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Record Nos. 7316, 7317, 7318

In the Supreme Court of Appeals of Virginia at Richmond

JAMES DAVID STOVER
v. Record No. 7316
COMMONWEALTH OF VIRGINIA

JAMES DAVID STOVER
v. Record No. 7317
COMMONWEALTH OF VIRGINIA

JAMES DAVID STOVER
v. Record No. 7318
COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7316

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 14th day of October, 1969.

JAMES DAVID STOVER, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

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

Upon the petition of James David Stover a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Fairfax County on the 27th day of January, 1969, in a prosecution by the Commonwealth against the said petitioner for a felony (Criminal No. 14702); 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. 7317

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 14th day of October, 1969.

JAMES DAVID STOVER, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

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

Upon the petition of James David Stover a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Fairfax County on the 27th day of January, 1969, in a prosecution by the Commonwealth against the said petitioner for a felony (Criminal No. 14703); 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. 7318

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 14th day of October, 1969.

JAMES DAVID STOVER, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

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

Upon the petition of James David Stover a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Fairfax County on the 27th day of January, 1969, in a prosecution by the Commonwealth against the said petitioner for a felony (Criminal No. 14704); but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

Record No. 7316

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* * * * *

This 27th day of January, 1969, came the Commonwealth, by her Attorney; and the Defendant, JAMES DAVID STOVER, who stands convicted of a felony, to-wit: murder, appeared agreeably in accordance with his recognizance of bail, and also appeared Claude M. Hilton, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

Thereupon, the Attorney for the Defendant made a motion to set the verdict aside as being contrary to the law and evidence and which motion the Court, after hearing argument thereon, denied. The Attorney for the Defendant then made a motion to have this case referred to the District Probation Officer for his investigation and report before sentencing, which motion the Court denied.

Thereupon, it was demanded of him, JAMES DAVID STOVER, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that JAMES DAVID STOVER do serve ten (10) years in the Penitentiary House of this Commonwealth, at hard labor.

And the Defendant having indicated his desire to apply to the Supreme Court of Appeals for a writ of error, it is adjudged and ordered that the execution of the sentence be, and the same hereby is postponed for a period of sixty days from this date to permit the Defendant to be present and assist his counsel in seeking such writ of error.

The fee of the Court Reporter who recorded the evidence and incidents of trial in this case is hereby assessed
page 68 } as costs in this case as provided by Sec. 17-30.1 of the 1950 Code of Virginia, as amended.

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

And the Defendant is continued on bond.

A. V. Bryan, Jr.
Judge

* * * * *

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* * * * *

MOTION FOR NEW TRIAL

COMES NOW the Defendant, James David Stover and moves this Honorable Court for a new trial and for grounds states as follows:

1. That new evidence has been discovered since the trial, which is material and a different verdict would probably have been reached on the merits, had this evidence been before the jury.

Randolph v. *Com.* 190 Va. 256, 56 S. E. 2d 226
Buford v. *Com.* 179 Va. 752, 20 S. E. 2d 509
Wigmore, Evidence 3rd ed. (63, 198, 248
Ingram v. *Peyton* 367 F 2d 933 (4th Cir. 1966)
Jackson v. *Com.* 98 Va. 845, 36 S. E. 487

2. That the Commonwealth suppressed evidence favorable to the Defendant concerning the character of the prosecuting witnesses

Brady v. *Maryland* 373 U. S. 83
Barbee v. *Warden* 331 F 2d 842 (4th Cir.)
Hamric v. *Bailey* 386 F 2d 390 (4th Cir.)
Jackson v. *Wainwright* 390 F 2d 288 (5th Cir.)
Levin v. *Katzenbach* 363 F 2d 287 (D. C. Cir.)
U. S. v. *Wilkins* 326 F2d 135 (2nd Cir.)
Giles v. *State of Maryland* 386 U. S. 66

WHEREFORE, for the grounds stated the Defendant moves this Honorable Court to grant him a new trial.

James David Stover by Counsel

Filed Feb 24 1969.

W. Franklin Gooding
Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

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* * * * *

AFFIDAVIT

State of Virginia

County of Arlington, to-wit:

I, Claude M. Hilton, counsel for the defendant, being duly sworn, represents to this Honorable Court the following:

1. That no evidence of the incident that occurred on July 19, 1968, involving the complaining witnesses in this case, came to my attention until on or about January 31, 1969, when a person associated with the Arlington County Police Department, Arlington, Virginia, informed me such a report was on file.

2. That the Assistant Commonwealth Attorney, prosecuting this case, and I had several discussions concerning this case, including discussions of the testimony of all the witnesses and the police records of these witnesses. At no time was any disclosure made to me about the incident involving the complaining witnesses occurring on July 19, 1968.

Claude M. Hilton

Subscribed and sworn to before me this 28th day of February, 1969. My commission expires April 21, 1972.

Mary T. Harding
Notary Public

page 72 }

* * * * *

This 28th day of February, 1969, came the Commonwealth, by her Attorney; and the Defendant, JAMES DAVID STOVER, who stands convicted of a felony, to-wit: murder, appeared agreeably in accordance with his recognizance of bail, and also appeared Claude Hilton, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

And this case came on to be heard on the motion for a new trial filed herein in writing by the Attorney for the Defendant. Thereupon, the Court heard evidence on behalf of

the Defendant and argument of the Attorney for the Defendant and argument of the Attorney for the Commonwealth, and in consideration whereof the Court does deny the said motion, and to the action of the Court in denying the said motion the Attorney for the Defendant notes his exceptions.

And the Defendant is continued on bond.

A.V.B., Jr.
Judge

* * * * *

page 74 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

NOTICE is hereby given that James David Stover appeals from the sentence imposed by this Court on the 27th day of January 1969, and announces his intention of applying for a Writ of Error and *Supersedeas* to the Supreme Court of Appeals of Virginia.

ASSIGNMENT OF ERROR

1. The trial Court erred in overruling the Defendant's motion to strike the Commonwealth's evidence as to first degree murder because the Commonwealth introduced no evidence of a deliberate premeditated murder.

2. The trial Court erred in giving Commonwealth instructions B, C, and D instructing the jury on first degree murder.

3. The trial Court erred in denying the defendant's motion for a mistrial after the Commonwealth attorney asked the defendant a question about the subsequent use of a bayonet on a specific date, in the presence of the jury.

4. The trial Court erred in denying the defendant's motion for a mistrial after the Commonwealth called a co-defendant, Burrell to the witness stand who he knew would plead the 5th amendment and refuse to testify and after commenting before the jury that if the Defense was not going to call Mr. Burrell, he was.

page 75 } 5. The trial Court erred in refusing to grant the defendant a new trial for *for* newly discovered evidence after the trial, concerning the complaining witnesses' conduct in a similar incident occurring

six days before the incident in question showing the complaining witnesses' disposition and character for turbulence and violence.

6. The trial Court erred in refusing to grant the Defendant a new trial because the Commonwealth suppressed evidence of the complaining witnesses' character for turbulence and violence.

Given under my hand this 14th day of March, 1969.

James David Stover

By Claude M. Hilton
Counsel for Defendant

Filed Mar 14 1969.

W. Franklin Gooding
Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

Record No. 7317

page 66 }

* * * * *

This 27th day of January, 1969, came the Commonwealth, by her Attorney; and the Defendant, JAMES DAVID STOVER, who stands convicted of a felony, to-wit: maiming, appeared agreeably in accordance with his recognizance of bail, and also appeared Claude M. Hilton, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

Thereupon, the Attorney for the Defendant made a motion to set the verdict aside as being contrary to the law and evidence and which motion the Court, after hearing argument thereon, denied. The Attorney for the Defendant then made a motion to have this case referred to the District Probation Officer for his investigation and report before sentencing, which motion the Court denied.

Thereupon, it was demanded of him, JAMES DAVID STOVER, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that JAMES DAVID STOVER do serve ten (10) years in the Penitentiary House of this Commonwealth, at hard labor.

Whereupon, the Attorney for the Defendant made a motion that the sentence imposed in this case run concurrently with sentence imposed in case number 14702, which motion the Court, denied.

And the Defendant having indicated his desire to apply to the Supreme Court of Appeals for a writ of error, it is adjudged and ordered that the execution of the sentence be, and the same hereby is postponed for a period of sixty days from this date to permit the Defendant to be present and assist his counsel in seeking such writ of error.

page 67 } The fee of the Court Reporter who recorded the evidence and incidents of trial in this case is hereby assessed as costs in this case as provided by Sec. 17-30.1 of the 1950 Code of Virginia, as amended.

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

And the Defendant is continued on bond.

Judge
A.V.B., Jr.

* * * * *

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* * * * *

MOTION FOR NEW TRIAL

COMES NOW the Defendant, James David Stover and moves this Honorable Court for a new trial and for grounds states as follows:

1. That new evidence has been discovered since the trial, which is material and a different verdict would probably have been reached on the merits, had this evidence been before the jury.

Randolph v. *Com.* 190 Va. 256, 56 S. E. 2d 226
Buford v. *Com.* 179 Va. 752, 20 S. E. 2d 509
Wigmore, Evidence 3rd ed. (63, 198, 248
Ingram v. *Peyton* 367 F 2d 933 (4th Cir. 1966)
Jackson v. *Com.* 98 Va. 845, 36 S. E. 487

2. That the Commonwealth suppressed evidence favorable to the Defendant concerning the character of the prosecuting witnesses

Brady v. *Maryland* 373 U. S. 83
Barbee v. *Warden* 331 F 2d 842 (4th Cir.)

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Jackson v. *Wainwright* 390 F 2d 288 (5th Cir.)
Levin v. *Katzenbach* 363 F 2d 287 (D. C. Cir.)
U. S. v. *Wilkins* 326 F2d 135 (2nd Cir.)
Giles v. *State of Maryland* 386 U. S. 66

WHEREFORE, for the grounds stated the Defendant moves this Honorable Court to grant him a new trial.

James David Stover

Varoutson, Koutoulakos & Arthur
By Claude M. Hilton

Filed Feb 24 1969.

W. Franklin Gooding
Clerk of the Circuit Court of Fairfax County, Va.

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AFFIDAVIT

State of Virginia

County of Arlington, to-wit:

I, Claude M. Hilton, counsel for the defendant, being duly sworn, represents to this Honorable Court the following:

1. That no evidence of the incident that occurred on July 19, 1968, involving the complaining witnesses in this case, came to my attention until on or about January 31, 1969, when a person associated with the Arlington County Police Department, Arlington, Virginia, informed me such a report was on file.

2. That the Assistant Commonwealth Attorney, prosecuting this case, and I had several discussions concerning this case, including discussions of the testimony of all the witnesses and the police records of these witnesses. At no time was any disclosure made to me about the incident involving the complaining witnesses occurring on July 19, 1968.

Claude M. Hilton

Subscribed and sworn to before me this 28th day of February, 1969. My commission expires April 21, 1972.

Mary T. Harding
Notary Public

page 71 }

* * * * *

This 28th day of February, 1969, came the Commonwealth, by her Attorney; and the Defendant, JAMES DAVID STOVER, who stands convicted of a felony, to-wit: maiming, appeared agreeably in accordance with his recognizance of bail, and also appeared Claude Hilton, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

And this case came on to be heard on the motion for a new trial filed herein in writing by the Attorney for the Defendant. Thereupon, the Court heard evidence on behalf of the Defendant and argument of the Attorney for the Defendant and argument of *of* the Attorney for the Commonwealth, and in consideration whereof the Court does deny the said motion, and to the action of the Court in denying the said motion the Attorney for the Defendant noted his exception.

And the Defendant is continued on bond.

A.V.B., Jr.
Judge

* * * * *

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NOTICE OF APPEAL AND
ASSIGNMENT OF ERROR

TO: W. Franklin Gooding
Clerk, Circuit Court
Fairfax County
Fairfax, Virginia

NOTICE is hereby given that James David Stover appeals from the sentence imposed by this Court on the 27th day of January 1969, and announces his intention of applying for a

Writ of Error and *Supersedeas* to the Supreme Court of Appeals of Virginia.

ASSIGNMENT OF ERROR

1. The trial Court erred in overruling the Defendant's motion to strike the Commonwealth's evidence as to first degree murder because the Commonwealth introduced no evidence of a deliberate premeditated murder.
2. The trial Court erred in giving Commonwealth instructions B, C, and D instructing the jury on first degree murder.
3. The trial Court erred in denying the defendant's motion for a mistrial after the Commonwealth attorney asked the defendant a question about the subsequent use of a bayonet on a specific date, in the presence of the jury.
4. The trial Court erred in denying the defendant's motion for a mistrial after the Commonwealth called a co-defendant, Burrell to the witness stand who he knew would plead the 5th amendment and refuse to testify and after commenting before the jury that if the Defense was not going to call Mr. Burrell, he was.
5. The trial Court erred in refusing to grant page 74 } the defendant a new trial for *for* newly discovered evidence after the trial, concerning the complaining witnesses' conduct in a similar incident occurring six days before the incident in question showing the complaining witnesses' disposition and character for turbulence and violence.
6. The trial Court erred in refusing to grant the Defendant a new trial because the Commonwealth suppressed evidence of the complaining witnesses' character for turbulence and violence.

Given under my hand this 14th day of March, 1969.

James David Stover

By Claude H. Hilton
Counsel for Defendant

Varoutsos, Koutoulakos & Arthur

By Claude M. Hilton
2054 N. 14th Street
Arlington, Virginia 22201

Filed Mar 14 1969.

W. Franklin Gooding
Clerk of the Circuit Court of Fairfax County, Va.

Record No. 7318

* * * * *

page 66 }

* * * * *

This 27th day of January, 1969, came the Commonwealth, by her Attorney; and the Defendant, JAMES DAVID STOVER, who stands convicted of a felony, to-wit: maiming, appeared agreeably in accordance with his recognizance of bail, and also appeared Claude M. Hilton, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

Thereupon, the Attorney for the Defendant made a motion to set the verdict aside as being contrary to the law and evidence and which motion the Court, after hearing argument thereon, denied. The Attorney for the Defendant then made a motion to have this case referred to the District Probation Officer for his investigation and report before sentencing, which motion the Court denied.

Thereupon, it was demanded of him, JAMES DAVID STOVER, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that JAMES DAVID STOVER do serve one (1) year in the Penitentiary House of this Commonwealth, at hard labor.

Whereupon, the Attorney for the Defendant made a motion that the sentence imposed in this case run concurrently with sentence imposed in case number 14702, which motion the Court, denied.

And the Defendant having indicated his desire to apply to the Supreme Court of Appeals for a writ of error, it is adjudged and ordered that the execution of the sentence be, and the same hereby is postponed for a period of sixty days from this date to permit the Defendant to be present and assist his counsel in seeking such writ of error.

page 67 } The fee of the Court Reporter who recorded the evidence and incidents of trial in this case is hereby assessed as costs in this case as provided by Sec. 17-30.1 of the 1950 Code of Virginia, as amended.

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

And the Defendant is continued on bond.

A.V.B., Jr.
Judge

* * * * *

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* * * * *

MOTION FOR NEW TRIAL

COMES NOW the Defendant, James David Stover and moves this Honorable Court for a new trial and for grounds states as follows:

1. That new evidence has been discovered since the trial, which is material and a different verdict would probably have been reached on the merits, had this evidence been before the jury.

Randolph v. *Com.* 190 Va. 256, 56 S. E. 2d 226
Buford v. *Com.* 179 Va. 752, 20 S. E. 2d 509
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U. S. v. *Wilkins* 326 F2d 135 (2nd Cir.)
Giles v. *State of Maryland* 386 U. S. 66

WHEREFORE, for the grounds stated the Defendant moves this Honorable Court to grant him a new trial.

James David Stover by Counsel

Varoutsos, Koutoulakos & Arthur

By Claude M. Hilton

Filed Feb 24 1969.

W. Franklin Gooding
Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

page 70 }

* * * * *

AFFIDAVIT

State of Virginia

County of Arlington, to-wit:

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2. That the Assistant Commonwealth Attorney, prosecuting this case, and I had several discussions concerning this case, including discussions of the testimony of all the witnesses and the police records of these witnesses. At no time was any disclosure made to me about the incident involving the complaining witnesses occurring on July 19, 1968.

Claude M. Hilton

Subscribed and sworn to before me this 28th day of February, 1969. My commission expires April 21, 1972.

Mary F. Harding
Notary Public

page 71 }

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Thereupon, the Court Reporter was sworn.

And this case came on to be heard on the motion for a new trial filed herein in writing by the Attorney for the Defendant. Thereupon, the Court heard evidence on behalf of the Defendant and argument of the Attorney for the Defendant and argument of the Attorney for the Commonwealth, and in consideration whereof the Court does deny the said motion, and to the action of the Court in denying the said motion the Attorney for the Defendant notes his exceptions.

And the Defendant is continued on bond.

A.V.B., Jr.
Judge

* * * * *

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

To: W. Franklin Gooding
Clerk, Circuit Court
Fairfax County
Fairfax, Virginia

NOTICE is hereby given that James David Stover appeals from the sentence imposed by this Court on the 27th day of January 1969, and announces his intention of applying for a Writ of Error and *Supersedeas* to the Supreme Court of Appeals of Virginia.

ASSIGNMENT OF ERROR

1. The trial Court erred in overruling the Defendant's motion to strike the Commonwealth's evidence as to first degree murder because the Commonwealth introduced no evidence of a deliberate premeditated murder.
2. The trial Court erred in giving Commonwealth instructions B, C, and D instructing the jury on first degree murder.
3. The trial Court erred in denying the defendant's motion for a mistrial after the Commonwealth attorney asked the defendant a question about the subsequent use of a bayonet on a specific date, in the presence of the jury.
4. The trial Court erred in denying the defendant's motion for a mistrial after the Commonwealth called a co-defendant,

Burrell to the witness stand who he knew would plead the 5th amendment and refuse to testify and after commenting before the jury that if the Defense was not going to call Mr. Burrell, he was.

page 74 } 5. The trial Court erred in refusing to grant the defendant a new trial for *for* newly discovered evidence after the trial, concerning the complaining witnesses' conduct in a similar incident occurring six days before the incident in question showing the complaining witnesses' disposition and character for turbulence and violence.

6. The trial Court erred in refusing to grant the Defendant a new trial because the Commonwealth suppressed evidence of the complaining witnesses' character for turbulence and violence.

Given under my hand this 14th day of March, 1969.

James David Stover

By Claude M. Hilton
Counsel for Defendant

Varoutsos, Koutoulakos & Arthur

By Claude M. Hilton
2054 N. 14th Street
Arlington, Virginia 22201

Filed Mar 14 1969.

W. Franklin Gooding
Clerk of the Circuit Court of Fairfax County, Va.

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Records Nos. 7316-7317-7318

page 1 }

* * * * *

Fairfax, Virginia
Circuit Courtroom Number One
Wednesday, January 15, 1969

The above-entitled matter came on for hearing before the Honorable Albert V. Bryan, Jr., a Judge of the Circuit Court of Fairfax County, and a jury, at 10 a. m.

APPEARANCES:

On behalf of the Commonwealth of Virginia:
Bruce Bach: Esq.

On behalf of the defendant:
Claude Hilton, Esq.

* * * * *

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DETECTIVE MUSTAINE, was called as a witness for and on behalf of the Commonwealth and, having been first duly sworn, was examined and testified as follows:

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CROSS EXAMINATION

By Mr. Hilton:

* * * * *

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* * * * *

Q. What was his purpose for coming to see you, Detective Mustaine.
A. It was related to me as he wanted to turn himself in, sir.
Q. And did he have anything with him at that time?
A. Yes.
Q. What did he have with him?
A. Had a bayonet type knife in a brown paper bag.
Q. And did he tell you what happened when he came in?
A. He made a handwritten statement out.
Q. What *what* did he tell you? Did he tell you what hap-

pened, in other words, in writing or through his conversation?

A. Through writing. He gave me a handwritten statement, yes, sir.

Q. Do you have a copy of that with you?

A. Yes, sir, it is in my case jacket.

Q. Would you get that please.

page 34 } A. Yes.

Q. Was there a typewritten copy made from his handwriting?

A. Yes, sir, I typed the handwritten copy.

Q. Would you get that. It might be easier for all the members of the jury to read.

The Court: I take it you have no questions concerning the voluntariness of this statement?

Mr. Hilton: No, certainly not. He freely gave it.

The Court: You mean you have checked into that and you are satisfied on that issue?

Mr. Hilton: Yes, I am.

The Court: Then your contention is that the defendant made a full disclosure of what went on there.

By Mr. Hilton:

Q. Would you read the statement that he gave you?

A. May I read from the typewritten one.

Q. Yes.

A. It says "Approximately"—well, it starts, the following is a typewritten confession given by James David Stover in handwritten form subject Stover gave in Fairfax in regard to this case.

* * * * *

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* * * * *

Q. Would you please go ahead and read the statement that he made regarding this case.

A. Yes, sir. It is dated July 26, 1968, 12:40. "At approximately 7 p. m. I left home. I picked up two other friends. We drove around for a while and we talked about various subjects. It was getting late and we were heading home on Great Falls Road toward Falls Church. I came upon a

car that was not properly being handled to my knowledge. I waited to pass, did so, and continued toward Falls Church.

Soon the same car came up to me fast and I could see he was trying to pass. Trying to avoid any further incident I took a driveway across a corner lot to avoid a
page 36 } light and"—I inserted "traffic light."

"The other car took the corner and continued the pursuit. I made a left down on Park Street and a left on Lincoln Avenue trying to see if they were really going to follow me or what. They did and I completed the procedure and did it again. They still were behind me after the second time around and I went straight on Lincoln Avenue toward Lee Highway.

The other car followed and began the pass and as it did what sounded like a shot was heard by me and the other occupants of the car. I was angry and followed the car to see where it was going.

There were in the chase a few objects hurled from the other car. After a few blocks I overtook the car. Stopped and got out ready to fight. My windshield had been broken and I was hit in the head with what I was told was a beer can. The other car then came—or backed up and left. I left and ended up on Great Falls Road headed toward Falls Church. I was stopped on the side of the road and at my left the other car came out at a high rate of speed. Catching a *glimps* of the occupants of the car I *coulse* see there was a car load determined to follow until either I lost them or ran out of gas or got out.

After a few blocks of driving we came out on a
page 37 } road that seemed to be a highway. Later I realized it was Dolly Madison, *McClean,* Virginia.

The car pulled into a gas station and I, after stopping, waited a second to see what was what. At that time the occupants of the other car jumped out and ran toward my car. There were two heavy objects that hit my car and broke the windshield. Four people from the other car came at us. Two of them came to my side and two to the other side. I jumped out and was grabbed by two guys. I had the knife in my hand and started swinging. I was hit in the face a couple of times and then the two of them ran to their car. I then ran to the other side of my car and handed one of the guys over there—" I am sorry. "I grabbed one of the guys over there with my hand by the shift. I *hollerred* twice," get off, get off right now." It seemed that my companions were trapped in the car. One of the other boys from the other car ran down the

street. The other started to fight me. I held him down and *hollerred* that I had a knife and that he better stop. In the end I cut his hand. By this time the other car had left. The two left behind had given up and one ran and the other was in my group; the two occupants of my car were out and one had an instrument and was saying something like, "Let me hit him, let me hit him." As far as I was concerned, page 38 } the fight was over.

I held the two apart for a second and then I questioned the fellow about what he was trying to do. He said some remark that I can't recall. I asked him about the cut and we looked at it. I told him to take the field bandage and wash his cut and put it on. He took it and I got in the car and left.

I went to work this morning and on the news about 10 o'clock I heard that a boy of 17 died in a fight last night. I took the afternoon off, got the weapon and came into the station."

Q. That is all I care about.

Mr. Hilton: I ask that this be marked and put into evidence for the Court, please.

Mr. Bach: I have no objection, Your Honor.

The Court: All right. Be received as Defendant's Exhibit 1.

(The above-referred to document was marked as Defendant's Exhibit 1 for identification and was received into evidence.)

By Mr. Hilton:

Q. Did you have occasion to talk with Mr. Stopage 39 } ver at other times about this case?

A. After the statement to determine who was in the car with him.

Q. Did you ever talk to him again?

A. No, sir.

Q. After talking with Mr. Stover, Dave Stover, did you go out and then talk to some other people that were involved in this incident?

A. Yes, sir.

Q. And then after talking with them did you ever come back and talk to Dave Stover again?

A. No, sir.

Q. You got his statement that he gave you, that he voluntarily gave you, and you never talked with him after that?

A. No, sir, I did not.

Mr. Hilton: I don't have any further questions.

REDIRECT EXAMINATION

By Mr. Bach:

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Q. Did you, in this particular case, did you ask the dead boy's brother or David Ricken, the other victim, to sit down and write out their version of this?

A. No, I did not, sir.

Q. How did you conduct the investigation of those two?

A. Took tape recorded statements of narrative style with questions and answers also. It was typed up later by a stenographer.

Q. You questioned the victims?

A. Yes.

Q. And you asked the defendant to sit down and write out what his version was of what happened?

A. He was instructed to do so, yes, sir. I did not ask him to do so.

Q. But you never questioned him?

A. In regards to the incident after he had written out the written statement, no, sir.

Q. Is there any particular reason that you know of why he was not questioned?

A. When he turned himself in at 12:15 and had identified himself as being, or we assumed he was the subject involved in this incident. At that point in the investigation page 45 } we had the defendant's *statment* showing he was there. That was all we did have, other than the statements from the victims and the circumstances in the case.

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page 58 }

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ROBERT ELLIS, was called as a witness for and on behalf of the Commonwealth and, having been previously duly sworn, was examined as follows:

DIRECT EXAMINATION

By Mr. Bach:

Q. State your name, please?

A. My name is Robert Ellis.

Q. And you are a detective, a sergeant in the Fairfax County police department?

A. I am, yes, sir.

Q. Were you employed in that capacity on the
page 59 } 26 day of July, 1968?

A. I was, sir.

Q. And on that date did you have occasion to see the defendant, Mr. Stover?

A. I did, yes, sir.

Q. And would you tell the jury the circumstances under which you saw Mr. Stover?

A. I was in my office around noon on that date when the defendant appeared at the door and asked for detective Sanders. I advised him that Detective Sanders was not in and asked if I may assist him. At which time he *offerred* a package to me and told me he had read in the paper where a boy had died and he would like to turn in a knife.

I, being aware of the situation, asked him to have a seat and I got a hold of Detective Mustaine and asked him to come in the office right away.

Q. Did he in fact give you the knife?

A. He did, yes, sir.

Q. And did you make any distinct marks on the knife?

A. Yes, sir.

Q. Sergeant Ellis, I am showing you a bayonet or a knife marked as Commonwealth's Exhibit Number 4. Can you identify that knife?

page 60 } A. Those are my initials on the butt end of it.

Q. Is that the knife that Mr. Stover gave you?

A. It is, yes, sir.

Mr. Bach: No further questions.

Marlene McDaniels

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MARLENE McDANIELS, was called as a witness for and on behalf of the Commonwealth and, having been first duly sworn, was examined and testified as follows:

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page 75 }

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By Mr. Bach:

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A. We pulled in on the other side of the cars and, as I said, it looked like we lost them because we didn't see anything. Then a car came in with the lights off and it was them, and we were in the car and David said, "All right. Get out of the car, Frank, and try to keep the doors shut."

Q. Excuse me, Marlene. Dave was still driving?

A. Yes, sir.

Q. Frank Koerner where was he sitting?

A. On my left and Paul on my right and Tom was still in the passenger's side.

Q. And who was sitting behind Dave?

A. Frank.

Q. And who was sitting behind Tom Bewick?

A. Paul.

Q. Do you know how close the car came to your car before it stopped, the Karmann Ghai?

A. Well, I can't really say. I guess maybe 20 or 30 feet. I really don't know the distance. I know they pulled in right here near the pumps, and we were on the other

page 76 } side of the station.

Q. What type of Pontiac did Dave Ricken have, was it a hardtop or what?

A. It was a convertible.

Q. And what type of a window did it have in the back?

A. It was a plastic window, hard plastic. You can't see very well out of it.

Marlene McDaniels

Q. Well, when the other car pulled in behind you, then what happened?

A. As I said, David said, "Get out of the car and try to hold the door shut so they can't get out." They started to get out of his side of the car and it was locked so it held them up a few seconds, and Tom Bewick got out first.

Q. The passenger's side?

A. Out the passenger's side, and then David and Paul and Frank.

Q. Paul and Frank got out of the back seat?

A. Yes, sir. They told me to stay there and not to move from where I was. Then they went back to the other car, and I couldn't see anything. I turned around and looked out the window but all I could see was shadows. I couldn't see what was happening at all.

Q. And why was this that you couldn't see?

page 77 } A. Because of the back window. It was all fogged up and you couldn't see anything, just some shadows.

Q. Were you looking around trying to see?

A. I looked around once trying to see, but I couldn't see anything.

Q. Was anything said about throwing rocks?

Mr. Hilton: I object to leading the witness.

The Court: Objection sustained.

Mr. Bach: You can go back to the witness stand, Marlene.

(Witness returns to the stand.)

By Mr. Bach:

Q. Now, Marlene, what is the next thing you remember seeing or hearing?

A. Well, about five minutes later, I don't think it was any longer than that, Frank came out to the car—

Mr. Hilton: I cannot hear.

By Mr. Bach:

Q. Repeat it.

A. About five minutes later Frank came up to the car and Dave was right behind him, David Ricken.

Q. Who do you mean by Frank?

A. Francis Peter Koerner. Dave opened the door

page 78 } and he said, "Move over, Marlene." So I moved

over in the back seat and he kind of pushed Frank in and got in and then—

Q. Where did he push Frank?

A. He pushed Frank in the back seat. He was right on my left side. Frank Koerner was leaning against the window. He said, "I have been stabbed, I have been stabbed." I said "No, you haven't", and I noticed there was a blood stain on the back of his shirt on his right shoulder, and at first I thought he was kidding, and then I saw the blood stain. He said, "I am going to die, I am going to die." I said, "No, Frank, you are not. You are not. Forget it." And then David said, "All right, Marlene, I am going to get out of here and I want you to get the license plate of the car."

So we backed up and we pulled around to where the Karmann Ghai was and he said, "Can you get it", and I said, "No, David, I can't see the license plate." He said, "I will move up closer." We got up closer and I saw the plate and Dave did and I just said it over and over to myself, and then we pulled out of the Langley Esso Station. In the meantime Frank had fallen on my lap and was groaning and saying, "I am dead, I am dead." He fell in my lap and he was just bleeding terrible, and so we were going down Dolly Madison Boulevard and about halfway to the substation

page 79 } David said, "Marlene, you are going to have to take the wheel. I think I am going to pass out." I said, "All right", and he said, "Jump over the seat", and I said, "I can't. I will step on Frank." I put his head on the seat and I went around and got in the car and started to drive off.

Q. Halfway to the substation did you all have a destination in mind?

A. Yes. David started toward the substation. I said, "Where are you going? You are not heading toward the hospital." He said, "No, I am going to the substation." So I said, "All right." Then he started on his way.

Q. And then you got behind the wheel?

A. Then I got behind the wheel and drove the rest of the way.

Q. Did you have occasion to observe David Ricken's condition?

A. The only thing I saw was some blood on his head and that is the only thing I noticed at the time while we were in the car.

When we got to the substation I got out of the car and he said, "I will put it in gear. You just run in there and tell

them the license plate number." I got to the door and I was covered with blood and I just started shaking.
page 80 } I could only remember the first three digits of the license plate, and the policeman went out and I got Dave out of the car and they said that Frank was really bad off and David got out of the car and he was covered with blood.

Q. Did Frank say anything else?

A. When I laid his head on the back seat he was making horrible moans. I got in the back and David got out and kept repeating the license plate over. He passed out for about three seconds and the police went in and called an ambulance and I went on in the substation. I gave them my story and they called the two ambulances, one for us and one for Tom and Paul, to get them. We told them two other boys were still down at the station.

Q. That would be Tom Bewick and Paul Koerner?

A. Yes.

Q. You left them at the station?

A. Yes, we didn't have time to get them. We didn't see them anywhere.

Q. Marlene, did you say Frank Koerner was bleeding from anywhere other than the back?

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page 89 }

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By Mr. Hilton:

Q. All right. When did this discussion about fighting occur in your car?

A. Well, the second time that the chase started Frank said, "Let's fight them", and David said, "No, I don't want to." Either Tom or Paul said, "It looks like they have *tire* arms in their car." David said, "No, I don't want to fight them. My car might get tended up or we might get hurt." Frank said, "Let's fight them." David said, "No, let's forget
page 90 } it."

Q. Were those discussions as you were going out toward the gas station, toward Langley Esso?

A. Yes, sir.

Q. And then you saw this car on the road and you asked them to come along and help, is that correct?

Marlene McDaniels

A. Yes, we were going there as we passed them.

Q. How many people in that car?

A. I only remember seeing one. There was nobody in the back seat.

Q. Was there any discussion about how you were going to meet at Langley Esso?

A. A lot of times when all the guys get together and they get split up they meet at Langley Esso a little bit later on in the night.

Q. Everybody in the car thought that there were going to be some other people out there, did they not?

A. Yes.

Q. Yes, indeed.

How long did or had your car been stopped after you pulled into the Esso Station before the other automobile pulled in behind?

A. Only about two minutes.

Q. It was a full two minutes?

page 91 } A. Yes, you know, just a couple of minutes.

Q. It was a very short period of time?

A. Yes, sir.

Q. When that car pulled in did they turn their lights off or the engine?

A. Yes, sir. I don't know if the engine was off. I did notice the lights were on.

Q. Are you sure that the car turned its lights on?

A. Yes, sir.

Q. Or do you know?

A. I am sure it turned its lights on.

Q. You don't know whether the engine was turned off or not?

A. No, sir.

Q. How long after that car stopped behind you did the people get out of your car? Almost instantaneously?

A. Yes, sir.

Q. And there were two people that went to one side and got out of the left side of the car and two people got out of the right and ran back to the other car, is that right?

A. Well, they got out of the car. I don't know what they did after that.

Q. Two of them got out on each side, didn't

page 92 } they?

A. Yes, sir.

Q. You said five minutes before they came back. Five minutes is a long time, isn't it?

A. Well, it happened awfully fast. They were out—
Q. Real quick, wasn't it?
A. Yes, sir.
Q. It was almost just the time that it would have taken the two people to have gotten out of the car and ran back to the other car and then ran back to your car, wouldn't it?
A. No, it wasn't that fast.
Q. How much longer would it have been?
A. As I said, it was a little bit longer than five minutes, but not much.

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page 95 }

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DAVID RICKEN, was called as a witness for and on behalf of the Commonwealth and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bach:

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A. Yes, sir. We were going to go to Tysons Corner and one boy had to be home, I think it was by—well, I am not too sure what time it was, but we had to take him home before we could turn back around, and after we had dropped this boy off, that is when the car with Burrell, Stover, and Henderson came passed us.
Q. What type of a car was this?
A. It was a Volkswagon Karmann Ghai.
Q. And do you know who the driver of that vehicle was?
A. Yes, sir.
Q. And who was it?
A. Stover.
Q. Do you see him the the courtroom.
A. Yes, sir.

David Ricken

Q. The defendant?
A. Yes, sir.
Q. What happened. Where were you when it passed you?
A. I was on Great Falls Street, coming away from Lemon Road toward Haycock Road.
Q. What happened when Mr. Stover and Mr. Henderson and Mr. Burrell passed you?
page 98 } A. One boy was hanging out the window and swearing and someone else had thrown something at the car.
Q. Now, who was this, do you know?
A. This was Henderson.
Q. And where was he sitting in the Stover vehicle?
A. He was on the passenger's side.
Q. Front seat?
A. Yes, sir.
Q. Then what happened?
A. I pulled up behind them and *shown* my headlights. I put my high beams on and *shown* them in their back window and followed them down the road at the same speed they were going and they went to the vicinity of West Street and Great Falls Street down in that area. I am not familiar with the names of all of the streets.
Q. Just do the best you can.
A. We followed them around in through the blocks in that area maybe three or four times. We went around the same blocks and then they ran a light and I stopped and waited and proceeded to follow them. Somewhere in the area we passed them, or I don't really know for sure whether we passed them or whether we lost them, but we headed back toward Lemon Road and they suddenly appeared and were pursuing us.
page 99 } We took a right on Lemon Road and went down Lemon Road about five or six blocks and they were right on me and started to pass me and I hit the brakes and they skidded on passed me and I took a left on the street. I don't know the name of it.
Q. Why did you do this?
A. Just to evade them, to keep them from doing any damage to my car or anything.
Q. Go ahead.
A. I stopped for a second to see if they were stopping or if they were going to go ahead. They stopped at one point and got out of the car. One boy got out, Henderson.
Q. How did you recognize him?

David Ricken

A. It was the beard and the moustache.
Q. He had a beard and moustache?
A. Yes, sir.
Q. Go ahead.
A. The boys in my car told me he was running toward my car with an object in his hand. They said it was a tire iron.

Mr. Hilton: I am going to object, if the Court please, to what other people told him. I think he should testify to what he observed and what he did.
The Court: Objection sustained.

page 100 } By Mr. Bach:
Q. Just tell what happened next. Tell us what you did and what you saw.
A. Yes, sir. I proceeded down the road I was on and turned in a few blocks up to the left, I believe it was, and pulled in between two cars, and here Francis got out to relieve himself.
Q. Frank Koerner?
A. Yes, sir, and we waited for him.
Q. What type of street was this?
A. Cul-de-sac.
Q. Go on.
A. *Any* my car was between two parked cars. We had about four car lengths between the two cars.
Q. Did you leave the motor running?
A. Yes, sir.
Q. Did you leave your lights on?
A. No, sir.
Q. Turned your lights out?
A. Yes, sir.
Q. Tell what happened next if you would?
A. Frank came back to the car and just after he had gotten into the car the Volkswagon Karmann Ghai went
page 101 } by the end of the street we were on and on out of sight. We waited there for about—
Q. Excuse me. Did they go past your car or past the street?
A. They past the end of the street we were on. It wasn't past our car.
Q. Never went past your car?
A. No.
Q. Go ahead.
A. From there, after we waited awhile—

David Ricken

Q. How long did you wait after their vehicle past the cul-de-sac?

A. I am not too sure. I know it was a reasonable time we *figued* that they would be quite aways away.

Q. Then what happened?

A. We turned around and we went back out almost identical to the way we came in and we proceeded back on to Great Falls Street, left off Lemon Road and we had just crossed a small bridge on Great Falls Street when there was a gravel turn-off where there had been a fruit stand at one time, and as we past this place I noticed the car and one of the boys was bending over picking up some rocks or something on the ground and the other two were yelling at us and I
page 102 } kept going. I didn't slow down or anything. I excelerated from there and they pulled out and followed us.

From there I took a left on Molley Drive and went down Molley Drive and around that block once and then I took the next left on Haycock Road. After I got to the end of Haycock at the intersection of Haycock and Westmoreland I took another left and proceeded on to Westmoreland toward the intersection of Kirby and Westmoreland. I cut around the light across where there had been a fruit stand, it is a by-pass, a gravel by-pass. I cut across that to avoid being stopped by a red light, and on to Kirby Road, and I went on down Kirby Road toward Langley Esso.

Q. Where was the Karmann Ghai?

A. The Karmann Ghai was right behind me all this time.

Q. Go ahead.

A. As we got down toward Saint Dunstance Church they pulled up even closer and they attempted to pass me a couple of times, but each time I sped up and then one time they pulled up and I noticed them right beside me so I hit the brake and they went on past me again and that is when a beer bottle was smashed on my hood.

Then when they stopped I past them and proceeded on down Kirby and into Langley Esso.

page 103 } Q. Now, David, let me interrupt you once more. You say they succeeded in passing you at one time?

A. Yes, sir.

Q. And what did they do when they past you?

A. A bottle was smashed on my hood.

Q. Did they keep going then?

A. No, they hit the brakes. They were going to try and stop me.

David Ricken

Q. And so what did you do?
A. I past them on the left hand side.
Q. So you were in front once again?
A. Yes, sir.
Q. And then what happened?
A. I proceeded on down to the bad part of Kirby Road where I figured I could lose them because I know the road fairly well because I used to work at Langley Esso. I looked out the rear view mirror a few times and then after about the first quarter of a mile of the bad part of Kirby Road I couldn't see their headlights anymore so I figured that I had a considerable lead, maybe a block or a half a block or something on them.

As I came into the last bad turn on Kirby Road I looked back out the side windows—mirrors—around
page 104 } the curve to see if they were following and I didn't see their headlights anywhere so I *though* I had plenty of time to hide if I was going to or to take off —I mean, to proceed down the road.

I came up to the edge of the lot at Langley Esso and cut into the lot.

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page 106 }

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I pulled up right beside that car, a little ahead of it and rather than step on the brake lights I pulled the emergency —or stepped on the emergency brake pedal.

Q. Why did you do these things, David?
A. To evade them if they were within sight of my car they wouldn't have been able to see it unless I had hit the brake lights.
Q. And what is the next thing? Well, going back again, David, had you been drinking?
A. Yes, sir.
Q. What were you drinking?
A. Beer, sir.
Q. Were you drunk or sober?
A. I was still sober, sir.
Q. And who else in the car was drinking?
A. Paul Koerner, Tom Bewick, and Frank Koerner.
Q. Frank had been drinking?

David Ricken

A. Yes.
Q. Was he drinking much?
A. No, sir. I would say that he hadn't even had one whole can of beer.
Q. Had Marlene been drinking?
page 107 } A. I can't remember, sir.
Q. And to the best of your knowledge before pulling in the Langley Esso, did anyone from your vehicle throw anything at the Stover vehicle?
A. Yes, sir, in front of the Saint Dunstance Church when they past us or when we past them. I believe it was Paul Koerner who threw a beer can into their car or toward their car, sir.
Q. Now, was this before or after the beer bottle smashed on your car?
A. After the beer bottle smashed on my hood.
Q. What happened when you stopped at the Langley Esso Station as best as you can recall?
A. I told Tom—the first thing I said was, "Tom, if they pull on to the lot, if they pull up behind us, jump out and grab a handful of rocks and throw it at them if they are out of the car.
Q. What kind of rocks?
A. Loose gravel, small pieces.
Q. In the parking lot?
A. Yes, sir, pebbles.
Q. And you say you said this to Tom Bewick?
A. Yes, sir.
page 108 } Q. Where was he sitting?
A. Passenger's side.
Q. Then what happened?
A. Well, I was saying to Tom this, and as I did, they pulled up right behind us.
Q. How far behind you did they pull up?
A. Approximately five feet.
Q. In back of your vehicle?
A. Yes, sir.
Q. Did they have their lights on, do you know?
A. No, sir, they didn't.
Q. Do you know whether their *moter* was running or not?
A. No, sir, I can't remember.
Q. What happened when they stopped their car behind yours?
A. I tried to get out of my car and the door was locked and

David Ricken

I unlocked it so it kind of surprised me and I reached around and by this time Stover was part way out of the car.

Q. You mean the defendant?

A. Yes, sir.

Q. Now, was anything said about what you all would do when they pulled in there, do you recall?

A. No, just what I told Tom Bewick about the rocks.

page 109 } Q. Why did you get out of your car, Mr. Ricken?

A. I wasn't planning on getting out of my car. I didn't think they would see us, then when they did I thought there was no use in running any further because I couldn't out-run them. They had already proven that. They stayed right with me all the time.

Q. Now, and did you get out of your car?

A. Yes.

Q. You did get out of your car, and what did you do?

A. I went immediately for the driver's side of the Volkswagon and Stover was all the way out. I had it in mind to kick the door shut and keep him in the car because I remembered that the time before when they were stopped that there had been a weapon mentioned, and I thought that if I could keep him in the car they wouldn't have a chance to use it.

Q. You mean somebody in your car mentioned a weapon?

A. Yes, sir.

Q. So you went back to the Stover vehicle?

A. Yes, sir.

Q. And when you reached the Stover vehicle where was Mr. Stover?

A. He was out of the car and closing the door.

Q. And was there anything unusual about his appearance or what he was doing?

page 110 } A. He approached me with both hands up and I grabbed him around the wrists.

Q. Did you see anything in his hands at that time?

A. No, sir.

Q. When he grabbed you around the wrists then what did you do?

A. I pinned him up against the back, rear part of the car on the side and I released his left hand and hit him a couple of times with my right hand.

Q. Then what happened?

A. I was hit in the back of the head by somebody that I hadn't seen approach me. All my attention was directed to Stover and I staggered back one step and tried to clear my

head and I was hit again and I went down on one knee. And during between the two times that I was hit I was stabbed once in the mouth.

Q. Do you know who hit you in the back of the head?

A. No, sir. I saw nobody, but I know who did it.

Mr. Hilton: I object. That is hearsay.

The Court: Objection sustained.

By Mr. Bach:

Q. Did you see Stover when you were hit in the back of the head?

page 111 } A. Yes.

Q. He was in front of you?

A. Yes, sir.

Q. Now, you say you were stabbed in the mouth?

A. Yes, sir.

Q. Who stabbed you in the mouth?

A. Stover.

Q. Did you see this happen?

A. Yes, sir.

Q. And where in the mouth did he stab you.

A. I had two stitches on the outside and 20 stitches inside and my teeth were parted and all loosened.

Q. Did it open up a wound?

A. Yes, sir.

Q. Did it bleed?

A. Yes, sir.

Q. What happened after you were stabbed in the mouth?

A. This was the second time that I was struck in the back of the head and I went down on one knee and Stover grabbed me by the left shoulder and pushed me down on my hands and knees.

Q. What were you trying to do, if anything, at this time?

A. I was trying to get away from him to clear

page 112 } my head up. I couldn't tell what was going on.

I was pushed down on my hands and knees by Stover. He had his left hand on my shoulder and he stabbed me in the neck.

Q. What part of the neck did he stab you in?

A. Down the side of the hairline here.

Q. Does it have a scar there?

A. Yes, sir.

Q. Would you step over here and show the jury the scar, please?

David Ricken

A. Yes, sir. (Witness complies.)

By Mr. Bach:

Q. About how long is that scar?

A. I have been told approximately about four and a quarter inches.

Q. Did you ever have occasion to personally measure the depth of that scar with any part of your body?

A. Right after I was hit I reached up because of the pain in my neck and I stuck my fingers against it and it went right inside up to the first joint of this finger.

Q. And was that bleeding?

A. Yes, sir, profusely.

Q. Now, after Mr. Stover stabbed you in the *nech,* or, what position were you in when he stabbed you?

page 113 } A. I was on my hands and knees trying to scrabble away from him.

Q. And where was he?

A. He was—he had one hand on my left shoulder and he was bringing his arm up to stab me again. I looked up and saw the knife and when I saw the knife I tried to get out because he was rising up to hit me again, and he stabbed me in the back.

Q. And where in the back did he stab you?

A. Beside the right shoulder blade.

Q. And you have the scar there?

A. Yes, sir.

Q. And did that bleed?

A. Yes, sir.

Q. And you saw the knife, is that correct?

A. Yes, sir.

Q. Can you describe the knife to the jury at all?

A. No, sir. I just saw the blade. I couldn't see the handle. He had his hand wrapped around it.

Q. Then this time you were flat on your stomach?

A. Yes, sir.

Q. Where was Stover when you were on your stomach?

A. He had one knee in my back and one hand on my shoulder holding me down.

page 114 } Q. And after he stabbed you in the back what was the next thing that occurred?

A. I heard Frank, or at that time I didn't know who it was. When I *frist* heard it I heard somebody running or running toward us in the gravel and Stover turned his attention from me toward Frank Koerner. That was who was approaching us.

David Ricken

Q. How did you learn it was Frank?
A. I turned and looked as I was getting back up.
Q. And had Frank been with you and Stover at any time prior to this?
A. No, sir.
Q. Where was Frank sitting in the car?
A. He was sitting on the passenger's side in the rear.
Q. And is that a two or four door car?
A. It is a two door.
Q. So you had to get out before he could get out?
A. Yes, sir.
Q. Now, is there any special mechanism on the seats of your car so that they won't fall directly forward?
A. Yes, sir. It is a lock that you have to reach down and lift up.
Q. David, I am showing you Commonwealth's Exhibit Number 15. Do you recognize the seats on that car?
page 115 } A. Yes, sir, they are mine.
Q. Would you show the jury the lock that you are talking about on the seat of the car?
A. This is the seat lock here. It has to be raised up and then push the seat forward before you release it.
Q. From the time you got out of the car, David, when you ran back, did you hesitate at all to going back to the Stover vehicle?
A. No, sir.

Mr. Bach: You can return to the stand.

(Witness complies.)

By Mr. Bach:
Q. And Frank was in the back seat when you got out?
A. Yes, sir.
Q. And when you were lying on the ground and turned around and saw Frank coming, did you hear Frank say anything?
A. Yes, sir. He was yelling at Stover, and Stover was yelling at him.
Q. What, if you recall, did Frank Koerner yell to Stover?
A. I don't know the exact words. I can't remember the exact words.

Mr. Hilton: I object.
Mr. Bach: Well, Your Honor, I think he can

page 116 } say as closely as he can remember, or remember the contents or meaning of what was said.

The Court: Objection overruled.

By Mr. Bach:

Q. As best you can remember, what did the deceased, Frank Koerner, yell?

A. He said, "I am going to get you for this", or "We are going to get you for this", I can't remember.

Q. One or the other?

A. Yes, sir.

Q. And what did Mr. Stover do or say when that happened?

A. He used one profane word and "kill you."

Q. Well, I realize it may be embarrassing.

Mr. Hilton: That is what I object to, their trying to interject some profanity that may or may not have been said, and the witness says he doesn't remember what was said.

The Court: I understood it to be that he didn't remember exactly what the deceased said. He qualified that by *asing* what the defendant said.

Mr. Hilton: I understand that the question goes to the defendant at this point, if the Court please.

The Court: He hasn't said that he didn't remember what the defendant said. Ask him whether he remem-
page 117 } bers, Mr. Bach.

By Mr. Bach:

Q. Do you remember what Mr. Stover said in response to Frank Koerner?

A. Yes, sir, I remember exactly what he said.

Mr. Hilton: I have no objection then.

By Mr. Bach:

Q. Would you state to the jury exactly what Mr. Stover said?

The Witness: Is it all right with you, sir?

The Court: Yes, sir.

By Mr. Bach:

Q. Go ahead.

A. He said, "You mother fuckers I am going to kill you."

David Ricken

Q. And when he said this to Frank what did Mr. Stover do?

A. Stover approached Frank in the same manner that he approached me with both hands up and the knife and blade toward Frank.

Q. And what is the next thing that happened?

A. I was still standing or getting up, and I saw black spots before my eyes. I could hear them scrabbling and everything, but I couldn't see what happened until after I was all the way up. My eyes cleared up and Frank was standing
page 118 } there and he said, I heard him say, "Dave, I am stabbed, I am stabbed." Then I ran to him and pushed him toward the car. I said, "Get in the car Frank. Let's go." He stood there and looked at the spot where I had been on my hands and knees as if he didn't even hear me. I ran toward the car and I noticed him still standing there, and I ran back to him and grabbed him and pushed him toward my car, and I jumped in the driver's side and he walked down to the passenger's side and past the open door and I reached out. I went across both seats out the passenger's side and grabbed him while he was still in reach and pulled him in the car.

The back seat on that side was still folded forward from when Paul Koerner had gotten out that side, and I went and pulled him in the seat and directed him right into the back seat where Marlene McDaniels was.

Q. What happened next?

A. I reached over and pulled the door shut and my door wasn't fully shut. I closed it and I heard Stover say—is it all right to say, sir?

The Court: Yes, sir.

The Witness: Stover said, "You guys are messing with the wrong mother fuckers."

By Mr. Bach:

page 119 } Q. Was that directed at you?

A. No, it was directed at whoever was on the other side of the car, of the Stover car. I took it that he said it at me. That is why I looked when I heard him yell it. I thought maybe he was coming back.

Q. What happened next after you got to Frank Koerner and got him in the car?

A. I closed my door and someone was approaching my car. I didn't see who it was. They were running toward my car

and I spun in the gravel when I accelerated. My tires spun and I pulled out of the gravel entrance on to Dolly Madison and back into the pavement in front of the Langley Esso.

Q. Why did you do that?

A. I was going to get their tag number of the Karmann Ghai.

Q. What happened next when you pulled into the station again?

A. I looked back to the Karmann Ghai and I couldn't see anything and I couldn't hear anybody and I told Marlene, I said, "Marlene, can you remember that tag number", or "can you read it?" She said, "No." I said, "Well, this is the number", and I told it to her and I said, "Repeat it and don't forget it. Repeat it." She repeated it and I was

page 120 } repeating it as I went up to the light and then back toward Fairfax substation—the McClean substation.

Q. McClean substation?

A. Yes, sir.

Q. Did you know at this point, David, how many stab wounds you had in your body?

A. I had one in my mouth, one in my neck, and one in my back, and the stitches that he tore out of my head were reopened and lengthened.

Q. When you were hit in the back of the head, not by Stover, but by someone else, did that cause any wounds to your head?

A. Gave me three raised cuts across the back of the head.

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page 123 }

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Q. I show you a picture marked Commonwealth's exhibit 16, can you identify the person in that picture?

A. Yes, sir. That is Frank Koerner.

Q. That is the boy that you saw and were with?

A. Stabbed, yes, sir.

Q. Now, Mr. Ricken, you stated that you saw Stover and Frank Koerner come together?

A. Yes, sir.

Q. And then you blacked out momentarily?

A. Just my eyesight. I didn't pass out.

Thomas Bewick

Q. How long a period of time was it before the time you blacked out when you heard Frank yelling, "I have been stabbed."

A. It wasn't even two seconds.

Q. Did you see anyone else on that side of the car?

A. Not at this time.

Q. Did you see where Stover went when he started hitting Frank?

A. Yes. He went back around the back of the car, the Karmann Ghai.

Q. Toward the other side of the car?

page 124 } A. Yes, sir.

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CROSS EXAMINATION

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page 147 }

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By Mr. Hilton:

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Q. Now, after that first blow was struck do you know who struck any further blows on you?

page 148 } A. Yes.

Q. And who did?

A. Stover.

Q. Did you see him?

A. Yes, I saw him when he stabbed me in the back.

Q. You did?

A. I was on my hands and knees looking up toward him.

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page 156 }

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THOMAS BEWICK, was called as a witness for and on

Thomas Bewick

behalf of the Commonwealth and, having been first duly sworn, was examined and testified as follows:

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page 172 }

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CROSS EXAMINATION

By Mr. Hilton:

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page 177 }

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A. Frank was acting, I guess, belligerent, the whole time, but Dave kept telling him to be quiet that we didn't want to fight because, you know, like I said, we thought they had a tire iron.

Q. While driving on Kirby Road the only one who wanted to fight was Frank?

A. Yes, sir.

Q. Nobody else?

page 178 } A. No, sir.

Q. What changed your mind when you got out to the Langley Esso station? Who told you about the rocks?

A. Dave Ricken.

Q. David Ricken said. "Let's get some rocks and throw some rocks."

A. No, he said to me, "Tom, get out of the car and throw some rocks and make sure they don't get out first."

Q. And what did you intend to do when you got out of the car and threw rocks and started running toward the car?

A. Just what Dave told me to do, make sure they didn't get out.

Q. You weren't reaching inside to pound them or anything, were you?

A. No, sir.

Q. You just thought that all four of you would get out of the car and walk back and just hold the door shut and laugh at everybody that was in there?

Paul Koerner

A. I didn't imagine we were going to walk back.

Q. You didn't walk back, did you. What made you think you wouldn't walk back?

A. We knew that they had a weapon and we

page 179 } wanted to make sure—

Q. That didn't stop you from going back there, did it?

A. If he was in the car he could not hit me with that.

Q. Oh.

A. As long as I kept him in there he wouldn't hurt anybody.

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page 186 }

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PAUL KOERNER, was called as a witness for and on behalf of the Commonwealth and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bach:

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page 194 }

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Q. And what did Stover, the defendant, do?

A. He came after me with the knife, and well, he came at me like this and when he came up to me I turned away like this and held my arm up like this and he knifed me across here. There is a scar here about that big. I guess about four inches, and came around and he cut me in the wrist here and cut my thumb about half off.

Q. And why didn't you run out of there?

A. Because the guy in the back seat had grabbed my arm and I couldn't get away.

Q. Was he still holding your arm when Henderson stabbed you—I am sorry—when Stover stabbed you?

A. Yes, he was.

Q. Do you have any marks or scars from this wound?

page 195 } A. Yes, I do. There are three. In fact, one is right here in the wrist, and there is one here on my thumb. The thumb is still not fully recovered.

Q. Are you saying that this was one stab?

A. One clean slash like that.

Q. And you turned your arm?

A. Yes, I did.

Q. Would you step down and show the jury your wrist and show them your arm, too.

A. Yes.

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page 222 }

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page 223 } WILLIAM F. ENIS, was called as a witness for and on behalf of the Commonwealth and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bach:

Q. State your name, please, sir?

A. Dr. William Enis.

Q. And you are a medical doctor?

A. Yes.

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page 229 }

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Q. Dr. Enis, looking at Commonwealth's Exhibit Number 4, how much energy could you say, or how much force would be necessary to drive that particular instrument straight into a man's back six inches deep?

A. Obviously I can't give you any exact force, but I can say that it would take a well directed strike with considerable force to drive it through the skin because this is a dull instrument, as you can see.

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page 238 }

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Fairfax, Virginia
Circuit Courtroom Number One
Thursday, January 16, 1969

The above-entitled matter came on for hearing before the Honorable Albert V. Bryan, Jr., a Judge of the Circuit Court of Fairfax County, and a jury, at 9:30 a. m.

APPEARANCES:

On behalf of the Commonwealth of Virginia:
Bruce Bach, Esq.

On behalf of the Defendant:
Claude Hilton, Esq.

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page 248 }

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CHARLES HENDERSON, was called as a witness for and on behalf of the Defendant and, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Hilton:

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page 263 }

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Q. Mr. Stover did the stabbing, did he not?
A. I guess so.
Q. Mr. Stover had the bayonet, did he not?
A. Yes, sir.

Q. That is the bayonet Mr. Stover had that evening?
A. Yes, sir.

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page 285 }

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JAMES DAVID STOVER, was called as a witness on his own behalf and took the stand and was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Hilton:

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page 294 }

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Q. Something was hitting you in the head?
A. Somebody or something. I wouldn't say something because it would to have had to been a hard object. More like a hand.

My knife is kept not actually under the seat, but there is a tunnel in a Volkswagon back between the seats and the blade of the knife was kept almost stuck almost down beside the seat and the tunnel. It slid back in there. The handle would be out almost even with the end of the seat.

I was coming out like this and these guys or something started hitting. I reached down and I pulled out, and I do remember, but I can't recall, but I do remember remarks made, please the Court, something similar to or was, "Get them mother fuckers", like that, as these people were advancing back.

Q. Was that said on your side of the car or the other side?
A. I couldn't tell you which side of the car. More or less directed from the front of the car to us, but it wasn't anybody in our car.

So I pulled the knife out with the same motion of getting

page 295 } out of the car. I was pushing on the car door and there was someone on the outside pushed the car door in. My leg was out of the car door and my leg got slammed in the car door. It was outside the door when the door was shut on it. So I got out of the car. Two people, both of them, were swinging at me and both of them were striking me. In defense of myself I started swinging. The knife was in my hand, and I motioned like this. (Indicating.)

This is how I grabbed it and pulled it out like this and came out of the car. I started swinging with both hands.

Q. How did you have your hand when you got out of the car when you got free of the door, how did you have your hand?

A. Well, similar to this, but more like this as I was trying to hide I imagine. I was being struck quite often.

The Court: Repeat your last answer, please.

The Witness: I had my hand in the air like this. I was trying to protect my head. The knife was out like this.

By Mr. Hilton:

Q. Were you struck in the head or being struck in the head?

A. I was being struck in the head, yes, sir. Two boys were beating on me from both sides. Then I started swinging. Doing anything I could to get away from these guys to protect myself.

page 296 } Q. How many times were you hit in the head?

A. How many times was I hit in the head. Numerous times. More than five. I don't know.

Q. Were you hit on other parts of your body?

A. I can remember the face and the head because that hurt most. I can't remember any place else. I didn't feel it anyplace else.

Q. Go ahead.

A. I do remember stabbing one of the boys. Which one I couldn't tell you. The area, I guess, would be in the back. The boy may have been off to my side like this and I was pushing my way like this and swinging around.

Q. At the time that you struck these blows where were the other two guys that you talked about before?

A. Sir?

Q. The other two boys that you talked about, the two that were in front of you hitting you in the face?

A. Both confronting me also. It was more or less like a

huddle like two guys on me and I was in the middle. That was their position.

Q. And for how long were both of those boys there in front of you and striking you?

A. I really couldn't say. It seemed like a long
page 297 } time, but I don't think it was.

Q. Was there any time during this scuffle that one of the boys there was there and one was not, or was both there at all times?

A. Not once I was confronted with them, once I got out of the car, both were there on me.

Q. They were on you at all times while the scuffle lasted?

A. I can't say. When I was getting out of the car I can't say that there was somebody there beating on me. I can't say if both of them were there.

Q. But once you got out of the car?

A. Once I got out of the car they were all there, both boys were with me and neither of them left or neither of them went away until after it was over and they both started running back to the car.

Q. And when they started running what did you do?

A. One boy fell down on the ground. The other boy was trying to help him up. I stopped there immediately. I ran around the other car, on the way around back of my car, to the other side there. There were two guys at the door or the window, or whatever you want to call it, and there was a commotion. I don't know what they were doing.

page 298 } Q. Did you say anything as you came around?

A. Yes, I did.

Q. What?

A. I said, "Get the hell off those guys." Both of them turned and more or less confronted me.

Q. Who turned and confronted you?

A. Both people turned.

Q. And what occurred at that time?

A. Well, at this time I was more calmed down than the initial thing over there. I came around and I was cooled down. I did say that I had a knife. I said I had a knife. It seemed to me that they attacked me anyway.

Q. Both of them or just one of them?

A. Both of them came toward me.

Q. Both of them came toward you?

A. Yes, sir. The only thing I did, really, I think, was put the knife up and possibly swing with the knife one time or so, then one of them *instantaniously* went across the lot and

this other guy was standing there and his arm was caught in the door, and what force was holding it I don't know. I didn't know at that time.

So he was still trying to scuffle with me. He was still scuffling with me and he was still punching me.
page 299 } He was punching around like this. He was punching like this and going crazy and his other arm was in the window.

I grabbed his shirt and I took the knife and I went like that up against the car and I said, "Calm down, buddy." Then he stopped. He stopped and I said, "What is the problem with you guys." He said, "Nothing", and I said "Didn't you know somebody got out of that car and threw rocks?" He said, "I don't know. I didn't do anything. I was in the back seat. I had a girlfriend with me. I didn't do anything." I said, "What the hell did you get out of your car for." He said, "I don't know. They just told me to get out." I looked at his hand and I could see that he was bleeding. I said, "Is that bad?" He said, "I don't know", and he looked at it.

I went around the front of my car, the light was still on in my car, the generator light. The keys were in the engine —in the car—and the engine died because of the emergency brake on, I don't know. I shut my light off, shut the engine off and pulled the latch for the trunk and went around to it. I took a sterilized field dressing out of the trunk of my car in the front, came back and opened the box up and told the kid, I said, "Look, put this on your hand now." He says, "No, that is all right." I said, "Well, you take it and put it on your hand." He said, "No, I don't want it on
page 300 } my hand." I said, "Wash your cut off anyway and put this on it."

The Court: Speak up.

By Mr. Hilton:

Q. Keep your voice up.

A. So then he says, "I will be all right. I said, "Well, where are you going to go to?" He says, "I am going home." I said, "Do you want a ride?" He said, "No, I don't want a ride. My buddies will be back." I said, "All right." Then he was doing this sort of "sir" to me, so I said, "Look, we are all young guys. You don't have to 'sir' me. I am not nothing big." And he said, "Okay", like that. Then Henderson says, "Look, man, the fight is all over, so you know, let's be right. My name is Chuck." Like that he said it. He put his hand up.

James David Stover

The boy grabbed his hand and Chuck says, "What is your name?" I said, "I don't want to know anybody's name. Shut up, I don't want to know anybody's name." So then the kid said, "Okay." I was talking to Chuck and John, John was out of the car and Chuck was out of the car. The kid goes on his way. I go and get back in the car, and going home I am scared. I didn't know what I did. It was the first time I ever done anything like that at all, and I mentioned to John, I said, "Man, I don't know, I think I hit one of those
page 301 } kids awful hard with that knife." And he said, "Where?" And I said, "I don't know. If it was in my hand I hit that kid hard."

I went home and I had blood on my shirt. It wasn't a large amount of blood. I took my shirt off, put it in the laundry. My wife was in bed. I climbed in bed and went to sleep. Got up the next morning, went to work at the 7-Eleven at six o'clock in the morning. While I was there working I happened to hear on the radio where a young man died, 17 years old, in a scuffle in McClean, and I knew I was in a scuffle in McClean, so I thought what should I do, and I wanted to run and I didn't want to run, but I didn't know what to do. I took the afternoon off and went home. I sat around home for awhile and I thought about what happened and what I did.

I picked up the knife and I put it in a brown paper bag and I took a taxi cab down to Fairfax Police Station.

At the Fairfax Police Station I went in and knocked on the Homicide Office and talked to a Sergeant. He got a lieutenant or detective, Sanders I think, I am not sure.

I talked to Detective Sanders for awhile and I wrote out a voluntary statement. I didn't know anything about what to do. Took the knife. Detective Mustaine came down and said he was in charge of the case and talked with
page 302 } me and things like that and that was more or less generally the end right there. I went to jail.

Q. When you first started this game of tag or this case, with these other cars, did you know any of the people in the car?

A. No, sir, I didn't.

Q. Did you at any time when you pulled into the filling station have the intent to hurt anybody?

A. No, I didn't. I wanted to attempt to stop them, really. I was still following the car, which was to me, nothing more than a short cut to avoid the light, and I am not familiar with that area.

James David Stover

Q. You had no intention of ever fighting with these boys?

Mr. Bach: I think this is grossly misleading this man, and he knows it. It is his own witness.
The Court: The last question is leading. Objection sustained.

By Mr. Hilton:
Q. Did you have any cuts or bruises about your face or your body as the result of this affray?
A. I had no cuts, no, sir. I didn't have none that I noticed. My back was bruised. It hurt.
page 303 } Q. Did you have any other bruises?
A. None that I noticed.

Mr. Hilton: No further questions.

CROSS EXAMINATION

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page 309 }

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Q. Have you had a fight since?
A. No, sir.
Q. Have you used a *bayone* since?
A. No, sir.
page 310 } Q. Did you use a bayonet on the 11 day of January at your gas station this year?
A. No, sir, I did not.

Mr. Hilton: I am going to object to this, Your Honor. I don't know what he is doing here.
The Court: Objection sustained. I direct that it be stricken and that the jury is directed to disregard it.

(Brief Pause in the Proceedings.)

Mr. Hilton: May I approach the Bench.
The Court: Yes.

(Whereupon, counsel approached the Bench and the following transpired:)

James David Stover

Mr. Hilton: I would like to ask for a mistrial because of the question that was asked. I think it is one that is the most prejudicial to this case. He has given an indication that this defendant used this bayonet before. I think if it is used in this case it will be highly prejudicial.

I am aware of the event of which the prosecuter is referring to, and this boy did not use a bayonet at any time. In fact, two colored people came in his filling station and attacked him and warrants have been sworn out for felonious *assualt* against those people, and on those questions, I move for a mistrial.

page 311 } Mr. Bach: I don't believe it came out that bad as far as the jury is concerned. I asked him if he used a bayonet and he said no.

The Court: You shouldn't have asked it.

Mr. Hilton: I am very concerned, and I think that even if there is the slightest inclination of this boy in this type of a situation I think the conclusion is just sufficient for the jury to find him guilty or to lay an extra heavy sentence on him, and I think it is most prejudicial.

The Court: I will deny your motion for a mistrial at this time.

Mr. Hilton: Note my exception, Your Honor.

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By Mr. Bach:

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page 320 }

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Q. These two boys according to your testimony were striking you numerous times about the head and face, more than five times, correct?

A. Yes, sir.

Q. And they didn't put a mark on your head or face, did they?

A. None that I know of, sir. I didn't notice at the time. I wasn't concerned about myself at the time.

Q. You weren't concerned about the fact that they were striking you about the head?

A. I wasn't concerned about myself at the time.

James David Stover

Q. You weren't?
A. In other words, I didn't look for bruises or anything like that.

* * * * *

page 322 } Q. Do you remember cutting anybody with that knife?
A. Do I remember cutting anybody?
Q. Yes.
A. I could have cut somebody like I said.
Q. Are you familiar with the blade of that knife, you are, are you not?
A. Fairly familiar, yes, sir.
Q. Did you think that that blade of that knife could cut anybody?
A. Yes, sir.
Q. Can you remember stabbing anyone?
A. I do remember, yes, sir.
Q. How many times did you remember stabbing someone?
A. Once.
Q. And you say you seem to remember you stabbed this guy in the back pretty hard, is that right?
A. Yes, sir.

* * * * *

page 328 } A. I didn't stab Paul Koerner.
Q. He was cut wasn't he?
A. He was cut, yes, sir. I cut him.
Q. You cut him?
A. Yes, sir.

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page 334 }

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Mr. Hilton: If the Court please, I would like to renew my motion for a mistrial as stated on the grounds that I stated before. He did go into prior incidents, and I be-
page 335 } lieve there were no prior incidents or even any evidence of any prior incidents of this boy using that knife or the bayonet.

Secondly, I would like a mistrial on the grounds that when the witness was on the stand there was mention of a name of

Joe Earmand. Now, none of these boys know a Joe Earmand. I don't believe that there is any evidence that they ever knew a Joe Earmand or ever associated with him. I do feel, however, that there is a Joe Earmand or an Earmand whose name has been well publicized in the newspapers in this area as being associated as one of the Beltway Bandits. He has been on trial in this Court and in Arlington and other cases. I do not feel that his name should have been used in connection with the defendant. They may have a feeling about this, and I feel that the mere association of that name with the defendant's is certainly prejudicial, and I would also move for mistrial on those grounds.

Mr. Bach: May I be heard on that.

The Court: Yes, sir.

Mr. Bach: Number one, I believe I asked Mr. Stover if he had been in any trouble with a bayonet since. Out of the hearing of the jury, of course, the fact is that he was in a fight with a bayonet afterwards. I don't think the jury has any idea of what I was talking about. I asked page 336 } him if he had been in any trouble since and he said no. The Court directed the jury to disregard the remark and I think the jury has to disregard that remark, and I doubt that they knew what the remark was about.

Secondly, Joe Earmand is a person, and I believe Mr. Burrell will testify, that Joe Earmand is a friend of his, a good friend. There is no connection with Lee Earmand and it never entered my mind.

Mr. Burrell will also state, as Joe Earmand stated to me, that he was with Burrell prior to this incident on that day. The Commonwealth believes that Joe Earmand was with him just prior to the killing, although I can't establish that there is no question Joe Earmand was with one of these three boys prior to the killing. I think it is a general question. It is a 17 year old boy that lives in Falls Church.

The Court: I am not concerned with the Joe Earmand. I am concerned with the question you asked concerning whether he had been in trouble or had used a bayonet since this offense. That is an improper question.

The only question in my mind is whether it is the sort of thing that can be cured by direction to the jury to disregard it. Telling the jury to disregard it is like telling them not to look at that elephant in the corner.

page 337 } Mr. Bach: The defendant answered he had not and nothing more came before the jury other than he had not been in any trouble since with the bayonet.

The Court: Well, the plain implication of your question was that he had been in trouble with it since.

I am concerned with it, really I am. After a day and a half of this trial it is an inexcusable question.

Mr. Bach: I apologize to the Court.

Mr. Hilton: If the Court please, I didn't get a chance to answer Mr. Bach. I would like to do this briefly.

The facts of this incident, as I understand, they have never been resolved in Court, but this boy was attacked by two other people with a bayonet. He never had a bayonet in his hand. He is going to be the prosecution witness in the other case.

Now, I believe Your Honor believes that it is before the jury. It is before the jury and it is in the minds of the jury that this boy did use a bayonet at some time after this offense. The defense counsel got up and objected to prevent the jury from hearing anymore, and I don't believe any direction or anything that you can tell the jury that is going to take it out of their mind that this boy was involved in something else, and I think that this is certainly
page 338 } highly prejudicial. I don't believe that it can be taken out of their minds and I don't believe that they would be able to make a fair and impartial decision.

Mr. Bach: May I say one more thing?

The Court: Yes.

Mr. Bach: I would be willing—I don't know, and I submit to the Court—the jury does not know what this is about. I don't think they have any notion even that this boy has been in any previous trouble, but if he wants to get back on the stand and say he has never been in a fight with a bayonet since, I will stipulate since I was merely fishing, and again, I apologize to the Court, but I don't believe that prejudices the boy. I do not believe they know what it was about. The jury was instructed by the Court to disregard it and I am perfectly willing to stipulate to the jury that there has not been any.

I apologize to the Court for bringing it up, and I hope the Court realizes that it was during the heat of cross examination in a serious case.

Mr. Hilton: If the Court please, not to belabor the point, but I can certainly understand the reason that it was done, but the fact is before the jury, and I think now any attempt that we get into and explain it will just drag us
page 339 } further down and bring it more to the attention of the jury and we would get deeper involved, and I submit, that after hearing this and having this brought to their attention they just cannot render a fair and impartial decision.

The Court: What do you say about the consequences of

telling the jury now that the circumstances that actually surrounded the use by the boy of the bayonet—what do you think about telling them?

Mr. Hilton: I am afraid, if the Court please, that, as I say, we are getting involved in a situation where we are going to be just worse off. I don't believe that there is any way that we can explain away the situation. It is there, and if we go into the details of trying to explain it away, why, there are times when he was involved in this, and this time he wasn't at fault at all.

I think the mere fact that he has been involved—it is like the defendant getting on the stand and admit to being convicted of a prior felony. It is going against him right away. The jury feels, "There, we have a criminal. We have got somebody who has been involved in the activity before", and I don't believe we can explain this.

The Court: Well, I will accept the prosecutor's statement that it was inadvertently done. It was not done
page 340 } in a calculated way to prejudice the defendant.

I believe any prejudice, however, to the defendant can be removed by a statement of the true facts surrounding the use of the bayonet, if what you say is true, and I assume it is, as to how he did happen to be using a bayonet.

I will allow either side to put him back on the stand for that purpose, if you desire.

Mr. Bach: I will put him back on the stand right now.

The Court: I believe the matter can be cleared up in the minds of the jury. The jury may well think he was involved in another incident with the use of a bayonet; but I believe, if the circumstances are as you related them to me, that any prejudice that he might suffer can be removed by an explanation of what the true facts are.

This isn't a game we are playing here today. We want to get the truth before the jury.

I am concerned. He may have been prejudiced. I think that prejudice, however, can be removed by an explanation by him or by you both through a stipulation as to what the true facts are.

Mr. Hilton: Well, if the Court please, I would like to except that because I feel that the mere fact it being be-
page 341 } fore the jury is prejudicial if you rule that we have to explain it in some way.

The Court: You don't have to. I am giving you the opportunity to.

Mr. Hilton: I am sorry. I used the wrong phrase. Could we put the defendant on where the question comes from Mr. Bach, "Have you ever been involved in any incident with

a bayonet", and he says, "no." Then have Mr. Bach stipulate that he has never been involved in any incident?

I think we ought to have something coming from him that he has no knowledge of any incident because I think it has been planted firmly in the minds of the jurors that he knows of some incident where this boy used the bayonet whether or not it comes out in Court here today or what happened, and I would like some statement from him that he has no *knoledge* of any instance where this boy used a bayonet.

I would still like to except to this.

Mr. Bach: Your Honor, if I may, of course, there was an incident with a bayonet; however, I will stipulate to the jury that I have no knowledge that this boy was involved in a subsequent or that he subsequently used a bayonet and that I was merely fishing when I asked that question. If that would satisfy Mr. Hilton I will stipulate. I will stipu-
page 342 } late to anything else to get this trial on the road.

The Court: The situation as related to me by you, Mr. Hilton, is that the defendant was robbed or attempted robbery of him while he was manager attendant at a filling station.

Mr. Hilton: That is correct.

The Court: That he used the bayonet.

Mr. Hilton: This boy never used the bayonet. Two people in the store used the bayonet.

The Court: If that is the truth of the situation then the jury ought to be told that is the truth of the situation. I think that the prejudice to the defendant can be removed in that way.

Now, you except to that, sir, and I understand your position on it, but I would rather have them told what the truth of the situation is than just them having the feeling that the Commonwealth Attorney knows of any incident which he has been involved in.

Mr. Hilton: Is this going to be subject to cross examination as to what went on out there? Are we going to have a trial of this situation out?

The Court: No, sir, not as far as I am concerned. I will allow you to do this if you want to. Understand
page 343 } that in doing this you are not waiving your objection to this ruling, but I believe that prejudice to the defendant can be removed by telling them what the true situation is and I want to do that if possible.

I will allow him to be put on the stand and I will allow you to interrogate him and I will deny cross examination.

Mr. Hilton: I will still note an exception.

The Court: All right. Call the jury.

James David Stover

(The jury was called back to the courtroom and the following transpired:)

The Court: Mr. Hilton.

Mr. Hilton: I would like to call Dave Stover back to the stand.

Whereupon, JAMES DAVID STOVER, was recalled as a witness in his own behalf and was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Hilton:

Q. Dave, you heard the question the prosecuting attorney asked you concerning the use of a bayonet. At any time after this incident you never used a bayonet at any time since this incident, have you?

page 344 } A. No, sir.

Q. You never used it before?

A. No, sir.

Q. Now, he referred to an incident some day in January, I believe the 11 of January, were you working in your filling station on the night of the 11 of January?

A. Yes, sir, I was night manager.

Q. And did two colored subjects come into your gas station and attempt to *assualt* you with a knife either in an attempt to rob you or to do some damage to the station or whatever?

A. Yes, sir.

Q. And you never at any time since that incident or since this incident in question have ever used a knife or bayonet?

A. No, sir, I haven't.

Mr. Hilton: No further questions.

Mr. Bach: No questions.

The Court: You may step down, sir.

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Mr. Bach: Your Honor, if he is not going to call him, I would like to call John Burrell as an adverse witness. That is the other man who was in that car. He is out in the hall right now.

John Burrell

The Court: You can call him, but whether he can be an adverse witness or not we will have to wait and see what he proves adverse or hostile.

page 348 } Mr. Hilton: If the Court please, I would like to make this comment. I didn't call him because Mr. Burrell is here under a charge of his own and is not to testify, and I am not calling him for that reason. The Commonwealth Attorney may run into the same thing.

Mr. Bach: Well, let's see. I would call Mr. Burrell.

Whereupon, JOHN BURRELL was called as a witness for and on behalf of the Commonwealth and, having been first duly sworn, was examined and testified as follows:

Mr. Hilton: If the Court please, I think the witness ought to understand that the Commonwealth has called him, not the defendant.

The Court: Have a seat. You are advised that you have been called by the Commonwealth Attorney as a witness on behalf of the Commonwealth.

Mr. Burrell: I don't have to testify, do I, sir? I don't have to testify on their behalf or what?

The Court: You don't have to testify to anything that would tend to incriminate you. Have you been advised by counsel in this regard?

Mr. Burrell: He said it was up to me to tes-

page 349 } tify, but I would be testifying for them.

The Court: I think we had better take this up out of the presence of the jury. The jury will retire to the jury room.

(The jury was excused from the courtroom.)

The Court: State for the record your name.

Mr. Burrell: John Burrell.

The Court: On some occasion have you been advised that you should not testify by counsel?

Mr. Burrell: Yes, sir.

The Court: And who is your counsel?

Mr. Burrell: T. Brooke Howard.

The Court: He is not here today?

Mr. Burrell: He is not.

The Court: I don't know what questions you want to ask this witness, but his counsel is not here today and I am rather reluctant to go ahead with it.

John Burrell

Mr. Bach: May I state that I know this boy has been advised by Mr. Howard not to testify; however, Mr. Howard indicated to me that he was going to testify regardless of it and was sworn as a witness for Mr. Hilton. I had assumed he was going to testify. He has been here two days now. I know Mr. Howard does not wish him to testify.

page 350 } The Court: Well then, you don't intend to ask him any questions.

Mr. Bach: I would like to, but I am just saying to the Court—

The Court: He is entitled to have his counsel with him to advise him on each question and I am reluctant to have him testify to any questions that you want to ask if counsel doesn't want him to testify.

Mr. Bach: I will withdraw it. I certainly would get into an entire incident if I put him on.

The Court. In view of the past testimony it seems to me very difficult to stay away from anything that wouldn't involve this man and possibly incriminate him.

Mr. Bach: I know his counsel does not want him to testify, but my information was he was going to testify.

Mr. Burrell: I would testify if they needed me to testify, but they didn't.

The Court: You may step down and you may be excused.

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Mr. Hilton: Again, I would like to renew my

page 380 } motion for a mistrial on the grounds that a question was asked of the defendant as to whether or not he had used a bayonet before or after this particular incident in question at this trial, and whatever attempt was made to explain that away was certainly not an adequate one.

Also I would move for mistrial on the grounds that the name came into the case when no evidence or occasion at all was made in the trial, and that gentleman's name, even though he not be the same individual, is the same name as a person who has been involved in a series of B and E's, and is a member of a gang known as the Beltway Gang, and received a considerable amount of publicity in this community and that the association of the name "Earmand" with this case is certainly prejudicial.

Lastly, I have one other grounds that I would like to state on my motion for a mistrial, and that is the calling of Mr. Burrell who was a companion in this case and that he was brought before the jury and a comment was made at the time that if the defendant is not going to call Mr. Burrell I am going to call him, putting an inference in the jury's mind that the defendant was not calling him for who knows what reason, and that would be *determental* to the defendant's case,

page 381 } a companion in the automobile. That the defendant was forced to make some explanation of that before the jury and that certainly that put the defendant in a position where the jury feels that something was not brought out in the defendant's case that should have been and was trying to hide something, and I would ask for a mistrial on that basis.

The Court: The failure to call—

Mr. Hilton: If the Court please, I think the prosecution is well aware that he is charged and his case is coming to trial within a matter of a month, if I remember correctly, and is well aware that his attorney had already instructed the defendant not to testify.

Mr. Bach: Your Honor, I may just say this. I talked to Mr. Howard, he called me, but I think Mr. Hilton should state on the record just to have this straight that Mr. Hilton told me right up to today's trial and several times before that he was calling Burrell and that Burrell was going to testify to the fifth amendment, and Burrell was going to testify for the defendant. I fully expected him to testify. He sat here for two days and I am sure he came here today to testify, but for some reason he wasn't put on. I don't think the statement is fair that I knew he wasn't going to testify when, in fact, I did, and Mr. Hilton told me he was going to. Brooke Howard told me he was going to testify.

page 382 } Mr. Hilton: There was some discussion that he was going to testify. There is no question that I told Mr. Bach that Mr. Burrell may well be a witness in my case, but at the same time I choose not to call Mr. Burrell and then the comment was made in Court before the jury and it is that comment that went before the jury that laid the prejudice to my case.

Also, if the Court please, the Commonwealth has an equal right to the witness as I do as far as that is concerned in a question about who is going to call him. I did *intent* to call Mr. Burrell sometime before the trial. I had that intention in mind and I knew at that time his attorney had advised him not to testify, but that Mr. Burrell had indicated to me that he would testify as a part of my case, but when he got

to Court I chose not to call Mr. Burrell and I feel that any comment about the defendant's failure to call him has put some *suspiscion* in the minds of the jurors that the defendant was trying to hide something and it certainly prejudices our case.

The Court: Well, I am concerned about the motion for a mistrial: I don't believe, or I wouldn't rule as I am going to rule, I don't believe that the defendant has been prejudiced, and because I don't I am going to deny your motion
page 383 } for mistrial.

Mr. Hilton: Note my exception.

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page 1 }

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Circuit Courtroom No. 3
Fairfax County Courthouse
Fairfax, Virginia
Monday, January 27, 1969.

The above-entitled cause came on for hearing before the Honorable Albert V. Bryan, Jr., Judge of the Circuit Court of Fairfax County, Virginia, at 10:20 a. m.

APPEARANCES:

On behalf of the Commonwealth of Virginia:
F. Bruce Bach, Esq.,
Assistant Commonwealth Attorney

On behalf of the defendant:
Claude M. Hilton, Esq.

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The Court:

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I think the reference to the subsequent use of a bayonet was indiscreet on the part of the Commonwealth attorney. It can be argued, however, that the defendant brought that question on himself, and I don't believe it was prejudicial, nor do I feel that the reference to who was going to call Burrell. I don't think that was prejudicial.

The motion to set aside the verdict and for a new trial will be denied in all three cases.

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page 1 }

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Courtroom No. 4
Fairfax County Courthouse
Fairfax, Virginia
Friday, February 28, 1969

The above-entitled matter came on for hearing before the Honorable Albert V. Bryan, Jr., Judge of the Circuit Court of Fairfax County, Virginia, at ten o'clock, a. m.

APPEARANCES:

On behalf of the Commonwealth:
F. Bruce Bach, Esq.

On behalf of the Defendant:
Claude H. Hilton, Esq.

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Mr. Hilton: If the Court please, I have an affidavit I would like to file prior to this.

I believe there are all sorts of matters that the Commonwealth has agreed to stipulate to this morning. Namely, that they had the report in question of this incident of the 19th day of July, of '68. The Commonwealth Attorney did

have in his possession prior to the time of trial, I understand.

Mr. Bach: Your Honor, I do stipulate to that. We did have the Arlington County Police report.

The Court: You have summonsed 1, 2, 3, 4, 5 witnesses. Do you expect to put on all those?

Mr. Hilton: I expect to put on at least three, but they will be very short.

Mr. Bach: If I may, I would, I don't know whether this is in order. Before Mr. Hilton puts on any witnesses,
2/28/69 I would like to question him briefly on his affidavit.
page 3 } I do not, I feel that, of course, he is honest, you know, as he remembers it now. But I don't believe the facts are in the affidavit. I think I can bring them out.

Mr. Hilton: Well, if the Court please, I wasn't prepared to go on the stand at this point. I have nobody here to represent me, to ask me any questions in connection with this case.

It is my understanding for a motion for new trial, it is proper to file a sworn affidavit as to the circumstances. I don't believe there is anything that is set forth in this affidavit that couldn't be stipulated to.

Mr. Bach: The particular parts that I question are that this matter did not come to Mr. Hilton's attention until after the trial, I believe before the trial. The notes were made, a disclosure was made to him before this incident, and I submit to the Court, I can prove this.

Mr. Hilton: I would submit that he would have the witnesses to do it. I made my affidavit.

I didn't know of the indictment until the thirty-first day of January which is correct when someone from the Arlington County Police came to me and told me. That's the only thing I can testify to if I got on the stand.

2/28/69 If we did, I think there is no dispute that he had
page 4 } numerous discussions. We had four or five discussions with Mr. Bach on this case, either in his office or on the telephone; and I would say those discussions covered at least three hours time totally.

I can remember we discussed for almost an hour on the telephone—we discussed the record of the individual. My party says there was no record, and it was my understanding that the other people involved had no police records.

There is nothing else that I can testify to if I get on the stand, and I don't see anything disputed in the affidavit.

The Court: You put the Court in a position of having to decide, I don't doubt—I am not even suggesting that if you don't think is true what is in the affidavit, but it is a little awkward position that you have—that we have the clients

present in the Court and not at least be able to ask him questions. I think you will have to take it on the basis of where you put it?

Mr. Hilton: Mr. Koutoulakos was here earlier. He knows something about the case.

2/28/69 page 5 } Mr. Bach: I am not questioning the fact that Mr. Hilton did not recall any disclosure. But he states no disclosure was made, and my point is a disclosure was made, and that it was presented to him.

Now, whether it came to his attention, now, of course, is an entirely subjective matter, but he had the information concerning this incident.

The Court: I think, Mr. Hilton, that if the Commonwealth Attorney wants to examine you under oath on the affidavit, he can tie it in.

I in turn think you will be able to take evidence on the stand, but if he wants, we can delay the matter to such time as it takes.

Mr. Hilton: I'll go on the stand.

The Court: All right, wait just a minute.

Do you have any other witnesses you want sworn?

Mr. Hilton: Yes.

The Court: All witnesses in the case of *Commonwealth versus Stover,* please stand.

Mr. Hilton: Detective Mustaine.

The Court: All witnesses raise your right hand to be sworn.

(Whereupon, all prospective witnesses were duly sworn by the Clerk of the Court.)

2/28/69 page 6 } Mr. Hilton: What manner will we be proceeding?

The Court: If you are asking that your affidavit be received as substantive evidence on your motion, I think that the Commonwealth Attorney wants to cross examine you on this. So, and you are asking that, I gather, so I expect you better take the stand next.

Whereupon, CLAUDE H. HILTON was called as a witness in behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

Claude H. Hilton

DIRECT EXAMINATION

By Mr. Bach:

Q. Mr. Hilton, as I understand, you are claiming no disclosure was ever made to you concerning—state your name, please?

A. Claude Hilton.

Q. And you are the Attorney for Mr. Stover, the Defendant, in this case?

A. I am.

Q. As I understand your affidavit, it is your contention that at no time was any disclosure made to you of a certain incident?

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A. That is correct.

Q. And would you tell the Court very briefly what this incident was, so the Court will know?

A. Well, the incident as I understand it, occurred on the 19th day of July of '68. That the persons involved with the complaining witnesses in the cases against Mr. Stover.

Q. This was another fight, was it not, in Arlington County?

A. It occurred in Arlington County. Frank Koerner, his brother, Paul, David Rickman. Tom Buick, and the Mac Daniel boy were involved in that incident.

It is my understanding that the incident occurred in a similar situation to Mr. Stover's.

Q. To your knowledge, there is only one incident in question that was sometime prior to the murder which Mr. Stover has been convicted?

A. That's all I am aware of at this time.

Q. It is your statement, the Commonwealth did not give you the Arlington County Police report of this incident or any information?

A. They did not.

Q. Did the Commonwealth give you any information at all by the way of statements of the Commonwealth witnesses?

A. No, they did not.

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Q. You did not receive any, such as the Police Statements given by Rickman or Koerner?

A. No, sir, those had been requested at the preliminary hearing, and I was told at that time there had been no statements taken from the witnesses. And later after we had discussions and what I felt a full disclosure of what your witnesses and my witnesses would testify to, I felt I had the information that would be presented in Court.

Claude H. Hilton

Q. Well, were you told you would be given these statements?

A. No, I was never told that.

Q. You requested them?

A. I requested them at the preliminary hearing when there was another Commonwealth Attorney in the case, and told there would be not any statements taken from the witnesses.

Q. Did you consult with Mr. Ernest White and Brooke Howard concerning this case?

A. Yes.

Q. Do you know whether they received statements?

A. No, I do not, I am pretty sure.

Q. Did you talk to them subsequent to the preliminary hearing?

A. I talked with them. I don't know how many times.

2/28/69 page 9 } Q. You are stating you don't remember getting any statements at all, is that correct?

A. I got the statement of the Defendant and the other two boys that were in the car with him.

Q. If you would, look at this statement which is a statement of Paul Joseph Koerner. Are you stating to the best of your memory, you don't remember getting that statement from the Commonwealth along with an autopsy report and other materials?

A. No.

Q. Did you get the autopsy report?

A. Yes.

Q. Did it reveal an old wound that was partially healed?

A. Yes, I am not sure that it did. The test came out from the Doctor in the case from an old wound that was partially healed, and I am not sure if that was in the autopsy report or not.

Q. But you did read the autopsy report in your preparation of the case?

A. I did.

Q. Would you look on page 19—

Mr. Koutoulakos: For the record, I will introduce myself. My name is Lou Koutoulakos.

2/28/69 page 10 } Mr. Milton asked me to be here in the event he did take the stand. If that document is going to be testified from, it ought to be made part of the record.

The Court: I expect it better be marked for identification

as Commonwealth's Exhibit 1. That is what purports to be a statement from Paul Joseph Koerner, on August 21st, 1968, consisting of twenty-one pages.

(Whereupon, the statement referred to as Commonwealth's Exhibit Number 1, was marked for identification.)

By Mr. Bach:

Q. Would you read into the record starting with, "had you ever gotten Frank out of trouble before or something that—

A. The question: "Had you ever gotten Frank out of trouble?" "Yes, not real trouble."

The question: "Calling your attention to a couple of weeks before, three weeks before, had there been an altercation between you and some boys in Arlington?" "Yes."

The question: "Was this along similar lines?" "I would say so."

The question: "Who started this?" "David Rickman."

The question: "Dave Rickman?" "Yes, sir."

Q. If you had had that statement, that would
2/28/69 have alerted you to a previous incident?
page 11 } A. Yes.

Q. Are you stating you don't remember getting this statement, or you didn't get it?

A. I know I didn't get it, and I requested it at the time of the preliminary hearing and was told at that time there was no statements taken.

I then didn't request it because of the full disclosure I thought we apparently had in regards to the case.

Q. You did get an autopsy?

A. I did.

Q. You don't remember this?

A. The only thing I got from your office was the statement of the Defendant, Stover, Burrell Anderson and the autopsy report.

I was told at the time, none was taken.

Q. Did you make a record check in the Arlington County Police Department?

A. I had someone in the Department check the record, yes.

Q. Would a complete check of the complainants; Rickman and Koerner, if that had been made, would that had turned up this information?

2/28/69 A. No, it would not.

Harry M. Hittle

page 12 } Q. To your knowledge?
A. Yes, and I have a witness here that will confirm that.

Mr. Bach: That's all I have.
Mr. Koutoulakos: I'd like to have that offered into evidence.
The Court: To be *recieved* in evidence.

(Whereupon, the statement referred to as Commonwealth's Exhibit Number 1, was received in evidence.)

Mr. Bach: This is just a copy of the statement, not the statement itself.
The Court: Call your next witness.
Mr. Koutoulakos: Your Honor, could I be excused now?
Mr. Hilton: I'd like to call officer Hittle.

Whereupon, HARRY M. HITTLE was called as witness in behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Hilton:
Q. Would you state your name and occupation?
A. Harry M. Hittle. H-i-t-t-l-e. Patrolman, Ar-
2/28/69 lington County Police Department.
page 13 } Q. Directing your attention on or about the 19th day of July of '68, were you so employed at that time?

The Court: What was the date again?
Mr. Hilton: July 19.

By Mr. Hilton:
Q. And what were your duties at that time?
A. I was assigned to the Communications for the Police Department in Arlington County.
Q. In connection with those duties on the date of the 19th of July, did you have an occasion to take a report involving a David Rickman, a Frank Koerner, a Paul Koerner, Tom Buick, and a Roger, I believe, it is Mac Daniel?
A. Yes, sir.
Q. The name he gave you at the time he gave?

A. Rickman.

Q. Now, prior to talking with that boy, were there some other people that came to you?

A. Yes, sir, there was.

Q. And who was that?

A. Subject was the last names of Edwards and Forshee.

Q. What did Mr. *Forsheee* relate to you as to what had happened.

2/28/69 page 14 } Mr. Bach: I object to what has happened. He's got them in the Courtroom, and that would be hearsay.

The Court: Sustained.

By Mr. Hilton:

Q. Did you see the vehicle that these two gentlemen were driving?

A. I did, sir.

Q. And would describe the condition?

A. Yes, sir, it was a 1957 Ford. Both headlights were broken out. The windshield was broken on the right and left side, and one of the rear side windows was also broken.

It appeared to be broken with a instrument of some sort.

Q. Were they able to drive that vehicle home?

A. They were escorted home by one of our officers.

Q. Now, did you subsequently take statements from all of these people?

A. I took an incident report, a combined incident report from all subjects that were there and an incident report from the Edwards.

Q. And then you later put in that report the statements, concerning the other people that later came in?

A. Yes, sir.

2/28/69 page 15 } Q. And what did you do with that report. Did you type up a report?

A. Yes, sir.

Q. And what did you do with that report?

A. It was turned into our channels in the Department and went to the Detective Bureau for assignment to investigate.

Q. And do you know the outcome of any further investigations? Were any charges made out of this incident?

A. Not at the time of the report, nor after the time of the report.

Q. All right, now, what has been your assignment in recent months?

Harry M. Hittle

A. In recent months, it's been within the Communications section of the Department.

The last four weeks it's been in the record room of the Arlington County Police Department.

Q. In your connection with the work there in the record, are you familiar with procedures and the filing and has obtaining records, and the general procedures of that Department?

A. Yes, sir, the general procedures.

Q. Do you know of your own personal knowledge where this report was indexed and where it was kept?

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A. The investigators assigned a Xerox copy of the incident.

The true copy of the incident goes into our files in the record room.

Q. How is that indexed?

A. That is indexed by number. It is in sequence as they come into be logged by our Investigating Division.

Q. Did you have an occasion to make a record check of Dave Rickman, Frank Koerner, these other people that were involved in this incident?

A. No, sir, I don't recall making any records.

Q. Did you, in connection with the proceedings there, you testified how this report was placed? Did that report ever reflect on the Police records of these people?

A. No, sir. The only time an entry is made on an arrest record is when the subject is actually arrested.

Q. So this report is justified with reports that are in the Police Department and not put on their record, because they weren't arrested?

A. No, sir, it is not put on the record.

Q. Who has access to these records?

A. If anyone, strictly the investigator involved or somebody within the Investigating Division or somebody connected with the case.

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Q. Of your own personal knowledge, how many people on the Arlington County Police Department knew of this incident?

A. That I can recall, namewise at this time, would be—

Q. Just tell me the number.

A. Three people that I know of, possibly five.

Mr. Hilton: I have no further questions.

Harry M. Hittle

CROSS EXAMINATION

By Mr. Bach:

Q. Officer, how are these reports filed?

A. The reports are filed in numerical order in folders in the Records Section itself.

Q. If someone wanted to get back a particular report, could you look it up alphabetically?

A. I believe for, there is an index for the names of plaintiffs and companies and soforth.

Q. If someone checked the names Koerner, Mac Daniel, or Rickman, they would have gotten the record back?

A. I have only worked up there four weeks. But I do understand we do have cards. No notations are put on the arrest record.

These cards are for arrest purposes. They are not opened to the general public.

Q. Who are they opened to?

A. Members of the Police Department or Investigative Personnel.

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Q. If someone had to check these records through these names, they would have found these reports?

A. Yes, sir, I am sure they could have if they had gone through this separate file.

Q. You weren't the investigator on this thing?

A. No, sir.

Q. You justified the report?

A. No, I took the report.

Q. Who was the investigator?

A. Terry.

Q. And he would have been the one to decide whether any charges were filed or not?

A. Well, the incident was carried as a felonious assault.

Q. The incident was carried—

Mr. Hilton: He objected to my going into statements, and I am going to object to anything that was, that is hearsay.

The Court: Just confine it to what the record is. Objection sustained.

By Mr. Bach:

Q. Who was the complainant concerning the felonious assault?

A. David Allen Rickman.

Harry M. Hittle

2/28/69 page 19 } Q. He was the complainant, was he not?
A. Yes, he was. He was one of the victims involved.
Q. Was the other Frank Koerner?
A. Yes, sir, it was.
Q. And who were the suspects involved?
A. Forshee and the Edwards subject.
Q. The two men in the Court today?
A. Yes, sir, that's correct.

Mr. Bach: No further questions.

REDIRECT EXAMINATION

By Mr. Hilton:
Q. The subjects did come in and make a complaint?
A. Yes, sir, they did.
Q. And charges could have been made on the other people on the basis of this complaint?
A. These?
Q. These charges are listed in separate indexes under the name of the complainant?
A. Yes, sir.
Q. The name again?
A. Tomas, Edwards, Rickman.
Q. It was carried on as Rickman?
A. Yes, sir.

2/28/69 page 20 } Mr. Bach: That was David Allen Rickman.
The Witness: Yes, sir. I am sorry.
The Court: May this witness be excused?
Mr. Hilton: Yes, sir.
I think since we have stipulated to the report, there is no problem about getting a copy of that into evidence.
The Court: Mr. Bach.
Mr. Hilton: I would like a copy of that put into the record.
Again, I don't have an access to copies of the report over at the Police Department.
Mr. Bach: I do object to it at this time.
The Court: A copy of the report that was made in Arlington that this witness just testified was made.
Mr. Bach: I do have a copy of it. Well, I'll put it in if you want me to.
The Court: Do you want to authenticate it, so this witness—

Harry M. Hittle

Mr. Bach: I will state that this is the report that I had.
I don't know if there is any other.
The Court: Maybe you better do it through this witness to stipulate it that they are the same.
Mr. Hilton: Is this the report that was filed
2/28/69 with the Arlington County Police Department?
page 21 The Witness: Well—
Mr. Bach: Can he take the stand again?
The Court: I expect you better.

FURTHER REDIRECT

By Mr. Hilton:
Q. Go ahead.
A. Yes, sir, this is the report that I filled out, incident that was reported to our Department on the 19th of July.
Q. And is that a true reproduction of the copy filed in the Department?
A. It is, sir.

RECROSS EXAMINATION

By Mr. Bach:
Q. I have a couple of questions. Has Mr. Hilton seen this report or that copy of it?
A. Not this copy of it.
Q. Well, has he seen a copy of it?
A. I believe he has.
Q. Did you show it to him.
A. No, sir.
Q. Would you have shown that to him if he
2/28/69 asked you to?
page 22 A. No.
Q. He knew you had it?
A. He knew I had it.
Q. Is that against Department policy to show it to the Defense Attorney?
A. I don't know.
Q. But, it was shown to him, and you would have shown it to him if he asked?
A. I believe I would have, sir.

Mr. Bach: No further questions.
I have no objection to it going into evidence.
Mr. Hilton: I have another question on along this line.

What is the Department policy to giving out the reports?

The Witness: No reports are to be duplicated or handed out to anybody except an investigating officer or someone assigned to the case; or in this case a Police Officer going to Court in reference to the incident.

Mr. Hilton: And you would have given me the report if I had come to you, that would have been a breaking of the rules without the proper authorization?

The Witness: Without the proper authorization? Commonwealth Attorneys can get it, also.

2/28/69 page 23 } Mr. Hilton: So any showing to me of that report without the authorization of the Commonwealth Attorney would have been strictly against the rules of the Department, would it not?

The Witness: I am sure it would have, sir.

Mr. Bach: May I have one or two more. You don't know whether it is against the rules. You just think it would have been?

The Witness: It be against—

Mr. Bach: Is it against the rules to give a regular record check on anybody, to just a citizen?

The Witness: The citizen himself must come for his own record check unless the lawyer has an affidavit from that person.

Mr. Bach: It is quite common for Mr. Hilton to give Mr. Hassen, to call up and say, "give Mr. Hilton that record."?

The Witness: I don't know. I was in the record room at that time and working with the warrants. I had to become familiar with the situation.

Mr. Bach: But it is against policy to even give record checks, is it not?

The Witness: It is not against the policy with the regulations involved, and it has to be the individual or the attorney with an affidavit from the individual.

2/28/69 page 24 } Mr. Bach: Did you give Mr. Hilton regular checks on these boys?

The Witness: No, sir, I did not.

Mr. Bach: Did he ask you to give them to him?

The Witness: No, sir, he did not.

The Court: Anything further.

Mr. Hilton: I don't have anything further.

I'd like to call Roger Forshee as my next witness.

Whereupon, ROGER FORSHEE was called as a witness in behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

Roger Forshee

DIRECT EXAMINATION

By Mr. Hilton:

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

A. Roger Forshee, 3738 Rugby Road, Fairfax.

Q. Now, could you speak a little louder?

A. Yes.

Q. Where were you employed?

A. Airway Sheet Metal.

2/28/69 page 25

Q. Directing your attention on or about the 19th day of July, 1968, did you have occasion to be in Arlington?

A. Yes, sir.

Q. Were you with someone or alone?

A. I was with someone.

Q. Who was that?

A. Vaughn Edwards.

Q. And did some unusual occurrence happen during the course of that evening?

A. Yes, sir.

Q. Would you tell us what happened?

A. Vaughn and I was going over to see a girl, and it was pretty late; and we was headed down the street, and we was getting ready to make a U-turn, and a car-load of boys, and they was hollering at us.

We went—we pulled up aside of them, and they used some dirty language and were in a convertible car with the top down and all and we left and followed them.

They were sitting along side of the street out of the car with the baseball bat and started come toward the car. So we had some stuff in the car, a lug wrench and a tire arm. They started coming toward the car, and they left.

Q. Did they pass you at that time?

2/28/69 page 26

A. Yes, sir, we were sitting on the street, and they passed.

Q. And went on down the street in front of you?

A. Yes, sir, the convertible top or they jumped up while the car was moving; but when I got out of the car, they come running toward us with baseball bats and hollering. I tried to scare them. I threw a tire at them.

Q. How many people were in this car?

A. Five, two in the back and three in the front.

Q. You say before you brought your car to a stop, two already got out?

Roger Forshee

A. Yes, sir.

They was coming back in the car. I was pretty scared, because there was five in *there* car and two of us in ours.

I threw the tire arm and missed two that was getting out of the car. I tried to get back in the car and get away.

They took a jack handle and it come threw the windshield on the right side. The only thing that stopped it from coming through, it had a round end on it. So as he was leaving, he was getting in the car with a baseball bat and stuff. Rickman chased us down the street.

Q. What damage did they do to the car?

A. Windshield busted on both sides, and two places on the right side, one on the left. Headlights dented the car, the jack handle struck into the fender, stuck in coming through almost in the windshield, dented it in the right rear glass.

2/28/69 page 27

Q. You said that you could stop the first time, and then they passed you.

How far did you go down the road before their car stopped again?

A. As I got back in the car, they got in their car; and they passed around us. They just, I guess, was trying to get ahead of us and here they come running back up the street, so I got back out again.

Q. Where was their car in relation to the street?

A. They was in the left hand, and we was in the right hand.

Q. Where was it that they stopped? Would you describe the road there?

A. Sir?

Q. Would you describe the road there, was—

A. It was an underpass at, I think, its George Mason Drive and Glen Carlyn Road.

Q. And they stopped their car under the underpass?

A. Just this side.

Q. Did you know either of these boys?

A. Never seen them before.

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Q. Did there come a time when you found out who they were?

A. Yes, sir. We went to the Police Station.

Q. When?

A. Right after that.

Q. And how long was it before the other boys arrived at the Police Station?

A. I'd say approximately a half hour.

Roger Forshee

Q. Did you learn who the people were in the car when you were at the Police Station?

A. Yes, sir, I know just about all of them.

Q. On the basis of what you later learned as to the names of these people, would you tell who were the people that came back to your car with the baseball bats and with the tire arm?

A. One of them, Rickman was after us with the baseball bat.

The two that first got out, I am not exactly sure who they were. One of them, I think, it was Frank was batting on the right side of the car; and I am almost positive that he threw the tire arm through the windshield.

Q. You referring to Frank Koerner?

2/28/69 page 29

A. And Rickman busted the headlights out. I think it's Mike Koerner, he threw a jack or something at the car.

The other two boys, I just remembered them three, the two Koerner boys, because they are *bothers,* and Rickman because he is a big guy.

Mr. Hilton: I have nothing further.

CROSS EXAMINATION

By Mr. Bach:

Q. You stated two people ran back to your car?

A. Yes, sir.

Q. And you threw a tire arm at them, and you missed and hit two that were in the car?

A. Yes, sir.

Q. The two you hit with the tire arm were Dave Rickman and Frank Koerner?

A. Yes, sir.

Q. So they were never out of that car before you threw the tire arm?

A. No, sir. They were getting out.

Q. Were you hurt in anyway?

A. No, sir.

Q. Now, Rickman had a three inch cut on his head, didn't he?

2/28/69 page 30

A. I don't know for sure. One of them did.

Q. They were both cut in the head from you?

A. Yes, sir.

Q. And you weren't scratched, were you?

Dan Mustaine

A. Yes, I had a cut on me.
Q. As you say, bust any glass or do anything to your car before you had hit two of them in the head with a tire arm?
A. No, sir.
Q. The first thing that happened, you threw a tire arm?
A. Except for some cussing.

Mr. Bach: Except for some cussing—I have no further questions.
The Court: Do you know Stover?
The Witness: No, sir, not before today.
The Court: You may step down.
Mr. Hilton: I'd like to call Detective Mustaine for just one or two brief questions.

Whereupon, DAN MUSTAINE was called as a witness in behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

2/28/69 By Mr. Hilton:
page 31 } Q. Would you state your name and address?
A. Investigator Dan Mustaine.
Q. You are the Investigating Officer on this case?
A. Yes, sir. I am.
Q. Did there come a time that you received the copy of the Arlington County report in regards to this incident?
A. Yes, there was, sir.
Q. When did you receive that?
A. Datewise, I don't know—shortly after the incident involving the Defendant.
Q. Would sometime first in the middle of August be a fair date?
A. Sometime before the end of September, Mr. Hilton; but anytime after that.
Q. Did you subsequently give that report to the Commonwealth Attorney?
A. Yes, sir, I did.

CROSS EXAMINATION

By Mr. Bach:
Q. How did you get this report of this incident?
A. A matter of routine, I initiated the teletype message on

Dan Mustaine

2/28/69 page 32 } the North circuit of our teletype system requesting any, and all information involving some eight people, the five witnesses and the three Defendants, requesting any information my Department might have.

Q. This came as a matter of routine?

A. Yes, sir.

Q. Now, do you remember statements from the victims of this crime?

A. Yes.

Q. Do you remember the preliminary hearing of this case?

A. Yes, sir. I remember it having occurred.

Q. And do you remember having to make copies of those statements to the autopsy report?

A. Physically making the copies, no, sir. I was instructed at the time of the preliminary hearing by the Commonwealth Attorney at that time, Mr. Richard Horan, to make available these statements, the autopsy report to the Defense Attorney.

Q. Did that include the statement of Mr. Paul Koerner?

A. I am sure it was.

Q. Now, do you know who gave these to any of the Attorneys?

2/28/69 page 33 } A. I remember giving statements to the Attorney, whether specifically one statement to each Attorney—I can't remember that. But I remember the Attorneys coming in and out at different times getting at least one or two copies of different statements.

Q. These were available to anyone who asked for one?

A. Yes.

Q. Do you remember giving autopsies?

A. Yes, sir.

Q. Do you remember whether you gave any statement to Mr. Hilton or not?

A. Whether, I can't recall specifically giving Mr. Hilton any statement as such.

I gave the statements, and they were available to all of the Attorneys whether remembering specifically to Mr. Hilton, this I don't recall.

Q. Mr. Hilton, Mr. Ernest White and Mr. Brooke Howard?

A. That's correct.

Mr. Bach: No further questions.

Dan Mustaine

REDIRECT EXAMINATION

By *RM*. Hilton:

Q. Do you recall my coming to the Police Department to pick up some statements shortly after the preliminary hearing?

A. I *beleive* there did come a time.

Q. Do you recall what was given to me at that time?

2/28/69 page 34 } A. No, sir. I was instructed to give you the statements that I had taken from the witnesses and from the Defendant, and I assume that this is what you picked up.

Q. Are you positive you were instructed to give me the statement taken by the other witness at the time of the preliminary hearing?

A. Either before, at that time or just a short time after, the next day. I don't recall exactly when it was.

Q. Do you recall some discussion we had in the hall at the time of the preliminary hearing when there was some question raised about the statement, and it was mentioned at the time there had not been any statement taken from the witnesses or that they were available?

A. No, sir. There were two statements taken the night the incident happened, *they* day directly after the incident had occurred.

Q. If I told you when I came out to pick up the statement the only thing I got was the autopsy report was the statement of my Defendant, would deny that?

A. No, I won't deny it. There is a possibility that they were still on tape. That is a possibility, sir. I can't recall the dates that the things were taken.

I knew they were available, and I just made copies when they become available.

2/28/69 page 35 } Q. But at the time I came out to pick up my statement the only thing I got was an autopsy report, and the statement of my Defendant?

A. I don't know what you picked up. I am sure I gave you what we had.

Q. Going back to my original statement, would you deny that—

Mr. Bach: I don't think he has the right to cross examine his own witness.

The Court: Objection overruled.

Dan Mustaine

By Mr. Hilton:

Q. Would you deny that—the only thing I got was this boy's statement and the autopsy report?

A. I remember you coming and picking up something, I don't deny.

Mr. Hilton: So you won't deny that. I have no further questions.

RECROSS EXAMINATION

By Mr. Bach:

Q. Officer, were the statements of all the victims in this crime available if they had been asked for?

2/28/69 page 36 A. Yes, sir. They were cleared through Mr. Horan, and I was instructed to give all statements of all witnesses and Defendant and the Autopsy report to the three Defense Counsels.

Q. As best you can remember, did you do this?

A. Yes, sir.

The Court: Anything further?

Mr. Hilton: I have nothing further.

That's all I plan to put on.

The Court: All right, Commonwealth have any evidence?

Mr. Bach: No, Your Honor.

Mr. Hilton: If the Court please, I will try to be brief here. I am here on a motion that is in two parts. First, that due evidence was discovered which I had no knowledge of prior to the time of trial, and as I have said, I did not have that information in my possession until the thirty-first day of January 1969.

And I still would not deny that information, had not someone from the Arlington County Police Department come to me and said, "here is something I think you ought to know about"—I think we had testimony from Officer Hittle as to the procedures in that Department. If you get a record check, you don't pick up your reports.

The Court: Did you ask for a record check on all of the witnesses of the Commonwealth?

2/28/69 page 37 Mr. Hilton: I did receive a record check on the people in regards to felonious or charges that might be used.

The Court: When did you make that request, back in September, before the trial?

Mr. Hilton: Before the trial, and again this is a request that doesn't go through normal channels. Maybe some people call it, let me go over and get the records, but I am afraid I don't have quite that easy an access to the records over in the Police Department.

At any rate, this was a report that does not show on the arrest record. It was indexed in the name of David Allen Rickman which isn't the name of anybody with the mistake of what it heard as to the name.

I don't know who gave the wrong name there, but the record was indexed in the name of Rickman. I would never have found that report.

When I went back over sometime in the early part of February, I am sure I went over the Monday after I first learned of this report. And in order for that report to be found, at that time, we had to go by the date and go back up to pick the names up.

I requested through the three attorneys were together at the preliminary hearing, Mr. Howard, Mr. White,
2/28/69 myself. I was told at that time that the statements
page 38 } weren't available, that I could have the statement that my Defendant had given, which I got, and the autopsy report, and maybe I should come in with a motion after that for the Commonwealth to produce all of the statements.

I thought in the discussion I had with Mr. Bach, that we had a full discovery of the case, that I knew what their witnesses were going to say; and we discussed it at length.

Now, I would submit, if the Court please, that the questions for grounds for a new trial and after discovered evidence, that the evidence was discovered after the trial.

The Court: When did you first see the statement of Paul Koerner that's been introduced in evidence as Commonwealth Exhibit Number 1?

Mr. Hilton: Today is the first time. Secondly, it must appear that the plaintiff was diligent in getting and securing the evidence. Perhaps I wasn't, but I thought I was diligent in securing the evidence. The discussions we had, and as to the character of the people involved.

I attempted to get a record check through Arlington which I did. This didn't appear on the record.

There's no way that I could say that I could have gotten this report had it not specifically been called to
2/28/69 my attention.
page 39 } Now, I think that the evidence that has been

put before you by Mr. Forshee indicates that a similar occurrence, namely the people in the car were Paul Koerner, and David Rickman, started some shouting back and forth with the car that Roger Forshee and his companion were riding, that they went on up the road, that there was some more language going back and forth and some swinging of bats, and that then the boys drove out in front and stopped in the road and jumped out.

I would submit little almost the same situation that occurred with the Defendant, Stover.

I would submit that that evidence that Roger Forshee has brought before the Court would be admissible to show the turbulent and violent nature of Frank Koerner, Paul Koerner and David Rickman and would not be permissible in the trial.

For those cases, I have cited in my motion, *Randolph versus the Commonwealth. Buford versus the Commonwealth* which held that was malicious in the indictment with the intent to maim, disfigure, disable and kill, and also some sections of—which these two cases both alluded to. And that is so even though the Defendant—

The Court: And that is so even though the Defendant himself, may not have known?

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Mr. Hilton: I am not sure that is the majority rule in this Country. There are statements in conflict with that, but certainly the cases hold in Virginia that the Defendant did not need. The question is the violent and the turbulent nature of the prosecuting witness. This is held to be admissible where there is evidence of self-defense.

The case of Randolph holds that. They say that is only admissible in such instances where there is self-defense. This boy's story is he did act in self-defense. There are people that did entice him to follow them. When they got out, they ran back and were hitting them. They had their hands in the window as opposed to his story, that they were holding the door shut to keep him from getting out.

I would submit these prior acts that they would show the prior conduct that was had in this case.

The second part in my motion deals with the matters of suppression of evidence. It was my understanding that as I have said before, at the time of the preliminary hearing, no statements were available. I received no statement. As we got on into the case, a new Commonwealth Attorney came in, Mr. Bach.

We discussed the case many times. I felt I was well aware

of the records of the boys. We even talked that
2/28/69 they had never been convicted of anything before.
page 41 } We talked about the character of my people, my
client and the other people in the car.

The Court: Hearing those considerations, did you ever ask the Commonwealth Attorney whether he had statements?

Mr. Hilton: But at no time did the Commonwealth come forward and say that these boys were involved in other incidents.

During the course of our conversation, it was my impression from our discussions that these boys had no record, had nothing to reflect it on.

The Court: There is nothing in the record?

Mr. Hilton: This didn't say anything to the effect about their character in any way. I could go ahead and cite some cases, *Brady versus Maryland, Hamlet versus "Americk"* case. I think the Americk case clearly says the Commonwealth has an affirmative duty to come forward with any information they have that would be relevant and helpful to my case.

I think they have that affirmative duty, and in this case, I don't think they exercised that duty.

I think the case of Brady says clearly the fact that counsel in that case didn't ask for a ballistics report. The fact that
he didn't ask for it or is assumed he said some-
2/28/69 thing favorable to the Commonwealth, there was
page 42 } an affirmative belief on the Commonwealth to come
forward and lay that information out.

I would submit in this case, the Commonwealth had the duty to bring this to my attention. It was an easy matter. The report was in the file. When we were discussing the case, he could have shown me the report. There could have been some mention.

There was never any disclosure at any time on the Commonwealth's part, and I would submit they breached that affirmative duty which they had to bring forth the pertinent evidence which would have helped the Defense.

On those two basis, I would move you accept our motion for a new trial.

Mr. Bach: I don't think any of the cases go so far as to do what Mr. Hilton suggested that I had to do, and that would be in *affect* to give him every bit of information in the past lives of the complaining witnesses in this case.

This incident in Arlington had no relation whatsoever to

a crime with which Mr. Stover was charged, no relation whatever.

I don't think Mr. Hilton claims it. Frankly, I had this report in my file as I had numerous things. I told Mr. Hilton I never read it. I was familiar it was there.

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In my judgement, it was not relevant to the case. However, I state to the Court again, I was under the belief that Mr. Hilton had this information. Unfortunately, I was not in the case during the preliminary hearing. Detective Mustaine stated to me, as he stated on the stand, he was told by the Commonwealth to give Mr. Hilton any of the other attorneys autopsy reports and the statements of all the complainants. He was under the belief he did just that. If he did do it, of course, the information was available to Mr. Hilton.

Whether he read that statement or not, I don't know. If he didn't do it, he stated there was no question he was told to do it. Had he been asked, he would have done it.

I think Mr. Hilton stated correctly there was a very full discussion of this case. I think there was candor on both sides of this case, and I did not mention this incident to Mr. Hilton. I thought he knew about it. I thought he had these statements.

Furthermore, the burden is on stage two, to show that this was something that was very material that could have effected the outcome. I don't think this would have.

Number two, this was not available to him through diligence. We have got undisputed evidence if Mr. Hilton had asked for it, he would have gotten it. I certainly would have given him the statements.

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The Detective was under the impression he gave him the statement. Mr. Hilton admits that he did get the autopsy report which was part of what was supposed to be given to him. Mr. Hilton says he had a source in the Arlington County Police Department. The Policeman said this source would have gotten him this information. I don't think that this is the type of newly discovered evidence, number one that would have *effected* the jury one way or another.

I don't believe it is actually newly discovered evidence or evidence to be suppressed by the Commonwealth.

Mr. Hilton: I would just say briefly. As far as the disclosure here not being relevant to the case, I think the case clearly holds it is not for the Commonwealth Attorney to decide what evidence is material and not material. But the

fact that there is some evidence that would have been admissible at the trial of character, there was an affirmative duty to disclose. I think also here the cases say revealing something of essential fairness, and a question of due process, Constitutional Argument.

There is a case of *United States versus Chatman, Chatman versus the state of California.* It says when you are dealing with this Constitutional question, you have got to be sure this evidence would have been admissible or made a difference in the verdict.

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The Court: Beyond all reasonable doubt?

Mr. Hilton: Beyond a reasonable doubt, and I would submit with this man's argument of self-defense, and the story he told fits with precisely with the evidence you have heard here.

The same type of occurrence which would certainly lend credibility to his story of self-defense and made the jury think about some different result as to a verdict or punishment.

The Court: I don't believe this comes within the "passive non-disclosure," I think, is the way it's been put, of the Commonwealth Attorney, that would warrant a new trial.

Nor do I think it was the type of evidence that diligence couldn't have been secured before hand. More importantly, even if the evidence is admissible, I don't think it's the type of evidence that would on retrial change the position of the jury.

The motion will be denied.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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