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Record Nos. 6970,6971

In the Supreme Court of Appeals of Virginia at Richmond

THOMAS LEE PENN

v. Record No. 6970

COMMONWEALTH OF VIRGINIA

THOMAS LEE PENN

v. Record No. 6971

COMMONWEALTH OF VIRGINIA

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND

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. 6970

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 24th day of April, 1968.

THOMAS LEE PENN,

Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in error.

From the Hustings Court of the City of Richmond
W. Moscoe Huntley, Judge

Upon the petition of Thomas Lee Penn a writ of error and *supersedeas* is awarded him to a judgment rendered by the Hustings Court of the City of Richmond on the 18th day of April, 1967, in a prosecution by the Commonwealth against the said petitioner for a felony (Indictment No. 3); 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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6971

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 24th day of April, 1968.

THOMAS LEE PENN,

Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in error.

From the Hustings Court of the City of Richmond
W. Moscoe Huntley, Judge

Upon the petition of Thomas Lee Penn a writ of error and *supersedeas* is awarded him to a judgment rendered by the Hustings Court of the City of Richmond on the 18th day of April, 1967, in a prosecution by the Commonwealth against the said petitioner for a felony (Indictment No. 6); 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.

AFFIDAVIT

I, Thomas Lee Penn, do hereby certify that I am indigent and unable to pay or secure to be paid the cost of printing the record in my appeal to the Virginia Supreme Court of Appeals from the judgments of the Hustings Court of the City of Richmond.

THOMAS LEE PENN

Subscribed and sworn before me this 12th day of August, 1968.

Arthur H. Ratcliffe
Notary Public

My Commission Expires December 13, 1971.

Received 10-1-68 HES

* * * * *

CERTIFICATE

I, W. Moscoe Huntley, Judge of the Hustings Court of the City of Richmond, do hereby certify that I have investigated the matter of the indigency of Thomas Lee Penn and I am of the opinion that he is unable to pay or secure to be paid the cost of printing the record in his appeal to the Virginia Supreme Court of Appeals from the judgment of this Court.

W. Moscoe Huntley
Judge
9/26/68

Received October 1, 1968. H.E.S.

* * * * *

RECORD

* * * * *

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* * * * *

And at the same Hustings Court held for the City of Rich-

mond, at the Courthouse, on the 18th day of April, 1967, the following order was entered:

* * * * *

Indictment for Murder No. 3

* * * * *

Indictment for Murder No. 6

The said defendant was this day again led to the bar in the custody of the Sergeant of this City and also came his counsel and that for the Commonwealth as of record. And the jurors sworn on April 17, 1967, for the trial of each of the said cases appeared according to their adjournment and the polling of the said jurors was waived by counsel. And having heard all of the evidence and arguments of counsel in each of the said cases, the jurors retired to their room in the custody of the Sergeant of this City to decide upon a verdict in each case. And after some time, the jurors returned into Court and presented verdicts in the following words, to-wit:

Indictment for Murder No. 3

"I *GUILTY*

We, the jury, find the accused guilty of murder of the first degree and fix his punishment at confinement in the penitentiary for *life*." J. Montgomery Farrar, Foreman

Indictment for Murder No. 6

"I *GUILTY*

We, the jury, find the accused guilty of murder of the first degree and fix his punishment at confinement in the penitentiary for *life*." J. Montgomery Farrar, Foreman

Whereupon the said defendant, by counsel, moved the Court to set aside the verdict in each of the said cases as being contrary to the law and to the evidence and grant him new trials, which motion the Court doth overrule and to which action of the Court in overruling his said motion the said defendant notes an exception and time is allowed him not to exceed sixty days in which to file his bills of exception

Whereupon it being demanded of the said defendant if anything for himself he had or knew to say why the Court should not now proceed to pronounce judgment against him according to law, and nothing further being offered or alleged in delay thereof, it is the judgment of this Court that the said Thomas Lee Penn be confined in the State Penitentiary for

the balance of his life under each indictment, this being the period by the jury ascertained in each of the said cases.

* * * * *

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* * * * *

And it is ordered that the Sergeant of this City do, when required so to do, deliver the said defendant from the jail of this City to the Superintendent of the Penitentiary, in said Penitentiary to be confined and treated in the manner prescribed by law.

And thereupon the said Thomas Lee Penn is remanded to the Penitentiary.

* * * * *

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* * * * *

And at the same Hustings Court held for the City of Richmond, at the Courthouse, on the 20th day of April, 1967, the following order was entered:

* * * * *

The said defendant having indicated to the Court his desire to appeal from the judgments of this Court entered in the case of Indictment No. 1 on December 17, 1966, and entered in the cases of Indictments No. 3 and No. 6 on April 18, 1967, the Court doth appoint Richard R. Ryder, a competent attorney practicing before this Court, to assist the defendant in perfecting his appeal to the Supreme Court of Appeals of Virginia.

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

COMES NOW the defendant, by counsel, and hereby gives notice of appeal from the judgment of this Court entered on April 18, 1967, wherein the defendant was convicted of murder, wherein the victim was Malcolm Lynn Norment, Jr. in Indictment #3, and was sentenced to a term of life imprisonment.

The defendant assigns as error the following:

1. The Court erred in failing to sustain the defendant's motion to quash any written or oral statements obtained from the defendant on the basis that the admissions of such statements would violate his constitutional rights;

2. The Court erred in admitting into evidence certain statements in the nature of confessions made by the defendant as such admissions were obtained in violation of the defendant's constitutional rights;

3. The Court erred in failing to set aside the verdict of the jury on the basis that it is contrary to the law and the evidence.

THOMAS LEE PENN

By: R. R. Ryder
Counsel

Received & filed Dec 29 1967, Hustings Court Clerk's Office, LAS, Deputy Clerk.

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

COMES NOW the defendant, by counsel, and hereby gives notice of appeal from the judgment of this Court entered on April 18, 1967, wherein the defendant was convicted of murder, wherein the victim was Addison E. Wilkins in Indictment #6, and was sentenced to a term of life imprisonment.

The defendant assigns as error the following:

1. The Court erred in failing to sustain the defendant's motion to quash any written or oral statements obtained from the defendant on the basis that the admissions of such statements would violate his constitutional rights;

2. The Court erred in admitting into evidence certain statements in the nature of confessions made by the defendant as such admissions were obtained in violation of the defendant's constitutional rights;

3. The Court erred in failing to set aside the verdict of the jury on the basis that it is contrary to the law and the evidence.

THOMAS LEE PENN

By: R. R. Ryder
Counsel

Received & filed Dec 29 1967, Hustings Court Clerk's Office, LAS, Deputy Clerk.

* * * * *

Transcript of the trial and other incidents of the above when heard on April 17th and 18th, 1967, before the Honorable W. Moscoe Huntley, Judge.

* * * * *

page 3 } NOTE: Hearing on April 17, 1967, before the Honorable W. Moscoe Huntley, Judge.

PRESENT: J. B. Wilkinson, Esq.
Roland B. Kelley, Esq.
Attorneys for the Commonwealth

Richard R. Ryder, Esq.
Attorney for the Defendant

Thomas Lee Penn, the defendant,
in person and by counsel

NOTE: The Jurors were called and the witnesses were called.

The Clerk: Call the case of the *Commonwealth* v. *Thomas Lee Penn,* before the Court this 17th day of April, 1967, on two indictments for murder. Counsel for the Commonwealth,

Mr. Wilkinson and Mr. Kelley; counsel for the de-
page 4 } fendant, Mr. Richard Ryder, and the accused are present.

Thomas Lee Penn, you stand indicted for murder, whereas on the 21st day of May, 1966, you did feloniously kill and murder one, Addison E. Wilkins, against the peace and dignity of the Commonwealth; how do you plead to this charge, guilty or not guilty?

Mr. Ryder: Your Honor, the defendant would plead not guilty and not guilty by reason of insanity to the charges.

The Clerk: Plead not guilty by reason of insanity?

The Defendant: Not guilty. Not guilty by reason of insanity.

The Clerk: You also stand indicted for murder, whereas on the 21st day of May, 1966, you did feloniously kill and murder one, Malcolm Lynn Norment, Jr., against the peace and dignity of the Commonwealth; how do you plead to this charge, guilty or not guilty?

The Defendant: Not guilty. Not guilty by reason of insanity.

The Clerk: Do you wish to be tried by the Judge
page 5 } in these cases or would you prefer a Jury trial?

The Defendant: Prefer a Jury.

The Clerk: A Jury. Do you wish to be tried in these cases simultaneously or would you prefer separate trials?

The Defendant: Simultaneously.

The Clerk: And your decision to plead not guilty by reasons of insanity and to be tried by a Jury and to be tried simultaneously on these charges was arrived at after you talked to your attorney, Mr. Ryder, is that correct?

The Defendant: Yes, that's correct.

Mr. Wilkinson: Mr. Clerk, I think he also pleaded not guilty period, and then not guilty by reason of insanity.

The Court: Two pleas in each case.

The Clerk: The record will show that Thomas Lee Penn pleaded not guilty to each indictment and not guilty by reason of insanity.

By the Court:

Q. What is your name?

A. Thomas Lee Penn.

Q. What is your age?
page 6 } A. Nineteen.

Q. Are you the defendant named in the—are you

the defendant named in the indictments that was just read to you?

A. That's right.

Q. Have you talked to Mr. Ryder, the lawyer the Court appointed to represent you?

A. Yes, I have.

Q. Have you talked to your lawyer about the subject of witnesses?

A. Yes, I have.

Q. Speak up, please.

A. I have.

Q. Are you now ready for trial?

A. I am.

Q. Are you satisfied with your lawyer?

A. Yes—

Q. Do you have any complaint about the conduct of anyone connected with your case that you would like to report to me before going into your trial?

A. No, I don't.

Q. Very well.

page 7 } NOTE: At this time all Jurors retired to the hallway until their names were called and the empanelling of the Jury proceeded, during which certain Jurors indicated their opposition to capital punishment.

Mr. Ryder: Your Honor, I would ask that the record show that the defendant objects to the Court's exclusion of any Jurors that state they are opposed to capital punishment.

The Court: Very well.

NOTE: The empanelling of the Jury proceeded, after which the Jury was sworn and the witnesses were admonished by the Court and excluded from the Courtroom.

page 8 } Mr. Wilkinson: If it pleases the Court and the Gentlemen of the Jury, at this time each counsel will give an opening statement to what he anticipates proving by his evidence in this case. I will caution each of you at this time that what I have to say or what Mr. Ryder has to say is not evidence. The evidence will come from the witnesses as they testify on the stand.

Gentlemen of the Jury, we expect to show by our evidence

on the early morning of May the 21st, 1966, in the thirty-six hundred block of Richmond Road there was found two bodies, one was identified as Addison E. Wilkins and the other one a Malcolm Lynn Norment, Jr. We expect also to show by our evidence that Mr. Wilkins was shot ten times, that Mr. Norment was shot seven times. The first witnesses that we will call on behalf of the State will be the Medical Examiners, who will establish what we call in the law the *corpus delicti,* that these two men were killed by a violent external means, to-wit: twenty-two calibre pistol—twenty-two calibre bullets. We will show from that time that the Police then went on and investigated these matters

page 9 } and on May the 29th, early in the morning, of 1966, the defendant, accompanied by his brother, William Penn, and his father, William Penn, Sr., turned himself in to the Police Department over at the new Safety Building. During the course of that day the Police continued to investigate the matter and on that night, the 29th of May, the defendant gave a statement to the Police relative to these two matters. Now, I will not go into the details of these statements but will leave that to the officers that actually took the statement down.

The defendant was brought into Court the following day, which was Memorial Day, May the 30th, and there the Court carried his case over until the 31st of May, and on the 31st of May he was again brought into Court and at that time his mother was in the Courtroom, and the Judge then allowed him to talk with his mother sometime, and during the time that he was talking with his mother, or after that time, he came in—he told the Police, Sergeant Brown and Duke, that he would like to make another statement, at which time he made another statement. I will not go into that statement at this time either, but will let the officers testify as to

page 10 } what he told them on that occasion. I only submit at this time that both of the statements implicated the defendant in these crimes.

Now, we expect to show the motive, or the idea, or the reason for these killings was for robbery. We expect to show the condition of the victims clothes at the time that they were found, their pockets, and also the things that were taken off of them at the time that they were killed.

Now, Gentlemen, perhaps the defendant will have a defense of insanity. We do not know the defendant's case at this time, but if he does and he has the psychiatrists as we gathered from the *voir dire* this morning of each of you Gentlemen that there will be a psychiatrist here this morning to testify as to

the mental condition of the defendant. If that be so then the Commonwealth in rebuttal case will also call two doctors from Central State Hospital for their opinion of their observation of the defendant after these crimes.

Now, Gentlemen, that substantially is—or in a capsule, what the Commonwealth will prove by its case.

page 11 } Mr. Ryder: Gentlemen, my name is Ryder, I'm an attorney, I've been appointed by the Court to defend Tommy Penn. What I tell you, what Mr. Wilkinson has already stated, is not evidence for you to consider. The only evidence you are to consider is what is testified to by the witnesses as they testify and it's your reasonableness applied to that.

Now, you have done this, Gentlemen, you have sworn by your oath that you would follow that evidence and the instructions that His Honor gives you. Now, this is all I ask and the defendant asks, that you pay close attention to the testimony of the witnesses here and evaluate that evidence. Don't try to decide this case based on something that happened outside the Court, something you may have read or something you may have heard.

Now, Gentlemen, the evidence from the defendant's standpoint, we expect to show something generally along this line: We expect to show you that this defendant is now approximately nineteen years of age. He grew up in his early years in Lawrenceville, Virginia. We expect to show you that he came from a home-type situation where everybody that a boy

page 12 } normally would look to for guidance and leadership rejected him completely. We expect to show you that his father was a drunk, who habitually beat him, beat his mother. We expect to show you that his mother has had many, many mental problems. We expect to show you by the evidence here that when this boy was about fifteen years of age, he was committed to the juvenile authorites. We expect to show you that at that time the defendant was examined by various people and that at that time, when he was fifteen years of age, that he was found to be insane, that he was found to be what was termed a schizophrenic, I don't know exactly what that term means, but the psychiatrist will tell you; that he had various paranoid tendencies, that he had violent tendencies, that he was very hostile to the whole world, especially to members of his family and persons who had rejected him continually throughout his infancy. We expect to show you that he was sent to Central State Hospital when he was about fifteen years of age. He was sent there by Dr. Lordi, or on Dr. Lordi's recommen-

dation. We expect to show you that the evidence will be that Dr. Lordi, William Lordi, who was at that time head of the Memorial Guidance Clinic here in the City of Richmond, diagnosed this boy as being a schizophrenic and we

page 13 } expect to show you from the testimony of these two—or these people—that what happened was to a large extent predictable, what this defendant has or has not done, as will be shown by the evidence. We expect to show you that he was sent to Central State, stayed there approximately nine months, during which we expect the evidence to show that he received no treatment of any real description. We expect to show you that he was sent away from Central State with the desire or hope by the authorities that he would receive after-care psychiatric treatment. We expect to show you that this was not done. We expect to show that the defendant was examined sometime shortly before this trial by Dr. William Lordi and Dr. Lordi, I believe, will testify that the defendant is about as sick mentally as a person can get; that his tendencies are towards hostility, towards violence, that he has sought help in many, many ways over a period of years and has never gotten it; that his pattern of behavior is completely predictable, or at least predictable medically; and we expect to show you from the testimony of Dr. Lordi and one other man that the defendant is now insane, has been insane for sometime.

page 14 } When the evidence is concluded, Gentlemen, I would think you will arrive at the conclusion that Dr. Lordi, who over a period of years has had many, many opportunities to examine and evaluate this boy, is much more competent to give an opinion than the two, one or two psychiatrists from Central State who have examined this boy since the case arose and who have concluded or who will tell you their conclusions on rebuttal evidence introduced by the Commonwealth, apparently that in their opinion this boy has no mental illness of any kind. You will be called upon to evaluate the different psychiatric diagnoses. We will ask that you consider such facts as the fact that Dr. Lordi has over a period of years observed this defendant and that the State Psychiatrist, I believe the evidence will show that they examined him for maybe a half hour or maybe fifteen minutes and basing opinions to a large extent upon that type of examination.

We expect also to introduce evidence here of a psychologist who has had an opportunity to study this boy and who will tell you his opinion. But we only ask this, Gentlemen, use your brains, use your reason, listen to the evi-

page 15 } dence as it comes from that witness stand and evaluate it in the light of the instructions His Honor will later give you. Thank you.

GEOFFREY T. MANN, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:

Q. Would you please state your name and occupation to the Court and Gentlemen of the Jury?

A. Geoffrey Thomas Mann, M.D., Chief Medical Examiner of the Commonwealth of Virginia.

Q. How long have you been the Chief Medical Examiner of the Commonwealth of Virginia, doctor?

A. Oh, close to twenty years now.

Q. Before becoming a Medical Examiner for the Commonwealth of Virginia, did you have any education requirements, sir?

page 16 } Mr. Ryder: Your Honor, the defendant would stipulate Dr. Mann's qualifications, we know his qualifications and we do not question his expert—

Mr. Wilkinson: We'll just run over them briefly, sir.

A. Yes, I became—I hold the degrees of Bachelor of Arts, Bachelor of Laws, Doctor of Medicine. I have had special training in pathology, which is the science of the basic mechanisms of disease. I have had special training in forensic pathology which has to do with the basic mechanisms of trauma or injury. I am certified as a specialist in this by the American Board of Pathology, and by the British Board of Pathology. I am Professor and Chairman of the Department of Legal Medicine at the Medical College of Virginia; I am Professor of Forensic Pathology at the Medical College of Virginia. I have written three textbooks and numerous articles in the medical journals on various phases of forensic pathology.

Q. All right, sir. Doctor, did you have an occasion to hold an autopsy on a man named Addison E. Wilkins?

A. Yes, on May the 21st, 1966, at 10 o'clock in my morgue at the Medical College, I examined the body of Addison E. Wilkins.

Geoffrey T. Mann

Q. All right, how old a person was he, sir?

page 17 } A. At the time I didn't know, but I estimated his age at early twenties, subsequently discovered he was twenty.

Q. All right, and how big a person was he?

A. He—his measured height was sixty-six inches, five foot six, his estimated weight was a hundred and sixty pounds.

Q. Now, when you performed the autopsy, doctor, what did you find that caused his death?

A. This man had been shot ten times with a small calibre which I estimated at the time to be a twenty-two calibre. He had been shot five times in the back of the head.

Q. Could you point out where they were, sir?

A. Well, I've actually, on a plastic ply-film reproduced them directly from the body on this ply-film sheet, I think, which is—

Mr. Ryder: Your Honor, the defendant does not question that the cause of the death of Mr. Wilkins was by shooting ten times and that this was a violent external means, and we do not feel any that additional evidence is necessary from Dr. Mann as to the cause of death. We would object to his bringing any other evidence in. We do not ques-

page 18 } tion the fact that Mr. Wilkins was killed by a violent external means in the manner that Dr. Mann has stated, sir, that is, by ten bullets.

Mr. Wilkinson: Judge, I think it's a part of the Commonwealth's case to show that it is by competent evidence and I don't believe we can stipulate the facts on that.

Mr. Ryder: Your Honor, I would—

The Court: The Court will overrule your objection.

Mr. Ryder: We would except, sir.

Q. Well, just show us, Dr. Mann—

A. This is a ply-film which is placed on the body at the time of my examination of the location of the wounds and reflect—this is the ear, this is the right ear, this is the left ear, this is the furrow of the head and you will see that there are five bullet holes and this is in the exact position that they were in the back of the head. He also had five bullet holes in the back and the sixth here, just off the midline, this is the seventh here, and we will call this the right side, number eight, low in the back, number nine on the left side of the back, and number ten, just adjacent to it on the left side of the head,

five in the head and five in the back. Now, three
page 19 } of these in the head did not penetrate the skull,
didn't have sufficient force to penetrate the skull,
went through the scalp, and went... only two entered the head proper. All of these entered in either the abdomen or the chest. There was eighteen hundred cc's of blood... quart and a half of blood... and 150 cc's... one of the bullets had gone in the head and went through one side of the skull, right side of the skull,... (Note: The witness was away from the microphone and it is impossible to give the next sentence in its entirety).

Mr. Wilkinson: If Your Honor please, we'd like to introduce this as Commonwealth's Exhibit No. 1.

The Court: Very well.

Mr. Ryder: We would object on the basis previously stated, Your Honor.

Q. Now, Doctor, would you say that the death of Addison E. Wilkins was caused by a violent external means as distinguished from a natural cause?

A. He died as a result of gunshot wounds, he was otherwise a healthy individual.

Q. All right, sir, that's all the questions I have.

Mr. Ryder: I have no questions of Dr. Mann, Your Honor.

Witness stood aside.

page 20 } GORDON E. MADGE, introduced on behalf of
the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:

Q. Would you please state your name and occupation to the Court and Gentlemen of the Jury?

A. My name is Dr. Gordon Madge, I'm Associate Professor of Pathology at the Medical College of Virginia, Associate Professor of Forensic Pathology at the Medical College of Virginia, and Associate Professor of Opthalmics at the Medical College of Virginia, and Assistant Medical Examiner.

Gordon E. Madge

Q. Doctor, where did you get your education to become professor?

Mr. Ryder: Your Honor, the defendant does not question the qualifications of Dr. Madge.
The Court: Very well.
Mr. Wilkinson: We'll put it in the record.

Q. Give us briefly, sir, what—
page 21 } A. All right, graduate of the College of William and Mary and University of Maryland Medical School, took residencies at Johns Hopkins, Medical College of Georgia, the Armed Forces Institute of Pathology in Washington, D. C. I am a Fellow of the American College of Pathologists, and Fellow of the American Society of Clinical Pathology and a member of the American Academy of Forensic Sciences and various other societies.
Q. How long have you been in Virginia?
A. Seven years, sir.
Q. All right, did you have an occasion—well, you said you were Assistant Medical Examiner?
A. That's right.
Q. How long have you had that position?
A. Five years, sir.
Q. All right, sir, did you have an occasion to do an autopsy on a man named Malcolm L. Norment, Jr.?
A. I did, sir.
Q. And what was his age, sir?
A. Forty-one, sir.
Q. And what was his size?
A. Beg your pardon, sir?
Q. How large a person was he, Mr. Norment?
A. A hundred and six—he was estimated as weighing a hundred and sixty-five pounds and his length was sixty-nine inches.
page 22 } Q. And what day did you perform the autopsy, doctor?
A. On 5/21/66.
Q. Now, what did your autopsy show, sir?
A. The autopsy showed multiple gunshot wounds of the neck, chest and back.
Q. Could you tell us, sir, where these were?
A. Yes, sir, there were two wounds in the chest just above the left nipple.

Gordon E. Madge

Q. Were they in the front, sir?

A. That's right, sir, in the front, two wounds in the front just above the left nipple, two wounds in the back of the head just at the base of the back of the head.

Q. All right, sir?

A. And two in the back, these two wounds were in the back of the body, both of them almost in the midline, I can give you the exact measurements, if you so desire.

Q. All right, sir, whereabouts in the back?

A. Sir?

Q. Approximately whereabouts in the back?

A. In the back, in the mid-back, sir.

Q. In the mid-back, all right, sir?

page 23 } A. And then one bullet wound, the right side of the face.

Q. Now, doctor, as a result of your autopsy and examination of the body of Mr. Norment, was his death caused by violent external means as compared with natural causes?

A. It was, sir.

Q. Then it was by a violent external means

A. Yes.

Q. which were the gunshots?

A. That's right.

Q. That's all, sir.

CROSS EXAMINATION

By Mr. Ryder:

Q. Doctor, how many separate bullet wounds did you find, sir?

A. How many separate bullet wounds, found seven separate bullet wounds, sir.

Q. That's all the questions I have.

Mr. Wilkinson: That's all we have.

Witness stood aside.

page 24 } Mr. Ryder: I have a matter I would like to take up with the Court out of the presence of the Jury.

The Court: Very well.

NOTE: At this time the Jury retired from the Courtroom.

Mr. Ryder: The Commonwealth, I believe, now will endeavor to offer into evidence the statement attributed to this defendant, written statement, and oral statements.

In the previous trial of this defendant, the Court will recall that sometime prior to trial the defendant filed a written motion asking that the statements, both oral and written, be suppressed for use as evidence, and during the page 25 } course of the trial the defendant objected to the introduction of any statements, oral or written. Both the written motion and the objections were overruled by the Court and the Court admitted into evidence the written statements. At the prior trial, a transcript of the Police Court hearing, dated June the 15th, 1966, and a transcript of a Juvenile Court hearing dated July the 23rd, 1966, were introduced into evidence as defendant's exhibits. We would ask, or move the Court, to receive into evidence both transcripts, and we would move the Court to exclude any statement, oral or written, made by this defendant on the grounds that his Constitutional rights have been violated in the taking of these statements, with specific reference to the defendant's request for an attorney.

I would point out to the Court that the transcript of the testimony of Commonwealth witnesses in the Police Court and in the Juvenile Court show that prior to the time the defendant made any incriminating statements, either oral or written, he had on one occasion, stated that he did not want to make a statement until he had an opportunity to talk to an attorney. He had subsequently made another page 26 } statement wherein he said that his father was going to send him an attorney, and he did not want to make a statement until he talked to the attorney.

I would not cite to the Court a number of the recent decisions, such as *Miranda* and *Escobedo*. I would submit to the Court the fairly recent decision of the United States Court of Appeals for the Fourth Circuit, case cited as *United States* v. *Slaughter,* at 366 Fed. 2d, 833. This is a murder case. The question involved the admissibility of certain incriminating statements made by the defendant in the Slaughter case. I would point out to the Court that the evidence either introduced in the prior trial of this defendant, Tommy Lee Penn, or it will be introduced in this case, would show, one, that this defendant, at the time of his questioning, was nineteen years of age; that he had been arrested; that a warrant had been issued charging him with murder; that he voluntarily surrendered himself about six or seven o'clock in the morning; that he was questioned by various members

of the Richmond Police Department from approximately seven in the morning until approximately nine in the evening, and it was approximately nine, I might be off a half

page 27 } hour or an hour either way, but it was approximately nine that evening when he first admitted these incriminating statements, and the first request for counsel was made immediately or shortly after he turned himself in, that is he stated that he did not want to make any statement until he had an opportunity to talk to an attorney.

In the Fourth Circuit case, Your Honor, the situation, factual situation in the Fourth Circuit case, was that the defendant in that case was charged with having committed a murder that took place at Fort Bragg, North Carolina. He was also charged with a violation of the Act, the Interstate Transportation of Stolen Property Act. He was arrested initially on the *Dyer* Act charge by agents of the Federal Bureau of Investigation. He was taken before a United States Commissioner in New York City where he was arrested. It was obvious that they also suspected him of having committed this murder in North Carolina. He advised United States Commissioner, prior to any questioning by the F.B.I., that he wanted to obtain an attorney. After requesting or stating that he wanted to ob-

page 28 } tain an attorney, he was questioned by agents of the Federal Bureau of Investigation. At no time did he ever communicate or state that he did not want an attorney after he talked to United States Commissioner.

In the Slaughter case the Fourth Circuit reversed the conviction and if the Court would care to hear, I would read the Court some of the language indicated:

The significance of the case is that once an expressed desire for counsel is made according to the Slaughter case, then questioning of the person accused is to stop at that time until he has had an opportunity to talk to counsel.

That substantially is the holding of the Fourth Circuit proceeding. We would, as stated, move the Court to not allow any evidence of any statements, oral or written, to come into this trial and would ask the Court to consider the transcripts of the testimony as we have previously—as I have indicated to Your Honor, and ask that they be received into evidence for purposes of this motion.

Mr. Wilkinson: Judge, I don't think it's any evidence here whether he was advised or not, I think the Court

page 29 } would have to hear evidence on that before it could rule on the motion here. We are not bound by what goes on in Police Court or Juvenile Court, other than the fact of inconsistent statements.

The Court: I don't see how the Court could pass on it at this time, Mr. Ryder.

Mr. Ryder: I'm sorry, I didn't understand you.

The Court: I don't see how the Court could pass on it at this time.

Mr. Ryder: All right, sir, I would like to call that to the attention of the Court and I would ask that the Court to receive testimony as far as this motion is concerned out of the presence of the Jury before the Court admits those statements.

The Court: Very well.

HARRY W. DUKE, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:

page 30 } Q. Would you please state your name and occupation to the Court?

A. Harry W. Duke, Detective, Bureau of Police, City of Richmond.

Q. How long have you been a Police Officer, Mr. Duke?

A. I'm now in my twentieth year.

Q. Now, in your capacity as a Police Officer, were you investigating the murder of Malcolm L. Norment and Addison E. Wilkins?

A. Yes, sir.

Q. Directing your attention now to the 29th of May, of 1966, did you have occasion to talk to the defendant relative to these matters?

A. Yes, sir, I did.

Q. When was the first time you saw him that morning?

A. I would have to refer to my notes. (pause) I would say approximately eight A.M.

Q. And where was it?

A. That was in the interrogation room at Police Headquarters, or at least the first—when I first saw him was when I went back to the Police Detention to bring him back to the Police Interrogation Room.

Q. Did you go back and get him and bring

page 31 } him?

A. Yes, sir.

Q. What is the Interrogation Room or whatever you are referring to?

Harry W. Duke

A. That is the room that we have in Police Headquarters where we carry anyone when we wish to talk with them privately.

Q. All right?

A. or to question them in reference to any matters.

Q. And during that—the course of that, did you hear anyone advise the defendant of any rights that he might have?

A. Yes, sir, I, along with Sergeant Brown—I personally advised him of his rights once he was taken into the Interrogation Room.

Q. And what rights did you advise him of?

A. I advised him that he did not have to make any statement to us, any statement he made could be used in Court, he was entitled to have counsel and if he was without means to employ counsel of his own choosing that the State would appoint one for him.

Q. Well, did you advise him at that time that the State would appoint one for him?

page 32 } A. Yes, sir.

Q. All right, and after that did he make any statements?

A. Not at that particular time, no, sir.

Q. All right?

A. He stated to me that he thought that his father was going to employ counsel for him.

Q. All right, what did you do then?

A. I carried him then back to the Detention Section where he remained until approximately—until the lineup was held, which I believe was approximately 8:30 or quarter to nine.

Q. And then was he placed in the lineup?

A. He was placed in the lineup along with five other subjects of similar build and description.

Q. But he was not placed in the lineup relative to these two crimes?

A. No, sir.

Q. All right, did he make any statement at the lineup?

A. No, sir.

Q. Did you see him any more that day, the 29th?

page 33 } A. I believe I talked with him again around ten A.M., that morning, again advising him of his rights, and again he stated to me that—I advised him of the rights which I have just enumerated to the Court—and again he stated to me that he thought his father was going to employ counsel, he did not care to make a statement at that time.

Q. All right, and did you see him any more?

Harry W. Duke

A. Yes, sir, I talked with him again Sunday night around eight or eight-fifteen, where I again advised him of his rights and in the presence of Sergeant Brown, and we expressed to him what we had done that day and relative to a weapon which we had recovered from a home, from his brother's home. At that time he stated "I want to tell you the truth," and he orally gave us a statement implicating himself in the two offenses which he is being charged, being tried on today, and at that time we asked him would he dictate it to a stenographer, let her take it down, he stated he would, so at that time we secured the services of Mrs. Shackelford, a stenographer, who came in and took a statement from him, which he wilfully gave to her implicating himself in these crimes.

Q. All right, now, without going into the statement at this particular time, were you present during the time he gave the entire statement?

A. Yes, sir, I was.

page 34 } Q. At any time was he asked whether he was tired or hungry or anything of that nature?

A. Yes, sir, any number of times, which it is included in the statement, he was asked, and if he said he wanted cigarettes or wanted coffee or sandwiches it was granted him, and he was asked if he wanted to continue on and he said he wanted to go ahead and finish it that night.

Q. Now, so then he gave the statement implicating himself in these two crimes?

A. That's correct.

Q. All right, now, directing your attention to May the 31st, 1966, did you see the defendant on that day?

A. Yes, sir, I did.

Q. And where was that?

A. I saw him when he was brought into Police Court and he was asked at that time if he wanted to see anyone, he stated he wanted to call his father and it was brought up that his mother was in Court, he was asked if he wanted to see her, he stated he did. He was allowed to talk to his mother for about twenty to thirty minutes and after that time he said he wanted to see me and Sergeant Brown. We went back and talked with him again, again advised him of his rights, and he stated that—

page 35 } Q. Now, on this occasion did you all go back to him or did he ask to see you all?

A. He asked to see us.

Harry W. Duke

Q. All right, he asked to see you, and did you again advise him of his rights, what rights did you advise him?

A. That he did not have to make any statement, any statement he made could be used in Court against him, that he was entitled to counsel, if he was without means to employ his own private counsel, that the State would appoint one for him.

Q. All right, now, did he make a statement at that time?

A. Yes, sir, he did.

Q. Was his mother present when he made the second statement?

A. No, sir.

Q. Uh huh?

A. He stated to me that after talking with his mother she had told him to tell the truth and that he wanted to give us an additional statement.

Q. Uh huh. And then he made the statement?

A. Yes, sir.

page 36 } Q. How long did that second statement take?

A. You mean the length of the statement or the time that it took to—

Q. The time it took?

A. Just a minute and I will refer to my notes. (pause) The second statement was—we started at—the stenographer started taking it at 11:45 A.M., on the 31st of May and completed at 1:39 P.M. on the 31st.

Q. I believe he signed both of these statements, did he not?

A. Yes, sir, he did.

Q. All right, and in the second statement did he implicate himself in both of these crimes?

A. Yes, sir, he did.

Q. Did he implicate anybody else?

A. Yes, sir.

Q. And he had talked to his mother this morning at that time?

A. That is correct.

Q. Was the defendant threatened in any way.

A. No, sir.

Q. into giving a statement?

page 37 } A. No, sir.

Q. Were any promises made to him?

A. No, sir.

Q. Take the statement that was made on the morning of the 31st, I believe it starts the heading off there, Mr. Duke, (pause) where he's advised of certain rights, was it anything

in that heading about the State would appoint him a lawyer if he couldn't afford one?

A. Yes, sir.

Q. Whereabouts?

A. (reading) I realize that any statements that I may voluntarily make may be used in a court and that I am entitled to counsel, but I am willing to give you my statement at this time without the benefit of counsel. I am making the following statements of my own free will without any threats or promises of any rewards. I have been fed and I have not been mistreated in any manner since my arrest at 6:30 A.M., May 29th, 1966.

Q. Well, that—at that particular time he was advised that he didn't have to make any statement, any statement could be made—could be used against him, and he was entitled to counsel,

A. That is correct, yes, sir.

page 38 } Q. but the reference as to the State would appoint him one, was he advised of that right?

A. Yes, sir, he was advised of that, yes, sir.

Q. Do you know by whom he was advised?

A. He was advised by me.

Q. And what words or terminology did you use?

A. As well as I recall I stated, I said, Thomas, you realize I'm Detective Duke and this is Sergeant Brown, I want to advise you of your rights, that you do not have to make any statement to us, any statement you make can be used in Court, you are entitled to have a lawyer. If you are without means to employ counsel of your own choosing then the State will appoint one for you.

Q. All right, and did at any time you took either of these statements, did the defendant appear tired?

A. No, sir.

Q. All right, answer Mr. Ryder's questions.

CROSS EXAMINATION

By Mr. Ryder:

Q. Officer Duke, or Detective Duke, excuse me, sir, what time, approximately, did this defendant turn himself in at Police Headquarters?

page 39 } A. Around 6:30 A.M.

Q. Now, at the time he turned himself in, the Police officials of the City of Richmond were looking for him in connection with these murders, were they not?

Harry W. Duke

A. At the time he turned himself in there were two warrants out for him, not charging him with either one of these murders.

Q. And those warrants were for what?

A. Were for rape and felonious assault.

Q. Now, you first saw him around eight o'clock in the morning?

A. Approximately 8 A.M.

Q. Do you know between 6:30 A.M.—where was he between 6:30 in the morning and eight when you first saw him?

A. As I understand he came into the office approximately 6:30 A.M. and told the officer on duty at the desk that he was Thomas Penn, he understood there was a couple of warrants out for him. Information I received the officer on duty called a detective unit in, the warrants were served on him and we were—I was notified at home at approximately, I'd say, around quarter to seven—

page 40 } Q. Well, Officer, between 6:30, when he turned himself in, and eight, when you talked to him, he was in the custody of the Richmond Police Department?

A. That is correct.

Q. Now, then, when you first talked to him at eight o'clock A.M. had other police officers questioned him between six-thirty and eight within your information?

A. I understand he had been advised of his rights, but no one had questioned him.

Q. Now, this was taking place in the Richmond Police Department Building?

A. That is correct.

Q. Now, the conversation you had with him at eight o'clock A.M. in the morning, where did that take place?

A. Took place in Interview—I believe it's Interview Room "C."

Q. Now, that is in the Detective Headquarters?

A. It's—yes, sir, it's in the Police Building.

Q. Now, when you first questioned him he told you that he did not make—care to make a statement relative to anything until he talked to an attorney?

page 41 } A. I will have to refer to my notes, Mr. Ryder.

Q. If you've got the same notes I've got look on page 30 at the bottom of the page, sir?

A. We did not question him about any crimes after he came in, he was advised of his rights and he did not care to make

Harry W. Duke

any—to make a statement relative to anything until he talked to an attorney.

Q. Now, that was the first time he told you he didn't care to make any statement until he talked to an attorney?

A. That's correct.

Q. Now, then, the next time you talked to him was around ten o'clock in the morning, is that correct?

A. I believe that was correct, Mr. Ryder.

Q. Now, during the period from approximately eight until approximately ten when you talked to him the second time he was still in custody of the Police Department?

A. That is correct.

Q. Now, when you ques—when you went—by the way, on the second occasion, the first occasion at eight o'clock you initiated the conversation, that is, you went to him to talk to him, to question him, did you not?

A. That's correct.

Q. On the occasion at ten o'clock you went to him to talk to him, is that not correct?

page 42 } A. After the lineup had been held, yes, sir, I went back to him.

Q. I mean you initiated the questioning, he did not?

A. That's correct, he was again advised of his rights—

Q. And at ten o'clock, on the second occasion, you talked to him, he again told you that he did not want to make a statement until he talked to an attorney, is that correct?

A. That's right, stated he thought his father was going to employ one for him.

Q. And he didn't want to give you any statement until he talked to that attorney?

A. Stated he wanted to talk to an attorney, that's correct.

Q. Now, the next time you talked to him was what time?

A. Approximately around eight or eight-thirty Sunday night, which would be on the 29th.

Q. Now, you initiated that conversation did you not?

A. That's correct.

page 43 } Q. You went to him to question him concerning his involvement in crimes, did you not?

A. That is correct.

Q. At any time prior to 8:30 did this defendant ever tell you "my father is not going to employ an attorney for me?"

A. No, sir.

Q. Officer, at the time—by the way, let me ask you this:

from the second conversation at ten until 8:30 that night the defendant was in custody that period of time?

A. That is correct.

Q. Now, between ten o'clock and eight-thirty with, based upon your information from other police officers, the defendant was questioned by other police officers, is that not correct?

A. To the best of my knowledge, the only one that talked to him other than Sergeant Brown and I, I think Detective Epps talked with him briefly right after I did at—around ten A.M. that morning.

Q. And Detective Epps initiated that conversation, he went to the defendant to talk to him, did he not?

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

Q. At any time from 6:30 A.M. in the morning until 8:30 that night did you or any other police officer, within your knowledge, endeavor to take this defendant before

page 44 } any judicial officer, such as Police Court Judge, or any person of that nature?

A. We stated to him, Sergeant Brown and I did, that if he wanted us to we would either call Judge Huntley, Judge Witt or Judge Maurice and have an attorney appointed for him and he stated that he thought his father was going to employ counsel for him.

Q. But you did not take him before any judicial officer, is that—

A. He did not ask to be taken before one, he stated that he thought his father was going to employ counsel for him.

Q. I recognize that, sir, but I just want to get in the record that he was not taken before

A. No, sir.

Q. any judicial officer?

A. No, sir.

Q. Now, the purpose of your interrogation of this defendant was to elicit incriminating statements from him, was it not?

A. It was along the lines of my investigation, of what I was working on.

Q. I understand, sir, you went to him for the purpose of obtaining incriminating statements from him?

page 45 } A. I went to him to talk to him in reference to the crimes which I was investigating.

Q. Of which he had already been accused and he had been arrested on a charge of rape, is that not true?

Harry W. Duke

A. That is correct.

Q. Now, the first statement he gave you of an incriminating nature began approximately what time, sir?

A. The first statement, the oral statement which he gave us when I talked with him on Sunday night, I would say, was between 8:30 and 9:00 o'clock and then after he stated he wanted to give us a written statement and the services of Mrs. Shackelford, the stenographer, were gotten,

Q. Right, sir?

A. the statement was started at 10:30 P.M. and was completed at 1:20 A.M. and, as I stated previously, several times during that time he was asked if he wanted coffee, wanted sandwiches, wanted cigarettes, if he wanted to stop or if he wanted to continue on in the investigation.

Q. I understand that, Mr. Duke, but the first statement that he gave you of an incriminating nature, oral statement, was at 8:30 approximately?

A. Was orally, yes, sir.

Q. Now, up to approximately 8:30 or nine o'clock he had made no incriminating statements of any kind,
page 46 } is that correct?

A. That's correct.

Q. And the 8:30 to 9 o'clock conversation was initiated by you, that is, you went to him to question him?

A. That is correct.

Q. Now, you said that you took a subsequent statement from him, another statement, written statement, later on?

A. That was on the 31st, I believe it was.

Q. Now, during the interim between the first statement and the second statement, he was in custody, is that correct?

A. That is correct.

Q. When, within your knowledge, was he first taken before a judicial officer, some judge, like Police Court Judge, what date?

A. I believe he was carried into Police Court on the 30th of May, which was a Holiday, and then I think he was brought back in on the 31st, at which time I believe you were appointed as counsel for him. I was not present on the 30th when he went in.

Mr. Ryder: That's all the questions I have as to this motion, Your Honor.

Witness stood aside.

page 47 } Mr. Ryder: Your Honor, I don't want to take up a lot of the Court's time, but I have a transcript here of testimony of Officer Epps that was taken in the Juvenile Court. Now Officer Epps is here and I'm certain the Commonwealth's Attorney does not contend that his testimony here will be any material different than it was in the Juvenile and Domestic Relations Court. His testimony, if the Commonwealth can accept my interpolation of it, substantially substantiates Officer Duke as to the number of times the defendant requested, stated that he wanted to talk to an attorney before he made a statement, and I would offer —I think the testimony is contained in both of these transcripts, I would offer the Court the testimony of Detective Vann, I mean Epps, which is here, if the Commonwealth desires it.

Mr. Wilkinson: Well, I think you ought to go on and put Officer Epps' testimony in the record here.

Mr. Ryder: Well, I would offer this as being his testimony.

page 48 } Mr. Wilkinson: Well, frankly, Mr. Ryder, I don't recall his testimony, been a lot of cases tried.

Mr. Ryder: I understand that—

The Court: Officer Epps is available isn't he?

Mr. Ryder: Yes, sir, he's out there.

The Court: Get Officer Epps in the Courtroom. (pause) Gentlemen, it's getting close to the lunch hour, I thought we might let the Jury go to lunch.

NOTE: At this time the Jury was recessed for lunch in custody of the Sergeants, after being admonished by the Court.

page 49 } Mr. Ryder: Your Honor, the Commonwealth's Attorney has stated that he will stipulate the defendant was nineteen years old at the time, and I would offer the testimony of Epps at the Juvenile Court into evidence, I would not offer him as a witness at this hearing, sir. I would rest on what's in those transcripts and the testimony of Officer Duke's as to the motion.

Mr. Wilkinson: Your Honor, I take the position that Officer Epps ought to be called.

The Court: Officer Epps is available, and that's the best evidence.

Mr. Ryder: Your Honor, my stipulation was incorrect, the defendent was eighteen at the time, he was nineteen in October—is that agreeable?

The Court: Do you desire Officer Epps?

Mr. Ryder: Judge, I don't desire Officer Epps.

Mr. Wilkinson: We have him on the... Judge, stipulate that, our records show that he was nineteen and it might be a crucial point when the preliminary hearing should... All the evidence we have he was nineteen at this time.

Mr. Ryder: Well, if there is any question about it I'd like to try to prove his age.

page 50 } Mr. Wilkinson: Well, I mean we have everything nineteen, that's the reason I can stipulate it is a different age—

Mr. Ryder: Your Honor, I'd like to put the defendant on for the limited purpose of ascertaining his age.

THOMAS LEE PENN, being first duly sworn, testified as follows:

By Mr. Ryder:

Q. Tommy, were you born on October the 18th, 19 and what?

A. Forty-seven.

Q. In May of 1956, you were eighteen years of age, is that correct?

A. That's right.

Q. That's all the questions I have.

Witness stood aside.

page 51 } Mr. Ryder: That will be all the evidence on the motion, Your Honor.

The Court: Well, it's time for lunch, suppose we recess until two o'clock.

NOTE: At this time there was a recess for lunch.

C. L. BROWN, being first duly sworn, testified as follows:

By Mr. Wilkinson:

Q. Please state your name and occupation to the Court?

A. C. L. Brown, Detective Sergeant, Richmond Bureau of Police.

Q. How long have you been a police officer, Sergeant Brown?

page 52 } A. Thirty-eight years two months.

Q. Were you the one in charge of this investigation now before the Court?

A. Yes, sir.

Q. Would you relate to the Court, did you see the defendant on Sunday, May the 29th, 1966?

A. I did.

Q. And where was the first place that you saw him?

A. I saw him in the Interrogation Room in the Detective Division approximately 8 A. M.

Q. And at that time did you advise him of any rights?

A. Detective Duke advised him.

Q. In your presence?

A. Yes, sir.

Q. All right, now, subsequent to that, did you see him later that day?

A. Yes, sir.

Q. And what time did you see him later?

A. Approximately one or one-thirty P.M., I went back into the Detention Section and I saw him.

Q. All right, did you say anything to him at that time?

page 53 } A. I asked him how he was doing, if he wanted anything to eat, or a drink or cigarettes, I asked him had any attorney been to see him, he said no and I asked him did he want me to contact Judge Witt, Judge Huntley or Judge Maurice to see if they would appoint him an attorney—

Q. Well, now, who is Judge Maurice?

A. Judge Maurice is Judge of Police Court, Part One.

Q. And Judge Huntley is the same Judge that is presiding over this trial?

A. Yes, sir.

Q. Did he make any request that you contact the Court to appoint a lawyer?

A. No, sir, he said he didn't want—want to have a court-appointed attorney at that time.

Q. All right, sir, did you talk to him any later that day?

A. I didn't see him any more until that night, probably 8:30 or 9 P.M.

Q. All right, at that time was it—was there any discussion between you and the defendant?

A. Yes, we was in a small interrogation room in the Detective Division back of the screen and we—when I first started talking to him we wasn't even talking

page 54 } about any crime he was involved in, just some small talk, and we told him that—after that we told him that a gun had been found, a twenty-two pistol, in his brother's apartment in South Richmond in the washing

machine, and he said he didn't believe it, so Detective Wright and Hastings and Detective Baker, came up and they had this pistol with them, twenty-two pistol, and a little red mitten full of twenty-two bullets and that was a little—that was after nine o'clock and they said that they had found it over there and we—I saw that it was not loaded and Thomas examined it and looked it over very carefully and he believed it then, he believed that—he said yea, I think that's William's gun.

Q. Did he say anything about making any statement?

A. Sir?

Q. Did he say anything then about making any statement at that time?

A. Yes, he did.

Q. What did he say then?

A. He said that he wanted to make a statement and tell everything that he had done.

Q. All right, and did he make that statement?

A. Yes, sir.

page 55 } Q. Prior to his making the statement he had been advised of his rights?

A. Yes, we told him that he still had the right to an attorney before making any statement and any statement that he made could be used for or against him in Court.

Q. Did you advise him he could remain silent?

A. Oh, yes, he didn't have to make a statement.

Q. And then you said during the middle of the day or something you asked him about getting one of the Judges to appoint counsel?

A. That was approximately one or one-thirty P.M., the same day.

Q. And then at that time, now we are back to the evening when you were talking with him, at that time did he appear tired, say he wanted to go to bed or wanted anything?

A. No, sir, we asked him several times whether or not he wanted anything or if he wanted to discontinue and he said no he wanted to get it over with.

Q. And that's the time he gave a statement to you?

A. Yes, sir.

page 56 } Q. Were any promises made to him without making those statements?

A. No, sir.

Q. Was he threatened in any way?

A. Never threatened, no one.

C. L. Brown

Q. And then directing your attention to the morning of May the 31st, I believe he came up in Police Court that morning?

A. Yes, sir.

Q. Was he allowed to see any one after his appearance in Police Court?

A. The Judge allowed him to talk with his mother and he talked with his mother, I would say, approximately thirty minutes.

Q. After he talked with his mother was any request made of you and Officer Duke?

A. Yes, someone told Detective Duke and myself that Thomas wanted to talk with us and subsequent to that we—

Q. Did you go back and talk with him?

A. Yes, sir.

Q. And—

Mr. Ryder: Of course, Your Honor, we object to the hearsay, that is, someone told them that Thomas wanted to talk with them.

page 57 } The Court: Objection sustained.

A. He sent a message by someone—

Q. The reason you went back was because you had received—

A. Yes, sir, said he wanted to talk to us.

Q. When you got back there what was—

A. He said he wanted to tell us about the crimes that his brother, William Penn, were involved in—wanted to make an additional statement.

Q. Did he make a—was he advised of any rights then?

A. Yes, sir.

Q. What rights was he advised of?

A. I can tell you—at that time I, we told him that—we advised him of his rights, that he didn't have to make a statement, and that any statement that he made could be used in Court and he still had the benefit of counsel, and he said "I realize any statements that I may voluntarily make may be used in Court and that I'm entitled to counsel, but I'm willing to give you a statement at this time without the benefit of counsel," and he's making it without any threats or promises.

Q. Was he threatened at any time on the Tuesday morning you talked with him?

C. L. Brown

page 58 } A. No, sir.

Q. Was he offered any promises?

A. Not me or anyone in my presence.

Q. All right, and after that he gave an additional statement?

A. That's right.

Q. And the second statement, I believe you testified, he implicated his brother?

A. That's correct.

Q. Were you in Court when the first case was tried?

A. Police Court?

Q. No, in this Court?

A. Yes, sir.

Q. Were any statements made at that time by the defendant?

A. In the Courtroom?

Q. Yes?

A. Yes, from the witness stand.

Q. He admitted the—

A. From the witness stand he admitted all of these killings.

Q. That's all the questions I have, Sergeant Brown.

page 59 } CROSS EXAMINATION

By Mr. Ryder:

Q. Sergeant, you with Duke at approximately eight in the morning and approximately ten in the morning—

A. No, sir, I wasn't with him at ten.

Q. You weren't, you were with him at eight when the defendant told him he didn't want to make a statement until he talked to a lawyer, though, weren't you?

A. Yes, sir.

Q. Now, the first statement he gave you, based upon your investigation of the case, was partially untrue, is that correct?

A. I don't—what part of the statement?

Q. Well, were any portions of the first statement, based upon your investigation, untrue?

A. I wouldn't know without I read the entire statement, it's twenty-some pages.

Q. But in the first statement did he not tell you that he acted completely alone?

A. In the first statement, yes.

C. L. Brown

Q. Well, that was untrue, based upon your investigation, is that correct?

page 60 } A. Well, I wouldn't know, I wasn't there, I wasn't at the scene of any of these crimes.

Q. The second statement corrected things that was in his first statement, is that correct?

A. Well, yes, in other words, he implicated his brother in the second statement and he still involved himself.

Q. And in the first statement, though, he told you that he was working alone?

A. That's correct.

Q. Now, when you were in the Police Court before Judge Maurice on the 30th, when the defendant was present, did Judge Maurice advise this defendant of any Constitutional rights?

A. I don't remember.

Q. Sir?

A. I don't recall.

Q. You don't recall that he did or you don't recall whether he did not?

A. I don't recall what the Judge said to him.

Q. Do you recall him telling the defendant that he didn't have to make any statements?

A. I don't.

page 61 } Q. Do you recall him telling the defendant that he had a right to have an attorney present at all times?

A. No, I don't know what Judge Maurice said to him, I don't recall what he said.

Q. Now, did I understand you that approximately 9 o'clock, between 8:30 and 9, you and Duke went to the defendant to talk to him, is that correct?

A. Yes, sir.

Q. And did I understand that shortly after nine o'clock three more detectives came in?

A. Came in with the pistol.

Q. Came in the pistol?

A. Pistol and some bullets.

Q. And then you confronted the defendant with the pistol and bullets, is that correct?

A. Yes, we had been talking to him relative to the pistol, we knew that it had been found, of course, he said that he didn't believe that they had found a gun over there.

Q. Well, up to the time you confronted him with the pistol

C. L. Brown

he had made no statements incriminating himself, is that correct?

A. That's correct.

Q. And you had been talking to him for approximately a half an hour or an hour at that time?

page 62 } A. No, not that long.

Q. How long?

A. Probably fifteen minutes when they came in with the gun.

Q. And after you confronted him with the pistol and told him that the pistol had been found in his brother's house, this is when he first made an incriminating statement, is that correct?

A. Prior to that we had him in the room we wasn't trying to get a statement from him and we wasn't asking him anything relative to any of these crimes, just like I say it was just small talk, talking about other matters.

Q. What small talk were you talking about?

A. Oh, I don't know, just various things, I can't recall exactly what it was, but it wasn't pertaining to these cases.

Q. Well, you don't recall what the small talk was?

A. It wasn't relative to any of these murders, I can tell you that.

Q. But you went to him for the purpose of eliciting statements from him, did you not?

A. We went to him for the purpose of seeing if he, at that time, wanted to give us a statement as to any of

page 63 } these—

Q. Who, Officer, on March the 31st, gave you any information concerning this defendant desiring to talk to you?

A. He was in the cage there, where they allow people to talk with him, he was talking with his mother. We were standing around and we didn't try to hear the conversation, of course, and we were in and out the Courtroom, I think Court had adjourned, and I think I was in the Courtroom proper and now where Mr. Duke was I don't know, he may have got it direct from Thomas, but Duke told me that Thomas wanted to talk with us and in the meantime he had been taken back to where—

Q. Duke told you this,

A. Yea.

Q. you mean Detective Duke?

A. That's right, I don't know where he got it from.

C. L. Brown

Q. Did you talk to Thomas Penn's mother at any time that morning?

A. No, I did not.

Q. When the three officers came in with the gun you and Detective Duke were in the Interrogation Room at the Police Department, is that correct?

A. Yes, sir.

page 64 } Q. Where did those three officers go after they handed you the gun?

A. They went back in, out into the street to continue investigation, I believe.

Q. Were they present during any interrogation after they handed you the gun?

A. No, they were not.

Q. That's all the questions I have.

Mr. Wilkinson: That's all.

Witness stood aside.

Mr. Wilkinson: That's the evidence of the Commonwealth.

Mr. Ryder: Your Honor, I would renew the motion, as stated previously, made in writing to the Court, orally in open Court, to exclude from the evidence any state-

page 65 } ment made by the defendant, either oral or written, on the basis that the defendant has been denied effectively his right to counsel prior to the time that he made any such statement.

Mr. Wilkinson: Well, Judge, the position of the Commonwealth is the fact that he was accorded every right, even under—the confession was prior to *Miranda*, but Sergeant Brown told him even on that Sunday that he would call Your Honor, Judge Maurice and get him to appoint counsel if he wanted it, he said no, he wanted—at that time he was thinking about private counsel, and then when he was confronted Sunday night with the statement—with the pistol, then he came out, he says well, I'll make a statement, which he did. Now, going over until Tuesday morning, he had a right—he not had a right, but he was allowed to talk to his mother, his mother talked with him, apparently, and at that time then he comes up and he says I want to see Brown and Duke, he gives another statement, which he—and in that second statement he implicated his brother, and under the fartherest stretch of the imagination it would be no reason

to keep these statements out. They are voluntary, even the *Miranda* rule was (word unintelligible) but it
page 66 } wasn't there, even hadn't been announced when Sergeant Brown went in and says we will get counsel for you. There's no evidence before the Court that it was any duress or any promise or anything that these statements were not completely voluntary. It's also evidence that even in Court under oath that he admitted these things—admitted the crimes, so I take the position, I think, Your Honor, or take the position there's no question under any standard set up by any Court in the United States that the Commonwealth has complied with every rule that they have laid down, and this is purely a voluntary statement made by the accused, he knew what he was saying, he knew his rights, they had been protected and the statement was given. Even the counsel of his own mother, he gave a statement after that. Now I don't think any Court, including the United States Supreme Court, has said that a person can't rely on advice given by the mother. His mother was here, there, and told him to go on and tell the truth when he made the second statement. You get the second statement in, Judge, it's only fair to have the first one, no sense in taking it half way, just part of the statement, but you have to
page 67 } take both—and we respectfully submit, Your Honor, that this—we have complied with every mandate of the law and this is purely a voluntary statement. Now, he has the right and I think Mr. Ryder—under that case, Federal case, there, where he says I want a lawyer, that immediately stops it, but if you read the *Miranda decision*, it says any time during the interrogation if he changes his mind and wants counsel, you have to stop, so I think the converse would be true, anytime he changes his mind and wanted to make a statement, then he had every right to change his mind and make a statement, which he did here, he's changed his mind, from Sunday morning to Sunday night he's changed his mind. There's no evidence that through his education he didn't understand what he was doing, that he was tired at the time he gave his first statement, that there was any duress moves made against him, there was any promises made to him, that he did not understand his rights, what rights he had, there's not one scintilla of evidence along those lines, Your Honor, so we respectfully submit that even under *Miranda* that this is a voluntary confession—

page 68 } The Court: As I see it this case of *United States* v. *Slaughter,* I don't think that case is

applicable here, page 839, it says there that the appellant had requested an opportunity to consult counsel, request was made to Judicial Officer of the United States who evidently understood his request because he continued the preliminary hearing when the officers were first brought before him and he continued it twice thereafter to enable him to obtain counsel. In the case before the Court, there's no evidence in the case before the Court that the accused requested an opportunity to talk to counsel. It's true he said that he thought his father was going to employ counsel to represent him, but there's no evidence that the father made any attempt to employ counsel, in fact there's a complete lack of evidence that his father exhibited any interest whatsoever in this case. But his mother appeared in Police Court and spent some half hour or more with her son in Court. He was advised on some five or six occasions his rights, told him they would get counsel appointed for him, and he didn't desire counsel, apparently, and the statement he made, as far as I can see, is entirely a voluntary statement on his part and the Court would so hold.

page 69 } Mr. Ryder: The defendant would respectfully except to Your Honor's decision.

The Court: Very well.

Mr. Ryder: Your Honor, could I get my book back, sir.

The Court: Sir?

Mr. Ryder: Could I get my book back?

The Court: Yes, sir. Return the Jury, please, sir.

NOTE: At this time the Jury returned into Courtroom and the hearing proceeded:

The Court: Gentlemen, you waive the polling of the Jury?

Mr. Wilkinson: Yes, sir, the Commonwealth does.

page 70 } Mr. Ryder: Yes, sir, Your Honor.

The Court: Very well.

H. W. DUKE, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:

Q. Would you please state your name and occupation to the Court and Gentlemen of the Jury?

H. W. Duke

A. Harry W. Duke, Detective, Bureau of Police, City of Richmond.

Q. How long have you been a Police Officer, Mr. Duke?

A. Nineteen and a half years.

Q. Now, Mr. Duke, in your capacity as a police officer, in May of last year, which would be 1966, were you working on the cases now before the Court?

A. Yes, sir, I was.

page 71 } Q. Did you have occasion on May the 21st, 1966, to go out to the thirty-six hundred block of Old Richmond Road?

A. Yes, sir, I did.

Q. Upon your arrival what did you find there?

A. I found the bodies of two white men.

Q. Now, what were the—where were they?

A. The bodies were located approximately thirty-seven feet south of the south edge of the road bed of East Richmond Road, and that would be approximately one-tenth of a mile east of North 35th Street.

Q. Was it any type of excavation or anything going on there?

A. Yes, sir, the place was being cleared where apartment houses were to be built.

Q. Is that close to Oakwood Cemetery?

A. Yes, sir, Oakwood Cemetery parallels East Richmond Road on the north side of East Richmond Road and this excavation and this lot was on the south side of it.

Q. Did you subsequently find out the names of the two men that you found there?

A. Yes, sir, I did.

Q. What were their names?

page 72 } A. Malcolm Norment and Addison Wilkins.

Q. Now, upon your arrival, what was the condition as to their pockets?

A. Their pockets were turned wrongside outwards.

Q. Did they have any possessions on them?

A. No identification was on neither body at the time, there was—there was papers laying close by the body of Norment, which bore his name, he was later identified as being Norment.

Q. Did they have any money on them?

A. No, sir.

Q. Now, I hand you two pictures, see if you may describe them—

Mr. Ryder: Your Honor, may I take a matter up with the Court?

The Court: Yes, sir. You Gentlemen retire.

NOTE: At this time the Jury retired from the Courtroom.

page 73 } Mr. Ryder: Your Honor, these pictures haven't been marked, one appears to be the picture of a road near the scene where the decedents were found; the other is a picture of the *evacuation* and the decedents' apparently lying in the—on the ground. I have no objection to the picture of the road, but I would object to the picture showing the bodies of the decedents on the basis there's no question here of identification or there's no question as to where the bodies were found, and we would submit that, one, the picture is not material in that there's nothing about the scene that the officer cannot describe in his own words, and, two, the only purpose for introducing it would be to inflame the feelings of the Jurors because of the picture showing two bodies laying in the *evacuated* dirt, and we submit that we would object to the picture of the two bodies coming in.

Mr. Wilkinson: Now, Your Honor please, I think the pictures here is for the officer to describe as the places where they were found. This is sort of a deserted area, although one part of it, from across the field, there are houses there, which you can see, but that is the purpose of it, to

page 74 } show exactly how many feet they were—

The Court: I don't see any good in introducing that picture, I think the officer can describe it, I think the one of the house is all right, the Court will exclude it.

Mr. Wilkinson: All right, sir.

The Court: Take a five minute recess.

NOTE: At this time a short recess was had, after which:

The Court: You Gentlemen waive the poll of the Jury?

Mr. Wilkinson: Yes, sir.

The Court: Very well.

Q. Mr. Duke, would you describe to the Court and the Gentlemen of the Jury what you observed when you went over to the thirty-six hundred block of Old Richmond

page 75 } Road?

A. Yes, sir. Upon my arrival there, south of the

roadbed I could observe two bodies lying in this excavated area. I immediately ascertained that they were deceased and then I called for some assistance to come over to help me and assist in my investigation and in the taking of pictures and I also took measurements. The—from the south roadbed to the first spot of blood which I was able to determine was four feet four inches from the south roadbed going south across this excavation, fourteen feet and eight inches from that—from the roadbed was a second large puddle of blood and eighteen feet was a third large pile of blood. The body of Malcolm Norment, it's an embankment there where dirt has been bulldozed and piled up, the body of Malcolm Norment was found lying, his feet would have been south of the roadway thirty-two feet from the roadway and twenty-six feet one inches from the feet of Norment the feet of Wilkins was resting, his head was resting in an easterly direction and his feet was pointing back towards Thirty-fifth Street. Both victims were lying face down. I could determine bullet—what appeared to be bullet wounds in the clothing, I immediately notified the Medical Examiner, Dr. Mann, who responded to the scene. I completed my investigation there, having pictures taken, of taking my measurements and all, and then I came to the Medical Examiner, to the Morgue there, where I viewed the bodies again, which I think Dr. Mann page 76 } and Dr. Madge has already testified to this morning.

Q. All right, now did you continue to work on these two cases?

A. Yes, sir, I did.

Q. Did you ever see the defendant, Thomas Lee Penn, subsequent to this or after this?

A. Yes, sir, I first saw him on the morning of May the 29th, 1966.

Q. I believe I asked, but to make sure, you found these bodies on May the 21st?

A. May the 21st, yes, that's correct.

Q. And on May the 29th, 1966, you saw the defendant?

A. Yes, sir.

Q. Where was that?

A. At Police Headquarters.

Q. Approximately what time?

A. I first saw him at approximately eight o'clock that morning.

Q. All right, did you talk with him at that time?

H. W. Duke

A. I talked with him and advised him of his rights, that he did not have to make a statement to me, any statement he made could be used in Court.

page 77 } Mr. Ryder: Your Honor, we would object to any testimony coming in of this nature, sir, on the basis that the testimony he is now giving, I submit, is inadmissible, being hearsay. The only testimony that could come in, I would submit, under the hearsay rule, would be an exception to that rule, that being that the defendant made some declarations against interest. Now, the Officer's advice to him that morning is of no moment, I submit, to the Jury, because the Jury is not asked to decide the voluntariness or otherwise of the confession or statement that subsequently was made apparently, and I would object on the basis that this is hearsay and it's not an exception to the hearsay rule, sir.

Mr. Wilkinson: Well, Your Honor, please, I don't know the defense, but at the same time I think this goes to the weight that the Jury might want to give the confession because if it's no evidence before the Jury of that effect, leave the position of the defendant in argument to that point and maybe the Jury would give the statements less weight than if they knew that they were advised at that time, and I think to give the Jury the full picture of the situation

page 78 } would be much better than a half way picture.

The Court: The Court will overrule your objection, I think the Jury has a right—

Mr. Ryder: We would except to Your Honor's ruling.

Q. All right, now you advised him of certain rights that he had?

A. Yes, sir.

Q. And what were the rights?

A. That he did not have to make any statement to me and any statement he made could be used in Court against him and

Q. Excuse me, go on, finish?

A. and then at a later time he was advised of the rights again and was told that if he wanted us to, we would contact one of the three judges and have an attorney appointed for him and he still maintained that he thought his father was going to employ counsel for him.

H. W. Duke

Q. What time was the second conversation you had with him?

A. I would say approximately between ten and ten-thirty.

Q. Was that when you told him that you would call the— or someone told him that they would call the

page 79 } Judge to have a counsel appointed for him if he wanted it?

A. No, sir, he was told about one o'clock that we would— each time he stated that he thought that his father was going to employ counsel for him.

Q. Did you see him any more after one o'clock that day?

A. Yes, sir, I talked with him again along with Sergeant Brown between eight and nine that night.

Q. And at that time, between eight and nine of that night, and during the course of the conversation, did he make any statement relative to these two matters?

A. Yes, sir, after he was again advised of his rights and stated to us that he wanted to tell the truth and he did not want counsel that he wanted to tell us the truth and he made a statement to us.

Q. All right, now, was it any other—do you know why he changed his mind about making the statement about it?

A. Yes, sir, some—

Mr. Ryder: Now, Your Honor, I would object to the Officer stating why—

The Court: I doubt if the Officer can answer that question.

Q. All right, let me ask you was anything

page 80 } presented to the defendant before he made the statement on Sunday night and if so, what?

A. Yes, sir.

Q. All right, what was it?

A. A twenty-two calibre pistol was shown to him that had been taken out of his brother's home on East 16th Street.

Q. Did he have an opportunity to examine this pistol?

A. Yes, sir, he did.

Q. All right, after that what, if anything, did he say?

A. He stated that he wanted to tell us the truth about it.

Q. All right, did he tell you what happened on these occasions?

A. Yes, sir, he made an oral statement to us and then the services of a stenographer were obtained and he gave a written statement.

Q. To clear up one matter, he voluntarily turned himself in to the police that morning—

A. Yes, sir, he voluntarily turned himself in.

page 81 } Q. All right, now, getting back to the statement which was made on that Sunday night, which I believe you have a copy of,

A. Yes, sir.

Q. what time did you start taking the statement?

A. The statement was started at ten-thirty P.M. on May the 29th and was completed at 1:20 A.M. on May the 30th, and several times during the taking of the statement we stopped and asked the defendant if he wanted anything to drink, anything to eat, wanted cigarettes, or if he was tired or did he want to continue on. On several occasions he requested coffee or cigarettes and sandwiches, which he was given, and he stated that he wanted to go ahead and complete his statement that night. He was not tired.

Q. Prior to giving this statement, was there any force at all used against the defendant?

A. No, sir.

Q. Was he threatened in any way?

A. No, sir.

Q. Were any promises of leniency made to the defendant?

A. No, sir.

Q. Now, you have a copy of the statement and is it a signed statement?

page 82 } A. Yes, sir, it is a signed statement.

Q. All right, will you relate to the Jury and the Court what the statement was and I believe it's in question and answer—

A. It's in question and answering form, he did not know the names of the two subjects who he was giving us the statement to, so he referred to the first one, which later was identified as Addison Wilkins as a conscientious objector. He states in the presence of Detective H. W. Duke and R. E. Wright, I am making the following statement: The conscientious objector:

Question: Do you know his name?
Answer: No.
Question: Can you tell us what he looked like?
Answer: Medium height, wore eyeglasses.

Q. Did Mr. Wilkins wear eyeglasses?

H. W. Duke

A. Yes, sir, he did.
Q. All right?
A. Question: What type of eyeglasses?

Answer: I don't know, I know they had black frames—which the glasses found beside Mr. Wilkins' body did bear dark frames.

page 83 } Question: Do you know the type of clothing he was wearing on this particular night?

Answer: Dark clothing.

Question: How do you know that this man was a conscientious objector?

Answer: I read it in the newspapers.

Question: Did you call this man prior to meeting him on this particular night?

Answer: No, I met him about Forest Hill Avenue.

Q. Now, wait a minute, I met him about Forest Hill?
A. Met him about Forest Hill.
Q. All right?
A. I asked him if he could show me Laburnum Avenue, he said he could. I took him all the way down by the Cemetery right up where they were cleaning up the ground. I told him something was the matter with my accelerator and I stopped. I got out, walked around to his door, opened the door and asked him out. He asked me what I was going to do. I told him I was going to send him to a resting place, then I shot him. I put him in the area that they were digging up. I left him and went over town. I was coming down West

page 84 } Broad Street and saw another fellow and asked him if he was going to the Bus Station, he said he was and I told him I would take him there.

I might add this, this is the deceased, Malcolm Norment that he's referring to now, this other follow that he saw walking down the street and was going to take to the Bus Station.

Instead I took him to the same place where I took the conscientious objector. I got out of the car and asked him out and shot him. He grabbed his heart and mumbled something, then I put him down near the other body.

At eleven forty-five P.M. the accused was asked if he wanted to go to the men's room or if he wanted anything to eat and if he wanted to stop or finish the confession. Accused wished to finish the confession.

H. W. Duke

Answer: I then left and went home.

Question: Can you estimate how many time you shot the conscientious objector?

Answer: About from ten to twelve times.

Question: What guns did you use to shoot the conscientious objector?

Answer: Same two guns I used.

page 85 } Question: *Why* type of gun was this?

Answer: Two twenty-two calibre guns.

Question: Were these pistols or rifles?

Answer: Pistols.

Question: Did you take any personal belongings off of the conscientious objector?

Answer: I took his watch and identification.

Question: What did you do with these?

Answer: Burned his identification and broke his watch up because I already had one.

Question: What did you do with the watch after you broke it up?

Answer: Put it in the trash in my house.

Question: Where was your house?

Answer: 1201 North 26th Street.

Question: How much money did you take off the conscientious objector?

Answer: Eleven dollars because he couldn't spend any of it.

Question: When he got out of the car did he start running before you shot him or how did you shoot him?

page 86 } Answer: He started to run and I shot him in the back of the head.

Question: What did you do with the money that you took from his pocket?

Answer: Spent it in a useful way.

Question: Can you describe the second man that you left out there with the conscientious objector?

Answer: He was a tall man and slender.

Question: How was he dressed?

Answer: He was also dressed in dark clothes.

Question: Can you estimate how many times you shot him?

Answer: About ten times.

Question: What weapons did you use to shoot him?

Answer: The two guns that I disposed of.

Question: Did you take the identification off of this man also?

H. W. Duke

Answer: Yes, I did.

Question: Did you take any money off of this
page 87 } man?

Answer: He had eleven dollars also.

Question: What did you do with his identification?

Answer: Burned it.

Question: Where did you burn it?

Answer: In my heater.

Question: At what address?

Answer: 1201 North 26th Street.

Question: What did you do with the money?

Answer: Spent it in the same way I spent the other eleven dollars.

Question: Approximately what time was it when you killed the conscientious objector?

Answer: Pretty close to dawn.

Question: Approximately what time did you kill the other man?

Answer: About one-half hour—about one-half difference.

Question: Approximately what time did you pick the man up whom you described as the conscientious objector?

Answer: I don't know, it was after twelve o'clock at night.

page 88 } Question: Whose car did you have when you picked the men up?

Answer: Mr. Carter's car.

Question: Where did you get your pistols from?

Answer: I stole them.

Question: Did you steal them in Richmond?

Answer: Yes.

Question: Were these pistols stolen from parked automobiles, homes or business places?

Answer: Business places.

Question: Did you break in these places to steal these?

Answer: No, they were already open during the business hours.

Question: In other words, you shoplifted them?

Answer: Yes, sir, I walked behind the counter and got them.

Question: Do you know what place you got them from?

Answer: That I can't remember, but I know I stole them.

page 89 } Question: Where did you get your ammunition from?

Answer: I bought it.
Question: Where did you buy most of it from?
Answer: Places out of town.
Question: Did you take the money off of the people that you killed to buy your ammunition?
Answer: I spent some of the money to buy ammunition with, the rest of it I bought gas for the cars, I know I spent seventy-nine cents and bought a cross, I lost it.
Question: What were you going to do with the cross?
Answer: Keep it to pray with.
Question: Do you know the exact location on Broad Street that you picked up the second man you left on East Richmond Road?
Answer: No, I don't.
Question: Did you have any struggle with any of your victims?

Q. Now, just stop right there—just only one.
A. Answer: Only one.

page 90 } Question: Did you know your victims before you shot them?

Q. Well, the answer to that would be no.
A. Answer: No.

Question: Why did you take the second man to the same spot that you had taken the conscientious objector?
Answer: I thought about the other fellow and put him where he was.
Question: Were you angry?
Answer: No, I was not angry.
Question: Why did you kill these people?
Answer: I don't know.
Question: Did you get a thrill or any sexual satisfaction in killing these people?
Answer: After I had done it I knew something must have been wrong with me.

Q. All right, now, subsequent to this statement, Mr. Duke, did you see the defendant again on the date of May 31st, 1966?
A. Yes, sir, I did.
Q. And where was that, sir?

page 91 } A. That was in the Police Building over there adjacent to the Police Court.

Q. And approximately what time was that, sir?

A. I would say approximately—let me refer to my notes—I would say approximately 11:15 when I first saw him.

Q. In the morning?

A. A.M., in the morning, that's right.

Q. Now, had he talked to anyone that morning, a member of his family or anyone?

A. Yes, sir, he talked with his mother for approximately, I would say, between twenty and forty minutes.

Q. How did you happen to talk to him again on that morning after talking with his mother?

A. Sergeant Brown and I were standing outside of the Court there and one of the Court employees, I don't know whether it was the Bailiff or one of the Clerks, he came out and stated that Thomas Penn wanted to see Sergeant Brown and I.

Q. Did you go to see him?

A. Yes, sir, we did.

Q. And when you went to see him, what, if anything, did he tell you then?

page 92 } A. He stated to us that he had talked with his mother and his mother had told him to tell the truth and that he wanted to give us an additional statement in regards to the offenses which he's being tried on here today, and at that time we again advised him of his rights, and he stated he wanted to do it, he wanted to give us a confession, as he called it, tell the truth about it.

Mr. Wilkinson: Judge, may I speak with Mr. Ryder just a moment?

The Court: Sir?

Mr. Wilkinson: May I speak with Mr. Ryder?

The Court: Yes.

Q. Was that statement also typed up, Mr.—

A. Yes, sir, it was.

Q. All right, now, that statement, page 4, I believe is the third paragraph, went over near Forest Hill Avenue?

A. Uh huh?

Q. Will you start reading there, sir?

A. Went over near Forest Hill Avenue, my brother told me we were going to get another one. I saw someone walking

down on the side the same direction we were going. I told William, William pulled up beside me, I called him
page 93 } to the car, William asked him to show him Laburnum Avenue, he said he was going to a Club, that was the conscientious objector—speaking of *Addition Wilkinson,* so he told William he could—would show him where Laburnum Avenue was and asked William was he going to bring him back. William told him yes. He showed us where Laburnum Avenue was and asked William did he know where the Club was located. William told him yes, it was a little further down. I don't know whether he turned off or not, any way we came to a place where they were digging up ground. William stopped the car. The conscientious objector asked me what were we going to do. I told him I was going to send him to a resting place. I got out of the car and asked him out, then William got out. We walked off the road into the place where they were digging up the ground, I had my gun on him standing beside him, my brother William walked up and shot him in his head and I looked at my brother than I shot him.

Question: How many times did William shoot the man?

Answer: Six.

Question: How many times did you shoot the
page 94 } man?

Answer: I don't know, I believe it was six, I'm not sure.

Question: What guns were used to shoot the conscientious objector?

Answer: Black pearl-handled twenty-two calibre and my brother's gun.

Question: When you refer to your brother's gun, do you mean the gun the police are now holding?

Answer: Yes, after we killed the conscientious objector we left and went over town. We was coming down West Broad Street, we saw a man walking down Broad Street. I told my brother, he made a U-turn on Broad Street, and came back down the same side the man was walking. I asked the man was he going to the Bus Station, he said he was, I told him to get in and we would take him. He got in the front between me and my brother. My brother turned off Broad Street, off Broad, and asked the man where he was going, he told my brother he was going to Williamsburg. My brother told him he would take him there. My brother told him he

had another place to stop for a minute. We went over to a bootlegger's house but he was not at home, then
page 95 } we left and went to the same place we had carried the conscientious objector, stopped, I opened the door and told him to get out. The time he got out I shot him. He grabbed for his heart and mumbled, my brother came around and shot him, together we both shot him approximately ten or eleven times. When he fell I jerked him down almost near to the other one, I went back and got back in the car and my brother had already got in and started it up. We took the same road we was on, came up in the back of Fulton and William told me we had to ditch the car. We drove down to the dock, William said we were going to drive it off in the water, but someone was down there, we waited fifteen or twenty minutes, then he said we will have to burn it.

Q. All right, sir, answer Mr. Ryder's questions.

CROSS EXAMINATION

By Mr. Ryder:

Mr. Ryder: Your Honor, I would ask that the record show that the cross examination of this witness is made in the manner that it will be made because of the Court's
page 96 } previous ruling as to the statements, sir.

The Court: Very well.

Q. Officer, when you found the two bodies, you do not know how long those two bodies had been there, from your own investigation, is that correct?

A. No, sir.

Q. Was there—the bodies that you found, what was your position, where were you physically when you first saw those bodies?

A. Well, I received the call to respond to the East Richmond Road where the excavation was being carried on—

Q. Can you recall, though, sir, where you were physically when you first saw the bodies?

A. Yes, sir, I was—I can tell you exactly because I stood

Q. All right?

A. right there and had it measured, it was just a fraction over one-tenth of a mile east of North 35th Street on East Richmond Road.

Q. Now, were you standing on the road when you saw the bodies or were you standing in the field or where?

H. W. Duke

page 97 } A. I was standing, I'd say, approximately two feet off of the—off of a roadbed and you could only see one body from that point, the body of Addison Wilkins.

Q. From that point, driving in an automobile, could you see the body?

A. It would have been difficult in moving along unless you had been expecting to see them there.

Q. You were standing on your feet, not on

A. That's right.

Q. anything, when you saw the body, you could see the body from the road?

A. I could see one body.

Q. Now, was there any dirt or any other thing put over either one of the bodies in an attempt to conceal them?

A. No, sir.

Q. Anyone walking in that field or working on that machinery could very readily have seen those bodies, is that not true?

A. Yes, sir, that is how they were discovered, by someone walking through there.

Q. By the way, you have seen Thomas Penn's father and his mother, have you not?

page 98 } A. Yes, sir.
Q. Are either one of them in Court today?
A. I don't see them.

Q. At the time you showed the pistol, the twenty-two pistol to the defendant, did you make any statement to him or did any other officer, in your presence, make any statement to him to the effect that William had already confessed or that William had admitted anything?

A. No, sir, I did not and not to my knowledge did anyone.

Q. Now, then, sir, you had testified about some of the statement, now what you have testified to is excerpts from that statement, is that correct?

A. That was statement pertaining to the crimes for which he is being tried, yes, sir.

Q. All right, sir. Turn to page one of the first statement?

A. All right, sir.

Q. Now, the first page of the statement pertains to a preacher who was killed at the Eggleston Motel, is that correct?

A. That is correct.

H. W. Duke

Q. In the statement, Thomas Lee Penn admits shooting that man and killing him, does he not?

A. Correct.

page 99 } Q. Now, on the first page of the statement was he asked this question, did you shoot the gun any more times while you were in the Eggleston Motel, what was his answer?

A. Did you shoot the gun any more times—

Answer: I shot him once, I wanted him to live, it seemed like something came over me while I was in there and I knew I needed help, then I left.

Q. Turn to the portion of the statement dealing with Willie Sexton?

Mr. Wilkinson: What page is it?

Mr. Ryder: Mr. Wilkinson, I can't see—

A. I have it, Mr. Ryder.

Q. On page 6.

A. I have it.

Q. Now, Willie Sexton was another man

A. Uh huh.

Q. that this defendant admitted shooting and killing, is that correct?

A. That's correct.

Q. At the bottom of page 6 the question did you know you were going to shoot Willie when you left Johnson's Grill, what was the answer?

page 100 } A. Wait a minute now, I believe I'm on the wrong page.

Q. Page 6 at the bottom of it, sir?

A. Now, what was the question, Mr. Ryder?

Q. You asked him the question do you know—did you know you were going to shoot Willie when you left Johnson's Grill, what was his answer?

A. Answer: After I went in there I saw him and told him to let's go to Jack's Place. While I was on my way down there, it seemed that something told me to go ahead and bump him off.

Q. The next question was did you kill him for the money he had, what was the answer?

A. Answer: That is not no money to kill anybody for, I

really don't know why I killed him, I don't know why I killed any of them.

Q. On the—page 7, question, did you shoot some of the people that you have killed through the hand on purpose, what was his answer?

A. Answer: Yes.

Q. And the question was why?

A. Answer: To try to save them, I really didn't want to kill them. I wanted to give them a chance to live it out and turn me in.

page 101 } Q. On page 8, now that dealt with the defendant's killing another person, a woman, did it not?

A. Yes, sir.

Q. And that was a woman named Cynthia, is that correct?

A. That's correct.

Q. Beginning with the question did you attempt to sexually molest Cynthia, what was the answer?

A. No.

Q. Now, read the question and answers until I stop you?

A. Question: Do you know why you shot her?

Answer: Not really.

Question: Did she provoke you in any manner?

Answer: No, she didn't.

Question: Did you tell her anything before you shot her?

Answer: Yes, I told her it was her time to go, God had called her.

Question: Did you tell her anything else?

Answer: I let her talk and I listened to her.

page 102 } Question: What did she say?

Answer: She talked about her stepfather and boyfriend, she said her stepfather tried to beat her so I told her this was the best way out.

Q. You can stop there, sir. Go the next page—page 9. Now, that page deals with the questioning of the defendant killing another man, does it not?

A. That's correct.

Q. This is a man named Carter, is it not?

A. That is correct.

Q. Beginning with the question, you asked him this question, describe for us how you killed Mr. Carter, what's the answer?

A. We drove to an abandoned house that had been torn al-

most down, we took a drink of bourbon, I forced him in the house, I shot him with both twenty-two's. While he was dying, I told him if he lived, he would learn not to trust people.

Q. On the next page, page 10, you asked him the question, why did you kill Mr. Carter, what was his answer, right in the middle of the page?

A. Answer: I had no reason for killing him or none of them.

Q. On page 15 of the statement?

page 103 } A. All right, sir.

Q. Now, this concerned the defendant killing one of the persons involved in this particular case, did it not?

A. Yes, sir, part of it does.

Q. You asked him question, when you asked him what he did with the money, he told you, among other things, what were you going to do with the cross that he had purchased with the money, what did he answer?

A. Keep it to pray with.

Q. The bottom of the page you asked him, did you get a thrill or any sexual satisfaction from killing these people, what was his answer?

A. After I had done it I knew something must have been wrong with me.

Q. Now, Officer Duke, based upon your investigation of this case, do you believe that the statement that you took from the defendant, that is, both statements were true?

Mr. Wilkinson: Judge, I object to that question, that's invading the province of the Jury—

Mr. Ryder: I'm asking him his opinion of it, Your Honor.

page 104 } Mr. Wilkinson: I don't think he can give an opinion, Judge, it doesn't take any expert to know whether the statement is true or not.

The Court: I think the statement speaks for itself.

Mr. Ryder: We would except to Your Honor's ruling, sir.

Q. Officer Duke, have you ever totaled up, during your investigation, if you know, how much money this defendant got from any of the six people that he killed?

A. Mr. Ryder, I would have to answer that like this: I do not know the exact amount that was taken from any of them other than what the defendant himself stated to me that he took.

H. W. Duke

Q. And he told you that he took eleven dollars off of one person and eleven dollars off of another person?

A. That is correct.

Q. And of the other four he got not a nickel from them?

A. I don't think going into that, I don't think he ever stated the amount that was taken off of Mr. Carter, however, we know Mr. Carter's paycheck had been cashed just prior to the time that he was picked up.

page 105 } Q. And he bought groceries that day too?

A. He bought groceries, that's correct.

Q. Out of his paycheck. The most money that you know of that he took, based upon what he told you, was eleven dollars from one and eleven dollars from another?

A. That's correct.

Q. Now, some of the persons he killed, he took nothing off of them, is that correct?

A. That I cannot testify to, Mr. Ryder.

Q. Based upon what he told you?

A. I will have to go back into my notes, Mr. Ryder, it's been a long time since this.

Q. I understand, sir?

A. We know that it was approximately seventy some dollars taken at the Eggleston Motel where the preacher was.

Q. Do you know that he got it?

A. He admitted that he took the money and shot the man.

Q. Didn't he state in the second statement that his brother William was the one that took the money?

A. And they shared the—they shared the

page 106 } receipt.

Q. Did he say he got any part of the receipts in the second statement?

A. Wait just a minute, I will have to refer back. (pause) He stated in there that his brother took the money, he counted me thirty-five dollars and kept the rest, if you will look on the second page of the second statement.

Q. And his statement was that his brother was the one that took the money?

A. Took the money, that's correct.

Q. And this was before or after he had killed that man?

A. It was after he had killed him because in the statement he said we threw the box out of the window before we went to my brother's house. We got home to his house and he took the money out of his pocket, his wife was standing beside him—

H. W. Duke

Q. The point I'm getting at, Officer Duke, I don't mean to interrupt you, sir, but did not both statements show that the defendant walked into the Motel, shot *Eggleston* in the head and killed him, and then his brother took the money out of the cash register and later on his brother gave him a part of it?

A. You say both statements show that his brother shot him?

page 107 } Q. No, sir, no, sir, what I'm saying is, isn't the tenor—or doesn't what both statements show is that in the first statement he says that he shot him and killed him and then took the money?

A. He states he got thirty-five dollars from the cash register.

Q. Look at your statement, sir, first statement, sir, on the second page of it, down at the bottom, you asked him what was the first thing you did after you walked in there, talking about his walking into the Motel, is that correct?

A. That's right.

Q. And his answer was, I walked in and kicked the latch and pushed him in the back room.

Did you push him all the way into the bathroom?

I don't remember seeing a bathroom.

Did you say anything when you shot him?

I know he said something pertaining to God.

Now, he shot him and killed him before he got anything according to that statement, is that correct—on the next page you said where did you get the money from, I got thirty-five dollars from the cash register?

page 108 } A. That's correct.

Q. Now, in the statement where he implicates his brother, the second statement, (pause) read down at the bottom of the first page of the second statement?

A. You want the question and the answer?

Q. You asked him what Spencer's reply, what was Spencer's reply?

A. He was on the phone and I started to say something and William told me to wait until he got off the phone. Mr. Spencer asked, how many rooms do you all want, I told him we wanted a room for four, he said he had some. My brother walked behind the desk and pushed the man in a room, I waited outside. My brother had already told me to wait outside, I heard some paper money rattling and some change, then I walked in to where my brother and Mr. Spencer was,

my brother had already got the money. My brother walked out and told me to take care of it, so I shut the door to the room the man was in, then I shot him one time. My brother told me to empty it, then something came over me. The reason why I shot him one time was because I wanted him to live and I let him get a good look at my face. I page 109 } turned around and rushed out. I walked down the street fast, I got in the car with my brother and we drove his house, 407 East 15th Street.

Q. All right, sir, now the rest of the statement shows that when they—according to this part of the statement—when they got home to the brother's house, the brother counted out some money and handed it to him—

A. That's right.

Q. Thirty-five dollars?

Mr. Ryder: Your Honor, subject to the—well, the reason I'm asking this, sir, is because—and I want the record to clearly show because of the Court's ruling on the statement—I would ask that the entire, both statements, be admitted into evidence for the Jury's consideration, sir.

Mr. Wilkinson: We have no objection.

The Court: Very well.

Mr. Wilkinson: Do you have a copy of each statement there, Mr. Duke?

Mr. Duke: Yes, sir.

Mr. Wilkinson: All right, when you finish your examination you can put them all—

Q. Did you talk to this defendant on the morning that he turned himself in around eight o'clock?

page 110 } A. Very briefly.

Q. Did you ask him anything about why he had turned himself in?

A. No, sir, I don't—don't think I even recall—

Q. Did he state why he had turned himself in to you?

A. Not to me, but on information received he made the statement that he heard he was wanted and there was a couple of warrants out for him and he came on down to see what it was about, stated—

Q. Where was he at the time he supposedly heard that he was wanted?

A. He stated to me that he was in Wash—or stated to this party he was in Washington, D.C. on Saturday night when he heard it on television.

H. W. Duke

Mr. Ryder: That's all the questions I have, Your Honor.

REDIRECT EXAMINATION

By Mr. Wilkinson:

Q. Mr. Duke, about the car that they were using the night of the, or the night or early morning that you found the bodies of Mr. Wilkins and Mr. Norment, what page 111 } did they do with that car?

A. The car was parked on Nicholson Street, in the one hundred block, right underneath the trestle there, was burned, gasoline was, according to the statement from the defendant, they removed the plug from the gas tank—

Mr. Ryder: Your Honor, I would object to the Officer interpolating what the defendant said, what he is talking about is right here in the statement and the Jury can read it as to who did what, sir.

The Court: Very well.

Mr. Wilkinson: Do you find it in the statement there?

Mr. Ryder: It's on page 5 of the second statement, I believe it is.

A. I have it. It's a continuation where, when I read before, they said they were going to drive it off the river and then said they would have to burn it. We went back up—

Mr. Ryder: Well, Your Honor, I object to that, sir, because that's not what the defendant said.

The Court: Read it, please, sir.

page 112 } A. William said we were going—wait a minute—I went and got back in the car and my brother had already got in and started it up. We took the same road we was on, came up in the back of Fulton and William told me we had to ditch the car. We drove down to the dock, William said we were going to drive it off in the water, but someone was down there. We waited fifteen or twenty minutes, then he said we will have to burn it. We went back up in Fulton and stopped near the trestle. My brother asked me for the flashlight, which was on the dashboard. I gave it to him, he got down under the back of the car by the gas tank, I don't know what he used, a pair of *plyers,* or a wrench, he had taken a bolt loose and told me to

get some rags to soak them in—told me to get some rags to soak them in gas. Also told me to wipe the inside of the dashboard and the two doors with gas. I wiped the front and the back, I let the windows up on his side, he was on the other side shutting a door and letting the window up to, when he lit a match to a piece of paper. I also had a piece of paper in my hand too. I told him wait until I light mine, but he throwed his in the car and shut the door and told me let's go.

Q. All right, they burnt the car?

page 113 } A. They burnt the car, yes, sir.

Q. All right, sir, that's all the questions I have.

Mr. Ryder: I have no further questions.

Q. Let me ask you one other question, I'm sorry, the 3600 block South Richmond Avenue where you found the two bodies, is that in the City of Richmond, Virginia?

A. Yes, sir, it is.

Q. All right, sir, that's all.

Witness stood aside.

NOTE: At this time a short recess was had, after which:

page 114 } The Court: Gentlemen, you waive the poll of the Jury?

Mr. Wilkinson: Yes, sir, the Commonwealth does.

Mr. Ryder: Yes, sir, Your Honor.

The Court: Very well.

Mr. Wilkinson: Now, Your Honor please, at this time we have Officer Wright who is here with one of the statements and also Sergeant Brown who is subject to cross examination, if defendant so desires, and also Mrs. *Shackelfrod,* who transcribed the first one, if they are wanted, but I submit to the Court their testimony would be purely cumulative and would add nothing to it, but they are here for cross examination if the defendant desires to cross examine them.

Mr. Ryder: We have no desire to cross examine them.

The Court: Very well.

Mr. Wilkinson: Well, at this point, Judge, the Commonwealth rests its case in chief.

Mr. Ryder: Your Honor, would the Court—certain portions of the defendant's, of the record from Cen-

page 115 } tral State Hospital that I would like to get into evidence, and I could read it to the Jury at this time, it might save a little time in the morning, or wait until in the morning, whichever the Court desires.

The Court: How long will it take?

Mr. Ryder: Judge, I think fifteen or twenty minutes.

The Court: Sir?

Mr. Ryder: Fifteen or twenty minutes, I believe.

The Court: All right, suppose you go ahead and read it.

Mr. Ryder: Your Honor, these are excerpts that I am reading now from the records of the Central State Hospital in Petersburg, Virginia. This is an entry of November the 13th, 1963. In this entry it is recommended that the patient should have follow-up in the after-care clinic in Richmond and this is the entry dated November the 13th, 1963, shortly before his discharge from the hospital.

The Hospital records show that the defendant was admitted to the Central State Hospital on January the 19, 1963, and was furloughed from the Hospital on page 116 } November the 27th, 1963. When admitted to the Hospital, he was admitted after having been observed at the Memorial Guidance Center here in the City of Richmond, he having been referred to the Memorial Guidance Center from the Juvenile and Domestic Relations Court of the City of Richmond. He went to the Juvenile, into the Juvenile Court on the basis of a petition signed by his mother.

The patient was tested at the Memorial Guidance Clinic. The patient impressed the examiner here as functioning on a low intelligence level. He was diagnosed as schizophrenic reaction, chronic undifferentiated type. It is again a notation in the record dated July the 29, 1963, that after-care clinic in Richmond was definitely recommended.

According to the hospital records the defendant, while at Central State, escaped on May the 31st, 1963, and on April the 18th, 1963. According to a psychological study made of the defendant in the Admission Office on January the 19th, 1963, at Central State Hospital, he was diagnosed as a schizophrenic reaction, chronic differentiated type.

Some of the personal history of the defendant is as follows: The patient, speaking of the defendant, is the page 117 } youngest of four children born to his parents, the oldest one is twenty-two years. Another boy twenty years old, a girl nineteen, and the patient. It seems the patient got along fairly well with all the siblings, however, there's been some conflicts with him and his sister. They were the only ones living with his mother since the separation of

both the parents, the two boys went with their father to Richmond, the parents separated after ten years of marriage and the father is going with another woman in Richmond. The mother, according to the patient, is about fifty years old. She seems to be a chronic complainer. The mother complains about her children's attitude toward her, claiming that her boys and girls are very mean to her. She has been under treatment at the Medical College of Virginia for asthmatic condition and nervous condition. The mother is a highly nervous person and she gets in contact with the police every time she has any conflicts at home with her children. She used to complain very often about the neighbors. Patient stated that he started to school at the age of five and at the present time is in the Eighth Grade at East End Junior High School. Patient said he had been having

page 118 } problems in school since he doesn't go along with his teachers and other pupils. He was subsequently diagnosed at Central State not in conformity with the, or in agreement with the psychological study of Dr. Lordi. Instead of being given a diagnosis of schizophrenic reaction he was given diagnosis of transit situation personality disturbance, adjustment reaction of adolescence.

According to the history, a portion of it states, Mrs. Penn, speaking of the boy's mother, the defendant's mother, spoke of the patient as being very disobedient and belligerent at times. She stated that the patient frequently threatened bodily harm to her. The record shows that he was placed in two foster homes and was either expelled from both of them or ran away from both of them.

This is a part of the history obtained by Mrs. Audrey Crook of the City of Richmond Department of Public Welfare: Mrs. Mary Penn has been known to the Family Division of Social Service Bureau since 1958. She had lived and married in Lawrenceville, Virginia, but had separated from her husband, William Penn, since 1951. She said he left here and the four children destitute in Cumberland, Virginia, where he came to Richmond for work

page 119 } and began living with another woman, Lucy Coatlers. They now live at 27 Louisiana Street, Richmond. She came to Richmond in 1957 to find Mr. Penn and was advised through the Welfare Department to petition the Court for support payments. There has been much family disorder between the parents and also the siblings. Joseph was shot by the older brother, William, and consequently lost his right leg. William is married and living with his father, which Mrs. Penn greatly resents. Even this

young couple are said to be in conflict often. Mrs. Penn seems to have an overpowering super-ego. She states she was raised by a white family named *Scheer* after her parents died and seems confused by conflicting negro and white mores and standards. She identifies with whites, she has a rather refined air and wears elaborate fabric over herself, according to the fashion. She stresses the spiritual life, has many religious pictures and symbols in her home, has a close relationship with a Catholic priest and encourages Thomas' religious paintings, which he does with talent. Mrs. Penn retains the attitude of self-pity and indignation towards her husband and resents the children visiting him.

page 120 } Mrs. Penn has many physical ailments and has been a frequent visitor to MCV Clinic. Special significance is this over-dependence and helplessness in front of Thomas, making him feel torn between the roll of protector and rebellion—rebellious adolescence.

This is the report to the Social Service Bureau from Mrs. Annie Fisher, she's psychiatric social worker. She said, and this is the Memorial Guidance Clinic, she says Thomas was seen in our emergency clinic on December the 9, 1962, and later on was tested by the psychologist. He came to us on referral by the Juvenile Court as he had been placed in the Detention Home on a petition by his mother, who declared him to be beyond her control. The psychiatrist saw Thomas as a stocky, well-built, dark-skinned adolescent who had an odd-shaped head, as the top is smaller than the head is at eye-level. He was poorly, though cleanly, dressed. His responses alternated between being of a dullish and a bright nature. His mood was a depressed one, at the time, indicating poor impulse control. In his way of reacting Thomas showed an anxious attempt to keep himself intact. He is threatened by fear and fright which he feels—when he feels

page 121 } he is losing his personal definition. On the whole he may be regarded as an acting-out child who will try to discharge inattention in this way. Thomas responded well to being treated with respect, having preserved islands of self-esteem in his personality, although his life experience has been deprived and abused by the adults in his family. He has had a pillar-to-post kind of relationship with his parents, has been beaten and treated cruelly. At one time his very life was threatened by his father. On the other hand the mother has used him to live out her dependent needs and has exploited him emotionally. Our impression is that Thomas needs help and wants help, he is a psychotic child who is struggling to preserve his *ago* boundaries and he

should be placed in a therapeutic minimum. Our first recommendations for him is referral to the Educational Therapy Center, while he continues living in a foster home. If he cannot be accepted at the Center we would recommend his commitment to Central State for further study and treatment in their adolescent unit.

This is a part of the psychological examination: It appears that Thomas is attempting in an unsuccessful page 122 } way to hold himself together against disorganization. The tie with reality is weak. Ego development is inadequate. He is evasive and secret about his personal problems and an active oppositional tendency is shown by this hostile youth, who feels greatly deprived in the emotional area and in material things. Rejection has been experienced from his mother, father, older brother and others that would expect—that would be expected to show affection toward him. The need for affection is so great that it continues to be a great threat to him. Although attempts are made to hide from the outside his inner feelings and attempts are made to handle his affectional disturbance by introspective efforts, he engages in some acting-out behavior when environmental pressures become too great. This youth, who is unable to express his hostile and destructive impulses towards those who have been rejecting him, now appears to be showing a schizophrenic reaction. Thomas, who has an odd-shaped head, pictures his home life as constantly of much fighting and consisting of much fighting and continued rejection by his parents and by his older brother. The initial impression of a compulsive pattern with depress- page 123 } ing elements must be changed to one of a youth now showing schizophrenic reaction when analysis is made of the test results. The youth of average intelligence and endowment whose learning efficiency is below the expected grade point shows negatism, evasiveness, feelings of personal inadequacy and feeling of insecurity. Ego strength is weak and he tends to do much inner living. Thomas has experienced affectional deprivation over the years without adequate ways of handling the hostility he feels towards the world around him. There are psycho-sexual problems associated with his schizophrenic reaction.

This is a part of the investigation report made by—for the Juvenile and Domestic Relations Court by J. C. Kruse, Probation Officer. Speaking of Thomas' mother: Regarding her difficulty with Thomas, however, she regarded him as a disobedient child, he is quite belligerent at times. She states further that he has on several occasions cursed and threatened

bodily harm to her. She feels that Thomas, along with his sister Charlotte and the other two boys, are very mean to her at times. From the way she expressed herself it would seem she has a persecution complex that her
page 124 } children are always against her. When asked whether she had any suggestions to offer she stated that she wants for this boy to treat her with respect. Mrs. Penn filed a petition on September the 17th, 1962, to bring this case officially before the Court. She accused him (speaking of Thomas Penn) of cursing and threatening her with bodily harm.

The last entry shows that on November the 27th, 1963, Thomas Penn was furloughed from the Central State Hospital to be taken charge of by Doris Ann Dawson, a case worker for the Public—or the City of Richmond. He was discharged by a certificate that was entered on November the 30, 1964.

That's all I want.

The Court: Gentlemen of the Jury, it is now approximately four o'clock. We will recess until tomorrow at ten.

NOTE: After admonishing the Jury, the Court declared the hearing adjourned until the following morn-
page 125 } ing at ten o'clock A. M.

NOTE: Hearing on April 18, 1967, before the Honorable W. Moscoe Huntley, Judge.

PRESENT: J. B. Wilkinson, Esq.
Attorney for the Commonwealth

Richard R. Ryder, Esq.
Attorney for the Defendant

Thomas Lee Penn, the defendant,
in person and by counsel.

The Court: Gentlemen, you waive the polling of the Jury?
Mr. Ryder: Defendant waives, yes, sir.
Mr. Wilkinson: The Commonwealth does, yes, sir.

page 126 } WILLIAM M. LORDI, introduced on behalf of the Defendant, being first duly sworn, testified as follows:

William M. Lordi

DIRECT EXAMINATION

By Mr. Ryder:

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

A. William Michael Lordi, I am a psychiatrist.

Q. Dr. Lordi, what training have you had in psychiatry?

A. The usual background training, which consists of a degree in medicine, internship, three years general training in general psychiatry, two in child psychiatry, and I have my—I am certified both in general psychiatry and child psychiatry, and I've had a total of about eighteen years in psychiatry.

Q. Dr. Lordi, where did you receive your medical degree?

A. Long Island College of Medicine, 1949.

Q. Were you formerly the head of the Memorial Guidance Clinic in Richmond?

page 127 } A. Yes, sir, I was Director for over nine years.

Q. What is the Memorial Guidance Clinic?

A. The Memorial Guidance Clinic is a child guidance clinic for the community, sponsored by public and private funds, to provide diagnostic and treatment services to children and their families, children who have problems in living.

Q. Are children referred to your Clinic for diagnosis and for psychiatric treatment by the Juvenile and Domestic Relations Court of the City of Richmond?

A. Yes, sir, it's one of the public agencies that refers children to the Memorial Guidance Clinic.

Q. While at the Memorial Guidance Clinic could you give any estimate of the number of children that you diagnosed and treated over a period of years?

A. I can't give you an accurate estimate, but judging by annual figures during the nine plus years I was at the Clinic, we must have seen somewhere in the vicinity of five, six thousand children and their families, which means about twelve or fifteen thousand people altogether.

Q. Dr. Lordi, what—have you published or made any publications, written any publications in your specialty?

page 128 } A. Yes, sir, about a dozen or so concerning psychosis in childhood, concerning the problems of therapy with children and their families, concerning learning problems.

The Court: Excuse me, doctor, will you speak so these Gentlemen can understand you.

William M. Lordi

A. Yes, sir, I'm sorry.

The Court: That's a recording mike and not an amplifier.

A. Yes, sir.

Q. Dr. Lordi, have you had any training in dealing with persons who were so-called criminally insane?

A. Yes, sir, part of my training was in the U. S. Public Health Service and this was at Lexington, Kentucky, where we dealt with a variety of Federal prisoners, some of whom were psychotic, some who were not. In addition to that, along the way in my subsequent experiences, I dealt with psychotic children and adults.

Q. Dr. Lordi, are you presently in the private practice of psychiatry?

A. Yes, sir.

Q. Is that here in the City of Richmond?

A. Yes, sir, we have a private child guidance clinic.

Q. Doctor, did there come an occasion in the latter part of December or early January of 1962 and
page 129 } '63, when Thomas Lee Penn was referred to you from the Juvenile and Domestic Relations Court?

A. Yes, sir, I believe it covered November, part of December and early January, where we did a work up, because this boy and his family was referred to us.

Q. During that period of time, doctor, did you have occasions to talk to Tommy Penn?

A. Yes, sir, I did. I conducted a psychiatric examination and we did a battery of psychological tests on the boy, also talked with the mother and interpreted to the mother the findings and made recommendations to the Court.

Q. Based upon your examinations of Tommy Penn in 1962 and early '63, did you come to a conclusion as to what his mental condition was?

A. Yes, sir, we found him to be psychotic. We found him to be operating in a mental—to have a major mental disturbance that we diagnosed as paranoid schizophrenia and recommended that he be transferred to Central State Hospital for further study and treatment.

Q. Dr. Lordi, what, in lay terms as well as you can explain it, is a paranoid schizophrenic, what does it mean?

A. This is a mental state, wherein the individual cannot use reality as the ordinary person does, where
page 130 } he has increasingly poor control over his im-

pulses, where the forces of civilization, the forces that would hold in check destructive, overwhelming, frightening impulses fall away and the individual very nakedly acts out, feels out and experiences as many experiences of unreality, cannot distinguish what is coming from within himself and what's coming from without, and the paranoid aspect of it is that the individual cannot see that these things are coming from within and feels that they are attacks from without and sets about to defend himself, usually by attacking.

Q. Doctor, based upon your examinations—let me ask—let me withdraw that question for a moment, sir. Did there come an occasion in 1966, in about July of 1966, when you had an occasion to re-examine Tommy Penn by reason of an order from this Court?

A. Yes, sir, I did. I examined him, did a psychiatric examination and had a battery of psychological tests performed on him at that time.

Q. In your re-examination of him, did you arrive at any conclusion as to his mental condition?

A. Yes, sir, there had been deterioration, he was functioning less well intellectually, there was more violent, more intense, more constant breakthrough of his destructive impulses and angry, overwhelming feelings. This
page 131 } had increased and his over-all mental state had deteriorated importantly.

Q. In your conversations with Tommy Penn in July of 1966, was there anything said about religion, about voices?

A. Yes, Tommy had talked about finding religion, about wanting to find some way out of his trouble, about looking for help, he was confused, he did constantly make reference to the fact that he did hear voices, although he claimed he did not obey them, he did not listen to them, he tried to shut them out. There was an attempt on his part, I think, to recover or to heal himself by fleeing toward religion as an answer to his dilemma.

Q. Doctor, would you refer to your report of December the 12th, 1966, sir?

A. I have it, sir.

Q. Referring to the second paragraph beginning with "he laughed,"

A. Yes, sir.

Q. would you read that to the Jury?

A. My report was the summary of my contact previously

and the contact I had in the examination requested by the Court. I stated, in part, he laughed inappropriately at times and had ideas of reference and influence. He page 132 } spoke of things always going wrong, he spoke of wanting to live by God and felt accepted in the Church. He spoke about his erratic job performance and about voices telling him to quit. At many junctures he pointed out he's always wanted help and said some of his destructive behavior was to get attention and help. There were many themes of unbridled violence and death. He spoke, with feeling, about the spankings he received as a child and his fear of violence. He hears people call his name at times, but he does not answer. His affect was flat and though he knew time, place and person, his judgment was poor, and there were feelings of influence and reference.

Q. Doctor, in your opinion based upon your examinations in 1962 and in 1966, had Tommy Penn deteriorated mentally after his stay at Central State Hospital in 1966, and did he appear to be—

A. When I saw him in 1966, it was my feeling that this—it was my feeling, it was my opinion, that Tommy had deteriorated considerably, intellectually, emotionally and in terms of being more disturbed psychiatrically.

Q. Doctor, based upon your examinations of Penn, Tommy Penn, on the two occasions, in your opinion was his behavior pattern that resulted in violent psychotic episodes predictable?

A. Yes, sir, I feel so.

page 133 } Q. Based upon your examination in 1962, could you say that with reasonable medical certainty that Tommy Penn was likely to commit violent killings?

A. Violent acts, yes, I don't know about the word killings *per se,* but yes, I think that we could have reasonably expected that Tommy would act out with violence toward people for real and imagined insults.

Q. As a part of his mental disease did—would he believe that in effect the whole world was against him?

A. I feel he had a lot of global fears that there—that this was a friendly—friendless, hostile, destructive world. This had been his experience repeatedly.

Q. Doctor, if after you examined him in 1962 and he was sent to Central State Hospital, if he had been given intensive psychiatric care, do you believe he could have been helped?

A. Yes, sir, I think it's within the realm of possibility that he could have been helped.

William M. Lordi

Q. Doctor, what—I'm going to read to you entries from the record of Thomas Lee Penn at Central State Hospital from January of 1963, through November of 1963, and ask you if in your opinion this was the type of intensive psychiatric care that would have helped Tommy Penn: On January the 21st, of 1963, in the admission it stated, at brief
page 134 } interview today the patient came in readily, he was in good contact with reality, he talked free but not spontaneously. He appeared to be emotionally disturbed. No overt psychotic features were elicited at the brief interview. Beginning on February 4th, 1963, he was given Thorazine, 100 milligrams. On March the 27th, 1963, a Dr. Marti stated I examined this patient this morning since he complained of abdominal pains. Physical examination was negative other than the above mentioned pains. He was placed on a soft diet, his temperature was checked, he remained in the—during the rest of the day in bed. He will be checked again tomorrow. On March the 5th, 1963, a psychological examination was done by a Dr. S. Marti, M A R T I. He arrived at the conclusion that Thomas Lee Penn was suffering from schizophrenic reaction, chronic differentia type.

On March the 12th, 1963, at a staff conference, the following is noted: At interview the patient came in readily and took his seat as directed. He was co-operative and pleasant, related well, quite freely and spontaneously in most areas. Early in the interview he tended to evade or block to some extent on questions concerning his relationship with his mother, but at a later stage in the interview he talked freely about these. He described having been placed in a foster home when he reached his fifteenth birthday due to inability to get along with his mother. He said that he would fre-
page 135 } quently talk back to her and was resentful of her when she told him to do things. He said that he had been expelled from school for fighting with the other boys. The patient described his experiences in two foster homes as he described in each case, the reactions of the foster parents appearing somewhat strange particularly in the area concerning the most recent foster mother whom the patient described suspected that he had tuberculosis and more or less placing him and another boy in quarantine, insisting that they attend a tuberculosis clinic and having their plates washed in Lysol. It was undetermined at present time how much truth was in the boy's relating this, but he has main-

tained the story since admission to the Hospital and it is most probably, in my opinion, that this is wholly delusionary, this is not wholly delusionary. During the present interview there was no disorder of thought noted and no definite psychotic features were elicited. The patient's affect tended to be rather blunt, although he responded rather poorly to attempts to alter his emotional responses. He did not smile at all during the interview in spite of repeated attempts to either make him amused or get his confidence somewhat more. That's March the 12th, 1963.

This is August the 30th, '63: A note of In Chambers Social Service Worker: The patient entered my office and took his seat as directed. He was well-mannered, oriented and neatly dressed. He stated that he would like to return
page 136 } to his mother, but did not feel that the Welfare Department would allow it. He stated he had learned how to get along with people better and he had previously indicated that this was his biggest problem, with his mother. The patient felt that he could make the proper adjustment at home. We decided to talk to the Welfare Department, signing a three-day pass.

An entry of September the 9th, 1963, from In Chambers Social Service Worker: At this interview the patient had recently returned from seventy-two hour pass. He had been taken there by Mrs. Cook, Social Worker from Richmond Welfare Bureau. He stated that he got along well while home and made a good adjustment. There was no elicited conflicts with his mother during his stay. Mrs. Cook stated that the patient would be leaving the home—hospital permanently in the very near future.

An entry of September the 17, '63: The patient entered my office rather slow and seemed rather discouraged. I asked how I could help and he stated that Mrs. Cook promised to get him out in time for school and today was the 17th. I told him that it still wasn't too late to begin and that I was sure that Mrs. Cook was doing everything that she possibly could to get him out of the Hospital. He stated that he felt that way too but he wanted so bad to get in school again. I made a call to Mrs. Cook but she was out. I informed the patient to return on September the 18th, after which time I
page 137 } had talked to Mrs. Cook and would be able to get more information. He agreed and left. That's an entry by In Chambers.

Patient was seen again on September the 10th—this is an

entry of September 10—by Mr. Chambers, his social worker, regarding being placed in a foster home situation. Patient informed him he would rather stay in the Hospital than be placed outside of Richmond where he could visit his mother. I informed him that Mrs. Cook, the social worker from Richmond, was making arrangements for placing him.

September the 19th: Patient was neatly dressed and seemed relaxed in his conversation. I asked him how he felt about leaving the Hospital, he stated that he was better now and he felt more relaxed around people. He stated that before going —coming here—The rest of that entry doesn't appear to be—

Assuming Doctor, that those entries that I have read to you are substantially the number of times that Thomas Penn was seen by a psychiatrist or social worker and assuming that the medication he was given was Thorazine, 100 milligrams, in your opinion was that the type of intensive psychiatric care that he needed in order to get some help?

A. No, sir, that represents a kind of maintenance, looking after bodily needs, from what you have described, making contact with the patient to simply evaluate page 138 } him, but it does not represent any intensive treatment, if that is all there was to the boy's care at the Hospital.

Q. Doctor, in your opinion, based upon your knowledge of Central State Hospital, and based upon your conversations with authorities at Central State Hospital and other psychiatrists, are the facilities at Central State Hospital, referring to the personnel, adequate in order to provide the type of care that a man like Tommy Lee Penn would need?

Mr. Wilkinson: Your Honor, we object to that question for this reason: I think that's a matter solely in the province of the Jury. He can go and describe the person now, he can go into the facilities at Central State, but I don't think that any witness can invade the province of the Jury which—and they are the sole judges of it. We object to the question. I don't think Dr. Lordi can give his opinion as to Central State or any other place, but the defendant has every right to go into the facilities there, the personnel there, but the ultimate conclusion is a matter solely for the Jury.

The Court: Objection sustained.

Mr. Ryder: We would except to Your Honor's ruling, sir.

page 139 } Q. Doctor, in your opinion, based upon your examination of Tommy Lee Penn, in 1962 and in '66, do you believe he was able to distinguish right from wrong and understand the nature, character and consequences of the acts of murder that he's alleged to have committed or that he committed in May of 1966?

A. I don't think he was responsible, because I—it's my opinion that he was grossly psychotic.

Q. In your opinion, doctor, would the act of killing in May of 1966, by Tommy Lee Penn, be an act of impulse growing out of some mental disease affecting his volition?

A. Yes, sir, I believe that this is exactly what happened, that his incapacity

The Court: Speak up, please, sir.

A. His incapacity to handle his impulses, these violent, destructive, retaliatory impulses, broke through what small defense he had accumulated during his life.

Q. Doctor, a child of tender years from the ages of about seven to about fifteen, to whom do they look for their emotional and mental development?

A. Primarily the parents.

Q. If a child's father, at an early age, deserted the mother and the family, and frequently, during drunken episodes, beat the mother and the child, in your opinion
page 140 } would this tend to cause him to become mentally ill?

A. Yes, sir, the individual experiences a great deal of violence as a child usually acts out violently later on.

Q. If the mother of the child was the type person who was mentally ill herself from the time the child was of tender years, six or seven up to fifteen, would this have, in your opinion, any effect upon the mental condition of the child?

A. It would produce a great deal of instability It would—the model was a sick model in this instance, and the child internalizes mother and daddy. If they are sick, they build sickness into themselves. If the parents are adequate, they build that adequacy into themselves.

Q. Doctor, in lay terms, in your opinion, would it be fair to say that Thomas Lee Penn is about as sick mentally as a human being can get?

A. He has a major—in the language of the field of psychiatry, his disturbance is the most devastating, the most

profound, that is psychosis themselves, are the most profound way in which a human being can be mentally disturbed and the paranoid type is a particularly vicious variety of this important mental disturbance, vicious in that it's destructive to self and others.

page 141 } Q. Would a person suffering from paranoia be able to conceal that face from a trained psychiatrist or psychologist, on a brief interview, by that I mean fifteen or thirty minutes?

A. Yes, sir, I think it's possible. We have to keep in mind that there's a great many psychotic people who never come to the attention of a physician or a hospital. It's entirely possible. The paranoid becomes very skilled in covering his own tracks.

Q. Doctor, Tommy Lee Penn was asked the question concerning one of the persons that he killed:

Did you shoot the gun any more while you were in the Eggleston Motel?

Answer: I shot him once, I wanted him to live. It seemed like something came over me while I was in there and I knew I needed help, then I left.

Would that statement have any significance to you, sir?

A. No matter how sick a human being is, they make a variety of attempts to heal themselves, a variety of attempts to reach for some kind of help, and this appears to have been the situation with Tommy. He did that at several junctures that I am aware of.

page 142 } Q. He was asked the question, did you shoot some of the people that you have killed through the hand on purpose. His answer was yes; he was questioned why, to try to save them. I really didn't want to kill them, I wanted to give them a chance to live it out and turn me in. Is this along the same line, in your opinion?

A. Yes, sir.

Q. He was asked the question, describe for us how you killed Mr. Carter. Answer, we drove up to an abandoned house that had almost been torn down, we took a drink of bourbon, I forced him in the house, I shot him with both twenty-two's. While he was dying I told him if he lived he would learn not to trust people. Does this have any significance to you, sir?

A Yes, sir, I think it's part of the sick drama that Tommy was living out. One way of looking at this is so often a psychotic person does, he attempts to destroy the sick parts in himself.

William M. Lordi

Q. Doctor, could you give me any indication of the number of hours you have spent examining Tommy Penn in '62 and '63?

A. I can't—give me a moment—I made a tally of that, in the vicinity of sixteen, seventeen hours, something like that.

page 143 } Q. That's all the questions I have.

CROSS EXAMINATION

By Mr. Wilkinson:

Q. Doctor, are you familiar with the *McNorton* Rule?

A. Yes, sir.

Q. What is the *McNorton* Rule?

A. The *McNorton* Rule concerns itself as to whether or not an individual was under the influence of an overwhelming impulse when he committed an act. It essentially concerns itself with how much responsibility can reasonably be fixed on an individual, takes into account that human beings can and do get terribly overwhelmed or ill at times and, therefore, their behavior is an outgrowth of sickness rather than cussedness, meanness or badness.

Q Well, doesn't it say something about distinguishing the difference between right and wrong?

A. Yes, it addresses itself to—

Q. Excuse me, sir.

A. No, that's all right.

Q. Have you confused the *McNorton* Rule with the Durham Rule?

A. I don't think so.

page 144 } Q. Isn't the McNorton Rule—if this is what you are saying, you can answer it, if not, that from—as a result of a diseased mind, a person cannot distinguish right from wrong, isn't that right?

A. Yes, sir.

Q. Now, you've testified that defendant had a diseased mind?

A. Yes, sir.

Q. Now, is there a wide variance of opinion in psychiatry as to whether a person is mentally ill or not?

A. Yes, sir, there's, that's so.

Q. Is it true that we say a hundred psychiatrist could observe one person and all hundred of them come up with a different conclusion?

William M. Lordi

A. In the sense that they may feel that the cause of the behavior was due to different factors, but I think there would be lumps of concensus in one direction or the other. They would separate maybe into a couple of groups, but not a hundred groups, they would differ essentially, perhaps, in the meaning of behavior more than they would in terms of this is or is not psychotic, so that the difference might be the meaning and the significance more than, although you will, as you are suggesting, also find that one person might feel that this person was on the other side of sanity and this on this side.

page 145 } Q. In other words, psychiatry is what we would term an indefinite science?

A. I think there are elements of science and art in it, yes, sir.

Q. And it's nothing unusual to have a difference of opinion among psychiatrists as to the mental state of a person?

A. That's correct, sir.

Q. Now, you stated that—have you read the statements in this trial as given by the defendant?

A. No, sir, I have not

Q. Well, did the defendant relate to you his action during this time of the—of his life?

A. Yes, sir, he did, he told me briefly about the incidents as he lived through them.

Q. Did he say anything about taking money off of them?

A. May I

Q. Yes, sir.

A. see my records?

Q. Yes, sir.

A. I do not have any record that he did, he may have told me, I don't remember if he took money off the—

page 146 } Q. Well, assuming that he did in these statements, that on various occasions money was taken from his victims, would that influence your view a little bit?

Mr. Ryder: Your Honor, I would object to the question asked by the Commonwealth's Attorney because he is asking the doctor to give an opinion based upon facts that are incomplete. I would ask that the Commonwealth's Attorney be required to read to Dr Lordi what the defendant says with respect to each of these victims and ask him the questions.

Mr. Wilkinson: All right, sir, I will do that, sir.

William M. Lordi

Q. We will take the first one, doctor, which was Mr. Spencer, at the Eggleston Motel. I assume that he told you about this occasion?

A. Uh huh.

Q. Did he say that anyone was with him on that occasion?

A. I did not go into the details of each one of all of the happenings in these instances, but he ticked off that these happened, that they were motels, that there was one girl involved, he told me about each, but I don't remember whether he said that there was a person with him or not. I may have that, if you will give me a moment again, I'm sorry.

page 147 } Q. Well, doctor, when you examined him in 1966, you hadn't come to a conclusion before you examined him, had you?

A. Did I what?

Q. When you examined him in 1966 you had not come to your conclusion before you examined him, had you?

A. No

Q. You had not?

A. I had not.

Q. So the purpose of the examination of 1966 was to re-evaluate your opinion of 1963?

A. No, it was to perform a mental examination as to the mental competency of Tommy, that was what I was asked to do, to examine him psychiatrically and give an opinion of his mental state.

Q. Well, wouldn't these various matters that he told you about, wouldn't that assist you in coming to a conclusion?

A. Yes, sir, they might.

Q. Uh huh, but you didn't go into detail?

A. No, not about chapter and verse of each of the happenings *per se,* no, sir.

Q. Well, let me ask you was he well oriented when he told you about it?

page 148 } A. His orientation was coming and going, I mentioned, I believe, a few moments ago, that his mental state was one that came and went. There were times he was quite with me, there were other times he was quite paranoid, there were times he was extremely defensive, all of this shaded what he said and how he said it.

Q. Well, when he related these stories to you, was that the time you are talking about, sometimes he was oriented and sometimes he was disoriented?

William M. Lordi

A. Right, sir, also during the psychological testing, the same thing was true. There are times of inappropriateness, times when he would laugh where it was not related, times where he had moods and feelings that were not appropriate to what was going on in the situation, yes, sir.

Q. Well, isn't it a perfectly normal human reaction when you are telling anyone that you have done something wrong is to be rather hesitant in doing it on occasions?

A. Yes, but not out of contact.

Q. Pardon?

A. But not out of contact.

Q. What do you mean not out of contact?

A. To be concerned about voices you are hearing, for instance, that sort of thing. When a person is reporting a happening and also report simultaneously that he hears voices, this is a—this is quite some inroads into

page 149 } the ordinary contact, you are right that a person would feel anxious when they are revealing stuff that would put them at a disadvantage, but in terms of hallucinatory phenomena, that's something else, that not the ordinary human experiences.

Q Well, isn't it natural—normal raction to rationalize?

A. Yes, rationalization is a variety of reaction.

Q. In fact, that's a pretty basic human trait, isn't it?

A. Yes, sir, as a matter of fact, it's a rather advanced one, though, the kinds of personality defenses that this man used, were the most primitive kind, they were projection, paranoid projections, and denials and avoidances and hallucinatory things, which are the sort of stuff you find in the more disturbed and the very young.

Q. Now, you say this and you have come to that conclusion, could you tell the Court and the Gentlemen of the Jury what you based that conclusion on, I assume you are talking about when he gave you this statement is when you came to this conclusion, now tell us how he gave this statement and why he was disassociated with reality?

A. What statement?

page 150 } Q. The statement about the crimes that he committed?

A. Please rephrase your question, I don't know as I am understanding what—

Q. Well, I assume you said he became disoriented and he was disassociating himself with reality, now when you came

to that conclusion apparently was during the time that he was relating the various crimes to you that he had committed?

A. No, during the entire history and during the entire testing. This is a part of the psychotic process, there's kind of a coming and going, a kind of sampling of reality and leaving it and depending, surely some areas are more threatening and you get more primitive defenses, more backsliding.

Q. Well, what do you mean by a primitive defense, maybe I'm lost there?

A. O.K. A little child, when you confront them with something, say aged three, did you hit your brother, will say no, denial immediately. The ten year old kid will say yes, but he did something to me. The fifteen year old kid says I'm sorry I was just *made* at him. The older we get the more responsible we can behave, it's characteristic of the sick and young to use these very transparent, very primitive defenses so that they don't get spanked for doing something

page 151 } that's unacceptable. As I say, the sick and the child use defenses that are not dissimilar, so that as some of this material, as there was some risk, as Tommy revealed certain things about himself, whether it was in the batteries of psychological tests, or whether it was in the interviewing there would be this kind of seesawing back and forth, this is what *does* on in any psychiatric interview, you try to get some idea how does this human being operate, how well does he use reality, how consistent with his intelligence and his life experience is he performing, how much is this a reflection of sickness, how much of it is a reflection of poverty, how much of it is a reflection of intellectual dullness and yet constantly assaying these things, this is what I meant to convey about a kind of a swinging back and forth.

Q. Uh huh, well, now where was he using the primitive defense, what made you come to that conclusion?

A. A number of factors, the interview material—

Q. All right, now in the interview material, where in the interview material did you come to that conclusion?

A. For instance, when he was discussing his mother, there was a time he had threatened to kill his mother, there were times, and in discussing and bringing this out,

page 152 } he would deny it, he would deny that this was so and he would paint the picture of loving feelings and yet at the same time there would be rage and there would be anger that would break out alongside of it, this is the testimony to his inability to handle his impulses, the strength,

the intensity of the impulses broke right through his attempt to kind of present a more logical, a more wholesome picture,—

Q. Well, if the—

A. The average individual can carry that off, he can't.

Q Anyone that tells a falsehood is not necessarily mentally ill, are they?

A. No, of course not.

Q. And it would again come back to the thing, had he threatened his mother, then if the subject came up later, his denial of that would not be unusual, would it?

A. No, in and of itself, it wouldn't.

Q. All right, in the interview that was one occasion about his mother, were there any other times during the interview that you became—he became disassociated with reality?

A. Yes, when he was talking about the dreams of him killing his brother and his brother killing him.

Q. Did he say which brother?

page 153 } A. I believe it was— I'm talking about the interview of 1966, I believe it was William—William, sir.

Q. William—well, Doctor, if two people are connected committing violent crimes together that would leave an impression on their mind, wouldn't it?

A. Certainly.

Q. And the impressions of the mind usually come out in dreams on many occasions, doesn't it?

A Yes.

Q. So, if the defendant and his brother, William, were committing violent crimes together, such as murder and robbery, that would sort of be a normal reaction, wouldn't it, to think that your co-conspirator and yourself might have differences of opinion whereby one might hurt the other?

A, Let me say a word about dreams. Dreams aren't simply outpourings of rational thinking. Dreams represent the activity of the brain, the mind, when one is asleep and, therefore, what comes out is not a simple, direct message that you can read like a headline off a newspaper, it represents a lot of disguise, distortion and the like. We have all had dreams, I think perhaps it's easy to say that when we have a dream that we want someone, someone dies, that doesn't mean we necessarily wish them dead, it may mean that—it may mean something quite to the contrary, that we have

page 154 } extremely loving feeling, so to simply translate the contents of the dream as if one had made a

—stated a sentence is not accurate, that it—apparently this business of killing and this business of he and his brother being involved, of course, apparently is involved in all of that complex business that came out in a dream of being chased and mutually slaying each other to avoid capture, which is what the content of these repeated dreams are.

Q. In other words, if they were involved in it together, that would be sort of the normal reaction, the dream of something of that nature?

A. I'm hampered by the word normal, all I can say is that we think this was related to the fact that they certainly had the—some experiences together, yes, sir, I don't know what would be called normal under those circumstances, I couldn't say.

Q. Well, let me put it this way, Doctor, would it be a reasonable?

A. Expected.

Q. Expected, all right. All right, sir, we have, during the interview, the discussion about the mother, the dreams, now what else did you come to?

A. In the talking about the violence that the boy has both witnessed and experienced from his family members, this was an extremely difficult thing, we talked about page 155 } the rejection, the poverty, the hurt, and at this time the inappropriate laughter, there's nothing funny about the poverty, there's nothing funny about the sickness, and there's nothing funny about the beatings or the infidelity of the father, and the being thrown out and the being nagged, and yet, once again, here comes the laughter as a—in addition to that going off on tangents, what we call *non sequitur* tangents, you start over here and you end up over there, the sequence of thinking and the like, there were many breaks in the continuity of thought, although he could be pulled back with help at times.

Q. Now, Doctor, may I ask you this, apparently when you were talking about the violence, you were talking with him generally about his life in general, I mean what he had come up with, and, as you put it, the rejection, the poverty, the sickness, the beatings and so forth,

A. Yes.

Q. so was he at that time relating to you generally his life?

A. Yes.

Q. Well, now, when you start relating back over your life,

and I believe at this time he was apparently eighteen, it would not be unusual to get a bit confused would it, you expect a person to?

A. A person might get confused, yes.

page 156 } Q. So that's really nothing unusual about that?

A. I think once again this is a matter of degree, it's a matter of this consistently happening, this—these breaks—it's like a person fading in and out, this led me to go on and get brain wave studies because of this constant coming and going quality.

Q. Where were they—

A. Sir?

Q. Excuse me?

A. that the boy man—

Q. Excuse me, I'm sorry?

A. Sir?

Q. Go on, sir, I'm sorry?

A. That the boy manifested, I felt that—one—of course, he had been stabbed in the head with an ice pick, and I wanted to make sure that we either weren't dealing with a clot on the brain and that we weren't dealing with some variety of epilepsy here.

Q. Well, that brings to this point, did you find anything organically the matter with him?

A. I asked Dr. John Kendig to examine him neurologically and electroencephalographically and he was found to be essentially within normal limits on that examina-

page 157 } tion.

Q. Now, what is the electroencephalogram, what does that show, brain waves?

A. Yes, sir, all living tissue has electric current, we've learned by studying the electric current of the heart, for instance, and the brain, that gives us a lot of the information in diseased states and the recovery. In the brain, what I was looking for is the possibility of epilepsy which might interfere with consciousness, which might produce behavior that was automatic and not within the conscious control of a person, or dead tissue, or that sort of thing.

Q. In other words, and as a result of this test, they found the brain to be in normal limits?

A. Right, sir, no physical damage to the brain.

Q. All right, did you give him an I.Q. test?

A. Yes, sir.

William M. Lordi

Q. What was his I.Q., doctor?

A. In 1966 he tested in a dull range of intelligence. He had a higher verbal score and a low performance score but with a full scale in the dull range.

Q. Now could you explain

A. Yes, sir.

page 158 } Q. what the dull range is. Do you have the score that he made on his I.Q. test?

A. Yes, sir.

Q. What is that, sir?

A. We did a Wechsler Intelligence Scale, and we found him to have a verbal quotient, and let me explain verbal quotient. If you take the tasks that the mind performs you can divide them into things having to do with language and thought, and then things that are divided into what you can do with your arms, with your hands, what you can do with your body, this —I'm making it very crisp and too simple, but nevertheless that's essentially what we are dealing with. In other words, this lad verbally functions at a low average, but his ability to perform is in the high defective low dull range. In other words, he can do with his mouth many things, but his ability to perform is a good ten, fifteen per cent below that so that when you average both of these scores together we are essentially dealing with a lad who is functioning in the dull range. Dull means that it is below the middle of the population.

Q. What was the score, doctor?

A. I'm sorry, ninety-two verbal, seventy-nine performance, full eighty-two, now this was on a Wechsler Intelligence, a Wechsler Adult Intelligence scale.

Q. And it came out to 82?

A. Right, sir.

page 159 } Q. And the dull range is right below the middle?

A. It's right below so-called average, the usual for the population, middle of the population, he's below.

Q. All right, what would it be below dull?

A. Defective.

Q. Defective, and what would it be above average?

A. Well, above his would be average.

Q. I mean above average?

A. Bright.

Q. Bright and is there anything above bright?

A. Yes, sir, superior, very superior, genius.

Q. All right, now we get back to the crimes and then he

told you about, did—now, I'm going to call your attention to the first matter, which was Mr. Spencer at the Eggleston Motel, now did he tell you about this matter or this particular situation?

Mr. Ryder: Your Honor, I submit, sir, that the Doctor has already been asked that question and he stated that the man did not go into specific details as to page 160 } each one of them—object to him going over the question again, sir.

Mr. Wilkinson: Well, Your Honor, I think he's here as an expert and he testified to a conclusion and I'm only going into the facts in which he has based his conclusion on and I would certainly think that the defendant or the Commonwealth would have a right to question as to where he based his conclusion—I'm quite sure, Mr. Ryder—

Mr. Ryder: Well, I've got no objection, but I submit, Your Honor, he's been over that before, sir.

The Court: Very well.

Q. How much detail did he go into that one particularly?

A. He told me about the number of acts he had performed, stating there were six. He told me five men, they were one woman, told me they were all within three months period of time, but they were about—without plan. He talked about sometimes being—might I divert to say one thing about a psychiatric examination, to a large extent a lot of the data that you gather in a psychiatric examination comes by your not interfering with the patient delivering about himself, in contra-distinction to an ordinary conversation page 161 } or simple information getting. When you are conducting a psychiatric examination, you are evaluating how a total personality functions, so, therefore, you will go in and out on information, you will come back, you will refocus and the like, this is the usual nature, it is not a matter of simple inquiry that you might direct in and around learning a subject. Now, in light of that we went back and forth, talking about the number of crimes, what had happened, whether or not there was any sexual assault on the girl, what the man's feelings were during this time, what his awareness was, and that, essentially, was the way I approached this.

Q. Did he say anything about, in this particular instance, getting any money?

William M. Lordi

A. I don't remember if he did, I do not have any note that we talked about money.

Q. Well, I'm going to hand you these two Exhibits, Doctor, I guess we better use the Court's so there won't be any question, I'm handing you Commonwealth's Exhibit No. 1 and 2,

A. Thank you, sir.

Q. and on the statement that was taken, if you look on the first page, Doctor, right up at the top it has the date, this would be 5/29/66, right under that is 5/30

A. Yes, sir.

page 162 } Q. 1966. On page three, it says: Where did you get the money from?

I got thirty-five dollars from the cash register, that is the defendant speaking.

Was it a cash register or cash box?

It was a cash register sitting right there to my left.

Question: A little tray in the box was missing, did you take that away?

Answer: Yes, I took that away, I counted it out to be thirty-five dollars.

What did you do with the tray that you got out of the cash box?

I threw it off the bridge on the Turnpike.

Did he tell you that?

A. Not this in particular, but he did talk about taking some things at times, I believe there were cigarettes once, from one of the people that he shot, but I don't—I don't specifically remember money at this point, he may have but I do not remember it as such.

Q. Now, I believe you testified that this would come from an unplanned situation. Now, on the statement of 5/31/66, page one, the first page, right at the top, it says: I want to tell you about the preacher case first, that

page 163 } would be Mr. Spencer, do you know the name of the man you call Preacher?

Answer: Moselle Spencer.

What part did your brother, William Penn, play in the holdup of Spencer and his murder?

Answer: We stole a car, I don't know from what section, but it was a pink and white late model Buick.

Who drove the car?

My brother, William.

Where did you park the car before you went to the Motel?

William M. Lordi

First and Jackson, behind the Motel.
Did William go in the Motel with you?
Answer: Both of us walked in the Motel together.
Where was Spencer at that time?
Behind the desk.
Question: Who spoke to him first?
Answer: My brother.
What did he say?
He asked me—he asked him did he have any room?

Question: What was Spencer's reply and so
page 164 } on?

He was on the phone and I started to say something when William told me to wait until he got off the phone. Mr. Spencer asked how many rooms do you all want. I told him we wanted a room for four, so he said he had some, my brother walked behind the desk and pushed the man in the room, I waited outside, my brother had already told me to wait outside. I heard some paper wrattling and some change, then I walked into where my brother and Mr. Spencer was, my brother had already gotten the money. My brother walked out and told me to take care of him, so I shut the door to the room the man was in, and then I shot him one time. My brother told me to empty it, then something came over me. The reason why I shot him one time was because I wanted him to live and let him get a good look at my face, I turned around and rushed out. I walked down the street fast, I got in my car with my brother and we drove to his house, 407 East 15th Street. And so on, then they go about the tray, what they did with the tray and they threw the tray off on

the Turnpike, now, you say, Doctor, is this plan-
page 165 } ning?

A. Planning?

Q. Yes, sir?

A. Not necessarily, no, sir.

Q. That's not necessarily, what would you call that, would you call that an impulse?

A. Are you—what aspect are you referring to, let the man live?

Q. Well, at—the automobile, going to the motel, going in, doing what his brother told him, shooting the man, and coming out, getting away in the car and destroying the evidence?

A. I think—

William M. Lordi

Mr. Ryder: Your Honor, I object to the nature of the question, because the Commonwealth's Attorney is making conclusions that are not contained in the statement, he has read what he says is in the statement to the Doctor and I submit that the Doctor should be allowed to make his conclusion based on what has been read, not on what Mr. Wilkinson interpolated.

Mr. Wilkinson: Well, I withdraw the question, Judge.

Q. What was read, Doctor?

page 166 } A. An impulse is not something that has happened in a second. I think we have to get a little clearer idea of what an impulse is, an impulse is not a mementary thing like that, like I might hold upright. Not all impulses last a split second. When we are talking about sick motivation and we talk about impulse, this can go for a period of time so that impulse *per se* does not mean a second or a minute, it may mean hours, this sick need to destroy, this impulse, this breakthrough of destructive impulses may, indeed, last over a period of minutes and hours, so in that sense this could be certainly consistent with impulse, yes, sir.

Q. That could be, now what is your definition of impulse?

A. I'm trying to think of non—non-psychiatric language, an impulse—impulses are self-preservative drives that are meant to keep the individual alive, safe and secure, however, to the exclusion of the world outside and in a self-serving fashion.

Q. Well, are you saying, doctor, that he acted in this situation on an irresistible impulse?

A. Yes, sir, the need to kill.

Q. Well, do you think had, say, three police officers been in that Motel that he would have gone in to rob it?

page 167 } Mr. Ryder: Your Honor, I object to the question because he's asking the Doctor to come to a conclusion based upon a factual situation that's not in existence.

Mr. Wilkinson: Well, now, Your Honor, please, the irresistible impulse, my understanding of the legal definition of the irresistible impulse is that.

The Court: Objection sustained.

Mr. Wilkinson: Judge, may we excuse the Jury a minute to take that up?

William M. Lordi

The Court: Yes, sir, Gentlemen, you mind stepping outside.

NOTE: At this time the Jury retired from the Courtroom.

Mr. Wilkinson: If Your Honor please—

page 168 } The Court: You haven't laid any groundwork for the question, I mean the Court didn't know exactly where you were going.

Mr. Wilkinson: Yes, sir, well, we are relying and cite as our authority 207 Va. page 580, where our Supreme Court describes this: The defendant says that the Court erred in adding to an instruction in defining irresistible impulse this sentence: In this respect, the Jury is instructed that if the act which is alleged to be the result of an irresistible impulse planned in advance, then, as a matter of law, such act cannot be said to be the product of an irresistible impulse. There was no error in so instructing. The word impulse implies that which is sudden, *sponteneous,* unpremeditated. Webster's Dictionary, and witness, Centor was asked could you have an irresistible impulse and then plan to carry out that impulse? He replied, it is conceivable. He further stated that an irresistible impulse is one that involves no planning, it could occur at any place in the presence of anyone, no attempt at concealment would be made. Now, as I understand the defense here now is that the defendant when confronted with various situations he has an impulse that he

page 169 } cannot control, which would come under —and he has a diseased mind—Dr. Lordi has certainly testified that the defendant had a diseased *mine,* he's a paranoid schizophrenic, and as a result and a product of this diseased mind, he has irresistible impulses which he cannot control. Now, when he comes to that conclusion I feel that we have a right to cross-examine him through the defendant's statement that he made to show that they were planned, which might change the doctor's opinion as to an irresistible impulse. The irresistible impulse is a legally defined word and defined by our Supreme Court, and it's my understanding that if I have—or if a person has the irresistible impulse it does not matter who is around and so forth, and that is the theory of what we were going on.

The Court: I think under the circumstances I take that to mean you have a right to pursue it.

Mr. Ryder: Your Honor, of course, the question that was

asked the doctor was in his opinion if three police officers had come in at the time Penn was in there whether he would have carried the act out or not.

page 170 } The Court: Well, from the Doctor's long experience, he—

Mr. Ryder: Well, Your Honor, he's asking him to give an opinion based upon a set of facts that are not in existence and did not happen.

Mr. Wilkinson: It's a hypothetical question, I understand, Mr. Ryder, he's an expert.

Mr. Ryder: Yes, sir, but as I understand a hypothetical question, Your Honor, it has to be based upon fact, and that is not a fact in this case. You can give him a set of facts and ask him a hypothetical question based upon that set of facts, but not give him an imagined series of circumstances.

The Court: The Court will allow the question.

Mr. Ryder: We would except to Your Honor's ruling.

NOTE: At this time there was a short recess, after which:

page 171 } The Court: Gentlemen, you waive the polling of the Jury?

Mr. Ryder: Yes, sir, Your Honor.

Mr. Wilkinson: The Commonwealth does.

Q. Dr. Lordi, getting back to—assuming the facts that I have just read you out of the statement, and adding one fact to that, assume that there were police officers in the motel that night, if your opinion that the defendant would have committed the crime?

A. I honestly don't know how to answer that, judging from other behaviors, he would probably have avoided that situation is all I could say.

Q. Well, when you speak of impulse, do you mean—using that word as a state of mind, as distinguished from what most laymen would feel an impulse was?

A. I wasn't always a Doctor, I was a layman once too, and I'm trying to think of what I thought impulse was, how I think of it differently today. The impulse life of an individual, if I may make a statement and clarify what I mean by impulse: A child is born and he has impulses that are a reflection of his biological being. As he is reared, civilizing influences modify his impulse life, or don't modify it, or accentuate it, or heighten it. In that sense, in view of this man's

history, the examination and the like, I felt that
page 172 } he was obeying overwhelming impulses over
he did not have control by reason of his mental illness, by reason of the way he had been programmed up to that—that minute, so that there's a—this is part of the sickness, that this sort of builds up, is discharged, goes down again, builds up and is discharged, but never really gets solved so that this, this impulse life is always a constant dimension in this man's life and the thing that governs his behavior and needs, literally, to be drained off periodically in these acts of violence.

Q. Well, now, that more or less is a, what I would call it professional viewpoint of an impulse, that you have given there?

A. Yes.

Q. A state of mind?

A. It's part of the way the equipment functions. Impulse life is a—we all have this dimension, we obviously all don't—it isn't—doesn't function the same in all, the difference is how we are reared, what growth we knew, what experiences we had, so state of mind is only a part of how to say it.

Q. All right, in your opinion, in describing these various things to you that the defendant did, do you think he knew that they were wrong?

A. I think he had some awareness, yes, sir.

page 173 } Q. Don't you feel that he could distinguish right from wrong?

A. At times, yes, sir.

Q. At the times he committed the offenses would you say, the two offenses before the Court, he could distinguish right from wrong?

A. Without sounding like I'm playing with words, he might could, but he didn't, because I felt he was sick at those times. He did attempt to do something to restore by not, I gather, emptying the gun into the man that was shot, the man he claims he shot. This was some sort of battle going on between what's sick and what's restorative in this man.

Q. All right, I believe that's all the questions I have.

REDIRECT EXAMINATION

By Mr. Ryder:

Q. Doctor, just one question, sir, do persons frequently, with a high I.Q., above normal, become paranoid schizophrenics?

A. Yes, sir, I.Q. *per se* is no guarantee of what kind of—is no insulation against a disturbance nor does it predispose except the duller we are, the more we get overwhelmed, the less control we have of ourselves, and the less page 174 } we are able to benefit from society.

Q. That's all the questions.

Witness stood aside.

RICHARD A. CHILDRESS, introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ryder:

Q. Mr. Childress, your name is what, sir?

A. Richard A. Childress.

Q. Are you a Bailiff in this Court, sir?

A. Deputy City Sergeant.

Q. Is a part of your duties the handling of prisoners?

A. Yes, sir.

page 175 } Q. On one prior occasion, specifically in December of 1966, when this defendant was in this Court, as you were walking him out of the Courtroom on one occasion did he suddenly become violent?

A. Yes, sir.

Q. Had you done any act to him to provoke his violence?

A. No, sir, other than he said keep your hands off of me.

Q. And did he become so violent that it took five men to restrain him?

A. I don't know how many of the fellows it was but to keep from hurting him that's what—

Q. It took four or five men to hold him, did it not?

A. That's right, sir.

Q. Had you treated him any different on that particular occasion,

A. No, sir.

Q. than you had treated him before or since?

A. No, sir.

Q. That's all the questions I have.

Mr. Wilkinson: No questions.

Witness stood aside.

Doris A. Dawson

page 176 } DORIS A. DAWSON, introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ryder:.....

Q. Miss Dawson, would you state your full name, please?

A, Doris Ann Dawson.

Q. Would you speak just a little louder, that's not a microphone, that's just a—

A. Oh, Doris Ann Dawson.

Q. Miss Dawson, in November of 1963, were you a Social Service case worker with the Bureau here in the City of Richmond?

A. Yes, sir.

Q. In November of 1963, did you have occasion to come into contact with Thomas Lee Penn?

A. Yes, sir.

Q. Did you have occasion to visit in the home of Thomas Lee Penn?

A. Yes, I did.

Q. With whom was he staying at that time?

A. His mother and his sister.

page 177 } Q. Did you have occasion to observe Mrs. Penn?

A. I did.

Q. Did she appear to you to be paranoid?

A. Yes, she did.

Q. In your opinion, based upon your observation of the relationship between Thomas Lee Penn and Mrs. Penn, was Mrs. Penn an influence on Thomas Lee which would tend to cause him mental difficulties?

A. Yes, sir.

Q. When he was placed in or taken to Mrs. Penn's home, placed in Mrs. Penn's home by your Bureau, after he returned from Central State, is that correct?

A. Yes, sir.

Q. Was there any other foster home available for him other than being with his mother at that time—

A. (No response from the witness).

Q. Well, let me put it a different way, was there any attempt to put him in any foster home other than with his mother at that time?

A. At that time he refused to go in a foster home and he had to be placed in his own home.

Q. That's all the questions I have.

page 178 } CROSS EXAMINATION

By Mr. Wilkinson:

Q. What do you do now, ma'am?

A. I'm a graduate student at the School of Social Work in Richmond, R.P.I.

Q. In other words, you are a student now?

A. A second year student yes, sir.

Q. Pardon?

A. Yes, sir, a second year student at the Graduate School of Social Work, R.P.I.

Q. All right, that's all.

Witness stood aside.

ELMER SEAY, JR., introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ryder:

Q. Sir, your name is Elmer T. Seay, Jr., is page 179 } that correct?

A. That's right.

Q. Mr. Seay, in 1964, early 1964, were you a case worker with the City of Richmond?

A. I was.

Q. In that capacity did you have occasion to come into contact with Thomas Lee Penn?

A. Yes, I did.

Q. Did you have occasion to come into contact with the mother of Thomas Lee Penn?

A. I did.

Q. From your observations of the mother of Thomas Lee Penn, did she appear to you to be a psychotic or a paranoid?

A. Well, I'm not qualified.

Q. I understand you are not an expert, sir?

A. No.

Mr. Wilkinson: I think he's answered that, Mr. Ryder, he

says he's not qualified, I think maybe—we have no objection to that, Your Honor.

The Court: Very well.

Q. Do you know what the term paranoid
page 180 } means?
A. Paranoi—

Q. Yes?

A, Uh huh.

Q. Based upon your observations of Mrs. Penn, do you believe that she was paranoid?

Mr. Wilkinson: Well, now, Your Honor, I pose the same objection, I think that he can testify as to what he observed and so forth.

Q. What did you observe about Mrs. Penn?

A. Well, Mrs. Penn impressed me—

The Court: Speak a little louder, please.

A. Mrs. Penn impressed me being sort of concerned about herself. The relationship, as I got the impression, between her and Thomas wasn't very good.

A Voice: Can't hear him.

The Court: Can't hear the witness—you'll have to speak up.

A. Oh, the relationship, I was impressed by my observation, was that it wasn't very good and Mrs. Penn seemed to be more concerned about herself at the time.

Q. Did there appear to be a rejection by Mrs. Penn of Thomas Lee?

A. Yes, I feel I got that impression.

page 181 } Q. That's all the questions I have.

Mr. Wilkinson: No questions.

Witness stood aside.

ROBERT J. HALSTEAD, introduced on behalf of the defendant, being first duly sworn, testified as follows:

Robert J. Halstead

DIRECT EXAMINATION

By Mr. Ryder:

Q. Mr. Halstead, would you state your name, please?

A. Robert J. Halstead.

The Court: Speak louder, enough so these Gentlemen will understand you, please?

A. My name is Robert J. Halstead.

page 182 } Q. Mr. Halstead, where are you employed, sir?

A. The Juvenile Courts of Richmond.

Q. What is your employment at the Juvenile Court, sir?

A. I'm a psychologist.

Q. What training have you had in psychology?

A. I've had sixty graduate hours at Richmond Professional Institute and some eight years of experience.

Q. Has your experience been at the Juvenile Court by and large?

A. Five or six years of it, yes.

Q. And what are your duties at the Juvenile Court, what do you do?

A. Routine examination and sometimes special examination of mostly juveniles involved in various offenses or in litigation.

Q. And does this concern psychological evaluation of the individual?

A. Yes.

Q. What generally is a psychological examination?

A. It's a battery of standard psychological tests which have the purpose of determining the relative in-

page 183 } telligence, the emotional stability, something of the emotional history of the individual.

Q. Did you have an occasion on November the 8th, 1962, to make a psychological evaluation of Thomas Lee Penn?

A. Yes, I did.

Q. Do you have the report there that you made, sir?

A. Yes.

Q. Is that the report dated November the 8th, 1962?

A. Yes, it is.

Q. Would you read to the Jury the test that you administered, sir?

A. There's an error in the typing, do you mean the be-

havioral notes which are under the heading Tests Administered?

Q. All right, sir?

A. Thomas was almost mute during testing, with poor articulation, apparently considerable fear of speaking, he had scars all over neck, face and arms and kept covering a scar over his lip with his hand. I had the idea that the boy was frightened and had great difficulty in approaching me or relating to me at this time.

page 184 } Q. Did—what was your evaluation of him?

A. I felt that he was severely disturbed, that he was near psychosis, I entertained the idea he might be psychotic by which, take the lay term, insane. I did not want to state this publicly without further evidence from another professional, and for this reason I encouraged referral to Dr. Hertha Riese who was working with us on some cases at that time and felt that she might be able to verify or otherwise qualify my opinion.

Q. In your report, sir, the next to the last paragraph, beginning "this is an interesting," would you read that to the Jury, sir?

A. Yes, sir. This is an interesting, complicated and sick personality. There is some evidence that Thomas is very near a psychotic break and while I would not want to diagnose psychosis and recommend institutionalization without more behavioral as opposed to test evidence, we should be aware of this danger, that is the danger of his being psychotic. Such a break would have certain paranoid features and might involve such behavior as acting out of hostility and of atypical sexual impulses, delusions, psychosomatic manifestations, and religious ideation. Would you like any of this translated into—

Q. Just—I'm going to endeavor"—A psychotic

page 185 } break?

A. This means going noticeably insane, observably insane.

Q. Could it take the form of a hostile act such as killing an individual?

A. Yes.

Q. What was your prognosis?

A. I felt that this severe disturbance would continue unless he had help and by this I mean intensive help.

Q. By the intensive help you would mean intensive psychiatric care by a psychiatrist?

A. Competent individual therapy in a situation of preferably daily, certainly several times a week, hour-long consultations with a psychiatrist or a psychologist, a competent, experienced therapist.

Q. If the record established that at Central State Hospital over a period of approximately nine months, this defendant was evaluated by a psychologist, interviewed in a—on two or three occasions by a psychiatrist, given Thorazine, 100 milligram, and not seen by—well, I'll strike that part of it, but if the records at Central State showed that this was the type thing that was done for this boy, in your opinion would that have been the intensive psychiatric care that he needed?

page 186 } A. You mean he was only seen a few times

Q. Yes, sir?

A. during the entire period?

Q. Yes, sir.

A. And the symptoms were suppressed with drugs but no individual therapy was given?

Q. Yes, sir?

A. This is not what I mean by intensive therapy at all.

Mr. Ryder: Your Honor, for the record, I desire to ask this witness the same question that I asked Dr.—endeavored to ask Dr. Lordi, that is, I would like to ask this witness that in his opinion, the facilities at Central State Hospital, that is the personnel facilities, were adequate to render the intensive psychiatric care that this defendant needed at that time.

Mr. Wilkinson: Well, Your Honor, we would interpose the same objection.

The Court: Objection sustained.

Mr. Ryder: We would except to Your Honor's ruling, that would be all the questions I would ask him.

page 187 } CROSS EXAMINATION

By Mr. Wilkinson:

Q. Mr. Halstead, your observation was made when?

A. In 1962.

Q. Did you observe him in 1966?

A. I have not seen him since. At the time I could say that a prognosis could have been given to the effect that this was a severe and enduring kind of disorder.

Robert J. Halstead

Q. Pardon, I didn't understand you?

A. At this time, I could have, or at this time, on the basis of my interview in 1962, it is possible to say that he was suffering from a severe and chronic disorder which would not be expected to disappear. This is a very stable kind of disorder, it's a more or less a paranoid character structure, and this is extremely unlikely to change over a period of time.

Q. Psychologists disagree when paranoia exists, don't they?

A. Not that I've heard of, sir.

Q. You've never heard of psychologists disagreeing as to when somebody's a paranoid?

A. You mean they disagree in an individual case?

Q. Yea, uh huh?

page 188 } A. You'll find variations of opinion in all these cases, but I would expect the great majority of psychologists to see in this personality the same things I saw.

Q. There is a wide difference of view in psychology, isn't it?

A. I doubt that a serious—

Q. But there is a difference in the view, a wide difference?

A. I'm not sure that I quite understand your question.

Q. Well, psychologists differ greatly as to a conclusion, the mental capacity of a subject, whether he's mentally ill or whether he's all right?

A. In my experience these variations are slight variations of degree—I'm not saying that an occasional psychologist doesn't miss something entirely, but for the most part two clinical psychologists will tend to see pretty much the same things, in pretty much the same degree, in the same person.

Q. Would they be more exact than the psychiatrist in determining the mental state of an individual?

A. That would depend on the psychiatrist and the psychologist.

page 189 } Q. Well, from your experience have you found them to be more competent?

A. I think this is a bad question you have asked me, sir, I think there are some highly competent psychiatrists and some highly competent psychologists, and some of both who are less competent than people in the other professions.

Q. Well, don't you find among psychologists some that are more inclined to find mental illness than others?

A. Oh, you would find this is psychologists and psychiatrists both.

Q. Pardon?

A. You would find in both some individuals who would more easily see pathology and some who wouldn't.

Q. In fact some psychologist follow the theory that anybody that violates a criminal law is mentally ill, don't they?

A. I am not aware of this.

Q. You are not aware of it—or come pretty close to it?

A. They feel there's some social disturbance.

Q. Is that what we call anti-social?

page 190 } A. I would not call a common thief psychotic on the basis of the common theft.

Q. What you call him, anti-social personality?

A. I'd have to know the individual before I could say.

Q. All right, that's all.

Witness stood aside.

NOTE: At this time a short recess was had, after which:

The Court: Gentlemen, you waive the poll of the Jury?

Mr. Wilkinson: Yes, sir, the Commonwealth

page 191 } wealth does.

Mr. Ryder: Your Honor, that's the defendant's case.

The Court: Very well.

EMILIO F. MONTERO, introduced on behalf of the Commonwealth, on rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:

Q. Doctor, would you please state your name and occupation to the Court and Gentlemen of the Jury?

A. Emilio F. Montero, I am a physician and a psychiatrist.

Q. Where did you receive your medical degree, Doctor?

A. I received my medical degree in the University of Havanna, Cuba, in 1957.

Q. Did you have any pre-medical education

page 192 } or was it all at the University of Havanna?

A. It was all in the University of Havanna.

Q. How long did it take you to get your degree, sir?

A. Seven years.

Q. When did you leave Cuba and come to the United States?

A. August of 1957.

Emilio F. Montero

Q. Have you received any further training since that time?
A. Yes, sir, I received my rotating internship in St. Francis Hospital in LaCrosse, Wisconsin. I started in my residency in psychiatry in 1959, January.
Q. Will you speak a little bit louder, Doctor, please?
A. Yes, sir.

The Court: That's a recording device.

A. Pardon me?

The Court: This is not an amplifier, it's a recording device.

A. I didn't understand.
Q. That does not amplify, it just records.
page 193 } A. Oh, I understand now. I started my training in psychiatry in 1959, in the State of Colorado. I came back to—I went to Minnesota in 1960, where I remained in a mental hospital as the Chief of Service of the Intensive Treatment for two years, came to Virginia in 1962. In 1964, I started as the Chief of Service of the Criminal Division of Central State Hospital in Petersburg. In 1966, January, I was promoted to Clinical Director for the Criminal Building of Central State Hospital, and I have been working there since that time on.
Q. Since what time, sir?
A. In Central State Hospital since 1962, with criminal patients since 1964.
Q. And working in—is your primary responsibility now working in the Criminal Section at Central State?
A. Yes, sir.
Q. Is that—where is Central State located?
A. It is in Petersburg, Virginia.
Q. And in doing this, do you have an occasion to observe many people to see whether they are mentally competent to stand trial and also were they competent at the time the charge against them was committed?
A. Yes, sir, an individual who is sent to the
page 194 } hospital for observation on Court order, charged with a crime, is sent to the Criminal Building and I would have the opportunity of observing and study them.
Q. Approximately how many patients have you observed during your course of training, Doctor, or your course of practice?

Emilio F. Montero

A. It would be at the present time over one thousand.

Q. Have you ever testified in any other Courts in Virginia or the Federal Courts as to the mental competency of a person?

A. I have testified in many courts in the State of Virginia.

Q. Now, did you have an occasion to observe the defendant, Thomas Lee Penn?

A. Yes, sir.

Q. When did you first observe him, Doctor?

A. He was admitted to the Hospital on September 13th, 1966, on a Court Order from the Hustings Court of the City of Richmond for observation as to his mental condition. I interviewed him for the first time on the following day, September 14th.

Q. And how long did this interview take?

page 195 } A. I would have to give you approximate times, Mr. Wilkinson, I do not remember. This particular individual refused to discuss about his alleged offenses. I saw him altogether on three different occasions and I would say altogether from any time from two to three hours.

Q. Now, at the time he was committed in 1966 to Central State for observation did you then have any past history on him?

A. Yes, sir, we have the benefit of the old record. He was admitted on January 19, of 1963. He was placed on furlough from the Hospital on November 27th of the same year, and he was finally discharged on November 30th of 1964.

Q. And how was he discharged, sir, I mean what was the nature or finding on his discharge?

A. He was discharged as not mentally ill.

Q. As what, sir?

A. Not mentally ill.

Mr. Wilkinson: Your Honor please, we move to introduce his discharge into the Court as Commonwealth's Exhibit No. 3. Mr. Ryder, may we use that photostat?

Mr. Ryder: Yes, sir, I have no objections. Your Honor, I would object to the discharge certificate as having no legal

page 196 } significance because even assuming that the statement of his not being mentally ill is correct, that was in November of 1964. The episodes for which he's on trial took place in May of 1966 and I submit that the

certificate of discharge has no materiality as to his mental condition in May of 1966.

The Court: Objection overruled.

Mr. Ryder: We would except, Your Honor.

Mr. Wilkinson: That would be No. 4, I believe, Your Honor.

Q. Did you study his past record at Central State, sir?

A. Yes, sir, I reviewed the record.

Q. How long was he at Central State for observation in 1966?

A. I should say he was admitted on September 13, of 1966, he was returned to the jurisdiction of the Court on October 24th of 1966, a total of one month and eleven days.

Q. Now, do you have any—

Mr. Ryder: Did I understand him to say a total of one month and eleven days, is that—

Mr. Wilkinson: No.

Q. How long was it, Doctor?

page 197 } A. One month, eleven days.

Q. And during the course that the the defendant was at Central State in 1966, does your record show or do you know of any unusual happenings at that time with the defendant, did he get along with people in other words?

A. He did get along with people.

Q. Did other people observe him at that time while he was at Central State?

A. Yes, sir.

Q. How do you come to the conclusion that a person—I'm talking about Central State Hospital now—how do you come to the conclusion if a person is mentally ill or not?

A. We conduct a psychiatric interview, they undergo a series of tests, they—

Q. A series of tests, was the defendant given any tests?

A. He was given the routine physical examination, laboratory work-up, X-rays, electroencephalogram, psychological test, he was seen by a social worker, he was observed also by the—he was seen by the other doctors in the —who belong to the—who belong to the Staff of the Criminal Building. He was observed by the nurses, nursing personnel. Then we all put our opinions together and we arrived to a conclusion.

Emilio F. Montero

page 198 } Q. How are all these opinions gotten together, Doctor?

A. We have what we call the Staff Conference, a Staff Conference, and we discuss the case and we interview the individual.

Q. And in this particular case, how many people were at the Staff Conference?

A. This particular case there were four doctors, one social worker, the psychologist and the nurse.

Q. And a nurse?

A. Yes, sir.

Q. And what was your conclusion as to the mental state of the defendant, based upon your findings, the history, your interviews, the psychological tests, the physical test?

A. It was my conclusion that he was not mentally ill.

Q. If he were not mentally ill, would you then go to the conclusion to find out if he could distinguish right from wrong?

A. Yes, sir, in my opinion he could distinguish right from wrong, he knew the nature and the consequences of the act, which he allegedly committed.

Q. Did he discuss with you the nature of his—or the act that he had committed?

page 199 } A. No, sir, he did not.

Q. Have you had an occasion to see the statements that have been introduced in the evidence?

A. No, I haven't.

Q. You have not, all right. What psychological tests were given, Doctor?

A. He was given the I.Q. test.

Q. What was—did that consist of?

A. It has a verbal part and it has a performance part, his full scale I.Q. was 103, which is normal.

Q. Which is what?

A. Normal.

Q. Normal?

A. Yes, sir.

Q. All right, was he given any other—

A. He was given the Bender Gestault, which is a test to rule out any organicity, to see there's any disease of the brain itself and it was—it was not indicative of any organicity.

Q. Which test was that, Doctor?

A. Bender Gestault.

Emilio F. Montero

Q. How about the electroencephalogram, was he given one of those?

page 200 } A. The electroencephalogram was also given and it was reported as within normal limits.

Q. On the second test you mentioned about any disease of the brain, did you find anything there?

A. No, sir, he was given a complete battery of psychological tests.

Q. Well, everybody says he was given a complete battery of psychological tests, were there any more tests psychologically given him?

A. Yes, sir.

Q. What tests were they, so we'll know what the battery is?

A. He had the Rorschach.

Q. Now, what is that?

A. This is the blocks.

Q. Pardon?

A. Him blocks.

Q. Blocks?

A. He had the M.M.P.I.

Q. What is that?

A. It's a test which consists of over four hundred questions, the person just answer the questions, and draw a person, in which a person is asked to draw some figures, some—we call it a projected test.

Q. Now, the Rorschach test, what was the

page 201 } findings there, if anything?

A. The report of the test is that there was no evidence of disorganization or any underlying psychotic processes. There was no evidence of mental illness.

Q. How about the M.I.—I mean M.P.I. test?

A. Same result, no evidence of mental illness.

Q. Were there any other psychological tests that were given him?

A. No, sir.

Q. Doctor, we've heard a lot about paranoid this morning, what is para—what are the symptoms of a paranoid?

A. Individual who think that people are against them, who imagines, say, enemies. Individual who feel that people talk about them behind their back, they feel persecuted. They may be grandiose.

Q. Might do what?

A. Grandiose.

Q. What is that, sir?

A. People with ideas for grandiosity, they feel powerful, more important than what they really are.

page 202 } Q. Would that be the person that we usually think about thinks he's Napoleon or—

A. Yes, sir.

Q. Uh huh, all right. What other symptoms would you be looking for in a person for paranoid?

A. That's about it, the most significant symptoms of a paranoid, are you talking really about schizophrenia?

Q. Well, that's my next question now, Doctor, what is the—what are the symptoms of schizophrenia?

A. Schizophrenia is a measure of mental illness, which is characterized by—it is a disorganization of the personality and it has primary symptoms which have to be present in any given individual for them to be given a diagnosis of schizophrenic. The four cardinal symptoms of a schizophrenia will be ambivalent, disassociation of affect.

Q. I'm sorry, that truck, I can't hear you?

A. Yes, sir, disassociation of affect.

Q. Disassociation?

A. That's right—of affect. Disorganization of thought or speech, and autism.

Q. And what is the fourth one?

A. Autism (spelling) A U T I S M.

Q. What is that, sir?

page 203 } A. It is a way of thinking in which the individual fulfils unfulfilled desires, disregarding reality.

Q. From your observation of the defendant did you find any of these symptoms

a. No, sir.

Q. present?

A. No, sir.

Q. How do you usually find these symptoms in an individual?

A. They are mainly found by a psychiatric interview, an individual who shows disassociation of affect, for instance, would be an individual who shows little emotional content in the conversation. He would be an individual who may be talking about something very sad and would be laughing about it. The affect is completely inappropriate and not in keeping with the situation, an individual who shows disorganization of a speech is an individual who may manifest the symptom in various ways, it will be an individual, for in-

stance, who would be unable to reach a goal in conversation, it would be an individual who would not answer straight to the point to a question put to them.

Q. Well, now, when you talked with the defendant did he answer the questions you put to him?

A. Yes, sir.

Q, Were they coherent?

page 204 } A. He was completely coherent, he was able to reach a goal in the conversation. There are many manners in which an individual would be able to show disorganization of speech, I didn't find any disorganization of speech in this individual.

Q. Now, in your capacity at Central State, do you have occasion to make rounds of the criminal wards?

A. Yes, sir.

Q. Did you make rounds while the defendant was over there?

A. Yes, sir, I did.

Q. Would you see him on the days when you would make the rounds?

A. I saw him, yes.

Q. Doctor, is that any way used in your evaluation of an individual, when you make your rounds through the wards and so forth?

A. Where you take the whole picture at the time you are ready to make a diagnosis on—I took into consideration what I observed in my ward rounds, in the rounds of the criminal building. I saw him in the ward, I talked to him, I saw him talking to the other individuals, he would be socializing and talking to the other individuals, he talked to me too, I already talked to him.

page 205 } Q. Well, talking to other individuals, would that have any significance to you, sir?

A. It would have some significance, an individual who in—a schizophrenic, he may be somewhat withdrawn and remain by himself.

Q. Is that a major characteristic of a schizophrenic?

A. It wouldn't be a major characteristic of a schizophrenic, many individuals can be withdrawn and not be a schizophrenic. The major characteristic of a schizophrenic will be the four symptoms I mentioned.

Q. Uh huh. All right, sir, answer Mr. Ryder's questions.

Emilio F. Montero

CROSS EXAMINATION

By Mr. Ryder:

Q. What are those four symptoms again, sir, of schizophrenia?

A. Ambivalent, autism, disassociation of speech, or of affect, excuse me, and disorganization of thought.

Q. And it's your conclusion, based upon whatever examination you made, that this defendant has no mental illness of any kind?

A. Yes, sir.

page 206 } Q. Who is Dr. Marti, S. Marti—M A R T I?

A. Dr. Marti was a resident, first-year resident in psychiatry at the time when this individual was admitted to the hospital in nineteen and sixty—1963.

Q. On March the 5th, of 1963, did Dr. Marti at Central State Hospital diagnose this defendant as a schizophrenic?

A. March the 5th?

Q. Yes, sir, March the 5th, 1963?

A. March the 5th.

Q. Yes, sir.

A. Dr. Marti presented the case in the diagnostic impression, remember that Dr. Marti only had had at that time three months in psychiatry, so he was completely green in the field, his impression was a schizophrenic reaction, chronic differentia type, however,—

Q. Now, are you saying that Dr. Marti, at that time, was not capable of making a proper diagnosis?

A. Yes, sir, I am saying that because the diagnosis was turned down and he was given another diagnosis, he—

Q. He was employed by Central State Hospital at that time, is that correct?

page 207 } A. Yes, sir, he was a resident, he was a doctor undergoing or receiving training in psychiatry.

Q. And his diagnosis

A. No.

Q. although you say it was improper—

A. No, he didn't make any diagnosis, he made a diagnostic impression.

Q. His diagnostic impression was that he was schizophrenic?

A. Yes, sir, however, his diagnosis was changed, or was not accepted.

Emilio F. Montero

Q. It was not accepted based upon what, sir?

A. I wasn't present, there was a Chief of Service there who was conduting the staff.

Q. What was the staff?

A. It's a—the staff is a meeting where we doctors meet together with the rest of the individuals who are in contact with the patient and present our findings.

Q. Well, now, had the—based upon your records there, had the doctor that was conducting that staff interviewed this defendant?

A. That's the usual way.

page 208 } Q. I didn't ask you if that's the usual way, I asked you if he had interviewed this defendant, based upon your record?

A. Based upon my record, yes, sir, he—

Q. When?

A. On March the 5th—March the 12th of 1963.

Q. That was during the Staff Conference, was it not?

A. Yes, sir.

Q. Now, then, how long did the Staff Conference take, do you know, sir?

A. No, sir.

Q. Well, now, looking at the Staff Conference notes of the 12th of March of 1963, does—didn't I understand you to say that a schizophrenic is a person that is disorganized personality?

A. Yes.

Q. Isn't there one of the things during the Staff Conference a statement that this defendant did not smile at any time during the interview in spite of repeated efforst to make him amused and gain his confidence somewhat?

A. Will you tell me where that is?

Q. I think that's in the next to the last portion or the next to the last sentence of the second paragraph

page 209 } of the summary?

A. Page number 2?

Q. No, sir, I believe it's on page number one of the report of March the 12th, '63—well, that's all right, sir, we'll go to something else then. Now, at this Staff Conference, which you do not know how long this took, were present Dr. Hayes?

A. Uh huh.

Q. Dr. Marti?

A. Yes.

Q. Now, Dr. Marti, some seven days before had given a

diagnostic impression that this defendant was suffering from schizophrenia, is that correct?

A. Yes, sir.

Q. That diagnostic impression was changed, based upon the staff interview, is that correct?

A. I don't know based on what.

Q. Well, now, you have nothing else in the record to show that Dr. Hayes had even talked to this defendant prior to March the 12th, is that not correct?

A. Let me review it to see if I find out, because I know Dr. Hayes personally, I know that he interview the patient quite several times.

page 210 } Q. Uh, huh, well, you look at the record and tell me how many times he interviewed him?

A. Let me clarify something, we don't record everything single interview with every patient at Central State Hospital, we will be dictating the whole day long, that's completely impossible. Dr. Hayes, however, saw this individual on January 21 of 1963.

Q. Where?

A. Admission staff conference, January 21 of 1963.

Q. And what happened at the general admission staff conference?

A. The patient is interviewed and he is assigned to the—for work-up.

Q. For work-up?

A. Yes, sir.

Q. Well, now, how long did Dr. Hayes talk to him during the initial interview?

A. I wasn't present.

Q. By the way, where is Dr. Hayes now?

A. Norfolk.

Q. Now, you said in September of 1966, you observed this defendant some two to three hours, is that correct?

A. September of 1966?

page 211 } Q. Yes, sir, I think that was a guess, I don't believe you knew exactly how long you had observed him?

A. I made that clear.

Q. Some two or three hours, is that correct?

A. Yes, sir.

Q. Now, of that two or three hours, how long did you spend talking to him?

A. Two or three hours.

Emilio F. Montero

Q. Well, now, I thought the two or three hours was your observation period of him?

A. Talking to him.

Q. That doesn't include the time that you walked through the ward and saw him?

A. No, that doesn't include that.

Q. Uh huh. Now, did I understand you to say in 1963 that this defendant was at Central State for a month and eleven days?

A. No, sir, that was 1966.

Q. 1966?

A. Yes, sir.

Q. During the period of time from January of 1963, according to your records, through November of 1963, what treatment was given this defendant?

page 212 } A. I think that he received some medication.

Q. What medication—Thorazine? Do you have the page there, your notes?

A. I believe I could find it,

Q. Doctor, I believe it says Thorazine, he was given 100 milligrams of Thorazine on one occasion?

A. Yes, sir, he was given Thorazine, 100 milligrams, three times a day, you are right.

Q. What's Thorazine?

A. It's a tranquilizer.

Q. Tranquilizing drug?

A. Uh huh.

Q. In other words what that drug is supposed to do is to quiet a man down?

A. To calm the man down, to control behavior.

Q. All right, sir?

A. He was a behavior problem, by the way.

Q. But it's not given to him for the purpose of endeavoring to effect a cure, if he is mentally ill?

A. No, I don't think that we have found a cure for mental illness.

page 213 } Q. I understand that, sir. Was there any intensive psychiatric care given this defendant during his stay there?

A. I see by the record that he was seen several times.

Q. Well, now, how many times was he actually seen by any psychiatrist over there?

A. I wouldn't know, I'm sure that many—as I told you be-

fore, not all the times that the individual is seen is entered in the record.

Q. No, sir?

A. I don't know how many times he was seen.

Q. Doctor, assuming for the moment—oh, by the way, you did not see this defendant at any time during his stay in 1963 at Central State, did you, sir?

A. No, sir, I did not.

Q. So then, as a matter of fact, you don't know what his condition was in 1963 other than what is set forth in your reports based upon what some other doctor has said, is that correct?

A. Yes, sir.

Q. Doctor, if Central State Hospital, the authorities at Central State Hospital had made a mistake and turned loose a person who was psychotic and because of their

page 214 } having made this mistake in turning this person aloose who was psychotic, he engaged in psychotic episodes such as killing people, would this *case* any *embarassment* to the authorities at Central State Hospital?

A. I don't know, because I hope that you don't think they were going to keep in the hospital everybody who is called mentally ill.

Q. No, sir, but they should keep everybody in there who is psychotic, shouldn't you?

A. That's right, but I'm sure he wasn't psychotic, the record—

Q. Well, now, you don't know whether he was psychotic or or not in 1963, do you, sir?

A. Yes, I do, that's what the record says, I'm just basing my opinion on the record, in no place does it say that individual was psychotic.

Q. Uh huh, well, would it cause any *embarassment* to Central State if they had made a mistake and released him when he was psychotic?

A. When he was psychotic?

Q. Yes, sir?

A. Probably.

Q. Central State Hospital is controlled by a board, hospital board, is it not?

page 215 } A. I understand that.

Q. What is the makeup of that hospital board, do you know who is on it?

A. I know some names.

Emilio F. Montero

Q. Well, are they psychiatrists?

A. Not in 1963, I think they added a psychiatrist, they are going to add a psychiatrist now, but I don't know anything about it, I'm not involved in any administration of the hospital.

Q. Well, now, when anybody with your hospital disagrees with the policies of that board, does it result in their being fired no matter how competent they are as psychiatrists?

A. I doubt that's the case.

Q. Well, now, didn't that recently happen?

A. I don't know anything about, I don't think that was the case.

Q. You don't?

A. And I don't think that you know either.

Q. Doctor, what is—assume this for a moment, sir, assume that a child between the ages of six and seven years of age is subjected to a drunken father who beats him and his mother and is subjected to a mother, who is mentally ill herself, is it reasonably probable that that child

page 216 } will develop mental illness as a result of those surroundings?

A. He may or he may not.

Q. He may and he may not?

A, Right. There are many individuals with the same type of background who do not develop mental illness.

Q. Would constant rejection, such as causing him to be arrested for no practical reasons by his mother, cause him to have any mental difficulties of any kind?

A. I don't know whether that would cause any mental difficulties of any kind, I would consider the individual very unlucky.

Q. Well, wouldn't it be quite a mental shock to an eleven-year-old or twelve-year-old boy?

A. I think that would depend upon the individual.

Q. Well, how about if in his home life there was constant violence such as one brother shooting another brother to the extent that the one brother that was shot lost his leg, would that have any severe mental impression or make any severe mental impression upon the individual?

A. I hope so, it doesn't mean that he has to develop mental illness necessarily.

page 217 } Q. Suppose when he was discharged—when this defendant was furloughed from Central State Hospital he was sent to live with his mother who was

psychotic, would that fact, in your opinion, tend to cause him to have any mental illness of any kind?

A. Is this a hypothetical question?

Q. No, sir, it's not a hypothetical question, the evidence here is that she was psychotic when he went to live with her?

A. Uh huh, because I don't know whether the mother was psychotic or not.

Q. Well, assume for a moment the witnesses have testified that his mother was psychotic when she went to live—or when he went to live with her, would that have impression upon him mentally?

A. What witness?

Q. Sir?

A. What witness, a qualified psychiatrist?

Q. Assume these facts for just a moment, sir, assume that his mother was psychotic,

A. Uh huh.

Q. assume that he was taken from Central State Hospital and put to live with his mother,

A. Uh huh.

page 218 } Q. in your opinion, based upon those assumptions, would that have any effect upon his mental health?

A. Sure, you have given me a hypothetical question, individual who is psychotic who is placed in a psychotic home, he was psychotic to begin with, so he is psychotic, sure.

Q. Would the fact that his mother was psychotic, would this have any effect upon him?

A. It could.

Q. Isn't it probable that it would?

A. Yes, it probably would.

Q. Is it normal and usual for a child of thirteen, or fourteen or fifteen years of age to curse his mother and threaten bodily harm frequently to his mother?

A. You would have to qualify what is normal for you and what is normal on this particular occasion because if my mother did beat me up, I think it would be very normal to cuss her out, too.

Q. Well, I don't particularly know that I understood what you said, sir?

A. What do you mean by normal?

Q. I don't know, sir?

A. Then you should qualify that before asking.

Q. Well, does the usual child within your ex-

page 219 } perience of eleven, twelve, thirteen, fourteen years old, curse his mother and threaten bodily harm to his mother?

A. The usual child?

Q. Yes?

A. No.

Q. Wouldn't this indicate that the child perhaps might have some mental difficulties of some kind?

A. No, sir, that wouldn't indicate to me mental illness.

Q. Would that be healthy behavior on the part of the child from your standpoint?

A. It may be healthy.

Q. That's all the questions I have.

REDIRECT EXAMINATION

By Mr. Wilkinson:

Q. Doctor, is there a difference between mental illness and behavior patterns or behavior problems?

A. Yes, I think that behavior is—you are talking about diagnostic differences, yes, behavior problem is not a mental illness, behavior problem is a defect of the personality.

Q. Would that necessarily show a mental ill-
page 220 } ness?

A. It is not a mental illness.

Q. Now, the last conference, the staff conference you had on this particular defendant, how long did that take, do you know?

A. In the particular case exactly how long it happened—how long it took, I am sure I cannot tell you that. I know it took quite sometime in this particular case. I wrote down here his case was reviewed and he was interviewed for a lengthy period of time. I cannot tell you for sure how long he was interviewed.

Q. Could you be a paranoid schizophrenic and still know right from wrong?

A. Sure, he can, the fact that individual is mentally ill doesn't mean that he doesn't know the difference between right and wrong, that is why we have the *McNorton* Rule.

Q. What is the *McNorton* Rule, Doctor?

A. McNorton Rule say, it's a test using (word unintelligible) psychiatry in legal proceedings, when the defense of mental illness is being brought up, it have two parts. First, you have to determine whether an individual is mentally ill

or not. If the individual is mentally ill, you have to determine whether the individual knows the difference between right and wrong and the nature and the consequences of the act that he committed.

page 221 } Q. All right, sir, that's all the questions I have.

RECROSS EXAMINATION

By Mr. Ryder:

Q. Is the *McNorton* Rule, in your opinion, and in the opinion of many, many psychiatrists, completely outmoded?

Mr. Wilkinson: Your Honor, I have to object to that, that is the law and I don't think the witness' opinion as to the law would make any material difference.

Q. Doctor, you are not endeavoring to state to the Jury that a person suffering from paranoid schizophrenia necessarily know the difference between right and wrong, are you, sir?

A. I said a patient, an individual who is schizophrenic paranoid may or may not know the difference between right and wrong.

Q. But it would be rather unusual for the person to one, know the difference between right and wrong and, two, do the right instead of the wrong, wouldn't it?

A. Not so unusual.

Q. Sir?

page 222 } A. It's not so unusual, we have many of those patients who are schizophrenic paranoid and know the difference between right and wrong, and know the nature and consequence of the act by them committed.

Q. Would he be able to do the right?

A. Yes, he can.

Q. He could?

A. Yes.

Q. At all times?

A. I don't say at all times, at certain times.

Q. Suppose he was, during the course of some psychotic episode, would he be able to distinguish right and wrong and be able to understand the nature and consequences of his act, and would he be able to resist an impulse to do the wrong?

A. Of course, there are individuals, under those circum-

stances, who would be unable to adhere to the right or wrong.
Q, All right, that's all the questions I have.

Mr. Wilkinson: I have no further questions.

Witness stood aside.

page 223 } NOTE: At this time the Court, admonishing the Jury, and the Sergeant being sworn, declared a recess for lunch, after which:

The Court: Gentlemen, you waive the poll of the Jury?
Mr. Wilkinson: The Commonwealth does, yes, sir.
Mr. Ryder: Yes, sir.
The Court: Very well.

LEO E. KIRVEN, JR., introduced on behalf of the Commonwealth, on rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:
page 224 } Q. Would you please state your name and occupation to the Court and the Gentlemen of the Jury?
A. Leo E. Kirven, Jr., I'm a physician and a psychiatrist at Central State Hospital.
Q. Did you have any pre-training before going to Medical School, sir?
A. Yes, I finished Clemson University, Clemson, South Carolina, before entering Medical School.
Q. And where did you go to Medical School, Doctor?
A. Medical College of South Carolina, in Charleston.
Q. And what degrees, if any, did you receive?
A. Doctor of Medicine, and a Bachelor of Science Degree in Pre-Medicine.
Q. After finishing Medical School did you take any specialization as a study?
A. Yes, I did two years of internship with one specializing in psychiatry and then three years of training in psychiatry, with one year specialization in criminal psychiatry.
Q. Now, where did you take this training, sir?
A. The Department of Mental Hygiene and

page 225 } Hospitals at Eastern State in Williamsburg, the Medical College of Virginia, and Central State Hospital.

Q. And how long was your full internship there or did you spend in these hospitals you just—

A. Three years of psychiatric training.

Q. All right, sir, are you now presently employed at Central State Hospital?

A. Yes, I am.

Q. And how long have you been employed at Central State Hospital?

A. Since July of 1963.

Q. What is your job over there?

A. I'm Assistant Superintendent at the Hospital.

Q. Does your position carry supervision over any particular aspect of the Hospital?

A. All the clinical aspects of the hospital, all the medical departments.

Q. And would in that fall the Criminal Division?

A. Yes, it does.

Q. Do you see patients yourself on occasions, Doctor?

A. Every day.

page 226 } Q. Did you have an occasion to see the defendant, Thomas Lee Penn?

A. Yes, I did.

Q. And do you know when you first saw him, sir?

A. I can give you the date I first saw him—September 20, 1966.

Q. Did you have an interview with him at that time, sir?

A. Yes, I did.

Q. Do you know approximately how long the interview was?

A. No, I'm sorry, I don't record the time.

Q. All right, do you have any recollection of how long this interview would have taken?

Mr. Ryder: Well, Your Honor, I would object, the witness just got through stating that he doesn't have any recollection of how long it took, he would have to guess.

Mr. Wilkinson: All right, sir, I withdraw the question.

Q. All right, sir, did you see him on any other occasions while he was at Central State?

A. I saw him frequently, observing him when

page 227 } he was not aware that I was observing him, I saw him in interview two additional times after the initial interview, that's for psychiatric interviews.

Q. Did you review the case history that was on file at Central State Hospital of this man?

A. Yes, I did.

Q. After reviewing the case history and the times that you saw him, did you have an opportunity to observe him in the Hospital itself, the general demeanor and behavior there?

A. Yes, I observed him, his general behavior.

Q. Was there anything abnormal that you observed?

Mr. Ryder: Well, Your Honor, I would ask that the witness be required to testify what he observed and let the Jury determine what is not normal, sir.

Q. All right, what did you observe, Doctor?

A. He reacted with other patients satisfactorily on the ward level, conversed with them, took part in activities.

Q. Were you on the Staff Conference relative page 228 } to this man?

A. Yes, I was, I presided in it.

Q. Do you know approximately how long the Staff Conference lasted?

A. It would be a rough guess, but I would say about an hour.

Q. Were any examinations given to the defendant which you had an opportunity to examine?

A. Psychiatric examinations were given which I just stated I gave three personally, others were given also by other psychiatrists. Psychological testing was done, which I reviewed the results of these. Various laboratory procedures were done at the Hospital. Physical examination was done, electroencephalogram was done. Yes, numerous examinations.

Q. Doctor, what is a paranoid?

A. A paranoid is a condition that an individual may have in which he has feelings of persecution, that there are people or things working against him, trying to harm him, do things to him. There are some secondary symptoms of a paranoid individual, usually they are rather grandiose, have a blown-up idea of their abilities, of themselves as individuals. They often have religious trends in their conversation.

Q. What is schizophrenia, I guess is the way you pronounce it?

page 229 } A. Schizophrenia is a type of mental illness that is characterized with several primary symptoms and several secondary symptoms.

Q. What are the primary symptoms?

A. The most prominent primary symptom of schizophrenia is disorganization of thought, which, in turn, usually brings about disorganized speech and conversation, if you engage such individuals in conversation. The—

Q. What do you mean by disorganized—disorganization of speech?

A. What they are saying is not *revelant* to the questions which—to the topic at hand, their conversation doesn't make sense to you. The—there are other prominent symptoms of schizophrenia, primary symptoms, one is the flatness of affect.

Q. What is that, sir?

A. Such individuals do not have the proper emotion for the situation at hand, they may talk about a very sad situation without show of emotion, this is a personal situation or they may be talking about something that you would expect to have happy reactions to and they are not happy, do not appear happy, do not sound happy. Usually their control of their tone is in the same level, there's no up and down to them, they may have artistic thinking, which is a type of
page 230 } thinking that a schizophrenic has when he has regressed, he lives in a situation that is not proper for the environment in which he's in, in other words, he's in a world of his own, sort of excluding his environment or those around him, not paying too much attention to what's going on, and these are the prominent primary symptoms of schizophrenia, there are secondary symptoms, such as hallucinations, hearing voices, seeing things that are not there, delusions of grandeur, special powers and things of this type.

Q. Now, Doctor, from your interview and from the psychological reports which you examined and from the other tests run on the defendant, did you find any of the symptoms present in the defendant which would indicate that he was paranoid or schizophrenic?

A. Found no symptoms of schizophrenia at all, I did find this individual to be somewhat hostile at times, which may be interpreted as a sign of paranoid tendencies, feelings of being unloved, inadequate situation, environment and what not, may be called tendencies of paranoid feelings, but not a paranoid illness.

Leo E. Kirven, Jr.

Q. What would be the difference between a paranoid feeling and a paranoid illness?

A. Well, I think anyone can have feelings of—paranoid feelings at times, if the situation—if it's a realistic and where people are against you or things are not page 231 } going as you expected them to go, you may get feelings that the world is not treating you right, and we would interpret this as a paranoid feeling.

Q. Paranoid illness, how about that?

A. This is the same type of thing, but which has reached a degree that the person is not able to function properly in his environment, that he allows such feelings to interfere with his every day adjustment, in other words, they can't work, they can't maintain their proper role of the father and a husband, things that you would expect people to function in their every day way of living.

Q. Doctor, are you familiar with the rule in Virginia regarding the criminally insane, I believe it is the *McNorton* Rule?

A. Yes, I'm familiar with it from a medical standpoint.

Q. Would you tell the Court and the Gentlemen of the Jury what the *McNorton* Rule is?

A. Well, the *McNorton* Rule is the present accepted rule, as I understand it, by which the legal profession decides if a person who has a mental disorder is responsible for his behavior or not. The Rule itself states that first of all there must be a mental disorder and if—say, if there is a disorder present, it must be responsible for the individual's page 232 } behavior, I think, or the person is acting, his behavior as a result of his mental disorder.

Q. How about the irresistible impulse?

A. The irresistible impulse is also a rule that governs responsibility, criminal responsibility, stating that a person is not responsible for his behavior if he is subjected to the irresistible impulse, which would indicate that he is acting out of—as a result of a mental disorder and has impulses which are beyond control.

Q. Could you have a irresistible impulse if you thought about something—thought about doing something?

Mr. Ryder: Well, now, Your Honor, I object to the manner in which the question is asked, sir. He is asking this witness to determine whether or not a person can—he's asking him to

come to a legal conclusion and the context in which he's asked the question, sir.

The Court: Rephrase your question, Mr. Wilkinson.

Q. Under the legal definition of irresistible impulse, can you—when you observe a patient do you see if the patient thinks about the act committed before committing the act?

page 233 } A. In the observation of a patient who has been accused of some anti-social act we certainly would consider the possibility of the person acting under the irresistible impulse. We feel that such individuals do not stop to think about what they are doing, have very little concern, if any, of the situation at hand, in other words, they would—if they are acting under the irresistible impulse, they would perform this act regardless of who may be watching or present, including law officials and what not, which we usually feel is a deterrent for criminal activities, such individuals would carry out that activity regardless of the situation if they were acting under the irresistible impulse.

Q. Now, from your observation of the defendant, the psychological tests, and other tests that you had,—were available to you, I believe a physical examination, your Staff Conference, which you had there, did you or did you not find any mental disease present in the defendant, Thomas Lee Penn?

A. Found no evidence of any mental illness, or mental disease.

Q. Now, once you come to that conclusion, do you go to the second step of either the *McNorton* Rule or the irresistible impulse to find out whether you could distinguish right from wrong?

page 234 } A. No, it's assumed that someone can distinguish right from wrong if they are not mentally ill or mentally deficient.

Q. Was an I.Q. test given to the defendant?

A. Yes, it was.

Q. What were the results of that, sir?

A. Full scale I.Q. was a hundred and three.

Q. What range is that, sir?

A. Average—average being from about eighty, eighty-five to a hundred and twenty, so a hundred is considered the average.

Q. Now, I belive you have read, I asked you to read the statements that have been introduced into Court that the

defendant made shortly after his arrest, have you read those, sir?

A. Yes, I read them.

Q. Uh huh, did that shed any light at all on your examination?

A. I don't believe it changed the aspect of my examination at all.

Q. All right, answer Mr. Ryder's questions, please.

page 235 } CROSS EXAMINATION

By Mr. Ryder:

Q. Dr. Kirven, what you are saying, sir, is that in your opinion this defendant has no mental illness of any kind?

A. That's right, sir.

Q. Did I understand you to say that your findings, you noticed that there were paranoid impressions and schizophrenic tendencies?

A. In this individual?

Q. Yes, sir?

A. No, sir, we found no schizophrenic tendencies at all.

Q. And you found no paranoid impressions of any kind?

A. I believe that I said that I noticed some hostility in his mannerisms and some negativism with statements that there were many people against him and this type of thing which may be interpreted as a paranoid feeling.

Q. But the hostility and the feeling of rejection that you observed in him, you did not feel that that was of sufficient moment to feel that he had any mental illness of any kind?

A. No, I don't think so, the hostility is a
page 236 } so-called normal emotion for people to have.

Q. And his hostility was within the normal range as far as you know?

A. It would be hard to measure it normal unless it was compared to some other person in similar circumstances.

Q. What did you mean by normal range?

A. I said that hostility is a normal emotion, everyone has it.

Q. And are you saying that his hostility that you observed would be what you say is—

A. I'm saying it's not abnormal for a person to feel hostility.

Q. If a person shows negatism, evasiveness, feelings of personal inadequacy and feelings of insecurity, the boun-

dary—his boundaries are weak and he tends to do much inner living, are those schizophrenic tendencies?

A. I'm not sure I understand what boundaries you are talking about.

Q. Well, I'm reading, Doctor, from the report of a Mr. Marti, Dr. Marti, from Central State Hospital, dated March the 5th, 1963, I was endeavoring to quote Dr. Marti.

A. Let—let me find that so I can

Q. All right?

page 237 } A. read it along with you.

Q. That's the report of the examination of March the 5th, 1963?

A. All right. All right, sir, I have the report now, if you—

Q. I think the bottom, under the paragraph entitled Mental Status, down in the latter part of it?

A. Yes, sir.

Q. Doesn't it say he is of average intelligence level, he shows negatism, evasiveness, feelings of personal inadequacy and feelings of insecurity, the boundaries are weak and he tends to do much inner living?

A. I believe that Dr. Marti is quoting there from the impression of a psychologist who had seen him at the Memorial Guidance Clinic prior to his commitment to Central State Hospital.

Q. All right, sir?

A. I don't—I'm not sure that Dr. Marti, I could not say whether this is his impression or not.

Q. Well, his impression at the time was that this defendant was suffering from a schizophrenic reaction, chronic differentiated type, is that true?

A. Yes, I see that that was his diagnostic impression. I would agree that the symptoms which are listed

page 238 } here, negativism, evasiveness, feelings of personal inadequacy and feelings of security, which have been changed in my record to read insecurity, and the boundaries are weak and tend to do much inner living would be symptoms of schizophrenia, however, I would not agree that these symptoms are in this individual.

Q. Doctor, assuming that in March of 1963, well—let me change that, sir. Assuming in November of 1963 that the defendant's mother was receiving therapy and was psychotic, would it be a healthy situation to place this defendant in the family or within the home of the mother?

A. That's your question?

Q. Yes, sir?

A. I do not feel it's healthy at any time to place anyone in the home with a schizophrenic mother, who is actively psychotic. However, as far as the development of schizophrenia in such a situation, this would not have a great bearing on the situation since the symptoms of schizophrenia seem to develop at a much earlier age than this.

Q. You would say then, sir, that placing a fifteen-year-old child in a home with a mother who was psychotic, would have no appreciable affect on his mental condition?

A. On any development of schizophrenia.

Q. Well, how about any development of para-
page 239 } noid?

A. That I don't know, I think that that would —I would have to know a little bit more about the situation than the theoretical situation of a sick mother.

Q. Uh huh?

A. I believe, and I say again, I don't think it's healthy to ever place anyone in the home with a psychotic mother, a child.

Q. Did I understand you to say, Doctor, that one of the symptoms, one of the indications of a person being in a psychotic state would be identification with hyper-religion or something of this nature?

A. No, I don't believe I said that, I said that a person with paranoid tendencies may have some religious preoccupation.

Q. Doctor, if Central State Hospital, the authorities at Central State were mistaken in their diagnosis of Thomas Penn when they furloughed him in November of 1963, and the fact he was paranoid, and engaged thereafter in a series of killings, would this cause any *embarassment* to the authorities at Central State?

A. The fact that we might have been wrong in our diagnosis, is that what you are saying?

page 240 } Q. And because of your being wrong in your diagnosis, the person that you were wrong about killed a number of persons?

A. I don't quite get your question.

Q. Would

A. I don't ever consider—

Q. that *embarass* the authorities at Central State?

A. I doubt that that question has ever really been given serious consideration,

Q. All right, sir?

A. certainly not by me.

Q. Well, as a matter of fact, Doctor, up until, let's see, September the 20th of 1966, you had never seen this defendant, is that correct, sir?

A. But I had reviewed his record, but

Q. I understand you reviewed his record, sir,

A. prior

Q. but you had never seen him?

A. Prior to that date I had reviewed his record.

Q. But you hadn't seen him and talked to him, had you, sir?

page 241 } A. I think that I'm well qualified to answer that question, because I'm the person who personally discharged him in 1964, do you have the record?

Q. Did you have an interview with him in 1964?

A. No, sir, that—

Q. You signed the discharge—

A. That's right.

Q. And from 1963 to 1964 when you signed the discharge papers, did you see him at all?

A. No, I did not.

Q. Do you know what his mental condition was in 1964 when you discharged him?

A. Let me see if this report—No, the patient was released on trial visit in November of 1963, and referred back to the Welfare Department of which he was a ward at the time of his commitment, and we do not ordinarily follow these cases.

Q. You don't know what happened to him thereafter?

A. No, I don't.

Q. Now, when you signed his restoration—may I see that Exhibit—when you signed the certificate of discharge, discharging him as not mentally ill on November 30th, 1964, you had not seen him for over a year, is that correct?

page 242 } A. First of all, I didn't sign the certificate of discharge, sir.

Q. You didn't, who signed that?

A. Superintendent, I believe.

Q. He had not seen him for over a year?

A. I approved his discharge.

Q. But you knew nothing about his mental condition at that time?

A. No, not on that date, no.

Q. And you hadn't known anything about his mental con-

dition from November of 1963, is that correct?

A. That's right.

Q. That's all the questions I have.

REDIRECT EXAMINATION

By Mr. Wilkinson:

Q. Doctor, in your examination from the reports, did you find any evidence of a mental disorder that had recovered from—

A. Any what, sir.

Q. Any evidence of a mental disorder which the defendant had recovered from, recent mental disturbance?

A. At the time of my examination?

Q. Yes, sir, in 1966?

page 243 } A. No, I found no evidence of any mental disorder at all. In my opinion, he's never had a mental disorder of any type.

Mr. Wilkinson: Judge, it's two more questions I want to ask the doctor, but I would like to take them up without the Jury here for the Court to rule on—

The Court: Very well, Gentlemen, you mind retiring for a moment.

NOTE: At this time the Jury retired from the Courtroom.

Mr. Wilkinson: Your Honor, my two questions would be did the defendant talk to doctors relative to the crimes which he is charged with. I understand the answer would be no. My next question would be why he did not talk with

page 244 } them about these crimes and it's also my understanding that his answer was, I'm doing it on the advice of my attorney. Now, ordinarily, I think on interrogation that would not be admissible because under *Miranda* and the rest of them they say that the silence of the defendant will be guarded by the police, but now, through the simple issue of the sanity or the mental condition of the accused at that time, I think it's relevant to show and to support the theory of the Commonwealth that he was sane at that time, because he could follow, it would be a circumstance for the Jury to consider, that he could follow the advice of his attorney, and that is my understanding of the two questions I have. I submit that it is relevant to show that particular point. We've gone into the other aspects

of it, the whole issue of the insanity, so I think it would be relevant to that.

Mr. Ryder: Your Honor, I would have no objection if the Court would also allow me at the same time to state why the advice was given to the defendant, the advice was given to him because, based upon my conversations with many doctors, by reading in the newspapers and things of
page 245 } this nature, and the fact of my having gone over the reports from Central State Hospital as to what they found previously, I did not feel that the authorities at Central State Hospital under any circumstances would come to a conclusion that this man had anything mentally wrong with him and if the Court would allow me to go into those reasons and state to the Jury, I would have no objection to the Commonwealth's Attorney asking the questions, but I think the Jury should have benefit of the reasons why the advice was given.

The Court: What do you have to say to that, Mr. Wilkinson?

Mr. Wilkinson: Well, I was just thinking, Judge, what he said. I don't have any—I know that Mr. Ryder would be in the position, he's counsel and can't be a witness, I would have no objection to him putting in the record to the best interests of his client, or whatever words you want to use, Mr. Ryder, as long as you don't get off on too far on the issue which we objected to first and which the Court has sustained us in that objection,—

Mr. Ryder: Do I understand that you have no
page 246 } objections to my stating the conversations that I have had with psychiatrists, as to their opinion of Central State, and as to the reasons why I gave him this advice.

Mr. Wilkinson: Well, I don't think we can go into conversations you've had with psychiatrists because—

Mr. Ryder: Well, that's the reason for the advice, Your Honor, and I submit that if they are going to bring it out, I should be allowed to tell the Jury why I gave him the advice.

Mr. Wilkinson: Our point is really not whether—about the advice, but the fact that he followed the advice, simply shows the state of mind and his capacity to understand. But, Mr. Ryder, if you want to say in the best interests of my client I told him that, what I believe, then I have no objection to that.

Mr. Ryder: Yes, sir, but I'd like to state the reasons for the belief, sir.

The Court: I think that's sufficient.

Mr. Ryder: Your Honor, I would submit to the Court, one, that by asking the question the Commonwealth's Attorney necessarily is going to place me in the position page 247 } of having to be a witness, because I feel that in the interests of my client I would have to state to the Jury what has been told me by psychiatrists and other persons.

The Court: No, you can't do that—

Mr. Ryder: I recognize this, sir, but that is the reason for the advice, and I submit that Your Honor is allowing the Commonwealth's Attorney to tread on rather dangerous ground in having this doctor testify that the defendant did not answer his questions based upon the advice of counsel. Now, I submit, Your Honor, that the law, as I understand it, is that the fact of a man not testifying, the fact of a man not giving a statement, cannot in any manner be held against him in any way, shape or form. As a matter of fact, I have an instruction drawn which Your Honor is very familiar with, that the Jury cannot consider in any way, shape or form the failure of the defendant to testify. And I do not believe that the law would allow the Jury to consider, for the purposes of what Mr. Wilkinson desires to get it in, the defendant's following the advice of counsel to not testify in effect, to not talk to these doctors, and I submit, sir, that that is infringing on the rule that a Jury cannot page 248 } consider the silence of an individual in any way, shape or form, and I would object to the question, sir.

The Court: What do you have to say to that, Mr. Wilkinson?

Mr. Wilkinson: Well, Judge, I was thinking there some way to avoid—I think it's very relevant to show that a person is told to do something and he follows that advice. In this particular case it happened to be Mr. Ryder because he was his lawyer, and I'm not saying anything other than the fact that that's what he should have done all along, is followed his lawyer's advice, but at the same time, when we go to the issue of the insanity or sanity of the accused, I think it is relevant to show that in an environment where he is in the hospital, that he could follow the advice which he was told by his lawyer, or his mother or anyone else that

would give him advice, he could follow advice, and I think it's very relevant, because sanity can be shown by other ways other than the experts, or insanity would into that way. Now, if—I was thinking here that did he talk to him I was very explicit about Dr. Lordi, about going into details about these crimes, and now I think it would leave the Com-
page 249 } monwealth in a position the Jury thinks, says, yes, Dr. Lordi, he questioned at length, but now when he gets—the Commonwealth calls Dr. Kirven, he doesn't say anything about it, and the reason we can't say anything about it and can't do it is because he wouldn't talk to us relative to the crimes, well, now, that's our position on it, Your Honor.

Mr. Ryder: Your Honor, I submit, sir, that the Court—if the Court allows this type of questioning, that the only purpose for introducing it by the Commonwealth is to use the defendant's silence against him, to use the defendant's refusal to give a statement against him, that is the only reason he wants to get it in, and as I understand the rule, sir, his silence can never be even mentioned by the Commonwealth, much less used against him.

Mr. Wilkinson: If you feel that strongly about it, Mr. Ryder, we will—

The Court: Sir?

Mr. Wilkinson: We will withdraw the question, Judge.

The Court: I have some serious doubts that's
page 250 } a proper question, because he hasn't—he refused to take the witness stand, which he has a right to do—you are more or less getting into the record what you couldn't get in directly and I think his silence would be invaded, I don't believe you can go that far.

Mr. Wilkinson: All right, sir.

The Court: Return the Jury, please.

NOTE: At this time the Jury returned into the Courtroom.

The Court: Gentlemen, you waive the poll of the Jury?

Mr. Wilkinson: The Commonwealth does, yes, sir.

Mr. Ryder: We waive.

Mr. Wilkinson: I don't believe we have any further questions of Dr. Kirven.

page 251 } The Court: Any further questions.

Mr. Ryder: I have none.

Witness stood aside.

The Court: The Commonwealth rests, Your Honor.

The Court: Very well. All right, Gentlemen, you will have to retire again while the instructions—

NOTE: At this time the Jury retired from the Courtroom.

page 252 } The Court: Gentlemen, have you agreed on the instructions?

Mr. Wilkinson: Yes, sir, Your Honor.

The Court: These are the instructions you hand the Court, one through thirteen are the ones that have been agreed upon?

Mr. Wilkinson: Yes, sir.

Mr. Ryder: Yes, sir.

The Court: And there are no instructions which you are not in agreement on?

Mr. Ryder: No, sir.

The Court: Very well.

NOTE: At this time the Jury returned into the Courtroom and the Court instructed the Jury, after which Counsel argued to the Jury and the Jury retired to consider of its verdict, and after some time returned into the Courtroom.

page 253 } The Court: Gentlemen, you waive the poll of the Jury?

Mr. Wilkinson: Yes, sir, the Commonwealth does.

Mr. Ryder: Yes, sir.

The Court: Gentlemen of the Jury, have you reached a verdict?

A Voice: We have.

The Clerk: Stand up, Thomas Lee Penn

The verdict of the Jury in the case of the first indictment, we, the jury, find the accused guilty of murder in the first degree and fix his punishment at confinement in the Penitentiary for life.

The verdict of the jury in the second indictment, we, the jury, find the accused guilty of murder in the first degree and fix his punishment at confinement in the Penitentiary for life.

Mr. Ryder: Your Honor, prior to sentencing could the defendant make a motion—

The Court: Sir?

Mr. Ryder: Before sentencing could I make a motion— Your Honor, the defendant would move the Court
page 254 } to set the judgment or the verdict of the Jury

aside as being contrary to the law and the evidence in each case.

The Court: The Court will overrule your motion.

Mr. Ryder: We except, Your Honor.

The Court: Stand up:

In Indictment No. 1, in accordance with the verdict of the Jury, the Court finds you guilty of murder in the first degree and fixes your punishment at confinement in the Penitentiary for life.

In accordance with the verdict of the Jury in Indictment No. 2, the Court finds you guilty of murder in the first degree and fixes your punishment at confinement in the Penitentiary for life.

All right, if you desire to take an appeal in these cases, then, in that event, notice of your intention to do so should be given within sixty days from the date of the final judgment of this Court. Notice of your intention to appeal should be given and assignments of error should be stated in writing. It will require approximately ten days to prepare the transcript of the evidence in this case, which page 255 } must be within the sixty day period.

Mr. Ryder: Your Honor, the defendant has asked me to request the Court, on the record, that a transcript of the trial be obtained and that notice of appeal be filed. I will file a formal notice of appeal in all of the cases with the Court tomorrow, sir.

The Court: Well, at the same time if you will address a letter to the Clerk of the Court requesting copy of the transcript

Mr. Ryder: All right, sir.

The Court: that will be provided. Anything further, Gentlemen?

Mr. Ryder: No, sir.

Hearing concluded.

CERTIFICATE

I, Edward C. Earle, Jr., do hereby certify that I have on this 1st day of June, 1967, faithfully and accurately, to the best of my ability, transcribed the foregoing testimony and other incidents of trial, in the case of Commonwealth v. Thomas Lee Penn, recorded by electronic equipment in the Hustings Court of the City of Richmond.

Edward C. Earle, Jr.

page 256 } We do hereby certify that the foregoing is a true and correct transcript of the evidence and proceedings in this case.

James B. Wilkinson
Attorney for the Commonwealth

Richard R. Ryder
Attorney for the Defendant

I do hereby certify that the foregoing transcript of the evidence was tendered to me on the 2d day of June, 1967, and signed by me this 2nd day of June, 1967.

W. MOSCOE HUNTLEY
Judge of the Hustings Court of
the City of Richmond, Virginia

I, L. A. Schumann, Deputy Clerk of the Hustings Court of the City of Richmond, Virginia, certify that the foregoing evidence in the case of *Commonwealth* v. *Thomas Lee Penn,* was delivered to me on the 2d day of June, 1967.

L. A. Schumann
Deputy Clerk of the Hustings Court of
the City of Richmond, Virginia

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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