert of action, the probable consequences of which the person is dead, does an abandonment or can an abandonment—

The Court: Did he—

Mr. Horan: I think on the one hand, can he abandon once the initial onslaught has taken place in concert? Well, if one is talking about aiding and abetting and not concert of action—

The Court: Well, if you find or if the jury should find aiding and abetting at any point, even though the man then walked off, I think he could be found guilty if there is aiding and abetting in the ultimate. I think aiding and abetting in causing the man serious bodily harm, one normal consequence of which could be death, I think then if he turns and walks away, if he has aibed and abetted in causing this serious bodily harm that could lead to death, even if he walks away.

Mr. Horan: This is why the Commonwealth requested the

insertion of the words "at any time" in that instruction, and I think there is sound law behind it.

Mr. Swayze: Judge, if I understand Mr. Horan correctly, he takes the position that a defendant once having been in concert of action with others cannot thereafter, page 424 } as a matter of law, abandon. He is stuck with whatever they do.

The Court: With whatever the incidental probable consequences are.

Mr. Swayze: There is no way he can get out of it?

The Court: What if we had a situation where say five men decided they are going to cause a riot and by causing a riot they can go out and say so-and-so is a no-good so-and-so and realize that this will bring on the riot. And they go out and say that, and one of them, after they say that and the thing starts moving, one of them says I am in a little too far and he walks away and a riot results. Even if at that point he walks away, would not that be concert of action?

Mr. Swayze: Your Honor, he is guilty of having started the riot and having acted and participated, and he cannot erase his guilt of what he has already committed. But, certainly it is never too late for a citizen to stop in the participation of a crime and say I am going to get out, I am going to get away from it.

The Court: I think that there are times when it is too lave to move out.

Mr. Swayze: Your Honor, he has got to have a way to abandon. Abandonment certainly is our whole defense and the whole issue. If you eliminate that defense there is no defense. That is our defense that we made to the jury, that he abandoned, and I think it would be improper page 425 } to instruct the jury at this point now and tell them that it is not a defense.

The Court: I am not going to tell them it is not. This instruction has been given and will remain before them. What the Commonwealth has suggested and suggested earlier was to put in the phrase, prior to "concert of action", put in that the defendant did not act at any time by concert of action with such other person or persons or by aiding and abetting them, then the jury cannot find the defendant guilty.

Mr. Swayze: That's telling them, Your Honor, that once he starts participating he is on the train and he cannot get off, and he is responsible for everything that thereafter happens.

The Court: There are times when a defendant cannot abandon even though he wishes he could, and there may even

be a long time element. A time bomb. What if a man sets a time bomb and walks off and an hour later he says, I wish I hadn't done that, I'm going to get out of town?

Mr. Swayze: Right. He is responsible, of course, but we do not have a time bomb here. We have a different case and it has to be judged on the facts in this case.

The Court: Surely.

Mr. Swayze: Could he have abandoned? Certainly in this case I think the thing, the way it occurred spontaneously alongside of the road leaves this man a clear opportunity to run away and to abandon, to have nothing further

page 426 } to do with the beating. It isn't a situation of a time bomb at all. He didn't put anything in motion that would lead to a homicide. The only thing that he did was scuffle.

The Court: Wait a minute. Again we have got to take it in view of what the jury could find against him, not just what they could find in favor of him. Number one, they could find he didn't abandon at all, all he did was sit in the car. Number two, they could find that he did in fact set the time bomb or he did incapacitate this man to such an extent that the others, the other two were able to come and finish him off later. They could find that from the evidence. They could find the statement that he had beat the hell out of him, that he had hit him with the rifle, they could believe it. They could believe he ended up on the ground and was so incapacitated that he couldn't defend himself. Can you then abandon what you have done? And a man comes back then and gouges his eyes out and then he hears a thump, thump, thump. I am saying that this is what the jury could find. They could find there is absolutely no abandonment.

Mr. Swayze: I think if you tell them he could abandon. Did he abandon, did what he did under the circumstances constitute an abandonment? That's the issue, and that's the issue I think that has been submitted and should be for the jury.

The Court: I think the confusion—does that mean after he abandoned, did he then have a concert of action

page 427 } or did he then aid and abet after he went back to the car?

Mr. Swayze: If he did, the instructions—

The Court: I don't think the concert of action has to be, I think it has to be prior to.

Mr. Horan: Your Honor, a second point—

The Court: I think aiding and abetting can be prior to attempted abandonment of a crime.

Mr. Swayze: That gets into the question, did he abandon under the circumstances of this case, did—

The Court: I think their confusion is, as it appears to me from reading B, they could feel that we go on and we say thereafter someone else, other than the defendant, inflicted the wounds which caused the death of Greer F. Holyfield, and the defendant did not by concert of action. It sounds like the concert of action and the aiding and abetting has to be after he allegedly abandoned, and I think that is in my opinion not the law. I think the law is if he had the concert of action and aided and abetted at any time in connection with the crime that he would be responsible.

Mr. Swayze: Your Honor, I think that's telling them that you can't abandon.

The Court: I am not too sure on the law that there is really sufficient evidence to show an abandonment. I mean, those numerous other instructions concerning premeditation, and did he intend this, et cetera, et cetera. I just

page 428 } think that Instruction B has confused the jury by making them think maybe he aided and abetted beforehand or by concert of action beforehand, that he could then walk away to the car and this relieves him of any responsibility for the crime by merely walking over and sitting down.

Mr. Swayze: If Your Honor takes that instruction out you are sentencing this man to death.

The Court: I am not talking about taking the instruction out at all. I am granting the instruction. I am considering amending the instruction by adding that phrase.

Mr. Swayze: I think you are eliminating, when you say "at any time", you are making it impossible for this man to abandon, and eliminating our entire defense once there is a concert of action. Certainly there is no question but what they were acting in concert at one point in this thing, and to tell them that he can't abandon once you start as a matter of law—

The Court: I would really like to see some cases, Mr. Swayze, on abandonment under these circumstances.

Mr. Swayze: Well, I'll be glad to research this, Your Honor.

The Court: I mean that after three men have been in a fight and one man knocks him down, I think the jury did find incapacitated him, can the man then just walk off to the car and sit down in a seat of the car and have this be an abandonment? I have allowed the instruction on abandon-

page 429 } ment. But, I don't think that the phrase abandoning the conflict can erase all of the—

Mr. Swayze: Sir, the Jury is the one to pass on it.

The Court: I don't think that this instruction initially—initially we put that phrase in and I think we took it out and I think the jury has determined from this instruction that the concert of action or aiding or abetting has to be after the abandonment or he is not liable. And, I don't believe that's the law.

Mr. Tydings: But, Your Honor, the jury could also find that, in fact, even though in the original scuffle he knocked him down that he was not incapacitated and that no deadly blow or any blow of any lethal caliber had occurred at that time, and at that stage then the defendant had gone back to the car totally withdrawn, abandoned, and here comes Gadd, and he's never been in any action, concert or aiding and abetting with Gadd at that point. Gadd had gone up the road. He had completely left.

The Court: He was in direct concert of action with Monroe, and Gadd was in concert of action with Monroe in successive beatings it would appear from the evidence.

Mr. Tydings: We don't know whether Monroe had finished before Gadd got on—

The Court: I think there was evidence that Monroe came back to the car and Gadd went down.

page 430 } Mr. Tydings: He could have been acting solely alone at that point. There is no evidence to show that gouging eyeballs out will cause death.

Mr. Swayze: Your Honor, we did submit a case, if you recall, on abandonment which is the only case that we could find in Virginia on the subject, and that was the *Nelson* case, and we took that instruction out of that *Nelson* case. That is where we got it.

The Court: That is one where there was an unknown killer and the man had been stabbed and there was no evidence.

Mr. Tydings: Here there is an unknown killer in effect.

The Court: Oh, no, this man was clearly killed by one or more of the four men at the scene.

Mr. Tydings: Or more, if any, is the unknown element—

The Court: No, sir. We know who killed him. It was all of them or some of them. There is no person not connected who killed this man. In the *Nelson* case he was seen chasing a guy off in the darkness with a poker, and then later a man found a knife wound in his chest. There was no poker around.

Mr. Tydings: Well in this aspect it is an unknown here as to any of the other four who acted with Gadd, who we all admit.

The Court: They incapacitated the man and

page 431 } left him in a ditch. I think we have certainly got aiding and abetting him in the killing of the man.

Mr. Tydings: That is a fact the jury has to determine.

The Court: The evidence now is that when Gadd came up the man was lying in the ditch, and that's from Gadd's own statement through one of your witnesses, that when Gadd came up the man was lying in the ditch. Gadd picked up the rifle and hit him on the head.

Mr. Tydings: There was nobody else.

The Court: This was Gadd's statement to Whisenhunt. It was put in evidence when Gadd arrived the man was lying in the ditch. There was a statement that he said, "I have had enough." Monroe says he gouged the man's eyes out. Now, if that doesn't incapacitate him—

Mr. Tydings: All right, but you can draw the inference the other way. They may not.

The Court: Fine, but what does this have to do with this problem here?

Mr. Tydings: You are saying that if in fact he stared at all then he can't abandon under these circumstances, and that's something for the jury to decide.

Mr. Horan: I think what the Judge is saying, if the conduct has gone so far, then he can't abandon, and not even getting to the concert of action question, if he was aiding and abetting the subsequent killing in any way, he can't aban-

page 432 } don that. And that's why it should have those words "at any time" if he had aided and abetted them.

The Court: Of course, you could have had a much stronger case of abandonment. The defendant could have gotten out and said, "Hey, let him up." Or something like that. He could have said when Gadd went down there something like, "Don't hurt him any more." I allowed the instruction on abandonment because I wanted to give an instruction in conformance with the defendant's theory, of his defense, but it doesn't mean that it is a strong defense. It doesn't mean that it is a strong defense.

Mr. Swayze: The strength of it depends on the jury.

The Court: And the evidence and the instructions.

Mr. Swayze: How they interpret the evidence.

The Court: Right. But, the instructions are very important, and apparently this jury is reading the instructions with great detail. I think that this instruction has misled them.

Mr. Swayze: Your Honor, I think to change it at this time is to deprive this man of his defense theory. We made out closing arguments based on these instructions, Your Honor, and I based everything on this abandonment.

The Court: It is the only thing you have got, Mr. Swayze, and no matter what instructions have been given, that is still your only defense.

page 433 } Mr. Swayze: No. No, I may have made some other type of arguments had we had another type of instruction. Now, if the jury has been improperly instructed, I made my argument based on this instruction, we would have to try this case again.

The Court: It was your request that I take this out.

Mr. Swayze: I made my arguments based on that instruction. If Your Honor tells the jury that this is an improper instruction, we will have to try this case again.

The Court: No, sir, I don't agree.

Mr. Swayze: I would take that position, and it is up to you to rule on it, of course. I based everything in my argument, and the record has it, on this abandonment. I told the jury that.

The Court: How does adding those words change your reliance on abandonment? What other defense would you have relied on if I had put in "at any time"? You said abandonment in your defense.

Mr. Swayze: I don't think I would have said that if the—

The Court: I am saying here you have said that. What other defense would you have had or could you have asserted if I had given Instruction B with those words added?

Mr. Swayze: It is difficult for me to answer on the spur of the moment. I would have to give it some thought. But, I did give extensive thought on this last night

page 434 } in preparing my address to the jury, and I did base it on abandonment because I felt that was our best presentation. Now, to take this and change it now changes the signals after the play has been made, and I think it is to the detriment of this man, and is the only fair thing to give him a fair trial, and to try him again.

The Court: I think he has had a fair trial.

Mr. Swayze: I think he has, too, and I commented that to the jury.

The Court: I don't see any other potential defense in this case other than abandonment.

Mr. Swayze: It is up to me to find the defense.

The Court: You are saying it is unfair because you could have had some other defense, and I am telling you to tell me what other defense.

Mr. Swayze: You would have to permit me to gather my thoughts a little bit.

Mr. Tydings: I would say one, we would have to take

exception to granting those instructions if those words be in there.

The Court: You can do that now.

Mr. Tydings: I think the jury has come right down and pinpointed the whole case, and I think we have come right down to the whole issue in this case, and I think that to change the wording one way or the other would throw

page 435 } it right to the jury that the Court is going towards the Commonwealth side rather than the defense, and I would suggest—I don't know whether anybody else—

The Court: You had better talk among yourselves. I don't want you two to argue.

Mr. Tydings: I would say you could just say, well, Instruction 13 is the Commonwealth's side of the case and Instruction B is the Defense's.

The Court: No, sir. These are the instructions of the Court and they are given by the Court. They are the Court's instructions. They are not the defendant's or the Commonwealth's instructions, they are the instructions of the Court. They say it is in conflict and they can't determine that, and I can understand why it is in conflict. Now, when the question of putting in "at any time" came up, I was going to grant it, but you objected to it and the Commonwealth agreed to take it out and it was taken out.

Mr. Swayze: I made my closing arguments on the basis of that.

The Court: Fine, but you haven't shown me how this was a detriment to your client.

Mr. Swayze: If you will permit me a little time to organize my thoughts, I will be glad to present the approach to the case.

The Court: How much time do you want, sir?

page 436 } Mr. Swayze: Well, how much time will you give me? How much time might you give me?

The Court: We have a jury out. I can't say we can come back tomorrow and discuss that point again.

Mr. Swayze: I am here at your disposal and I will do anything you tell me.

The Court: I personally don't see any other defense in the case, and I had understood that you said that was the defense and it was thoroughly argued.

Mr. Swayze: I wouldn't have said—

The Court: I mean, in here you have said that that was your defense in the case.

Mr. Swayze: If you take that away from me, I wouldn't have put it to the jury in the way that I did.

The Court: What would you have done?

Mr. Swayze: If you will give me an opportunity, I will tell you. I am not prepared at this moment to make a statement. I haven't had a chance to confer with anybody, especially the defendant.

The Court: I think we are getting off in the pretty far reaches of conjecture as far as what might have been said or what might not have been said.

Mr. Swayze: I wouldn't have said this is our whole defense, gentlemen of the jury, if your Honor hadn't permitted it at that time as a defense. I wouldn't have based it

page 437 } on that. I would have been remiss if I did.

The Court: I am not eliminating your defense.

Mr. Swayze: You are telling them in effect he was in concert. That's the end of it, he can't abandon.

The Court: And that the defendant did not, at any time, by concert of action with such other person or persons or by aiding or abetting them then the jury cannot find the defendant guilty.

Mr. Swayze: All I can do is say we gave these a great deal of discussion at the time. We have all approached the case. Mr. Horan has made his argument; and I have made mine. A man's life is in the balance. If you put those words in there all I can do is ask you not to change the instruction.

The Court: How about just changing the one word "did" to "had?" That the defendant had not by concert of action with such other person or persons or by aiding and abetting them?

Mr. Swayze: May I see the instruction, Judge?

The Court: I haven't marked it up. Please don't. This is the jury's copy. I think it should be "had not acted by concert of action with such other person or persons or by aiding or abetting them." Actually as given in this sense it leaves out that word. Let me read the whole thing as I would propose to amend it: "The Court instructs the jury that if they believe from all the evidence that Glen D. Blevins, John

page 438 } Monroe or Belvin Penny struck the deceased and threw him to the ground, and that the resulting injuries to the deceased were not sufficient to cause his death, and further believe that Blevins abandoned further conflict, and thereafter someone else, other than the defendant, inflicted the wounds which caused the death of Greer F. Holyfield, and that the defendant had not acted by concert of action with such other person or persons or by aiding and abetting them, as defined in other instructions, then the jury cannot find the defendant guilty."

Mr. Swayze: Your Honor, that has the same effect on the jury. It tells them if he had acted in concert or aided and abetted, then he can't abandon. That's what it tells them.

The Court: Couldn't they find that he did not aid and abet? Can't they find that he did not act in concert of action with them?

Mr. Swayze: Yes.

The Court: Why can't they find abandonment?

Mr. Swayze: Because you have told them once having acted in concert or aided and abetted, he cannot thereafter abandon.

The Court: I don't know of any law that says that he can abandon what he has done if murder is the result.

Mr. Swayze: I think that he can abandon. I think that that is our real prime difference here, if you take that away, as I have said.

page 439 } The Court: Let's assume you have a fact of aiding and abetting already accomplished. Once you complete the accomplishment of that, can you abandon? Can you turn around and walk away and let the ultimate happen?

Mr. Swayze: I don't believe you are stuck with whatever then happens.

The Court: Can you get unstuck?

Mr. Swayze: He can abandon before, the defendant abandon prior to the time that the homicide was committed. That's how he can abandon, and that's what Blevins did. He walked away before it reached that point.

The Court: Let's get to a different hypothetical. What if you have a man aiding in an assassination. This man's job is to go there and set up the rifle and telescopic sight and aim into the chair the man is going to sit in, and he goes up there and aims it on the chair, and you are the guy that is going to pull the trigger. And, I get up and walk out of the room and I get out of that room and I say, "Oh, boy, I don't want to be involved in this." And I walk on down and leave.

Mr. Swayze: That is the same thing as the time bomb. I think it illustrates the same point. There is a different situation here. There are two separate phases. It wasn't a steady transaction progressing toward a definite end. It started out with a scuffle, ended up as a homicide. This man got off at the very last moment that he could get

page 440 } off, but I think that he got off, and I think the jury should be able to find that he could get off at that point. The test is whether or not the jury believes that it is in two phases. Perhaps Your Honor doesn't

believe this, but the jury could believe it, that there are two phases to this case.

The Court: I think under the instructions they could find this man did not aid or abet in the commission of the murder, and I think that they could find he was not in concert of action in the commission of the murder. This is only precluding those two things in giving an instruction for the defendant saying you would have to preclude those two things in order to have abandonment. You would have to find that he wasn't acting in concert of action or aiding and abetting in the murder. You would have to preclude those to have abandonment.

Mr. Swayze: The abandonment has to take place before that homicide is committed.

The Court: Before it got to the point where he couldn't stop it, or prevent it, prevent further damage to the man which probably would lead to homicide.

Mr. Swayze: I really think that really does put upon him a tremendous burden that he has as a matter of law to stop it.

The Court: I haven't instructed the jury on that.

Mr. Swayze: I really think that it what they
page 441 } are going to think you are telling them.

Mr. Tydings: Couldn't the jury also find that, considering the circumstances, the drinking, and the man with the gun, and perhaps this defendant when he first back there to scuffle with them and took the gun away from him says something like maybe, "I'm safe now." And then he goes back to the car and doesn't think that somebody else is going to harm him. Could they find that this was reasonable for him under the circumstances and to his way of thinking that was all he could have done under the circumstances. He figures he's safe, he got him down, and he's not going to hurt him. He's in the ditch and they got him down and the gun away. "We can go now." Couldn't they find that under those circumstances that he didn't have to go out and say, Stop, or Don't do anything else, other than get in the car? Also that he had no idea what Monroe was going to do, that he was going to gouge his eyeballs out or that Gadd was going to go back there? He had no reason to interpret what he heard at that time.

The Court: Well, he heard Monroe say he gouged his eyes out. And then Gadd goes by and he heard then, but he doesn't get out. This is arguing the effect of the evidence and not what the instruction should be.

Mr. Swayze: I don't think that you are changing the effect—

The Court: What I said to the jury—I don't
page 442 } think that I have by this changed it. Had not
acted does not spell out at any particular time.

Mr. Swayze: I must object, Your Honor, and I will move for a mistrial.

The Court: All right, sir. This is the last part as amended, "and the defendant had not acted by concert of action with such other person or persons or by aiding or abetting them, as defined in other instructions, then the jury cannot find the defendant guilty in this case." Frankly, I think that we all were remiss in not wording it better by putting in the word "acted" in the first place.

Mr. Swayze: At this point, Your Honor, before we go back to the jury, I would like to present my motion for a mistrial.

The Court: All right, sir.

Mr. Swayze: On the ground that if the statement you just made is correct and that we were ill-advised in giving the instruction to the jury, the only fair thing to do now is to let this defendant have a new trial so that counsel's argument will not react against him instead of for him. It was intended by me in making my argument to concentrate on this matter of abandonment and I did concentrate the whole thrust of my argument to that one point. The Court is now taking that from me by amending the instruction, placing this man
in the virtual position of no defense under my
page 443 } argument, under the closing summary, and I can't
believe that this man's life can be taken from him because of this instruction that we made a mistake in, a mistake in constructing that instruction. It is only fair to give me a new trial.

The Court: Mr. Swayze, if the jury had made a decision on the case and we were to find that there was error in that instruction which prejudiced the defendant's case, certainly there would be a new trial granted. The jury has not made a decision. They have asked for clarification on instructions. It has to be brought to the attention of the Court in what manner the adding of the words "had" and "acted" and substituting that word for "did" would affect the defendant's right to bring forth to the jury proper argument. I have not heard anything whatsoever to show that my changing the phrase in "that the defendant did not by concert of action" and "that the defendant had not acted by concert" would affect the arguments or the result in this case.

Mr. Swayze: I have indicated, Your Honor, it would take a moment to organize my thoughts.

The Court: I have asked you how long you want and I don't think you are asking the Court to tell you how long you can have. You tell me how long you want and I'll rule on it.

Mr. Swayze: Your Honor, I am very much embarrassed. I don't know what to say. I dislike very much holding up the progress of this trial and the other one with
page 444 } which I am also involved. I have two juries now. I don't think in fairness that I could give you an answer before the morning.

The Court: Well, sir—

Mr. Swayze: With the obligations I presently have on me.

The Court: The obligation of having the other jury case going on was one you incurred by no fault of this Court. In fact, I asked you if you wanted to try the case and you said, "Yes," and you started this while the jury in the present case was out, and I can't take that into consideration, sir.

Mr. Swayze: I wouldn't want my situation to reflect adversely on my client.

The Court: Well, the only defense that you have said, not only in court but in here, the only defense that has been put forth by the defendant is that of abandonment. The jury has been instructed on what force could be used, et cetera, when one is believed to be under attack, and things of that nature, and I believe you argued that also. And now I have tried to give you an opportunity to bring in any other defense to the Court's attention that was not argued. I would have to rule that in my opinion to change Instruction B does not, and certainly there is no reason for me to believe that it would, affect the manner of the argument to the detriment of the defendant. The abandonment was argued in great detail and so was the question of force used to resist an assault.

page 445 } Mr. Swayze: I would like to note my exception to the Court's ruling on that point and inquire how this is going to be brought up to the jury.

The Court: I am just going to read Instruction B as amended.

Mr. Swayze: Your Honor, one of the things that has already occurred to us here is that in the presentation of my argument to the jury I would have presented perhaps in the light of separation of abandonment between the two offenses and given more emphasis to the fact that the two offenses could have occurred here, and they could so find. I would not have placed it as I did on the single abandonment theory. That is one of the things that has occurred to me.

The Court: Isn't that all the same thing, that the one

offense was that your man committed an assault and that he abandoned it and therefore he is not responsible?

Mr. Swayze: It may be, but I am a little at a loss for words at the moment to adequately do the task that is now presented to me by this change, and that's all I can say.

The only alternate is to send the instructions back as they are and decide on the instructions as given, period. I have heard this is done many times.

The Court: I have also heard that the court instructs them on things that weren't instructed in the first place.

Mr. Swayze: It was an immaterial instruction
page 446 } or not too vital. It is our only defense.

The Court: There again you have said it is your only defense. How does the words "not acted" instead of "did not" affect your case? I haven't put in "at any time."

Mr. Swayze: It has that effect. That is exactly what it tells them. It tells them exactly the same thing.

Mr. Tydings: Your Honor, with that wording it would be possible to argue separate—two concerts of action.

The Court: He has already mentioned that.

Does the Commonwealth have any comment on this?

Mr. Horan: No, Your Honor. First of all, I think Mr. Swayze is overemphasing what his argument was and that it was his only defense. I thought he certainly went into what this man was doing out there with the rifle, and force used, and so on and so forth. That wasn't his only defense. But, Your Honor, I feel quite strongly, as I indicated yesterday, I felt that instruction was misleading and I feel the instruction is a proper statement of the law.

Mr. Swayze: That still doesn't go to the point, though, that I couldn't have a new trial or—Your Honor could grant me the right at a later time to argue this motion for a new trial, mistrial.

The Court: We don't know what the result is going to be yet. You certainly may make a motion after the verdict if the verdict should be against your client. I will
page 477 } certainly allow you time to file in writing with authorities any motions you desire. And, I don't intend to hold you under a 21-day thing. I mean, after sentencing, if you so request, I will allow you a reasonable time to prepare a written motion and set aside the verdict.

Mr. Swayze: I hate to see this defendant put to the expense of a new trial, and it would be very unpleasant for everyone. That is all I can say. I will have to make that effort.

The Court: We haven't had a full trial yet. I am going

to grant Instruction No. B as amended. I am going to do this primarily to correct the grammatical error, and I don't think the instruction is complete without the word "acted". And, as I previously said, "that the defendant did not by concert of action with such other person or persons or by aiding or abetting them," I am inserting the word "acted" to correct the grammatical error, and as far as the word "had" instead of "did", that is to correct it so it will not have the effect of giving the jury the idea the only way they can act by concert of action or aiding and abetting when he went back to the car. I'll just—as far as bringing this to their attention, I'll just read Instruction No. B as amended and tell them that they will have to decide the case on the law and the evidence as given to them.

(Whereupon, the conference in the Judge's chambers was ended.)

page 448 } (Whereupon, at 1:00 o'clock p.m., the jury returned to the courtroom and the following proceedings occurred.)

The Bailiff: Please be seated.

The Court: Let the record show that the defendant is present with his counsel and the Commonwealth by her counsel in person. The jury is present.

Members of the jury, in response to your question, the Court has made an amendment to Instruction No. B. I will read it to you as amended.

"The Court instructs the jury that if it believes from all the evidence that Glenn D. Blevins, John Monroe or Belvin Penny struck the deceased and threw him to the ground, and that resulting injuries to the deceased were not sufficient to cause his death, and further believes that Blevins abandoned further conflict, and thereafter someone else, other than the defendant, inflicted the wounds which caused the death of Greer F. Holyfield, and that the defendant had not acted by concert of action with such other person or persons or by aiding or abetting them, as defined in other instructions, then the jury cannot find the defendant guilty in this case."

Ladies and gentlemen, you will have to decide the case on the evidence and instructions given you by the Court. Now I will ask you, it is 1:00 o'clock. Would you prefer to commence with your deliberations or return for your deliberations after lunch?

page 449 } The Foreman: I couldn't tell any difference. Is that the same instruction?

The Court: You will see the pen notation changes. You will just have to decide the case on the instructions as given to you and on the evidence that you have heard in the arguments of counsel. But, do you wish to go to lunch now, or would you wish to return to the jury room?

The Foreman: Let's go back to the jury room for a few minutes.

The Court: All right, sir.

(Thereupon, the jury retired to further consider its verdict.)

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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