Return to
FILE COPY
Supreme Court of Appeals
Richmond, Va.

211 VA 633

Record Nos. 7400, 7401

In the
Supreme Court of Appeals of Virginia
at Richmond

WILLIAM SYLVESTER OWENS
v. Record No. 7400
COMMONWEALTH OF VIRGINIA

ROY LEE FERGUSON, JR.,
v. Record No. 7401
COMMONWEALTH OF VIRGINIA

FROM THE CORPORATION COURT OF THE
CITY OF CHARLOTTESVILLE

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. 7400

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

WILLIAM SYLVESTER OWENS,

Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in error.

From the Corporation Court of the City of Charlottesville
George M. Coles, Judge

Upon the petition of William Sylvester Owens a writ of error and *supersedeas* is awarded him to a judgment rendered by the Corporation Court of the City of Charlottesville on the 30th day of April, 1969, *nunc pro tunc* as of January 20, 1969, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; 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. 7401

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

ROY LEE FERGUSON, JR.,

Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in error.

From the Corporation Court of the City of Charlottesville
George M. Coles, Judge

Upon the petition of Roy Lee Ferguson, Jr., a writ of error and *supersedeas* is awarded him to a judgment rendered by the Corporation Court of the City of Charlottesville on the 30th day of April, 1969, *nunc pro tunc* as of January 20, 1969, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; 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. 7400

* * * * *

page 1 } WARRANT OF ARREST

Commonwealth of Virginia, City of Charlottesville, To-wit: To the Chief of Police or any Police Officer of said City:

Whereas C. E. Jones of said City, has this day made complaint and information on oath before me, J. Grayson Johnson a Justice of the Peace of said City, that William Sylvester Owens in said City on the 8 day of September, 1968, did unlawfully fail to disperse after being order to do so in violation 18.1-254.4, 18.1-254.8—of the laws of the Commonwealth of Virginia.

These are therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and produce before the Municipal Court of said City the body of William Sylvester Owens to answer said complaint and to be further dealt with according to law.

Given under my hand and seal this 9 day of September 1968.

J. Grayson Johnson, J. P. (Seal)

OFFICER'S RETURN

Executed on the day of 196 , by placing in custody the body of the above named defendant—by summoning the above named defendant to appear at the Police Court of said City on the day of 196 , at o'clock, M

Police Officer

JUDGMENT

Upon examination of the foregoing charge this 12th day of September 1968, the above named defendant is found Guilty as charged, and adjudged to pay a fine of $250.00 and costs and to serve a term in jail of 6 months certified to the Grand Jury of the Corporation Court of said City.

Appeal noted 9/12/68

Allan N. Spitzer
Judge of the Municipal Court
Judge, Juvenile and Domestic Relations Court

C. D. Moore
Clerk

RECOGNIZANCE

Commonwealth of Virginia, City of Charlottesville, To-wit:

Know All Men By These Presents, That we William Sylvester Owens principal, and Rev. Henry B. Mitchell, surety, are held and firmly bound unto the Commonwealth of Virginia in the full sum of One thousand dollars 00/100 ($1,000.00) Dollars, to the payment whereof we bind ourselves, our heirs and personal representatives, jointly and severally, by these presents. Sealed with our seals and dated this 12th day of September, 196 . The condition of this obligation is such that if the above bound William Sylvester Owens principal shall personally appear before the Corporation Court of the City of Charlottesville on the day of 196 , to answer the charge herein specified; and, unless the same be finally disposed of before said Justice, shall also personally appear before the Corporation Court of said city on the first day of the Oct. term, 1968, thereof, and at any other time or times to which the proceedings in connection with said charge may be continued or further heard, and shall not depart thence without leave of Court, then this recognizance to be void, otherwise to remain in full force and effect until said charge shall have been finally disposed of.

Signed and acknowledged before me this 12th day of September, 1968.

William S. Owens (Seal)

J. Grayson Johnson,
Justice of the Peace

Henry B. Mitchell (Seal)

* * * * *

Appeal Noted

Commonwealth of Virginia
v.
WARRANT OF ARREST

Name William Sylvester Owens
Address 814 B Hardy Dr.
Race Sex Age
Bonded to 196
Continued to 196
Continued to 196
Trial 196

* * * * *

page 2 } WARRANT OF ARREST

Commonwealth of Virginia, City of Charlottesville, To-wit:
To the Chief of Police or Any Police Officer of Said City:

Whereas, pursuant to objection of counsel for William Sylvester Owens made this day at trial in this Court upon appeal of a warrant heretofore issued on September 9, 1968 against William Sylvester Owens by J. Grayson Johnson, Justice of the Peace for said City, that said warrant did not adequately set out any offense under the laws of the Commonwealth, C. E. Jones and C. Donald Moore of said City have this day made complaint and information on oath before me, George M. Coles, Judge of the Corporation Court of the City of Charlottesville, under the provisions of Section 16.1-137 of the Code of Virginia, that William Sylvester Owens in said City on the 8th day of September, 1968, did unlawfully or riotously, with six or more other persons acting together, use force or violence and with such other persons be unlawfully or riotously assembled and while so assembled and so using such force or violence, upon the police officials of said City going among such persons so assembled and commanding them in the name of the State immediately to disperse, did remain present at the place of the above described riot or unlawful assembly after having been lawfully warned to disperse as aforesaid, in violation of the laws of the Commonwealth of Virginia.

These are therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and produce before the Corporation Court of the City of Charlottesville the body of William Sylvester Owens to answer the aforesaid complaint and be dealt with according to law.

Given under my hand and seal this 26th day of November, 1968.

George M. Coles (Seal)
Judge of the Corporation Court
of the City of Charlottesville

* * * * *

page 6 }

* * * * *

At a Corporation Court of the City of Charlottesville, on the Law Side Thereof, Held on Thursday, December 5th, 1968.

* * * * *

Commonwealth of Virginia,
v.
William Sylvester Owens,

On this the 5th day of December, 1968, came again the Commonwealth of Virginia, by her Attorney, and the defendant, William Sylvester Owens, again appeared in court in obedience to his recognizance; likewise appeared John C. Lowe, attorney for the defendant.

Thereupon counsel for the defendant further moved to dismiss the charge against the defendant on the grounds that the State Statute concerning riots, under which the defendant is now being tried, is unconstitutional, and the Court, having heard argument thereon, overruled said motion, and to which action and ruling of the Court the defendant, by counsel, objected and excepted.

Thereupon the Court, having fully heard the evidence and argument of counsel and having maturely considered of its judgment, finds the defendant guilty as charged in the warrant issued by the court for failing to disperse after being ordered to do so by a police officer under conditions therein set out, and fixes his punishment at confinement in jail for a term of six (6) months.

It is therefore Adjudged and Ordered that the defendant be confined in jail for a term of six (6) months, the period of confinement by the court in its judgment ascertained.

page 7 Thereupon counsel for the defendant took exception to the court's finding, and thereupon counsel for the defendant further moved the court to suspend all or a portion of said sentence, which motion the court overruled.

And counsel for the defendant indicated an intention to apply to the Supreme Court of Appeals of Virginia for a writ of error to said judgment, the defendant was permitted to depart upon posting a $1,000.00 bond pending said appeal.

s/ George M. Coles, Judge

* * * * *

page 8 }

* * * * *

Commonwealth of Virginia,
v.
William S. Owens,

ORDER

Upon the Motion of the Defendant, William S. Owens, for good cause shown, no objection being made by the Commonwealth, a motion to suspend execution of sentence entered upon the conviction of the defendant sentencing him to six months in jail is taken under advisement by the Court until the further Order of this court.

Enter: George M. Coles
Date: Dec. 23, 1968

* * * * *

page 10 }

* * * * *

At a Corporation Court of the City of Charlottesville, on the Law Side Thereof, Held on Wednesday, April 30th, 1969.

* * * * *

Commonwealth of Virginia,
v.
William Sylvester Owens,

On the 20th day of January, 1969, came the defendant William Sylvester Owens, by his Attorney, and the Commonwealth of Virginia, by her Attorney, whereupon the Court having maturely considered the motion of defendant made on the 23rd day of December, 1968, to suspend the execution of sentence entered upon the conviction of the defendant, sentencing him to six (6) months in jail, and the Court being of the opinion that defendant's motion should be denied, no good and sufficient cause being then shown, it was accordingly so ordered from the bench in open court, and no written order having been entered by the Court on that date, and no prejudice

appearing, the Court doth this 30th day of April, 1969, enter this order *Nunc Pro Tunc* denying defendant's said motion.

GMC

page 11 }

* * * * *

Commonwealth of Virginia
v.
William Sylvester Owens

* * * * *

NOTICE OF APPEAL

Notice is hereby given that William Sylvester Owens will apply for a writ of error from the final order in the above styled case entered by the Corporation Court of the City of Charlottesville on the 20th day of January 1969, convicting him of a charge that he did unlawfully or riotously with six or more other persons acting together use force or violence and with such other persons be unlawfully or riotously assembled, and while so assembled and so using such force or violence upon the police officials of said City going amongst such persons so assembled and commanding them in the name of the state to immediately disperse did remain present at the place of the above described riot or unlawful assembly after having been lawfully warned to disperse as aforesaid in violation of the laws of the Commonwealth of Virginia, and sentencing him to six months in jail.

ASSIGNMENTS OF ERROR

Said William Sylvester Owens, by counsel, asserts as his assignments of error the following:

page 12 } 1) That it was error for the Court to rule that §§ 18.1-254.1 through 18.1-254.8, commonly known as the Anti-Riot Act, of the Code of Virginia of 1950 as amended, were not violative of the Constitution of the United States, including particularly the provisions of the First and Fourteenth Amendments.

2) That it was error for the Court to rule that §§18.1-254.1 through 18.1-254.8 of the Code of Virginia of 1950 as amended were not violative of the Constitution of Virginia,

including particularly the provisions of Article I, Section 8.

3) That it was error for the Court to rule that defendant had not been placed in jeopardy as contemplated by the Constitutions of the United States and Virginia by the conviction in a Municipal Court on the 12th day of September 1968, and that defendant therefore could be tried on a new charge in the Corporation Court based on the same allegedly criminal acts, rather than being tried on an appeal of the first conviction.

4) That it was error for the Court to rule that it was not a violation of due process guaranteed under the Constitutions of the United States and Virginia for defendant to be tried on the merits of his case by the same judge who had heard inadmissible and possibly illegally obtained evidence, and evidence heard at a time when defendant was not present, had no right to assert evidentiary objections, had no right to cross examine or confront witnesses, and did not hear evidence given.

5) That it was error for the Court to admit into evidence irrelevant and in some cases highly prejudicial evidence over the objection of counsel as noted and excepted to during the trial.

page 13 } 6) That it was error for the Court to overrule defendant's motions to strike at the conclusion of the Commonwealth's evidence and at the conclusion of all the evidence.

7) That the judgment of the Court convicting defendant and sentencing him was contrary to the law and the facts of the case.

WILLIAM SYLVESTER OWENS

By John C. Lowe
Counsel

* * * * *

Filed March 20, 1969

G. Stuart Hamm, Jr., Clerk

* * * * *

Record No. 7401

* * * * *

page 1 } WARRANT OF ARREST

Commonwealth of Virginia, City of Charlottesville, To-wit: To the Chief of Police or any Police Officer of said City:

Whereas C. E. Jones of said City, has this day made complaint and information on oath before me, J. Grayson Johnson a Justice of the Peace of said City, that Roy Lee Ferguson in said City on the 8 day of September, 1968, did unlawfully fail to disperse after being order to do so in violation 18.1-254.4 and 18.1-254-8—of the laws of the Commonwealth of Virginia.

These are therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and produce before the Municipal Court of said City the body of Roy Lee Ferguson to answer said complaint and to be further dealt with according to law.

Given under my hand and seal this 19 day of September 1968.

J. Grayson Johnson, J.P. (Seal)

OFFICER'S RETURN

Executed on the day of 196 , by placing in custody the body of the above named defendant—by summoning the above named defendant to appear at the Police Court of said City on the day of 196 , at o'clock, M

Police Officer

JUDGMENT

Upon examination of the foregoing charge this 12th day of September 1968, the above named defendant is found Guilty as charged, and adjudged to pay a fine of $250.00 and costs and to serve a term in jail of 6 months certified to the Grand Jury of the Corporation Court of said City. Appeal noted 9/12/68 196

Allan N. Spitzer
Judge of the Municipal Court
Judge, Juvenile and Domestic Relations Court

C. O. Moore
Clerk

RECOGNIZANCE

Commonwealth of Virginia, City of Charlottesville, To-wit:

Know All Men By These Presents, That we Roy Lee Ferguson principal, and Henry Floyd Johnson, surety, are held and firmly bound unto the Commonwealth of Virginia in the full sum of One thousand dollars 00/100 ($1,000.00) Dollars, to the payment whereof we bind ourselves, our heirs and personal representatives, jointly and severally, by these presents. Sealed with our seals and dated this 12 day of September, 1968. The Condition of this obligation is such that if the above bound Roy Lee Ferguson principal shall personally appear before the Corporation Court of the City of Charlottesville on the day of 196 , to answer the charge herein specified; and, unless the same be finally disposed of before said Justice, shall also personally appear before the Corporation Court of said city on the first day of the Oct. term, 1968, thereof, and at any other time or times to which the proceedings in connection with said charge may be continued or further heard, and shall not depart thence without leave of Court, then this recognizance to be void, otherwise to remain in full force and effect until said charge shall have been finally disposed of.

Signed and acknowledged before me this 12 day of September, 1968.

Roy L. Ferguson (Seal)

J. Grayson Johnson,
Justice of the Peace

Henry Floyd Johnson (Seal)

* * * * *

page 2 } WARRANT OF ARREST

Commonwealth of Virginia, City of Charlottesville, To-wit:
To the Chief of Police or Any Police Officer of Said City:

Whereas, pursuant to objection of counsel for Roy Lee Ferguson made this day at trial in this Court upon appeal of a warrant heretofore issued on September 9, 1968 against Roy Lee Ferguson by J. Grayson Johnson, Justice of the Peace for said City, that said warrant did not adequately set out any offense under the laws of the Commonwealth, C. E. Jones and C. Donald Moore of said City have this day made complaint and information on oath before me, George M. Coles, Judge of the Corporation Court of the City of Charlottesville, under the provisions of Section 16.1-137 of the Code of Virginia, that Roy Lee Ferguson in said City on

the 8th day of September, 1968, did unlawfully or riotously, with six or more other persons acting together, use force or violence and with such other persons be unlawfully or riotously assembled and while so assembled and so using such force or violence, upon the police officials of said City going among such persons so assembled and commanding them in the name of the State immediately to disperse, did remain present at the place of the above described riot or unlawful assembly after having been lawfully warned to disperse as aforesaid, in violation of the laws of the Commonwealth of Virginia.

These are therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and produce before the Corporation Court of the City of Charlottesville the body of Roy Lee Ferguson to answer the aforesaid complaint and be dealt with according to law.

Given under my hand and seal this 26th day of November, 1968.

George M. Coles (Seal)
Judge of the Corporation Court
of the City of Charlottesville

* * * * *

page 6 }

* * * * *

At a Corporation Court of the City of Charlottesville, on the Law Side Thereof, Held on Thursday, December 5th, 1968.

* * * * *

COMMONWEALTH OF VIRGINIA,
V.
ROY LEE FERGUSON, JR.,

* * * * *

On this the 5th day of December, 1968, came the Commonwealth of Virginia, by her Attorney, and the defendant Roy Lee Ferguson, Jr., appeared in court in obedience to his recognizance; likewise appeared John C. Lowe, attorney for the defendant.

Thereupon counsel for the defendant further moved to dismiss the charge against the defendant on the grounds that

the State statute concerning riots, under which the defendant is now being tried, is unconstitutional, and the Court, having heard argument thereon, overruled said motion, and to which action and ruling of the Court the defendant, by counsel, objected and excepted.

Thereupon the Court, having fully heard the evidence and argument of counsel and having maturely considered of its judgment, finds the defendant guilty as charged in the warrant issued by the Court for failing to disperse after being ordered to do so by a police officer under conditions therein set out, and fixes his pnishment at confinement in jail for a term of six (6) months.

It is therefore Adjudged and Ordered that the defendant be confined in jail for a term of six (6) months, the period of confinement by the Court in its judgment ascer-
page 7 } tained.

Thereupon counsel for the defendant took exception to the Court's finding, and thereupon counsel for the defendant further moved the court to suspend all or a portion of said sentence, which motion the court overruled.

And counsel for the defendant indicated an intention to apply to the Supreme Court of Appeals of Virginia for a writ of error to said judgment, the defendant was permitted to depart upon posing a $1,000.00 bond pending said appeal.

S/ George M. Coles, Judge

* * * * *

page 8 }

* * * * *

ORDER

Upon the Motion of the Defendant, Roy Lee Ferguson, for good cause shown, no objection being made by the Commonwealth, a Motion to Suspend execution of sentence entered upon the conviction of the defendant sentencing him to six months in jail is taken under advisement by the Court until the further Order of this Court.

Enter: George M. Coles
Date: Dec 23, 1968

* * * * *

page 10 }

* * * * *

At a Corporation Court of the City of Charlottesville on the Law Side Thereof, Held on Wednesday, April 30th, 1969.

* * * * *

COMMONWEALTH OF VIRGINIA,
v.
ROY LEE FERGUSON, JR.,

On the 20th day of January, 1969, came the defendant Roy Lee Ferguson, Jr., by his Attorney, and the Commonwealth of Virginia, by her Attorney, whereupon the Court having maturely considered the motion of defendant made on the 23rd day of December, 1968, to suspend the execution of sentence entered upon the conviction of the defendant, sentencing him to six (6) months in jail, and the Court being of the opinion that defendant's motion should be denied, no good and sufficient cause being then shown, it was accordingly so ordered from the bench in open court, and no written order having been entered by the Court on that date, and no prejudice appearing, the Court doth this 30th day of April, 1969, enter this order *Nunc Pro Tunc* denying defendant's said motion.

GMC

* * * * *

page 11 }

* * * * *

COMMONWEALTH OF VIRGINIA
v.
ROY LEE FERGUSON

* * * * *

NOTICE OF APPEAL

Notice is hereby given that Roy Lee Ferguson will apply for a writ of error from the final order in the above styled case entered by the Corporation Court of the City of Charlottesville on the 20th day of January, 1969, convicting him

of a charge that he did unlawfully or riotously with six or more other persons acting together use force or violence and with such other persons be unlawfully or riotously assembled, and while so assembled and so using such force or violence upon the police officials of said City going amongst such persons so assembled and commanding them in the name of the State to immediately disperse did remain present at the place of the above described riot or unlawful assembly after having been lawfully warned to disperse as aforesaid in violation of the laws of the Commonwealth of Virginia, and sentencing him to six months in jail.

ASSIGNMENTS OF ERROR

Said Roy Lee Ferguson, by counsel, asserts as his assignments of error the following:

page 12 } 1) That it was error for the Court to rule that §§18.1-254.1 through 18.1-254.8, commonly known as the Anti-Riot Act, of the Code of Virginia of 1950 as amended, were not violative of the Constitution of the United States, including particularly the provisions of the First and Fourteenth Amendments.

2) That it was error for the Court to rule that §§18.1-254.1 through 18.1-254.8 of the Code of Virginia of 1950 as amended were not violative of the Constitution of Virginia, including particularly the provisions of Article I, Section 8.

3) That it was error for the Court to rule that defendant had not been placed in jeopardy as contemplated by the Constitutions of the United States and Virginia by the conviction in a Municipal Court on the 12th day of September 1968 and that defendant therefore could be tried on a new charge in the Corporation Court based on the same allegedly criminal acts, rather than being tried on an appeal of the first conviction.

4) That it was error for the Court to rule that it was not a violation of due process guaranteed under the Constitutions of the United States and Virginia for defendant to be tried on the merits of his case by the same judge who had heard inadmissible and possibly illegally obtained evidence, and evidence heard at a time when defendant was not present, had no right to assert evidentiary objections, had no right to cross examine or confront witnesses, and did not hear evidence given.

5) That it was error for the Court to admit into evidence

irrelevant and in some cases highly prejudicial evidence over the objection of counsel as noted and excepted to during the trial.

page 13 } 6) That it was error for the Court to overrule defendant's motions to strike at the conclusion of the Commonwealth's evidence and at the conclusion of all the evidence.

7) That the judgment of the Court convicting defendant and sentencing him was contrary to the law and the facts of the case.

Roy Lee Ferguson

By John C. Lowe
Counsel

* * * * *

Filed March 20, 1969

G. Stuart Hamm, Jr., Clerk

* * * * *

* * * * *

Records Nos. 7400-7401

* * * * *

page 1 } November 26, 1968

Court convened at 10:00 a.m.

Stuart Hamm, Clerk: William *Sylvestor* Owens will you stand please? You are charged with on the 8th day of September, 1968 that you did unlawfully fail to disperse after being ordered to do so in violation of 18.1-254.4, 18.1-254.8 with the laws of the Commonwealth of Virginia.

Lowe: Prior to plea Your Honor I would ask that the clerk read the warrant verbatim please. I don't believe that states anywhere in there in violation of those provisions. I would like to have it in the record verbatim.

Hamm: I'll be glad to read it anyway you want me to.

Lowe: I think it's material in this particular instance Your Honor and I would like to have the record accurately reflect the way it is written.

Court: Well, if you will come up and look at it and show us what you want to change...

Lowe: Well, Your Honor the numbers and I'm reflecting also the way this was read in the lower Court which we're appealing from—the numbers were read failing to do so and 18.1-245.3 and 18.1-254.8 in violation of the laws of the Commonwealth of Virginia. Now that was the way they were charged and convicted in the lower court and I think that's the way it should reflect on the record.

page 2 } Court: Well this has been amended to read 254.4...

Lowe: Yes sir, I understand that.

Hamm: Do you want me to read it?

Lowe: Just where it says failure—being ordered to do so 18.1-245 or in your case 254.4 and 18.1-254.8 in violation of the laws of the Commonwealth of Virginia.

Court: Well read it like it is and if Mr. Lowe has any objection or the Commonwealth wants to amend it why I'll be glad to hear it.

Hamm: The warrant then as I understand it to read, did unlawfully fail to disperse after being ordered to do so 18.1-

254.4—no and—18.1-254.8 in violation of laws of the Commonwealth of Virginia.

Lowe: Right, thank you. We plead not guilty Your Honor.

Court: Just a second, does the Commonwealth...

Camblos: I don't understand the point being made of the warrant. Is it Mr. Lowe's contention that he does not understand that these people are accused of failing to disperse when properly ordered to do so during the course of a riot.

Lowe: That is correct. This warrant does not charge that is our contention.

Camblos: If Mr. Lowe has any question about it Your Honor I move to amend the warrant to read the precise wording of the statute which is cited in the warrant.

page 3 } Lowe: I have argument addressed to that if you'd like to take Mr. Ferguson also before I address myself to this argument.

Court: I haven't gotten to him...

Lowe: Well this is identical...

Hamm: We haven't gotten a plea on this one.

Lowe: All right, Your Honor I would like to object to any amendment...

Court: Well wait just a minute. He's not entered a plea yet for this has he?

Lowe: Sir?

Court: Did I understand you...

Lowe: Your Honor Mr. Camblos has moved for an amendment. I am addressing myself to that motion.

Court: All right, have a seat.

Lowe: First, Your Honor we object and objected and preserved the objection in the lower Court to any amendment, including the amendment which read 254.4. As originally written if you check 245.3 which is what the warrant originally read, Code of Virginia 245.3 refers to participation in marathon contest or something which, is completely irrelevant and I don't think there would be any contest that that was actually charged. At the trial below Mr. Gillium, Assistant Commonwealth Attorney moved to amend the warrant saying that it was a typographical error by the Clerk or a clerical error and that he transposed the numbers. Well

page 4 } if you transpose the numbers to 254.3 you still can't get to 254.4. And further Your Honor before that amendment the charge did unlawfully fail to disperse after being ordered to do so, with those two sections, 245.3 and 254.8 does not charge an offense recognizable under the laws of the Commonwealth of Virginia. Therefore, to amend the warrant in such a manner as to create a charge in the warrant would be in violation of

Section 19.1-175 of the Code of Virginia which authorizes amendment but only if it does not change the nature of the offense charged. Now in this particular instance the effect of the amendment would be to take the warrant which does not charge an offense and change it into a warrant which does supposedly charge an offense. This would run contrary to a decision of the Supreme Court of Appeals in the Case of *Evans* against *Commonwealth* which referred to the next section which was 19.1-176 but refers basically to the same amendment process. At that particular case an amendment was sought which would have changed the charge from a misdemeanor to a felony at the trial of court and the court allowed the amendment. And the Supreme Court of Appeals held that that was an improper amendment because it did change the nature of the charge by raising it from a misdemeanor to a felony. Certainly the same would be true even more so raising it from a no offense status into a misdemeanor status. And for that reason we oppose and object to any amendment including an amendment which was made in the lower Court for which we did preserve an
page 5 } objection.

Court: Mr. Camblos.

Camblos: In the first place Your Honor I don't think there is any such thing as preserving an objection in the lower Court. Of course this is a trial *de novo* and what objections may have been made or exceptions taken in the lower Court are in complete nullity of course. I do not believe Your Honor that that statute is—the warrant is as artfully drawn as it might have been. On the other hand I think that to Mr. Lowe and his clients and anyone else practicing at this Bar, it must have been perfectly plain as to what these defendants are charged with. The sections of the Code under which they were charged set out in the warrant —one of them misnamed perhaps but the other one actually being the section that would define the offense. I believe that there would be no change of the nature of the offense charged unless it is as contended the Court feels that no offense was charged. If any offense was charged in that warrant the nature of it certainly wouldn't be changed by now amending that warrant to set up the wording of the statute verbatim. If Mr. Lowe wants to insist upon his position and is planning to take this matter to the Court of Appeals, perhaps we can satisfy him by granting the motion quash, swearing out a new warrant, starting all over if he wants to put his clients to that expense. But if that warrant doesn't charge any offense then there's certainly nothing to keep the Commonwealth from swearing out another warrant.

Court: Let me see the statute. This charges "is
page 6 } unlawful if failed to disperse after ordered to do
so"—if it doesn't do anything else, it's in violation of the laws of the Commonwealth of Virginia. If they've got the wrong statute referred to, why . . .

Camblos: Your Honor the only possible *ommission* in the wording of the warrant would be an allegation that it was during the course of a riot.

Lowe: Your Honor I just point out one other thing, 18.1-254.8 which is the second reference in the body of the warrant, is not in any way a provision which sets forth an offense. All it is, is an empowering provision giving police officials power to disperse groups which are gathered. It in no way sets forth an offense so that there is no offense designated in the warrant. I will further point out that the Supreme Court of Appeals has addressed itself to exactly the argument that Mr. Camblos is making. In the case of *Falden* against *Commonwealth* in 1937 an indictment charged conspiracy to rob a mail truck. Now clearly the defendant and all the attorneys at the Bar knew exactly what the Commonwealth had in mind, meaning robbing the people who were in the mail truck. However, the Court held that although the facts alleged in the indictment were true, it did not allege an offense because you cannot rob a truck. You can rob persons and it therefore
reversed the case. The same thing is true here. It
page 7 } does not matter that we may have known that he
was proceeding under the riot Act. The fact is he did not do it properly or the police authorities did not do it properly as required by law. Another case *Bissell* against *Commonwealth* in 1957 involved a statute which required that the races be seated separately. The charge in that case charged a lady with failing to take the seat which was designated for her but did not allege that this was based upon race. And the Supreme Court of Appeals of Virginia very interestingly reversed that by saying that it did not allege a necessary element of a statutory offense. A necessary element of this statutory offense is the fact that there was either a riot or a rout or an unlawful assembly in progress at the time there was given the order to disperse. That appears no where in this warrant and therefore the warrant is defective.

Court: Well of course the defendant is entitled to know what he is charged with. I believe there is a statute that permits this court to hear the evidence and then charge him with what the evidence shows. Let me find that. Suppose we suspend a minute.

Recess.

Court: Under the provisions of Section 16.1-137, the Court of Virginia outlines the procedure on an appeal when the warrant is defective and it provides that the court can hear evidence and issue a new warrant and we'll proceed under that section and if the Commonwealth wants to put page 8 } on any evidence at this stage I'll be glad to hear it to see whether or not a new warrant should be issued.

Camblos: Your Honor while the Commonwealth doesn't acknowledge that the warrant is defective, it does acknowledge that it could be more artfully drawn. Certainly it is the Commonwealth's position that the Defense counsel is completely appraised of the charges his clients face as is demonstrated by the fact in chambers a minute ago he stated that he wanted to argue the constitutionality of the statute under which they are charged. I don't see how he could possibly do so or be prepared to do so unless he knew what they were charged with. However I do agree with the Court that since there has been objection to the form of the warrant under the Code Section stated, the Court having power to issue a new warrant at this time, I would like to present evidence which I believe will convince the Court there is probable cause for the issuance of such a new warrant.

Court: Now Mr. Lowe I believe you want to make a statement of your rights...

Lowe: Yes sir. I did not make a statement in chambers which would in any way indicate that I knew this particular provision of the statute. My comment was that Article 1.1 which I believe is commonly known as the Anti-Riot Act or the Riot Act as a whole is unconstitutional and while I was sure Mr. Camblos intended to proceed under some provision of it, I do not particularly know which one he pro- page 9 } ceeded except that 254.4 was indicated on the warrant. I would like to raise in order to preserve at this time the constitutionality argument that the entire Anti-Riot Act, Article 1.1 which starts with Section 18.1-254.1 and continues on is unconstitutional. It is unconstitutional under the Constitution of Virginia and also the United States Constitution as being in violation of the due process provisions of the Fourteenth Amendment requiring certainty—on the basis this is too vague—is also unconstitutional in that it is an unconstitutional abridgment of the First Amendment rights to free speech and assembly in that it does not represent a clear and present danger or does not state so within the body of the Act in such terms as a man of common ordinary intelligence can decide what is his conduct which

would be criminal and what is that would not. Now...

Court: Let me just cut you off at this point Mr. Lowe. Until we have a warrant, you're right in preserving your rights on this to the question of the constitutionality of the statute. But I'll give you an opportunity to be heard. First I think we'd better go ahead and see if the Court is going to issue a warrant.

Lowe: All right, sir. I will preserve my argument then for a later point in trial. I would like to except to the Court's proceedings, object to it and except to the way we are proceeding on this warrant.

Court: Well we might as well . . .

Camblos: May it please the Court, may I now
page 10 } call a witness?

Hamm: We haven't arraigned the other man yet.

Court: Well we might as well...

Camblos: The same will apply to both...

Court: All right, I don't think it makes any difference because the other warrant is the same form. Well all right, go ahead and arraign him.

Hamm: Roy Lee Ferguson, will you stand. You are charged with on the 8th day of September 1968, you did unlawfully fail to disperse after being ordered to do so, 18.1-254.4 and 18.1-254-810 in violation of the laws of the Commonwealth of Virginia. Do you plead guilty or not guilty?

Lowe: Same objection but not guilty Your Honor.

Court: All right, I think in both cases the Court will proceed to hear the evidence to see whether or not a new warrant should be issued.

Camblos: Mr. Moore will you come forward please?

Lowe: Your Honor may I have a point of clarification. As these witnesses are presented here do I understand the Court will take all of their testimony at one time or will they be recalled after a new warrant is issued?

Court: This is preliminary. This is not on the trial of the case. This is to determine what points should be tried. In other words the Court is—this is almost like working with
a Grand Jury. If it fails to properly issue a
page 11 } warrant, the Court will try to determine from this
evidence what warrant to issue. And then of course the defendants will be arraigned on the new warrant, if one is issued, and then the trial of the case will commence.

Lowe: Do I understand that I would have the right to cross examination at this point or will it be *ex parte* as in Grand Jury?

Court: I don't think you have a right to cross examina-

tion. This is just like the swearing out of a warrant originally.

Lowe: I will again respectfully object and except to the Court's ruling.

Court: All right, this is not the trial of the case.

C. D. MOORE, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Camblos:

Q. Would you state your name please sir?

A. C. D. Moore.

Q. And your occupation?

A. Police officer for the City of Charlottesville.

Q. Mr. Moore I believe you are Lieutenant in charge of the 4 P.M.—midnight shift in the Police Department?

A. That is correct, sir.

page 12 } Q. Did you act in this capacity during the first full week of September of this year?

A. Yes sir.

Q. During that week would you tell the Court briefly whether you observed various assemblages of persons?

A. I did sir.

Q. Did you undertake to keep watch over those assemblages?

A. I did.

Q. Did you observe those assemblages committing unlawful acts?

A. From time to time, yes.

Q. Tell the Court whether or not any property damage occurred so far as you could tell from your observation as a result of activity of those assemblages?

A. The glass windows and doors to predominantly all the businesses in the Preston Avenue area at one time or another during that week were broken once or more times.

Q. Did you observe various persons known to you among the persons assembling?

A. By sight, not by name at that moment.

Q. Tell the Court whether or not the assemblages seemed to involve the same group from night to night or some of the same group, not precisely.

A. It definitely involved some of the same people

page 13 } from time to time. The size of the group was not always the same but some of the people are known to me and they were there all the time.

Lowe: Your Honor if I may interrupt for just a minute to make one objection, not specifically that answer, but I do want to preserve this so there will be no question on this. I object to this testimony being heard by the same Court that is going to hear the warrants on the merits. I think that a lot of this, particularly since I have no right to object or cross examine, is highly prejudicial, is irrelevant and I would object to it being heard by this Court.

Court: Of course this is proceeding under the statute...

Lowe: Well I except to your ruling.

Q. Mr. Moore tell the Court whether or not these assemblages which involved basically the same persons from time to time increased in the degree of property destruction as time went on, night to night?

A. At the onset, the first beginning, there was an accumulation of 50 to 60 people. Attention was called to the fact that they were assembled. On that particular night it was a matter of marching down Preston Avenue, crossing towards Main Street. A little later on that particular crowd broke up into a little group. I saw a window broke out of the liquor store. The school over—Jefferson School—was fairly well beat up. It was confined to small

page 14 } activity at the onset. As the week wore on and as the time passed it got worse and worse...

Q. Had the police made a decision as to how to handle it at first when it wasn't so bad?

A. At the onset I was working under instructions to survey the situation, to keep it under surveillance, to watch it, to stay with it and to act under certain circumstances at certain times if the situation got too bad. I did that for—it's my recollection that I did that on Monday and Tuesday, Wednesday and Thursday. I was not there—by Friday night the situation had gotten to increasingly worse. Saturday at 8 o'clock in the morning I called my superior and I indicated to him—this is what I did, I indicated to him that I was dissatisfied with the course we were following, that my job required me to enforce the law, I was not doing it and if I was not going to be permitted to enforce it, I would not come back to work that evening. He could replace me. A few minutes later he called me back and said "Enforce the law."

Q. Now we get to Sunday night, September 8th. On that night did you observe people assembled in the area in which you had previously observed these assemblages?

Lowe: Excuse me Your Honor, I would like to move for exclusion of the other witnesses if this is going to be coming back and forth. I think it would be appropriate here if the other officers are going to testify, if we could—at this point I think it would be appropriate before any preju-
page 15 } dicial...

Court: Mr. Lowe you don't have any standing. It's like when someone swears out a warrant before the Justice—you're not there to cross examine or to object to the evidence. Now I'm perfectly willing to exclude the witnesses but this is to determine whether a warrant should be issued and I don't want to have to speak to you again about it.

Lowe: Yes sir I understand.

Court: You understand that...

Lowe: I'm just trying to protect my clients rights Your Honor as I see them and I realize how Your Honor is proceeding. I just want to make sure the record reflects that these objections were raised.

Court: Were the witnesses excluded down at the trial in the Police Court?

Lowe: Your Honor at the trial in the Police Court I moved for the witnesses to be excluded and was told that I did not have standing at that point also because the first people who were tried were not involved in my particular case, were not my clients and I objected down there for the same reason I'd like to...

Court: I think the best thing to do is to hear this in chambers. This is just to determine whether a warrant should be issued. Nobody but the Commonwealth Attorney and witness for the Court will be present.

Lowe: Yes sir. I would just like to preserve the
page 16 } objection again that I feel that it should be held in open Court and recorded for the purpose of the record again.

Court: All right.

Lowe: And I except to your ruling.

At this point in the hearing Judge Coles, Commonwealth Attorney Jack Camblos and C. D. Moore, Police Officer, retired to the Judge's chambers. Officer C. E. Jones was also called in.

Court: From the examination of the original complaining witness and the testimony of Mr. Moore, the Court feels that there is sufficient cause to believe that an offense has been committed and accordingly I have instructed the Commonwealth Attorney to prepare a new warrant which the Court will issue when it's complete charging offense under the new riot statute.

Camblos: Then we are in adjournment then until I can do that sir?

Court: All right, sir.

Recessed for new warrant to be prepared.

Court: All right, the Court has—hereby dismisses the original warrants and has issued under its own hand new warrants and I'll require that these defendants, former defendants, now be arrested under these new warrants and brought before the Court.

Lowe: Your Honor if we could go on the record for a moment, there is one thing which we took up back in the room that I don't think has gotten on the record. I would like to just mention that on 11 September 1968—I would page 17 } like to make a matter of record the fact that on that date I wrote to the Clerk of the Municipal Court and asked that both Mr. Owens and Mr. Ferguson be tried on the warrants. I don't know that it has any further purpose at this point except that it was not on the record. I would like for it to be a part of the record.

Court: That is a part of what we're trying to do is to see that they are tried on the warrants.

Lowe: Yes sir, right.

Officer Kelso placed the Defendants under arrest.

Court: Now Mr. Lowe while the officer is making his return is there any request for a continuance on these two cases?

Lowe: No, Your Honor, I believe that it will not be necessary to have a continuance on the warrant as drafted.

Court: All right, sir. And we're going to try these two cases together as I understand it?

Lowe: Yes sir.

Camblos: The Commonwealth has no reason for continuance Your Honor.

Court: All right, sir.

Hamm: Roy Lee Ferguson, will you stand please? You are now charged that under the provisions of Section 16.1-137

of the Code of Virginia that you did in said city on the 8th day of September, 1968, unlawfully or riotously with six or more other persons acting together use force or
page 18 } violence and with such other persons be unlawfully or riotously assembled. And while so assembled and so using such force of violence upon the police officials of said city going amongst such persons so assembled and commanding them in the name of the State to immediately disperse did remain present at the place of the above described riot or unlawful assembly after having been lawfully warned to disperse as aforesaid in violation of the laws of the Commonwealth of Virginia. Do you plead guilty or not guilty?

Lowe: Subject to the same objections we have made we would like to plead not guilty. And if I might add Your Honor I think with the Court's permission rather than continuing renewing objections at each point that we have already discussed, if it's sufficient to note that we will make that a continuing objection and just leave it at that.

Court: All right.

Camblos: May it please the Court those objections were made pursuant to another warrant. We now have proceeded in a different manner under a different warrant and I would like for the objections to be specifically stated because I don't know what objections Mr. Lowe now has.

Court: I expect you had better state them.

Lowe: All right, sir. First of all the primary objections I was referring to were the procedural objections in the manner in which we went about quashing the old warrant and taking evidence and so forth on the new war-
page 19 } rant. The procedure itself I objected to. A this point I want to make sure it was preserved as to this warrant here. I do have the constitutional objection that we have already made and I would suppose we would have to renew this since this is a new warrant again. I would also object on the basis that have been tried below. I realize that the Courts of Virginia has said that they do not have jeopardy now that it's on an appeal. I want to reserve the point in the event that we want to pursue that as a matter of constitutional issue—that we do object that they have been tried once, found guilty, that the objections raised in Municipal Court were valid objections and should have resulted in a dismissal. As I say I realize the Courts of Virginia have ruled against this and there isn't any prob-

able tie up. I want to reserve the objection that there was even a new warrant issued on this client.

Camblos: May it please the Court I would like to know whether the Defense Counsel is triffling with the Court. He has made objections that the warrant below was a nullity. Now he seems to be objecting on the ground that the defendant prior jeopardy. Now I think he should state his ground one way or the other. He can't have it both ways.

Lowe: Your Honor I have not made the statement that is was a nullity. I made the statement that there was no offense charged in the warrant. That objection was made in the court below and contrary to what Mr. Camblos feels, I be-
page 20 } lieve that my preserving the objection below might very well have some legal relevance. I mention it for that purpose. I believe that the warrant did not charge an offense, it was improperly amended and that the Commonwealth must stand before on that warrant. Now whether the warrant is a nullity or not, I think is a decision for this Court to make. Our argument was that if there was no offense charged and that the amendment is improper and...

Court: The Court has now dismissed the...

Lowe: I realize that. I realize that the Virginia law at this point would indicate that that was a nullity down there but as I say I'm not prepared to concede that point on appeal.

Court: All right, will the Defendant stand again. Now you realize that you can either be tried by the Court or by a jury. Is it your desire and wish to be tried by the Court without a jury?

Ferguson: I'd rather have the Court try me.

Court: All right, and the Commonwealth?

Camblos: If it please the Court the Commonwealth will likewise waive a trial by jury.

Court: All right.

Hamm: William *Sylvestor* Owens, will you stand? You are now charged that under the provisions of Section 16.1-137 of the Code of Virginia that you did in said City on the 8th day of September 1968, did unlawfully or riotously with
page 21 } six or more other persons acting together use force or violence and with such other persons be unlawfully or riotously assembled. And while so assembled and so using such force of violence upon the police officials of said city going amongst such persons so assembled and commanding them in the name of the State to immediately disperse did remain present at the place of the above described riot or unlawful assembly after having been unlawfully warned to disperse as aforesaid in violation of

the laws of the Commonwealth of Virginia. Do you plead guilty or not guilty?

Lowe: Not guilty.

Court: All right, now you also realize that you can either be tried by a jury or by the Court. Is it your wish and your desire to be tried by the Court without a jury?

Owens: With the Court.

Court: All right, and the Commonwealth?

Camblos: The Commonwealth likewise waives trial with jury, Your Honor.

Court: All right. We are now ready to proceed. I will just give you this as a word of advice. We are going to have to wind this case up tonight even if we have to run a little late because we have another case tomorrow. I understand that this is a very important case to all parties but we'll have to run it through even if it runs a little over time—a few hours over time.

Camblos: May it please the Court as the Court has just stated, it is the position of the Commonwealth page 22 } that this is an important case. It is not and I stress, not a case under the City Code of failure to obey a police order. This is a case of ones involved in a riot refusing to allow the police officials to properly disperse those rioting. The Commonwealth will show Your Honor that the general disturbance had started in the City of Charlottesville some several days prior to the time of these arrests, that is was a continuing disturbance dying down in the period of the day time and springing up again each night among the same persons or roughly the same group of persons, that the police initially undertook to handle it without making arrest on the theory that making arrest might be the spark to cause it to really get out of hand. They found that this procedure did not work, that the continuing disturbance got worse and worse and finally on the night of these arrests the police who were then at maximum strength in patroling the area where the disburbances had been taking place in order to try to preserve the property and the safety of the citizens on two occasions ordered the rioters to disperse, that on each of these two prior occasions the rioters of whom the two defendants were a part, failed to disperse but just moved to a different place in the immediate vicinity. The police continued to observe the unlawful acts, the riotous acts of the mob—it got worse and worse, including fire bombing of places of business, breaking of windows. The police then con-

cluding that there was no other choice moved in in force to arrest all that they could arrest and to put a
page 23 } stop once and for all to the rioting in progress. These two defendants among others were arrested by the police at that time. We think under this evidence Your Honor, the Court will find that these two defendants are guilty under the Riot Act, that the crime was extremely serious and that these two defendants should be severely punished for their part in it.

Court: Mr. Lowe?

Lowe: Your Honor I would like at this time to make a constitutional argument that the Court has previously issued since we had not made it at all at to these warrants. I want to preserve the . . .

Court: I'm not going to listen to your full argument at this time because we've got all of these witnesses that have been waiting here since 10 o'clock but I will permit you to make a statement of the general points that you—but I won't hear an argument at this time because that's something we can *here* on another day if necessary.

Lowe: All right, well I would like to object and challenge the constitutionality of the entire Riot Act on the basis that is *is* violative of the Virginia Constitution, Article 1, Section 8 I believe it is, that requires certainty to be attached to criminal offenses in order that a man may determine whether his conduct is criminal or otherwise. It is violative of the due process provisions of the Fourteenth Amendment for the same reason and it is also an unconstitutional
page 24 } abridgement of the First Amendment, Rights of Speech and so forth. To highlight any further I think at this point would not be necessary subject to preserving the right to make a full argument on all these points at the appropriate time. I have authorities and point them out . . .

Court: Well, for the record the court will give you full opportunity to give any argument on this point—these points that you wish but at a future time after we hear the evidence.

Lowe: All right, sir.

Camblos: May it please the court I answer in saying that to claim that this Act is violative of right of free speech and assembly is in my mind absurd. I think that one member writing an opinion in the United States Supreme Court has pointed out that the right of free speech doesn't give anyone the right to cry fire in a crowded theater.

C. D. Moore

Lowe: I might make just an opening preliminary statement. As assuming for the moment and passing by the question of constitutionality or other objections we have raised, just taking the merits of the case, we believe that the evidence will be that in spite of all these objections, even overlooking that there was no offense committed under the provisions of the Riot Act as such, we believe that the evidence will show that these two men are not guilty of any offense. I want to be sure that there is no assertion as once
page 25 } before has been made—that there is no assertion that these men are guilty or that we failed to claim that they are not guilty. They are most definitely not guilty not merely on the constitutional rights, Your Honor.

Court: All right, call the first witness please.

C. D. MOORE, having *bee* duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Camblos:

Q. Would you state your name please sir?

A. C. D. Moore.

Q. Occupation?

A. Police Officer for the City of Charlottesvillle, Lieutenant.

Q. Mr. Moore as a Lieutenant in the Police Department of the City of Charlottesville, do you have charge of one of the shifts, the daily shifts of the police?

A. Yes sir.

Q. Which one?

A. 3:45 to 11:45 at night, normally.

Q. Were you acting in that capacity in the early part of September of this year?

A. Yes sir.

Q. In that capacity were you called upon to observe certain assemblages which occurred early in Septem-
page 26 } ber of this year?

A. Yes sir.

Q. Would you tell the Court what observation you made first, what assembly you first observed?

A. The first assembly I observed was a marching of a sizeable group of young colored people down Preston Avenue, easterly on Preston Avenue, crossed over in the direction of the bus terminal, got back on Main Street and the crowd diminished on that particular day.

C. D. Moore

Q. Did you or other police officers take any specific action in connection with that assembly?

A. No action was taken on that day.

Q. Was any property destroyed by members of that assembly?

A. One glass was broken out of the liquor store at 8th and West Main Streets and the Jefferson School had some windows broken, is my recollection.

Lowe: Objection Your Honor. I don't see what relevance this has to the charge before the Court unless there is going to be some testimony that brings it in. These particular defendants—it happened on a different day—I don't think there is any allegation that they are charged under these warrants with these offenses.

Court: I'm going to overrule the motion at this time. Is there going to be a tie in with this . . .

Camblos: May it please the Court I believe that
page 27 } all of the evidence regarding this occasion and
occasions every night from this time forward to
the date of these arrests, will show a pattern of increasing violence by groups of persons unlawfully assembled together in rioting.

Lowe: We except to your ruling Your Honor.

Court: All right.

Camblos: Mr. Moore had you finished stating what the property was damaged or destroyed in the assembly of that night?

A. I said that I saw a window broken at the 8th Street liquor store and the reports reflect that windows were broken in the Jefferson School—the number of windows I don't know but window panes.

Q. Mr. Moore did you report this to your superior at the Police Department?

A. Yes sir.

Q. Was a decision made regarding the handling of it by the police?

A. Yes sir.

Q. What was that decision?

A. At that point I went to my commanding officer and I found him on the second floor of City Hall that night. I told him what I had seen and what I had observed. He and I at that point decided that we would keep these people, this group of people under surveillance—no action was taken.

C. D. Moore

page 28 } Court: What was the date of that Mr. Moore?

A. Your Honor I believe it was on a Monday night—the date I cannot be certain about but I'm going to be talking about Monday, Tuesday, Wednesday and Thursday I was off —then Friday and Saturday and Sunday are the nights that I'm going to be talking about.

Q. Now again on the following night, were you again on duty?

A. Yes sir.

Q. Did you observe any similar assembly involving generally the same persons?

A. Yes.

Q. And what did you observe that night?

A. I do not have any recollection of any damage that particular night. I do not recall any damage. It was just a matter of getting up and walking, marching along the street in large numbers.

Q. What action did you take in regard to the assembly the second night?

A. Exactly the same as I had the first night, just followed them along and watched them and increased my personnel just a little.

Q. Now did this according to your own knowledge or according to police reports you have read, continue nightly from that point forward?

page 29 } A. It did continue nightly, yes sir.

Q. Tell the Court whether or not the violence, property damage, any other unlawful acts increased as it continued?

A. By Thursday night and by Friday night it was substantially worse. By Friday night it was substantially worse—by Friday night—police too have some sources of information and these sources of information with which we were given, we had by this time increased our personnel and our strength very very much. At this time we had considerable State Police, County Police, University Police stashed away. We had them stashed away and we had them stashed away for a reason because we were in possession of information that real bad things were going to happen.

Q. Did real bad things happen?

A. I thought they were bad. I could not begin to tell you the amount of windows and I mean some of them were great big *enomous* things—in this little shopping center over here for instance. You just couldn't keep the windows in that

place. And on one night, it was Friday night, it's my recollection that every glass in that place was broken out, business occupied or not occupied, except for two—two places is my recollection that the windows remained in.

Q. This is what place you're talking about?

A. This little new shopping called Plaza Shopping Center —Plaza something or other.

page 30 } Q. Where is it?

A. It's located right across the street from the Triangle Service Station. It's on Preston Avenue. It's just two or three doors west of the Nite & Day Market.

Q. Is this in the City of Charlottesville?

A. Yes sir, it is. Almost directly across the street from the Monticello Dairy.

Q. Did the various damage—property damage that occurred seem to be localized or centered around any point in the City?

A. It did not spill out of the area—the Preston Avenue area to any great degree. A couple of homes were rocked and rocks thrown into the living quarters of a couple of people that I know.

Q. Who were these people?

A. One was Officer F. D. R. Jackson and the other was H. R. Granger, both police officers.

Q. Are they both negro police officers?

A. Yes sir.

Q. Now did this continue Saturday night?

A. This continued again Saturday night. On Saturday night we were operating basically in a little corner over back of the Monticello Dairy where a party had gotten into progress . . .

Q. Now before we get into details of Saturday night had you talked to your superiors about the hands off policy that had previously been formulated?

page 31 } A. Yes sir.

Q. And what decision had been arrived at to that discussion?

A. That we were going to enforce the law, to make arrest when necessary.

Q. Did the violence continue on Saturday night?

A. Yes sir.

Q. Did it become necessary to make arrests?

A. Yes sir.

Q. Was this still roughly the same group that had been involved all along?

C. D. Moore

A. Yes sir.

Court: Mr. Camblos I think what might modify its previous ruling—I think this evidence heretofore is admissible for the purpose of showing the clear and present danger and as possible justification for the action of the police. But I don't think it would relate to the guilt of innocence of these two defendants because they have not been connected with it at this—by any of this evidence so far.

Q. Do you remember whether or not you saw these two defendants on the nights previous to Sunday, September 8th?
A. The one on the end with the darkest skin and the heavier hair, he was a constant visitor. The one sitting next to Mr. Lowe was there—I don't know how much but there.
And I didn't know either one of their names of
page 32 } course at that time. But I just recognized them.
Q. You mean you had seen them both in this group from time to time?
A. Yes sir.

Camblos: Your Honor I think it's appropriate in finding that leading up to the occasion in issue, it tends to show the
Judge: I agree. Up until that point these defendants had *riotuous* condition on that occasion.
not been tied into it.

Q. Now Mr. Moore again on Sunday night were you again on duty Sunday, September 8th?
A. Yes sir.
Q. And could you tell us about when that night anything to do with this matter came to your attention further?
A. I do not remember the hour or the minute. Officer Blake and his officer, whoever was working with him, took a warrant on Preston Avenue to Presto Cafe. This warrant had been sworn out by some individual. It was not a police warrant. It was some individual of the city who had sworn out a warrant against a fellow by the name of Fry. That warrant was served at the Presto Cafe and before the completion of the service on the defendant who was placed in the car, I arrived on the scene and that is my first encounter with this situation on Sunday night.
Q. Do you remember approximately what time that was
Mr. Moore?
page 33 } A. It wasn't dark. It was not dark but I don't know just exactly what time it was.

C. D. Moore

Q. Was there any large group of people there?
A. There was a large group of people there.
Q. Would you estimate how many?
A. 75 to 100.
Q. Tell the Court what you observed there on the occasion of the arrest of Fry, the defendant in the warrant you mentioned?
A. The officers had served this warrant on Woodson Fry. The police car was parked across the street from Presto Cafe, headed in an easterly direction. I want to think that it's Frank Jackson, F. D. R. Jackson, was the other officer—I might be wrong but I think he was the other officer. They took this man into custody and started to the police car with him and it was just an explosion—swearing and cursing and yelling police brutality and almost instantly, simultaneously there was a surge of this entire crowd out into the street and started to cross the street in the direction of the police car. I pulled my men up on the line along the edge of the sidewalk—I pulled the police up on the side, the edge of the street. And at that point I approached this crowd of people and I told this crowd of people that they were unlawfully assembled, that this is a riot and you must disperse in the name of the law. They backed up and they went back to the sidewalk on the Presto Cafe side. A dozen or eight
page 34 } or ten possibly peeled off the end of it, started on in this direction coming east on Preston Avenue.
I saw no great change in the number of people. The crowd shifted a little bit to my left, still a sizeable crowd. They went across the street just to my left and come on over in the area between Jim Williams Buick and Harper Motors. They were watched for a short time. I just stayed right on them and right with them. The abuse was bad, hollering at these colored boys calling them Old Tom . . .
Q. Which colored boys are you talking about?
A. I heard several people call Frank Jackson Old Tom.
Q. You mean Police officers?
A. Yes sir.
Q. Calling the Police Officers that?
A. That's right—Uncle Tom . . .

Lowe: Excuse me. Your Honor before we go any further with this particular witness, could I renew my motion for exclusion of witnesses please?
Court: You've waited too long Mr. Lowe . . .
Lowe: No I think it would be in the discretion of the Court to do it at any point Your Honor and I had raised it before

but when we got back into the matter it didn't occur to me to renew it. I think it's appropriate at this point.

Court: You can make it at the start of the trial but after hearing part of the evidence I don't think you can then make such a motion. I'll have to overrule your motion.

Lowe: I except Your Honor.

page 35 } Q. Mr. Moore as I understand up to this point you've described only a surging, total silence and verbal abuse?

A. At this point I testified that there was a surge out into the street in the direction of the waiting police car where this defendant was yelling and screaming and half hanging out of the car. He was hanging out of the car down to his waist. I'm morally certain that he was trying to get these folks to come over to the car but that was the interpretation I got. But this is when I called my men up on the line and we interceded and said "Get back, go back to that sidewalk" and I gave my first order to disperse.

Q. Did any of the officers at that point draw their firearms?

A. No officer drew his firearm at that time. He had a stick but he did not draw any firearm.

Q. How many officers did you have there present the best you can remember?

A. I can't be real certain. I would like to say at this particular point, maybe six or eight.

Q. Now that you have described this crowd crossing the street to your left as you faced Presto Cafe and then between you and Jim Williams Buick . . .

A. No. The crowd moved up the sidewalk just a little bit, just beyond where the police were lined up and crossed the street and went into another parking area between

page 36 } Jim Williams Buick and Harper Motors.

Q. Did this put the crowd behind the police line as you had originally formed the line?

A. Well it was to—it would have been to their back but they were not necessarily behind us.

Q. If the police hadn't turned they would have been behind, is that what you're saying?

A. I was the officer in charge and the police were behind me. They were to do whatever I told them to do. At this point after a very few minutes had elapsed I went into this crowd of people again, some I could name, that I know . . .

C. D. Moore

Q. Tell us whether or not these two defendants were among the crowd?

A. They were among the crowd but at that moment I was not talking directly to them. I was talking to two other people that are not in this courtroom today.

Q. Go ahead.

A. I told these people again that I was not going to continue to beg them but they had to go, that they were unlawfully gathered, this was in violation of the law, this was a riot, that you must disperse. And again some more peeled off, a few people who were on the end, on the edge of the line peeled off and moved on away. A little later the people who were left who would probably number 15 or 18 or 20 went on across the street, went right in front of Walton's page 37 } Nite & Day Market. Some sat down, some were standing, one of them was writing—had a little book writing in it—or paper writing on it—and they huddled up right there in front of the Walton's store, just bunched up there. There was an automobile occupied by the Jones'—one is named Jelly, one Chocolate, one Snake—this automobile had these boys in it and it would shuttle up to this crowd and stay a few seconds and then gone—be gone five or ten minutes and right back it would come again—come back and shuttle again. They'd have another meeting and then their car was gone again.

Q. Did you receive any reports from near by areas that tied in with the coming and going of this automobile?

Lowe: Objection Your Honor, it would be hearsay?

Court: Now whether this is a question of the action of the police—as I see it it's not a question of the truth of officer's reports but on the basis of the information before Mr. Moore and when he acted. So I feel that in a determination of danger and justification that these reports would be admissible whether true or false.

Lowe: I except Your Honor.

A. Simultaneous with this operation, simultaneous with this running out and coming back, going out and coming back, reports were pouring in about broken glass, C. P. Martin was on fire and the two officers' homes were under attack —simultaneous with this running in and out.

Q. Now what did the crowd there in front of the page 38 } Nite & Day Market eventually do?

A. Mr. Walton come out of the store, closed it, locked up and went on his way. And in just a very few min-

utes after he left there was a slight moving around, shuffling around and from where I was sitting at the Triangle Service Station, drink bottles begun to ring out of that crowd—you could see them swapping in through the lights, hear them breaking and glass falling.

Q. Were they hitting any other objects? Were they doing any damage?

A. Office Mann is going to tell you—is going to testify in this case. I think that he's better versed on what the bottles hit than I am.

Q. All right...

A. But the bottles were flying. But just prior to this and anticipating something would happen, I had positioned my cars around this situation—had the cars positioned. When I saw these bottles flying and this glass breaking and this heaving of these missiles across the street and through the air, I ordered the police to move in and arrest everybody in that crowd that we could get.

Court: Approximately how many people were in that crowd at that time Mr. Moore?

A. I would estimate it to *me* 15 or 18 in that little crowd.

page 39 } That situation—on the Preston Avenue side there's a fence. Over on the other side of the street it's fairly well lined up with buildings. Of course there are some driveways over there. But I situated the police cars at one end, I took position at the other end and kept them under watch. I had a man or men with me—I had some help with me. And when I saw this infraction I ordered the police to move in—I was morally certain that they could see the same thing I did and to make these arrests and to take as many of them as we could get out of this crowd.

Q. What did the crowd do when the police moved in?

A. Nothing virtually. They just said "Well, what have we done or why are you arresting us? We haven't done nothing." No resistance, no fighting.

Q. Were these two defendants then among the crowd that you're talking about in front of the Nite & Day Market?

A. Yes they were. They were arrested on that point.

Q. And was this crowd part of the larger crowd that you all had twice before told to disperse?

A. Yes sir.

Q. Do you remember specifically who arrested these two defendants?

C. D. Moore

A. I don't remember specifically but I know now because I have examined the records and I know from the records, yes sir.

Q. Of those you arrested at that time did any of them give you any trouble?

A. No sir. There was no fighting, no . . .

page 40 } Q. Do you remember how many were arrested that night?

A. I'm not real certain of how many—in the whole thing there was some eight or nine but not all at that particular place.

Witness with you.

CROSS EXAMINATION

By Mr. Lowe:

Q. Do I understand that on this Sunday evening there was suppose to be a fire at C. P. Martin's?

A. I don't know whether it was on Sunday evening or Saturday evening. C. P. Martin was on fire but I don't know which evening.

Q. Didn't you testify to the fact that you had—that it was this evening that C. P. Martin's was suppose to be on fire and I think you said that Officer Jackson, one of the police officers, house was under attack? Did I misunderstand you?

A. I don't know whether it was the 7th or the 8th—I don't know whether it was the 7th or the 8th—I think it was the 8th but I'm not positive. At this point I would have to have some record.

Q. Well is this on the same night that the car was shuttling back and forth?

A. That's right.

Q. Was that on the night that these men were arrested?

A. The men were arrested the night the car

page 41 } was shuttling back and forth.

Q. And was it on the night that the car was shuttling back and forth that C. P. Martin was on fire and that the Officer's house was under attack?

A. That is my recollection. We've got seven or eight nights to contend with and that is my recollection.

Q. So you're not sure really whether that was on that night . . .

A. Morally certain—morally certain.

Q. Morally certain. Who told you or how did you know that C. P. Martin's was on fire?

C. D. Moore

A. My radio.
Q. By radio?
A. Yes, my radio.
Q. Who told you, do you remember?
A. Whoever the dispatcher was. I don't know who that was.
Q. And where were you located when you received that report?
A. I don't recall.
Q. In fact you don't even recall whether you were there at the Preston Avenue area where this took place at the time you got that call, do you?
page 42 A. I don't know where I was when I actually got that call. I arrested somebody on this occasion and I don't know whether I had taken him to headquarters or whether I was still in the area. I don't know where I was when the call come through.
Q. You arrested somebody on the occasion that you got this report?
A. I arrested somebody on the occasion that we're talking about—the 8th—that night there at Walton's store.
Q. I'm talking about the night that C. P. Martin's burned and the night the officer's house came under attack. Was that this same night? Was that the same night you made the arrests there in front of the Nite & Day Market?
A. My answer to that question before—I'm morally certain but I cannot swear to it—I'm morally certain.
Q. You're morally certain that that was the occasion but you can't testify where you were when you received the report?
A. No.
Q. You have no recollection of that at all?
A. I was everywhere that night. I don't know where I was at that moment.
Q. In fact can you give sworn testimony that it was that night other than saying you're morally certain that it was?
A. I'm morally certain and that's as far as I'm going.
Q. You testified that these two men were in these various groups. Do you remember specifically what night, the first
page 43 night is, that you saw—let's take Mr. Owens on the left there. Do you remember any particular night that you saw him in any particular assemblage?
A. No but he is a great talker. I don't know which nights it was but he was a great talker. He was there.

C. D. Moore

Q. You don't remember seeing him on any particular occasion other than the time that you pulled up to the curb there at the Nite & Day Market and made the arrest isn't that the case—you just remember that at some points he was in the crowds?

A. Under no uncertain terms he was there previously during that week.

Q. At some time but you don't know which occasions he was there?

A. I'm not certain at this time.

Q. So that other than when you pulled your police car up there with the others and actually made the arrests in front of Nite & Day Market, that is the only time you can actually pin point him being anywhere at any particular time during that week other than saying generally he was somewhere, is that correct?

A. I can tell you that he was in front of Presto Cafe with some degree of certainty but he was a great talker and for that reason it sticks out in my mind.

Q. How many people that were in front of that Presto Cafe can you remember?

A. I estimated the crowd to be on the 8th some-
page 44 } where between 75 and 100.

Q. Out of 75 to 100 people at night with whatever lighting the street lights give, you remember this particular man?

A. Yes.

Q. Do you remember testifying in Municipal Court as to these same events?

A. I do not.

Q. You do not?

A. As a matter of fact I didn't testify in Municipal Court. I was only called by the Commonwealth Attorney to give a resume and I did not testify in the case.

Q. You were not placed under oath?

A. I don't recall about the oath but in both courts that I've testified which is Municipal and Juvenile Court, I was called by the Commonwealth Attorney to describe what had happened in that particular week—that is as far as I went. I only testified in Juvenile Court against one juvenile who I arrested.

Q. You don't remember my asking you questions relating to your being parked at the gas station and what you could observe and where you observed it and where things happened?

A. I don't even remember your even being down there. Mr.

Lowe I don't recall any of your questions. I don't recall anything you said, no.

Q. These 15 to 18 people that you say were in front of the Nite & Day Market, how many of them were in the crowd earlier?

page 45 } A. I don't know. I would not undertake to try to do that.

Q. Could you identify any of them as being in the crowd earlier other than Mr. Owens?

A. Well I just know that the crowd that moved across the street from the opposite side of the street when I told them to disperse was the same crowd that we arrested up there across the street.

Q. Let's get some times down. What time was this taking place in front of the Presto Cafe when you related making the arrest and talking to the crowd there in front of the Presto Cafe?

A. I don't know.

Q. You don't know. Do you have an approximate idea?

A. No sir.

Q. Don't you keep records in a situation like this for your use or for reports and so forth?

A. In situations like this I do not keep records. I had other thoughts in my mind.

Q. Well how long before the arrests were made at the Nite & Day Market—how long a time before that did the events take place down at the Presto Cafe?

A. I don't know. If I could tell you that I could tell whether I was there. I don't know.

Q. Well was it ten minutes—was it an hour, three hours?

A. It wasn't three hours but it was more than

page 46 } ten minutes.

Q. If I told you that that took place around 9 o'clock in the evening, would that sound like it was—might be around the time, certainly within the ball park?

A. Mr. Lowe I've told you I don't know. That's it, I don't know. I cannot answer the question.

Q. Was it dark?

A. It got dark during the course of the evening but I don't know what time it got dark. September—it gets dark earlier in September than it does now. I don't know what time it gets dark now.

Q. Was it dark when you talked to the crowd in front of the Presto Cafe?

A. I don't think so but there again I don't know.

C. D. Moore

Q. Were you identifying the crowd in front of the Presto Cafe by street light? I mean do you have any recollection of that? Would that assist you in remembering whether it was light or dark?

A. No I didn't need any street light to identify Bernard Jones or Jelly Jones or Chocolate Jones—I didn't need any street light.

Q. So it was daylight?

A. Well I can tell who they are dark or light. I don't know whether it was light or not—I know who I was talking to.

page 47 ⟨ Q. What time was the actual movement where the police cars moved forward and made the arrests at the Night & Day Market? Do you have that time in your memory or your notes?

A. I don't have any notes and my memory is all I've got to rely on—based upon the fact that Mr. Walton closed that store about 11 o'clock, something after 11 is my recollection—there again I don't know.

Q. Now are you familiar with a man by the name of Brooks, a young negro man who works in the Nite & Day Market as manager and operates and runs it for the owner?

A. No sir.

Q. You're not at all?

A. No sir.

Q. You are not familiar with the fact that he was arrested that night?

A. I didn't arrest him and I don't know whether anybody else did or not.

Q. And you didn't follow the proceedings in the Municipal Court while it was going on and sit on the bench and listen to all these trials?

A. I'm the Clerk of the Court. It's impossible for me to sit in there. I have to stay in my office.

Q. Now I believe you gave testimony to the fact that the Nite & Day Market closed and I don't know whether you said owner or manager had left and it was a few minutes later that the bottles started flying. Is that what you said?

page 48 ⟨ A. I said that after Walton closed the store, cut the lights out and left—it was just a little while after that that the trouble *irrupted.*

Q. Did you see Mr. Walton leave?

A. Yes sir.

Q. What does Mr. Walton look like?

A. Big heavy set fellow, big fat fellow.

Q. Is he a white man or a negro?

A. He's a white man.

C. D. Moore

Q. After Mr. Walton left, do you know that the store was closed or you just concluded the store was closed?

A. I saw him do what I thought was lock the door with a key. I assumed it was closed.

Q. Is this a pad lock type lock or a key?

A. I don't know what kind of a lock it's got on it. I just saw him come out, cut the lights off and leave.

Q. So that if you heard testimony from that witness chair, from police officers and from others that Brooks was the one that was the manager of the store that evening and had not closed and in fact was one of the men arrested as he came out of the store or after the raid, that wouldn't fit very well with your recollection of events, would it?

A. Say that again—I didn't hear what you said.

Q. Well if testimony were given by your police officers that participated in this raid, if I can call it a raid, when you made the arrests, if your police officers testify that they arrested this man Brooks who was managing the store that evening as he came out of the store, then this would not fit with your statement that Mr. Walton closed and locked the store, and that it wasn't until after the store was locked, several minutes later actually that things started flying through the air?

page 49

A. Mr. Lowe I don't know Brooks. I don't know who he works for. I don't know what store he manages. I don't know whether he got arrested or not but his status quo or otherwise does not change what I have just said.

Q. All right. These 15 to 18 people were they bunched right around the door of the Nite & Day Market?

A. I don't say they were standing square in front of the door but predominantly in front of the building.

Q. 15 to 18 people are quite a few people there. Were they blocking your view of the building—could you see the building? Were they spread out into the street—how were they gathered?

A. I was sitting at the Triangle Service Station. The building would have been to their back if they had been facing the street. It would have been in front of them if they had been looking at it. I was looking straight down the street. The building did not figure as far as I was concerned.

Q. How far would you estimate your position was at the gas station from the store? How many yards for instance?

A. From here to that utility pole out yonder . . . (pointing out of the window of the courtroom).

page 50

C. D. Moore

Q. Would you say 60 yards would be a good estimate?

A. I don't know. After you pass 35 or 40 I wouldn't want to guess at it but I would say from here to that utility pole give ten yards one way or the other.

Q. And at 11 P.M. of course it was dark. And is there a lighting in that area at all?

A. Preston Avenue is lighted of course. There are lights along the street.

Q. Could you make out facial features from where you were—60 yards away at night?

A. I don't know that I undertook to do it. I don't know whether I could. I didn't undertake to do so . . .

Q. You did not undertake to do it?

A. No.

Q. So from where you were you could not identify anybody by face?

A. That's right, just people.

Q. Could you see whether some people walked down from let's say around the Preston Plaza shopping area and joined the group after you had originally taken your position up at the gas station?

A. That I don't know. I don't know whether anybody joined it or not.

page 51 } Q. You can't testify that they didn't join—some other people?

A. No there was some movement along that street. I don't know what all those people were doing.

Q. Now did you go in with the first wave of officers that pulled up in front of Nite & Day Market or did you sit back and sort of observe and supervise from a distance at first and then go up?

A. You mean when the arrests were made?

Q. That's right?

A. I probably was the first car there.

Q. Did you make one of the arrests?

A. I did.

Q. Do you recall who you arrested?

A. A juvenile—at this moment I do not.

Q. Let's go back again to this group of 15 to 18. I'm not sure I gave you an opportunity to answer fully on the number of people in that group that you could identify as having been in the earlier group or whether you could, other than Owens?

A. The number of people in that group were exactly the same people that I had previously told to disperse and to

leave that they were unlawfully assembled and to get away from there.

Q. So that you're testifying that the 15 to 18 people who were in front of Nite & Day Market, eveyone of them was in that group down in front of the Presto Cafe, is that correct?

page 52 } A. Mr. Lowe, one may have walked up, two may have walked away. I cannot be positively sure. I had no machine to tabulate this stuff with. I'm telling you that those 15 to 18 people there were basically the same people that had been told a few minutes before that "This is unlawful. You cannot stay here. You cannot break these windows, move on—you've got to disperse."

Q. Well now you made the statement earlier that this group was a part of the larger group?

A. That's right.

Q. Now you mean—that is some of this group were part of the earlier group, isn't that right?

A. No I mean this group.

Q. All of them?

A. I mean this group as the people that I had previously told to leave. Now if somebody went into the store and come out, I could not tell you who that was. I don't know who was going in and out of that store. I have no way of knowing.

Q. Well now was it everybody or was it just part of those people? You say it was this group—now by this group you would mean all of them unless you qualify it and I'm asking you are you qualifying it by saying all of them?

A. I have answered it as best I know how. And I'm not going to say that one didn't add on to that group or leave it, and that's it. I do not know.

page 53 } Q. In fact you can't say whether 5 or 6 added on or left can you because you couldn't see them from where you were, isn't that correct?

A. I have testified that I had them under complete surveillance from the Triangle Service Station and I could see them and the crowd seated on the sidewalk, some of them writing, some of them running back and forth to this shuttled car—back and forth to that car, are precisely the same people that had earlier been told to leave that area.

Q. Do I understand your testimony now is that you could make facial identifications from the gas station?

A. I haven't said that.

Q. Well then you couldn't see them in the sense of knowing whether some came and some left or whether these were the same people that you were observing from the gas station?

C. D. Moore

A. I know what was going on over there and I know what had been going on for a week. I had been watching this for the entire week. I knew then what was happening and I know it now.

Q. When you pulled up in your car and made the arrests there were 15 to 18 people I presume still there, were you concerned primarily with the person you were arresting or were you generally supervising the whole operation and directing all the officers?

A. The officers had their instructions. The officers had an order, a directive order from my radio to move in

page 54 } and arrest this crowd of people. These officers knew who we were watching. All of these officers knew what they were doing. We knew who we were watching. We knew why we were watching them and when they got that directive report they pulled their cars up from the opposite direction which closed off the area and we just didn't have enough officers to arrest everybody. We arrested as far as we had.

Q. But you were concerned primarily with this juvenile and each officer had a certain group that was his concern . . .

A. I was concerned with the lot. I didn't care whether he was a juvenile or what he was. My business at this time was to stop this and that's what I was concerned with.

Q. When you pulled up to the curb, however, your attention was aimed in this particular case, however you chose him, at this juvenile and that's what you concerned yourself with right then while the other officers were arresting others?

A. My concern was to—if they stayed there was to pack all of them in our cars and carry them all away. And of course you don't have that opportunity, you just get what you can and some get away.

Q. You arrested one juvenile I believe you testified?

A. That's right.

Q. Did making that arrest occupy your attention—did it take your professional skill and your attention and your application of your police techniques in order to

page 55 } make it and to make it effectively and with a minimum of disturbance?

A. Well I don't possess any efficiency. I arrested him in the usual normal manner. I handled him in a usual normal manner. He was quiet, civil—did not fight, did not do anything. I'm morally certain that I had to be giving some thought to what I was doing or else I wouldn't have been able to get back to the car but I don't know that there was a com-

plete divorcement of my thoughts at that time of what my mission was.

Q. Did you place him in your car and take him yourself down to the Police Station after making the arrest?

A. I'm not certain whether he went in my car or some other car. It's highly conceivable that my car transported him but there again I'm not real sure.

Q. Did all the cars go in a convoy or as each car got their people arrested put into it, did they take off on their own for the Police Station?

A. No. It goes like this, you send away some and leave some. You don't take all your manpower away, you leave some there. That's what happened in this case.

Q. Did you go with the first wave or did you stay back?

A. It wasn't a wave. It was a matter of a couple or three cars that had to go to the Police Station. It wasn't a wave. I don't know in what sequence we went. When we got to the Police Station we had to call Mr. Harlan—that's
page 56 } about all I remember about it.

Q. When you pulled up there and you made your arrest of your juvenile you didn't or did you then supervise the other officers or were they simply acting under the orders you had earlier given them in the manner in which you would expect?

A. I didn't personalize each case of course. Police officers —at a time like this you don't supervise each and every move they make. You give a general directive order and they carry it out.

Q. So you were not observing each of the 15 to 18 people that were there and each police officer. You were primarily concerned with your arrest that you were making and they were primarily concerned with the arrest that they were making and it went on pretty much of an independent basis, is that correct?

A. I did not observe every move that every police officer made which would be physically impossible. He was operating to a large degree independently at that particular moment subject to my orders.

Q. Did you observe what each of the 15 to 18 people did?

A. About five or six of them went to jail and the others got away.

Q. You couldn't testify for example what they were doing at the time the police arrested them whether they were sitting or standing or . . .

C. D. Moore

page 57 } A. When they starting throwing bottles everybody got up.

Q. And in fact if I were to ask you for example what Mr. Owens was doing or what Mr. Ferguson was doing, you wouldn't be able to tell me that because you were concerned with your person who you were arresting and the other officers were concerned with Mr. Owens and Mr. Ferguson, is that correct?

A. At that particular moment I don't know what he was doing. I didn't arrest them. I did not see them until sometime later.

Q. And in fact you didn't see the arrest take place of these two men because you didn't know which of your officers arrested them, is that correct?

A. I don't have any independent knowledge of actually seeing them placed under arrest. I may have. I don't have any independent knowledge of it at this moment.

Q. And the same is true of all the other people who were standing there—you couldn't testify as to who they were, where they were standing, who arrested them or anything like that specifically of your own knowledge, could you?

A. Again I do not know the names. I can only identify them by repetitiously seeing them. I just know that they were people who were seen repeatedly—were the same people. I don't know their names or where they live.

page 58 } Q. When you left the Presto Cafe where did you go prior to your returning to the gas station in the Nite & Day Market area?

A. I just don't have any idea in the world how I got there. I don't know whether I come down Grady Avenue or Preston Avenue. I don't know how I got there. I have no way of knowing what all of my movements were. I just don't know.

Q. But from the time you left the Presto Cafe you didn't stay right there in the spot—you did go about other calls, other business, other places and return?

A. I did not leave the area—did not leave the area. We had the place cornered off. We had a little system worked up by the State Police, County Police, University Police and if you said zone 1, 2, 3 or 4 I knew what that meant but people with a monitor didn't know and I was in one of those zones.

Q. When you say you didn't leave the area, will you describe to the Court what the size of this area is that you're talking about?

A. Well this particular area we're talking about now started along about the Coke Cola Plant, goes back to West Street up to the Triangle Service Station—now this is the area that

we're primarily concerned with now—when I say area this is what I'm talking about. And this little Plaza—this little Plaza over on Preston Avenue, newly constructed—everything in it is brand new—that's what I'm referring to now as the area.

page 59 } Court: All right, I expect we might as well adjourn for lunch. I think the Sergeant's Office will have to take these defendants into custody. If you want to apply for bond, you may do so later. I'll set the same bond...

Lowe: Well, they have a bond which is...

Court: I think that's attached to that warrant which you objected to. I'll have to—later on I might not be willing to renew the bond, the same bond—take them in custody and if bond is to be made why...

Camblos: May it please the Court I have Mr. Lionel Key here. He is an important official of a large industry. His testimony I don't think will more than—very brief. I wonder if I could put him on rather than make him come back after lunch.

Court: All right but I understand that Mr. Moore's cross examination is not complete.

Camblos: Yes sir. I don't want to keep Mr. Key here all day if I can help it sir.

LIONEL S. KEY, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Camblos:

Q. Would you state your name please sir?

A. Lionel S. Key.

Q. And your position sir?

page 60 } A. I'm manager of VEPCO.

Q. Are you also connected with the Volunteer Fire Company?

A. Yes sir, I'm chief of the Volunteer Fire Company.

Q. Have been for a long, long time, haven't you?

A. A few years.

Q. Mr. Key on the night of September 8th did you as chief of the Volunteer Fire Company answer any fire calls?

A. Yes sir, we answered one call at the C. P. Martin Company on Albemarle Street.

Lionel S. Key

Q. What did you find there Mr. Key?

A. We found—well the truck was there when I arrived—several of the volunteers. The fire was under control, I would say out by the time I arrived. A window was broken and apparently had been broken by a soft drink bottle.

Q. Did you find any remains of it, any glass foreign to the window on the inside of the building?

A. Yes sir, parts of a soft drink bottle. I think in fact a pretty large bottle.

Q. Could you tell when you arrived what kind of fire it had been? By that I mean the source of fuel that was combusted?

A. No sir, I couldn't tell just that. It was not a great deal of fire in there. Fortunately it was found early enough to stop it.

Q. Can you tell the Court whether or not the fire was in such a place that it could come from natural
page 61 } causes within the building, spontaneous combustion or electrical . . .

A. From my best observation I would say it would have to have been some way set.

Lowe: Your Honor I would like to just object on the same basis as the continuing objection—this has no relevance at all to this matter. It hasn't been tied to these defendants.

Court: Objection overruled.

Lowe: We except to the ruling of the court.

Q. As best as you remember Mr. Key about what time was it when you answered this call to the Martin Plumbing Company?

A. Mr. Camblos I don't remember. It seems to me like it was around 11 o'clock. I'm not positive.

Witness with you sir.

CROSS EXAMINATION

By Mr. Lowe:

Q. How do you place the date on this Mr. Key?

A. I happened to see a record of the fire call.

Q. When did you see that record?

A. I saw it this morning.

Q. All right, where is that record maintained?

A. At the present time the superintendent of the Fire Department has a copy of it.

Lionel S. Key

Q. You didn't make that entry?
A. No sir.
page 62 } Q. You say you were there at C. P. Martin that night?
A. That's right, at the fire.
Q. Do you remember what night of the week that was?
A. I don't know whether it was a Saturday or Sunday.
Q. It's possible that it was Saturday night, wasn't it?
A. I wouldn't say without referring to a calendar.
Q. Well of your recollection was it a Saturday . . .

Camblos: If the witness would like to see a calendar Your Honor I have one.

A. September 8th was a Sunday.
Q. And the record said September 8th is when this took place, is that right?
A. Yes sir.
Q. Do you remember what time of night it was? Was it one or two in the morning or nine or ten at night?
A. I just answered that I thought it was around eleven but I didn't remember.
Q. Would it be possible that it was let's say twelve thirty?
A. It could have been but if it had been twelve thirty it would have been on the 9th.
Q. Or it would have been on the 8th if it had been Saturday night the 7th and twelve thirty it would have been on the 8th?
page 63 } A. Saturday night, that's . . .
Q. That's right. So you can't of your own personal knowledge testify that that fire was on Saturday or Sunday, can you?
A. Not without—I know I was there. Without referring back to the records I could not.
Q. So in so far as testifying that it was on the night that these instances that we're referring to here today is concerned, you had no knowledge of these arrests that were made . . .
A. No sir. I had no knowledge of the arrests that were made. I had understood that there were arrests made the night we *recieved* the fire call.
Q. But you have no way of knowing of your knowledge right here in this witness stand as to whether that was on Saturday night or Sunday night?

A. That's correct...

Q. Or early Sunday morning or late Sunday night as the case may be?

A. That's right.

Q. And you certainly have no way of knowing who did it, do you? Who made the fires?

A. Who made the fires?

Q. Yes?

A. I have no way of knowing that.

No further questions.

page 64 } Camblos: May this witness be excused Your Honor?

Lowe: I have no objection.

Court: All right, he may be excused. All right we'll adjourn for lunch.

Lunch.

C. D. MOORE resumes testifying on cross examination by Mr. Lowe.

Q. Mr. Moore going back again to this group of 15 to 18 people who were in front of the Nite & Day Market, you've testified that from the distance you were parked at the service station, that you could not make out any specific faces I believe. Can you tell what these people were doing, that is were they sitting or standing or any actions of that nature? Could you see that well?

A. For a time some were—shortly after they arrived at this point—some were seated, some were standing, one was engaged in some kind of writing on a book, paper or something.

Q. With reference to the group in front of the Presto Cafe, as I understand you arrived after the police officers were making the arrest already on this fellow Fry, is that correct?

A. I did not hear them say he was arrested but I saw them with him in tow—I saw them when they put him in the car and immediately he popped back out of the car, had his waist through the window.

Q. And at that time you addressed the crowd, is page 65 } that your testimony?

A. When the defendant Fry was placed into the police car, almost simultaneously he popped back out, hanging out of the car down to his waist line, screaming and hollering and yelling. The crowd on the sidewalk surged out into the street and started across the street in the direction of the

police car. It was at that time I stopped them.

Q. You were out on the ground at the time that happened?

A. Out of the car—I was on the ground.

Q. Did you have the benefit of any megaphones or anything like that or were you just talking as you are talking here to the front line people?

A. Just my voice, just talking to them with my voice.

Q. You weren't particularly shouting or anything, just talking to the people who were right in front of you?

A. I intended—I think I was—reasonably sure I was talking loud enough for them to hear me because they responded and went back.

Q. All 100 of them or . . .

A. The street was clear. There again the street was clear. The people went back to the sidewalk, a few peeled off the end and left as I said before. Basically the principal crowd stayed there.

Q. I believe down at the Municipal Court you testified that as far as bottles flying, you saw bottles flying page 66 } through the air about that time and this is one of the or the thing which caused you to order your officers to move in. Is my recollection correct on that?

Camblos: I'd ask that it be clarified as to what time he's talking about when he said bottles were flying through the air about that time. I don't know what time he's talking about.

Q. With reference to the time you were parked in the service station parking lot observing this group in front of the Nite & Day Market, some 60 yards away, did you at that time observe what you thought were to be these bottles being thrown, flying through the air?

A. After surveilling this crowd of people for some time—some short time, I don't think it, I know it to be bottles. I could hear them breaking and I could see them in the air. It was right directly on.

Q. You couldn't identify either of these two defendants from that distance, could you?

A. I didn't. I don't know whether I could.

Q. You didn't?

A. No sir.

Q. So that you cannot say whether they or for that matter whether anybody else particularly threw these bottles?

A. I can definitely say that somebody else threw them.

Q. You can't say who threw them?

A. I cannot say that either of these threw them.

page 67 } I've never said that.

Q. And you're saying that you knew somebody threw them because they went through the air. You didn't see any particular person throw the bottles?

A. I don't know who the person was who threw the bottles. I just saw the bottles and heard them break—they were glass bottles. I don't know individually who threw them.

Q. Now when you addressed this group of 75 to 100 people in front of the Presto Cafe, where in that crowd was the Defendant Owens located, approximately? Close to you or in the background or where?

A. At the moment I was talking I don't know where he was.

Q. Where was the Defendant Ferguson?

A. I don't know.

Q. Do you know how they were dressed?

A. I think I know what one of them had on or some of the clothes that one of them had on but there again it's relying upon my memory and I'm not real sure. But I think I know what one of them had on.

Q. You don't remember where in the crowd they were?

A. No sir.

Q. In fact do you specifically remember seeing them in the crowd while you were talking to the crowd?

A. At the Presto Cafe?

page 68 } Q. Right.

A. I cannot say that I specifically spoke to them or saw them.

Q. All right. No further questions Your Honor.

CHARLES L. MARSHALL, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Camblos:

Q. Would you state your name please sir?

A. Charles L. Marshall.

Q. And your occupation?

A. I'm superintendent of the Fire Department.

Q. I'm wondering Mr. Marshall just how does that work in with the Fire Chief?

A. I'm a paid personnel and he's of the Volunteers.

Q. You all are on equal footing more or less?

A. That's right. I usually give ground to him because I think he's a better man than I am.

Charles L. Marshall

Q. Were you on duty on the night of September 8th of this year?

A. Well I wasn't specifically on duty then because I'm on duty whenever I'm in town, 24 hours a day, seven days a week.

Q. Did you with others in your company answer a call to C. P. Martin Plumbing Company?

page 69 } A. We did.

Q. Do you have a copy of the record—well first let me ask does your organization keep records of the calls they answer?

A. Yes sir.

Q. Do you have a copy of the record made in connection with that call?

A. I have a copy of the one we made but I do not take that one out of the files—but I do have a copy.

Q. Did you make this copy?

A. I did not but one of the men did it for me.

Q. Did you check to see if it was correct?

A. I did.

Q. Is the original made on a form like this?

A. Exactly like it, yes sir. It has to be made by the first people that arrive on the scene—that's who makes those copies.

Lowe: May I ask a question or two about this. I think Mr. Camblos questioned it but you did say you checked it against the record yourself?

A. I did, yes sir. It's exactly like the one . . .

Lowe: And you looked at it yourself. I have no objection.

Q. I show you a slip on a form and ask you if that is a copy of the original record made in connection

page 70 } with the fire call I asked you about?

A. This is, yes sir.

Q. And this at the top is dated. Is that the—what date is that?

A. That's the date that the alarm came in.

Q. And the next is location—it says 215 Albemarle Street. What is that?

A. That's C. P. Martin's Plumbing place.

Q. And then further down it has "Out 11 P.M., In 11:38 P.M." Is that the time . . .

A. That's the time we got the call, 11 P. M. and when he returned the truck in the station, he signs off—that is the time that that was taken.

Charles L. Marshall

Court: What was the time that they got the call?

Camblos: 11 o'clock they got the call and got back to the station at 11:38. I offer this as Commonwealth's Exhibit No. 1, Your Honor.

Court: All right, sir. That was September—what date?

Camblos: September 8, 1968. Now you say you personally went to this fire?

A. Yes sir.

Q. What was the condition of the fire at the time you got there?

A. Well it was very little, just some books burn-
page 71 } ing on top of the desk when I arrived.

Q. Was these any apparent internal thing that could have caused that kind of fire in that place?

A. No sir, no electric—nothing there. It had to be set with some kind of way.

Q. Was there anything that appeared to you that could have ignited by a *spontaneuous* combustion?

A. No sir.

Q. Were you able to tell when you got there what kind of fire it was? By kind of fire I mean the kind of material burning?

A. When I got there the only thing I could find was paper burning—very little blaze.

Q. How nearly out was the fire when you got there?

A. Oh, you could have taken it in a waste basket and taken it on out doors.

Q. Did you notice whether there was evidence that there had been a greater fire?

A. Yes sir. There was evidence that there had been a greater fire.

Q. Did you see any means of entry of any object or any means by which something could have entered the building?

A. We found a bottle, pepsi cola bottle or pieces of it on the floor inside.

Q. Did you see whether or not any of the outside of the integrity of the building had been breached?

page 72 } A. Two places in the big window were broken—two different places.

Q. Were those two places so situated that they could have resulted from the broken pepsi cola bottle that you found?

A. Yes sir.

Q. Did you check the pepsi cola bottle to see whether it had any odor about it?

Charles L. Marshall

A. What pieces we picked up we could not find and I did not.

Q. How far is this address on Albemarle Street from Presto Cafe and the Nite & Day Market?

A. Well from Presto it would be about 2 and 1/2 blocks I guess, two blocks down east on Preston Avenue and approximately 1/2 block off of Preston Avenue on the southside.

Q. Is it in the same general area of the city?

A. That's right.

Witness with you sir.

CROSS EXAMINATION

By: Mr. Lowe:

Q. I understand that you went out on this call at 11 until 11:38?

A. That's right.

Lowe: Your Honor I move to strike this witness' testimony on the grounds that it has no relevance. There's page 73 } nothing here to show—first of all to even tie in this pepsi bottle if there's some allegation that it was filled with gasoline or some such I gather is the inference. There is no testimony whatsoever to tie in the pepsi bottle with the fire. There is nothing except speculation to even tie in the hole in the window. In any event there is nothing to tie this fire in with any mob violence or in anyway tie in with these defendants or with anyone else in the crowd here. I think it's highly speculative. There may have been many fires in the city that night with an unexplained origin, maybe some with broken windows. I think that it may have been the heat that popped out that window. There's no testimony to preclude that possibility. Somebody might have left a pepsi bottle broken in there. All of this is purely speculative. There is no approbative value whatsoever of this testimony. I ask that it be stricken and that the exhibit be withdrawn.

Court: Mr. Cablos.

Camblos: May it please the Court, it's a question of a general situation in the city I think that's a part of the general situation. We can certainly show this evidence. We have also shown several other instances that we cannot directly connect with these defendants. However, it has been testified to that all of these instances, this instance as well as the attacks on

the negro officers' homes, were coincident with the coming and leaving of the car to the crowd of which these two defendants were a part.

Lowe: I have to take issue with that conclusion page 74 } that this has been established in any way. There is no evidence to tie in this incident either with these defendants or with anybody whatsoever. It's pure speculation. There may have been a lot of things that happened that night when that car was going and coming. There is no testimony to place that car on Albemarle Street. There is no testimony that a car went by. There is no testimony that that window was broken that night for that matter. This is all pure speculation. This is the reason why we have rules about irrelevant testimony and this is why this should be stricken.

Court: Well there was testimony on the part of Mr. Moore that he had received a report that C. P. Martin's was set on fire and I thought counsel did an excellent job in trying to shake his testimony as to whether it occurred on the night of September 8th or the day before. And I think this is collaborated to that extent and therefore admissible.

Lowe: Well Your Honor . . .

Court: Well if you will concede that this took place on that night, it's not necessary to prove it.

Lowe: Well Your Honor there are a lot of things that took place on that night that are not relevant to this trial. That's the point I'm trying to make. I would like to point out that I objected to Mr. Moore making that statement and the only purpose that was asked that that be put in testimony was to explain the actions of the police officers. Now we are asked to give approbative value to mere hearsay on the page 75 } radio that there was a fire bombing or a fire in said C. P. Martin. I don't think that's proper. You can use it perhaps arguative to show the state of mind of the police but now we are asked to make a legal faith and take some irrelevant testimony and use that to prove that this was fire bombing.

Court: Well as I say I think counsel has brought this upon himself because you tried to shake Mr. Moore's testimony that it happened on this occasion and tried to get him to say—and he said that he could only say to a moral certainty as I recall—that he could not swear that it was this night or the next night. So that's what makes this evidence important. I'll accordingly overrule the objection and admit it.

Lowe: All right, Your Honor my motion would go further than just to that. I think we have properly stipulated that

there was a fire there that night. But I still say that it is completely irrelevant. There has been no tie in to these defendants or to the general situation of these people in front of the Presto Cafe or the Nite & Day Maket. That's my objection primarily. There may have been a lot of things that happened in the city that night—there were violations of the law. There may have been arson that night somewhere in the city for all we know. But that's a lot different than saying that it connects in any way even remotely with these two defendants.

Court: Well I think this is all a part of the question of the reasonableness of the order for them to dis-
page 76 } perse and I previously ruled that Mr. Moore could testify as to what reports he got and not based upon the truth or falsity of the reports but upon what reports he got. And then when you tried to get him to say that he didn't know whether it was this night or another night, then this makes it important. It wouldn't be important—I don't think I'd agree with your motion to put it out if you hadn't cross examined him. The court has made its ruling.

Lowe: I except Your Honor. I have no further questions.

Camblos: Thank you very much. May this witness be excused.

Court: Yes sir.

B. R. BLAKE, having been duly sworn testified as follows:

DIRECT EXAMINATION

By: Mr. Camblos:

Q. State your name please sir?

A. B. R. Blake.

Q. And your occupation?

A. Police Officer for the City of Charlottesville.

Q. How long have you been on the Force Mr. Blake?

A. A little over 14 years.

Q. On the night of September 8, 1968, were you on duty?

A. Yes sir.

page 77 } Q. Did you go to Presto Cafe in connection with that duty to execute a warrant?

A. Yes sir.

Q. What kind of warrant was it? Was it a warrant for arrest or a civil warrant or what?

B. R. Blake

A. It was a warrant that some individual had gotten against another person.

Q. Was it an arrest warrant?

A. Yes sir.

Q. And who was it against?

A. Woodson Fry.

.Q Did you find him?

A. Yes sir.

Q. When you arrived there, were there other people present?

A. Yes, quite a lot gathering.

Q. Had you with other officers patrolled the city on the nights prior to this Sunday, September 8th?

A. I was off on Friday and Saturday nights.

Q. How about earlier in the week?

A. Yes sir earlier in the week we had.

Q. You didn't state whether or not the—quite a lot of people I believe you described them there at the Presto Cafe when you arrived—were generally some of the same people you had seen on nights previously during the

page 78 } week?

A. Some of them were.

Q. Could you describe the manner of those people? How did they act and behave when you arrived? How did you appraise the situation when you got there?

A. A powder keg.

Q. From what did you draw the conclusion that it was a powder keg?

A. Well in patrolling by several times before we had been yelled at, belittled and..

Q. Could you say whether or not the mood of the crowd seem to be an ugly one?

A. Yes sir.

Q. Did you make your arrest?

A. Yes we did.

Q. Did you have any other officers with you?

A. Yes, Officer Jackson.

Q. On arrival there had you made any report as to the situation?

A. We reported to the other cars what we were going to do.

Q. Did you make any report as to the crowd and the mood of the crowd?

A. No sir, we didn't deem it necessary. They were already out there.

Q. You say they were already out there, the other cars?

B. R. Blake

A. Yes sir.

page 79 } Q. Just how was that area being *partolled* at that time, Mr. Blake?

A. I believe there were three police cars in the area.

Q. Were the three *partolling* the area?

A. Yes sir.

Q. Patrolling it constantly?

A. So far as I know.

Q. Do you know whether you had any back up officers available?

A. Yes sir.

Q. Now tell the Court what happened when you made your arrest?

A. When we made the arrest, the subject we arrested resisted arrest, insulted Officer Jackson, refused to go—we took him bodily to the car.

Q. How did he insult Officer Jackson?

A. Told him he was a turn coat and told him he was crazy.

Q. Of what race is Woodson Fry?

A. He's colored.

Q. Officer Jackson?

A. Officer Jackson is colored.

Q. Did you succeed in getting your subject to the car?

A. Yes sir.

page 80 } Q. What did the crowd do, if anything?

A. Right many of them followed us over towards the car.

Q. Had you placed the car any place in particular in anticipation that this might happen?

A. Well we parked it in front of the Presto Cafe when we arrived.

Q. Did you later move it?

A. After we got the subject in, Officer Jackson was driving, he proceeded to turn around and got turned around. Fry was attempting to get out of the window so Officer Jackson stopped. That was . . .

Q. In turning around did you get the width of the street between you and the crowd?

A. Well he pulled up into Williams Buick lot and backed out into the street.

Q. Well on arrival which way was the car headed, east or west?

A. West.

Q. And did he park on the same side of the street as the Presto Cafe?

B. R. Blake

A. That's right.
Q. Was that where the crowd was?
A. Yes sir.
Q. When you turned then, do you mean you
page 81 } headed back east
A. That's right.
Q. All right. Did any other officer arrive at about that point?
A. Yes.
Q. Were you able to see or hear what the other officers did?
A. No sir, I was in the car with the subject whom we had arrested.
Q. What did you all do then?
A. We took Woodson Fry on to the jail.
Q. Now did you continue on duty that night?
A. Yes sir.
Q. What did you do the rest of that night?
A. As soon as we had gotten Fry into jail we went back to the area and hadn't been there long until we—we patrolled the area quite a bit, different places had reports of windows being broken in different locations.
Q. Do you remember some of those locations?
A. The Tile place up on Tenth Street has been just wrecked. The owner called Officer Jackson and myself to see him.
Q. Whereabouts on Tenth Street?
A. It's right across from Washington Park, Oliva & Lazzuri I believe it is.
page 82 } Q. Is that in this same area?
A. Yes sir.
Q. Same general area?
A. Yes sir.
Q. What did you find there?
A. We found every window in the place broken. The large plate glasses and door—the whole place was just wide open.
Q. All right, do you remember other specific places that you answered calls of property damage?
A. I don't know that we answered any calls but we came by the TT Hanger Restaurant and saw that that had been smashed out.
Q. What had been smashed out?
A. The large plate glass front.
Q. Did you see any others?
A. Barr Tire Company, The Apex Amusement Company on Rose Hill Drive, Wilhoit's Used Car Lot . . .

B. R. Blake

Q. Are any of these places that you've mentioned more than three or four blocks from the Presto Cafe?
A. No sir, all of them are in that same vicinity.
Q. Do you remember whether or not during your patrolling if you drove by C. P. Martin Plumbing building?
A. I don't recall.
Q. Were you present when Lieutenant Moore fi-
page 83 } nally directed that arrests be made?
A. Yes I was.
Q. Where were you stationed when you got that directive?
A. We were in the vicinity of Martin's Hardware on Preston Avenue.
Q. And far is that from the Nite & Day Market?
A. Approximately 50 to 60 yards.
Q. You say we, who was with you?
A. Officer Jackson.
Q. Did you respond to the directive?
A. Yes sir.
Q. What did you do?
A. We went east on Preston Avenue in the police car after we heard glass breaking on the order of Lieutenant Moore.
Q. Did you make any arrests?
A. Officer Jackson and myself arrested one man who failed to obey when ordered to move.
Q. How many people were there when you got there? How big a crowd not counting police officers?
A. Well the majority of them ran when we started towards them.
Q. Well how many would you estimate you saw running and otherwise?
A. I guess at least a dozen or more.
Q. Had you been present at any time when Lieu-
page 84 } tenant Moore had spoken to the crowd?
A. Not that night, no sir.
Q. Had you been present when anyone had told the crowd to disperse?
A. No sir.
Q. Had you seen either of the defendants, Ferguson or Owens in the crowd that night that you remember specifically?
A. I cannot say that I did.
Q. Can you say whether or not from the time you arrested Woodson Fry until you received Lieutenant Moore's orders to *made* arrests, any substantial change in the situation had taken place?

B. R. Blake

A. Well there wasn't near as many. The crowd had diminished quite a bit from the time we arrested Fry until this incident.

Q. Except for the fact that the crowd was now smaller, had the crowd changed otherwise?

A. No, it hadn't.

Q. Had it changed in its mood or its temporary sanction or your appraisal of the situation?

A. No sir.

Witness with you sir.

CROSS EXAMINATION

By: Mr. Lowe:

Q. When you arrested Woodson Fry was Lieutenant Moore present with you at that time during this process page 85 } of getting him into the car, turning around and so forth, was he there?

A. I believe Lieutenant Moore was across the street.

Q. You said that you had not been present when anyone told the crowd to disperse. Do I understand then that Lieutenant Moore did not tell the crowd to disperse while you were there?

A. I didn't hear him. I didn't see any cars across over there—maybe they had already gone.

Q. Was this warm weather, cold weather—this was the 8th of September?

A. Yes it was warm weather.

Q. Warm weather. The windows of your car were open?

A. Yes.

Q. So that if Lieutenant Moore had said anything you would have heard him, wouldn't you from just across the street?

A. Not necessarily—quite a bit of noise around me.

Q. Now Lieutenant Moore has testified that he said what he said loud enough that he thought that everyone could hear him. Did you see him addressing the crowd in a loud voice from across the street and yet not hear what he said, is that what you're saying?

A. No sir, I didn't say that. It's possible that I wasn't even there.

Q. You said you heard glass breaking, are you referring to bottles?

A. It could have been bottles or it could have

page 86 } been glass windows both—both of them were broken.

Q. Are you speaking now of down by the Nite & Day Market?

A. Yes.

Q. What windows, if any, were broken in or near the Nite & Day Market?

A. I believe the window to the Wayside Press was broken.

Q. Did you see this?

A. No sir.

Q. So you have no knowledge of any windows that were broken then?

A. Not of my own personal knowledge except hearing glass...

No further questions.

REDIRECT EXAMINATION

By: Mr. Camblos:

Q. Who was driving the car when you all arrested Woodson Fry?

A. Officer Jackson.

Q. What did Woodson Fry do after you got him into the car?

A. He became very disorderly and tried to get...

page 87 } Lowe: Objection Your Honor. I don't see what relevance this has to the charge. We've been over this so many times I think it's...

Camblos: It's perfectly clear Your Honor this officer has been cross examined about whether he heard Officer Moore or not. I'm getting ready to show he was fighting with the prisoner that he just arrested.

Court: I'll overrule the objection...

Camblos: Mr. Blake...

Court: I think counsel's questions have opened the door to this because he was indicating that he couldn't hear or have heard Officer Moore.

Q. Mr. Blake, you said he became unruly?

A. Yes sir.

Q. Was he making noise?

A. Yes he was.

Wayne Marshall

Q. Was he trying to get out of the car?
A. Yes he was.
Q. Who restrained him?
A. I did.
Q. Did you have any trouble doing it?
A. Yes he was determined that he—he pretended that he was sick.
Q. Did your efforts in connection with him occupy your entire attention?
A. Yes sir.

page 88 } Camblos: Do you have any questions Mr. Lowe?
Lowe: No questions.
Camblos: May this Officer be excused Your Honor?
Court: All right, you may be excused.

WAYNE MARSHALL, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Camblos:
Q. Would you state your name please?
A. Wayne Marshall.
Q. And your occupation?
A. City Fireman.
Q. Were you on duty on the night of September 8th of this year?
A. I was.
Q. Did you answer a call somewhere in the vicinity of 11 o'clock that night?
A. Yes sir I did.
Q. Where did you go in answer to that call?
A. The box alarm came into 8th and Preston Avenue. When I arrived at the box it was a gentleman standing there and he told me that he had pulled the box that the fire was at the C. P. Martin Hardware.
Q. Is it C. P. Martin Hardware?
page 89 } A. C. P. Martin Plumbing and Heating, I'm sorry.
Q. All right, what did you do then?
A. We went on to C. P. Martin's and when we arrived we could see smoke coming out of the two big holes in the plate glass. So we went ahead and just took an ax and just knocked it on out so we could get inside and put the fire out.

Officer F. D. R. Jackson

Q. Were you able to determine the nature of the fire?
A. It was a flash fire, a lot of papers and all were burned up on the desk and on the filing cabinets and so forth. It was no stacks of anything left, that had been piled up or anything burning or anything like that. One of the filing cabinets had just a couple of papers on top that was burned up—fragments only left.
Q. Had anybody arrived at the fire before you got there?
A. I think one of the police cars was there, yes sir.
Q. Did you find any glass that was foreign to the building itself broken inside the building?
A. Yes sir, it was—two pepsi cola bottles were found.
Q. Were you able to determine anything about those pepsi cola bottles?
A. Well if they had contained any liquid they would have burned out—you couldn't smell it.
Q. Was there any sign that the bottles had had fire in them or about them?
page 90 } A. Yes sir, they were burnt.

Witness with you.

CROSS EXAMINATION

By: Mr. Lowe:
Q. Mr. Marshall if there was a bottle that was in a fire you would expect it to look burnt wouldn't you?
A. Not necessarily.
Q. Not necessarily?
A. That's right.
Q. But you have no reason to know whether this bottle just happened to be in the place where there was a fire or whether it was any result of the fire or anything else, do you?
A. Well the papers were the only contents that were burnt, bottles were broken on the floor and the floor was burnt. The bottles were black.
Q. But you couldn't smell anything could you?
A. No they were burnt, everything was burnt off.
Q. So you have no way of telling what actually happened?
A. That's right.

No further questions.

OFFICER F. D. R. JACKSON, having been duly sworn, testified as follows:

Officer F. D. R. Jackson

page 91 } DIRECT EXAMINATION

By: Mr. Camblos:

Q. Would you state your name please sir?

A. Officer F. D. R. Jackson, Charlottesville Police Department.

Q. How long have you been on the Force?

A. A little over five years.

Q. Were you on duty on the night of September 8th of this year?

A. Yes I was.

Q. What was your duty that night?

A. To patrol the west side of Charlottesville.

Q. Does the west side include the Preston Avenue area?

A. Yes it do, everything west of the Southern Railroad tracks.

Q. How intense was the patrol of that area on that night?

A. Well it was heavily patrolled.

Q. Did you with Officer Blake go to the Preston Cafe in connection with your duties that evening?

A. Yes we did.

Q. Did you make an arrest there?

A. Yes we did.

Q. Were there other persons there when you arrived?

A. Yes it was a large crowd filling the sidewalk page 92 } in front of the Presto Cafe.

Q. Could you estimate the size of that crowd?

A. Oh, I'd say 75, maybe 80 people.

Q. Did you recognize any of the persons in that crowd?

A. Well not by name but most of the faces are familiar. I see them practically every day.

Q. Had you seen those faces in connection with your duties several days prior to this occasion?

A. Yes. Friday night when a part was broken up on West Street some of the faces that was at the party and some of the people that left the party were in front of Presto Cafe.

Q. Do you remember specifically whether either or both of the defendants were in the crowd at the Presto Cafe that night?

A. No I cannot due to the fact that I was so busy with Woodson Fry.

Q. Did you see either of the defendants any other time that night?

A. I saw them after they had been arrested in front of the Nite & Day Market.

Officer F. D. R. Jackson

Q. Do you know whether you observed them up until that point that night?

A. No because we had no particular reason to look for these two particular people.

Q. Now can you give the Court your appraisal of the mood of that crowd when you arrived at the Presto

page 93 } Cafe?

A. Well the crowd seemed to be—well let's say militant—I walked over to Woodson and I told him I had a warrant for him. And this is when he started yelling—you know "Honkey, get off of me Jackson, I don't know what's wrong with you" and I don't know what all. A little bit of everything. Woodson is the type of person that will run if you give him a half step so I merely locked my arms around him and walked him to the car. The crowd was behind me with bottles and rocks and hitting on top of the car so I immediately—without searching Woodson and put him in the car and turned the car around on the other side of the street so that maybe the passing traffic would keep the crowd on the other side of the street while I searched him. And I of course opened the back door and attempted to search him—he was yelling, hollering, kicking and what not. Then finally I did get him searched. I got in the car and started off and he was hanging half way out of the window then all the way down under the red light there at the intersection of Rose Hill and Preston Avenue. Of course we left at that time and went to the jail.

Q. Did you see whether or not any other officers arrived?

A. Yes in the middle of the arrest at the Presto Cafe or about the time we was turning around, Lieutenant Moore and I think one other person, one other officer in the car with him, arrived about that time.

Q. Were you able to observe what the other of-

page 94 } ficers did?

A. They all got out of the car and stood over by the Jim William's Buick.

Q. Did you see what the crowd did?

A. The crowd backed up out of the street at this particular time because we were leaving.

Q. When had the crowd gotten in the street?

A. Well they had started into the street or partially into the street when I was searching Woodson. I had my back to them.

Q. Were you present at the Nite & Day Market when Lieu-

tentant Moore issued orders to make arrests?

A. Yes I was.

Q. Where were you stationed immediately prior to receiving that order?

A. Directly beside Lieutenant Moore's car in the Triangle Gulf Station parking lot.

Q. Did you go to the Nite & Day Market?

A. Yes I did.

Q. Did you make any arrests?

A. Yes I did.

Q. Whom did you arrest?

A. Roosevelt Williams.

Q. What would be your estimate of the number of people in front of the Presto Cafe at the time Lieutenant

page 95 } Moore gave the order?

A. Well anywhere between 18 and 25, coming and going...

Court: Was that the Presto Cafe or are you talking about the...

Camblos: Nite & Day Maket.

Court: I think you asked about the Presto Cafe.

Camblos: I meant Nite & Day Market.

A. I took it for that's what you meant anyway.

Q. Had you seen persons there in front of the Nite & Day Market doing anything other than just being there?

A. Well out of the crowd flew bottles and I don't know what all across the street. This is out of the 18 to 25 persons—I don't know—out of this crowd that was there, threw bottles across the street and broke windows and even the windows in back of—on the same side of the street was broken.

Witness with you.

CROSS EXAMINATION

By: Mr. Lowe:

Q. What time did the order come from Lieutenant Moore at the Nite & Day Market to go in and make the arrests? Do you know what time it was?

A. I don't know exactly. It was somewhere between a quarter to eleven and eleven o'clock.

No further questions of this witness Your Honor.

page 96 } Camblos: May this witness be excused Your Honor?

Court: Yes sir.

C. D. JONES, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Camblos:
Q. State your name please sir?
A. C. D. Jones.
Q. And your occupation?
A. Police Officer for the City of Charlottesville.
Q. How long have you been on the Force?
A. A little over 3 and 1/2 years.
Q. Were you on duty on the night of September 8th?
A. I was.
Q. What was your duty that night, specifically?
A. We were called in early because of trouble on Preston Avenue and we were told to get a car and patrol the area, the Preston Avenue area.
Q. Did you do so?
A. I did.
Q. What time do you think you got started patrolling?
A. Right around 8 o'clock I received the call at home.
Q. What were your regular duty hours?
A. 12 midnight to 7:45 in the morning.
page 97 } Q. Did you observe any assemblages of people in that area that night?
A. Yes I did.
Q. Did you know any of the people in those assemblages?
A. Yes I knew quite a few of them. I live on Rose Hill Drive. I attend the park regularly up there and I see most of them.
Q. Did you previously know either or both of the defendants?
A. I did.
Q. Did you see them in any of the assemblages that night?
A. I did.
Q. Which one of them?
A. Owens and Ferguson both.
Q. You saw them both?
A. Yes sir.
Q. Do you know how many times you saw them that night in those assemblages?
A. I saw Owens, he was up and down the street several

times and he was in front of the Nite & Day Market and also Ferguson when the windows was broken.

Q. Had you seen Ferguson prior to—where had you specifically seen him?

I saw him one other time right in front of Presto.

page 98 } Q. Was there a crowd there at the time?

A. Yes sir, it was.

Q. Tell me whether or not the situation as to crowds in that area changed from the time you started patrolling about 8 o'clock or sometime after 8—I think you said you got the call at 8—sometime after 8 until arrests were made and sometime around 11—did the situation change?

A. Yes sir, it started—it was a rather large crowd in front of Presto during the time that Woodson Fry was arrested. After Fry was arrested and taken away, Lieutenant Moore then gave the order for the people to move on. He called several of them by name which we know—they've been downtown several times. They then moved west, away from Presto in between Harper's and Jim William's Buick. Several of them had something to say to me. Lieutenant Moore then told them again to move on, to go home.

Q. Did any of them obey the order?

A. Some of them moved on, some of them stayed in front of the Nite & Day and I noticed that several of the parents came by and got their kids and put them in the car and took them home. Most of them just stood right in the area, right in front of Nite & Day.

Q. At the time that Lieutenant Moore gave the order to make arrests, had the crowd gotten smaller than it had been originally?

page 99 } A. The crowd had scattered out—it was approximately—somewhere in the neighborhood of between 18 to 30 or 25 people in front of Nite & Day Market.

Q. Had you observed any destruction of property that night?

A. Yes sir, the window at Martin's Hardware—two big plate glass windows had been knocked out. The front door glass had also been knocked out. City Laundry—somebody threw a bottle or a rock through the glass at the City Laundry.

Q. Any others that you can remember?

A. During the time that we were riding around we saw several other places which had been hit—Birckhead Electric and Vaughan—Mr. Vaughan who use to be in the coal business has a place on Rose Hill Drive.

C. D. Jones

Q. Now where were you when Lieutenant Moore gave the order to make the arrests?

A. Officer Jackson and Mr. Blake was parked in one car on the other side of Lieutenant Moore, Officer Granger and myself, we were in another car on the opposite side—right in Triangle Gulf.

Q. What did you do on receiving the order?

A. He gave us the order to arrest anyone that we could get our hands on that's right there in the immediate area and we proceeded to do so.

Q. Did you make any arrests?

page 100 } A. Yes sir, I did.

Q. Who did you arrest?

A. I arrested Mr. Owens and Mr. Ferguson.

Q. What did you do with them after you arrested them?

A. I placed Mr. Owens under arrest, started over to the police car with him, he sort of jerked from me a little bit—he didn't make any attempt to hit me—I grabbed him by the arm and placed him in the police car. Mr. Ferguson, he then kept hollering and mumbling something to Owens—I placed him under arrest also for failing to disperse.

Q. Did either one of them make any statement to you as to why they had failed to disperse?

A. No, they hadn't.

Q. Did they make any statement at all as to what they were doing there?

A. Mr. Ferguson made a statement that he wanted to tell Mr. Owens something or something like that, but I don't remember exactly what it was.

Q. How long after Lieutenant Moore had given the order was it before you arrested Owens?

A. I would say the Lieutenant gave the first order somewhere around 9:30 or 10 o'clock.

Q. No I mean the order to arrest, not the order to disperse?

A. Oh, just a matter of a minute or five minutes,

page 101 } something like that.

Witness with you.

CROSS EXAMINATION

By: Mr. Lowe:

Q. At the time that Officer Jackson was making the arrest of Woodson Fry, where were you located at that time?

C. D. Jones

A. I was on the sidewalk with a few other officers.

Q. With Lieutenant Moore?

A. Yes sir.

Q. And you were participating essentially with him and the other officers right there and you heard what he did say to the people?

A. I did.

Q. As nearly as you can recall would you tell the Court the exact words Lieutenant Moore used—as nearly as you can recall?

A. I don't know what the exact words were but he told them to move on, to go home—he called several of them by names which we all know—he told them to move on home, get off the streets.

Q. Did he—I mean I realize you wouldn't remember exactly what words but did he say anything materially different from that and did he say anything other than that except in perhaps the terminology he used?

A. Not that I can recall.

page 102 } Q. Did he go into any greater detail?

A. No.

Q. Did he say anything about "I order you in the name of the law" or anything like that or did he just say move on and so forth like you just described?

A. He gave them a warning the first time and he told them the second time if they didn't move on we were going to have to start locking them up.

Q. Did he recite an particular Code provisions, 18.1 and such and such a section, something like that?

A. No, he didn't.

Q. Did he say anything about "Under the terms of the Riot Act I order you to disperse."

A. No he didn't.

Q. Did he say "This is a riot. I order you to disperse."

A. I don't think it was necessary for him to say it. Anyone could see what was going on.

Q. That's not my question. Will you please answer my question. Did he say "This is a riot. I order you to disperse."

A. Not that I recall, no.

Q. Did he say "This is an unlawful assembly or this is a riot or this is a *rout*" or in any other way use any of those three terms?

A. He did tell them that they were unlawfully assembled.

Q. He told them that?

page 103 } A. He did make that statement at one time I believe so.

C. D. Jones

Q. You believe so. Now I asked you before whether he said anything else materially different and you said no. You want to change your testimony now to say...

Camblos: May it please the Court what is materially different and what isn't materially different is completely a matter of opinion and it takes no change of testimony to state now as the witness is stating. I don't think the inference that the witness is changing his testimony in any way is at all called for.

Court: I will sustain the objection there. I don't think that that—I think you called his attention to something and he's answered and I don't think it's a question of—a question of changing his testimony. I sustain the objection.

Q. At the time Lieutenant Moore gave you the order to move from the service station, to move in and make the arrests, who was the first person you came upon?

A. Well the crowd was moving, some of them were running, some of them walking rather fast—Owens he just sat down on the sidewalk, never attempted to move and I placed him under arrest.

Q. Did you say anything to him or did you just say "You're under arrest".

A. I told him he was under arrest.

Q. And that was all you said to him?

page 104 } A. That's all I said.

Q. And then put him in the car. Prior to talking to Ferguson—excuse me to Owens, did you talk to any of the other people there, to the group at all or was he the first person you arrested?

A. I don't recall talking to any other people in the crowd.

Q. Now you then put Owens in the police car—I believe you said that Ferguson started saying something about talking to Owens. In fact didn't he say something about calling Owens' mother, do you recall that that might have been what he said?

A. I'm not sure.

Q. And what words—what did you say to Ferguson at that point? What conversation, if any, did you have with Ferguson? You started to say something—if you can recite what you did tell him?

A. I just told Ferguson that he was under arrest for failing to disperse.

Q. And that was the first thing you said to Ferguson?

C. D. Jones

A. That's right.

Q. Had Lieutenant Moore moved in with you or with the other officers?

A. I don't recall.

Q. Had Lieutenant Moore or any of the other officers addressed the group prior to making arrests or

page 105 } did you all just sort of move in and execute the plan that had...

A. We executed Lieutenant Moore's orders in making the arrests when bottles started flying.

Q. No one addressed the group first particularly, just moved right from that service station, down, got out of your cars, moved over and made the arrests as you have described?

A. Would you rephrase that?

Q. Say from the time you got the order from Lieutenant Moore in the service station you moved directly to the Nite & Day Market, got out of your cars and made the arrests?

A. That's correct.

Q. Now you said that Lieutenant Moore had ordered you to arrest anyone that you could get your hands on in the immediate area. Was that the order you are saying when you say that he ordered you to move in—was that the time he said that?

A. He gave us the order to arrest anyone in the immediate area who had not—failed to comply with the order that he had given them earlier.

Q. That he had given them earlier to disperse?

A. That's right.

Q. By that he was referring to the time when you were down in front of the Presto Cafe?

A. At the time we was in front of Presto—it's also at Harper and Jim William's Buick.

Q. Right. What time do you estimate the time

page 106 } that this was said at Jim William's and Harper—you say nine thirty or so? You started to say something and didn't finish it.

A. I would say around nine thirty, something like that. We was so busy nobody was watching the watch.

Q. At about what time was Fry arrested? Was that around nine o'clock?

A. It was in the early part of the night.

Q. Was it daylight do you recall whey Fry was arrested?

A. I believe it was dark. I'm almost sure it was dark, near dark.

Q. Well—now you say you saw Ferguson in front of Presto

—that was before Fry was arrested, wasn't it? That was earlier in the evening?

A. No this was while the crowd had gathered on the sidewalk as I said before.

Q. Was this before or after Fry was arrested?

A. Well Fry had been placed under arrest at the time...

Q. This was not at the time Fry was arrested though—it was later?

A. No, it was about the time that Fry had been placed under arrest. Fry had been placed under arrest, brought across the street and he was standing there and I saw Mr. Ferguson and Mr. Owens—several other individuals I don't know.

Q. What was Mr. Ferguson wearing do you remember?

A. I believe Mr. Ferguson had on a yellow shirt
page 107 } and Mr. Owens had on a bright green shirt.

Q. And you remember them specifically being there at that time?

A. Well I know both of them personally as I said and I know quite a few of them in the crowd personally.

Q. Now if testimony were given here that he was in a different part of town at that time, would you feel that it's possible that you were mistaken?

A. I wasn't watching my watch. I don't know what time it was. I don't think anyone had time to watch a watch with all the activity, bottles and bricks and so forth.

Q. What time did you come on duty—you mentioned you came on early?

A. I would say right around 8 o'clock.

Q. And when you came on duty did you go immediately to patrolling in this area?

A. I went to the Police Station and they told me to get a car and we came right on over there, that's right.

Q. So it was shortly after eight when you arrived at that area?

A. That's right.

Q. When you say patrolling, were you going up and down Preston Avenue or around in the area—just how were you patrolling?

A. That's right, we were going around through the area.

Q. And there were crowds gathered at even
page 108 } early time in the general area—a lot of people in the area at Presto?

A. There was a large crowd in front of Presto and you

had a few gathered here and a few gathered at different other places.

Q. Isn't it possible that—it's been some time since this all took place, isn't it possible that you saw Ferguson earlier in the evening in the crowd there?

A. Very possible...

Q. Before Fry was arrested rather that afterwards—do you have any particular reason to remember that it was afterwards or just that you remember seeing him?

A. He was there when Fry was arrested I know.

Q. You know?

A. I know I saw him.

Q. Where was he standing at that time?

A. I don't know exactly where he was standing but he was standing sort of near the edge—the crowd was gathering and some of them was sort of straggling along.

Q. Officer Jones just to clarify it I ask you what time—do you have a particular way of knowing what time Fry was arrested or were you just approximate?

A. Well I know it was 8 o'clock when I came to work. It was a little after 8 when I arrived over there. I don't know the exact time he was arrested—could have been between 8:30 and 9 o'clock.

page 109 } Lowe: No further questions Your Honor.
Camblos: May this officer be excused?

Court: If there are no objections...

Lowe: No objections.

HAROLD R. GRANGER, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Camblos:

Q. Would you state your name please sir?

A. Harold R. Granger.

Q. And your occupation?

A. I work for the Charlottesville Police Department.

Q. How long have you been on the Force?

A. Approximately 3 years.

Q. Were you on duty on the night of September 8th of this year?

A. Yes sir I were.

Q. What was your specific job that night?

Harold R. Granger

A. I received a call at my home at approximately—a little after seven to come out and stand by.

Q. Was that your normal duty hours?

A. No sir, it wasn't.

Q. What time do you normally go on?

A. 10 to 6 a.m. in the morning.

page 110 } Q. Did you respond to this call?

A. Yes sir I did.

Q. And were you on foot, a car or what?

A. In a patrol car.

Q. Was there anybody with you?

A. Yes sir.

Q. Who was with you?

A. Officer Jones.

Q. Did you see the crowd that has been described around the Preston Avenue that night?

A. Yes sir I did.

Q. Did you see any damage to property done in that area that night?

A. Yes sir I did.

Q. Very much of it?

A. Yes sir.

Q. Can you remember some of the places?

A. Yes sir.

Q. What were they?

A. Well first arriving on Preston Avenue we turned left then on 9th Street, noticed that one of the big picture windows in front of Jim Williams Buick was broken. And we went around to Harper Motors lot—didn't think there was any damage there—proceeded up Preston to Preston Plaza —all the windows there was broken—went around on . . .

page 111 } Court: Just a second, that's Preston Plaza?

A. Yes sir. We went through that lot, turned left on Charlton Avenue—the tile place up there on—right across from Washington Park was broken . . .

Q. Let me back up just a minute. You say all the windows at Preston Plaza were broken. When you say all, how many are you talking about?

A. Well mostly every building in the Plaza had windows broke on them.

Q. Does that mean three or four windows or does it mean a couple of dozen windows?

A. Well I noticed in the Sav-a-Lot Store, the window over

top of the base of the door was broken and at the Fish Market the one with the big plate window was broken out and all the way down just was one window broken, not all of them but just—every building had a window broken.

Q. Were you present when Woodson Fry was arrested at the Presto Cafe?

A. Yes sir I was.

Q. Did you hear Lieutenant Moore tell the crowd anything then?

A. Yes sir I did.

Q. Do you remember exactly what he told them? Do you remember the words he used?

A. I don't know exactly the same words?

page 112 } Q. Well tell us generally what he told them to do?

A. We was crossing from Jim Williams car lot going across where they started out into the street. I'm pretty sure Lieutenant Moore stated—said "I want all of you to get back on the sidewalk and I want you all to leave here because you are all unlawfully assembled here and to go on home and get on away from here."

Q. Did they go?

A. Some of them left and some stayed.

Q. Do you know whether or not either or both of these defendants were in that crowd at that time?

A. At that time I didn't notice either one of them at that time because I was looking at a couple of other fellows there.

Q. Did you notice either of these defendants in the general crowd in that area that night at anytime?

A. Yes sir, I did.

Q. Where?

A. Up in front of the—I know Mr. Owens was down there, right at the corner of Booker Street and Preston and later he was up there at the Nite & Day Market, in front of the Nite & Day Market.

Q. Where were you when the crowd was in front of Nite & Day Market?

A. I was over in the Triangle Gulf lot.

page 113 } Q. Aside from Lieutenant Moore telling the crowd that they were unlawfully assembled and telling them to go home in front of the Presto Cafe, did you hear him give any such orders at any other time?

A. Well as we started back over to our patrol cars which we had parked ours over in the Harper Motor lot—that's when a boy Tim drove up with the Jones' in it and they were ques-

tioning Officer Jones about some incident—and they was crowding around our car and that's when Lieutenant Moore came up again and told them to leave and he wasn't going to tell them again, to go away and leave from around this parking lot and go on home.

Q. Did they leave?

A. The ones in the car they kept raising a lot of racket and everything and they finally left and the ones that was coming across the street, they stood there for a few minutes and they moped along on back up in front of the Nite & Day Market.

Q. Did they stay in a crowd?

A. Some of them was going down east on Preston and some of them went down through Booker Street and some went west on Preston in front of the Nite & Day Market. All of them didn't go up in front of the Nite & Day Market.

Q. Did you make any arrests there in front of the Nite & Day Market?

A. Yes sir I did.

page 114 } Q. Who did you arrest?

A. Cass Mitchell.

Witness with you.

Camblos: I have one question, excuse me Mr. Lowe. Did you suffer any damage personally that night?

A. Yes sir, I did. First when we was going down from Charlton Avenue, someone threw a brick and hit me in my forehead with it and then later on I noticed—my mother called me and said that someone threw a bottle into our window at home.

Lowe: Your Honor I object to this testimony. I don't know what relevance it has to this charge, either of those two statements and I ask that it be stricken.

Court: I think that this all a part of what Officer Moore testified to. It's corroboration of that—it shows the general situation as I see it. I overrule the objection.

Lowe: I except Your Honor. Thank you.

Camblos: Witness with you.

Court: I think the last part does, especially on the grounds of hearsay is what his mother told him. Did you see that sir when you got home? Was there a hole in your window?

A. Yes sir.

Court: All right.

Officer C. D. Jones

CROSS EXAMINATION

By Mr. Lowe:

page 115 } Q. So after Lieutenant Moore ordered the people to disperse, the crowd broke up into small segments, some went down Booker Street, some went south, some went east, is that right?

A. About—that's right.

Q. So that in fact after Lieutenant Moore ordered them to disperse, they dispersed? Is that correct?

A. No sir.

Q. Now if the crowd broke up into four or five or six segments and moved off into all these different directions, wouldn't you say that was dispersal?

Camblos: Object Your Honor, it's not a question of what this witness thinks is dispersal.

Court: I think it's arguing with the witness. I'll sustain the objection.

No further questions for this witness Your Honor.

Court: No objection to this witness being excused.

Camblos: I'd like to recall *Office* Jones.

Lowe: I understood that Officer Jones' testimony had been concluded and he had been excused. I'm not sure why or what purpose or basis . . .

Court: I understood the Commonwealth Attorney to say he wanted to recall him.

Camblos: It's a matter of something I forgot to ask him Your Honor.

Court: All right, have a seat please.

page 116 } OFFICER C. D. JONES recalled to stand.

DIRECT EXAMINATION

By Mr. Camblos:

Q. Do you know who first arrived at the scene of the fire at the Martin Plumbing place?

A. A man by the name of Richard Banks—he was the first one . . .

Q. No, I mean first officer?

A. Officer Granger and myself.

Q. What did you observe when you arrived?

A. I noticed smoke coming out of the window and of course a faint smell of either oil or kerosene to myself.

Officer Harold Granger

Witness with you.

CROSS EXAMINATION

By Mr. Lowe:
Q. This is a plumbing and heating establishment I believe, isn't it? C. P. Martin is . . .
A. I think so.
Q. They deal in oil burners and electric heating units and other such items?
A. I would think so.
Q. Well if they deal in oil burners then it wouldn't be highly unusual for some odor of oil to be about the place would it?
A. That's correct.
page 117 } Q. So you have no way of knowing what the source of this odor or even whether it related to the fire, do you?
A. No.

No further questions.

REDIRECT EXAMINATION

By Mr. Camblos:
Q. Did you stay while the fire burned down?
A. Yes I did.
Q. Did the odor stay there after the fire had burned down?
A. To me I could still smell the same odor.
Q. All right.

Court: All right, you may stand aside.

OFFICER HAROLD GRANGER recalled to the witness stand.

DIRECT EXAMINATION

By Mr. Camblos:
Q. Officer Granger when you arrived at the scene of the fire at C. P. Martin's did you smell any odor?
A. Yes sir, I did.
Q. What was it?
A. It smelled as though it could be kerosene or gas.

Witness with you.

page 118 }

CROSS EXAMINATION

By Mr. Lowe:

Q. The same question I asked Officer Jones, you have no way of knowing whether it came from that building or whether it had anything to do with the fire at all, do you?

A. No sir.

No further questions.

Court: All right, thank you. Youmay stand aside.

OFFICER W. L. MANN, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Camblos:

Q. State your name please sir?

A. E. L. Mann.

Q. And your occupation?

A. Police Officer for the City of Charlottesville.

Q. How long have you been on the Force?

A. Six years.

Q. Were you on duty on September 8th of this year?

A. I was.

Q. Were you on duty that night?

A. I was, sir.

Q. What was your duty that night?

A. To patrol the general area in which the dis-
page 119 } turbances and things had been taking place.

Q. Had you previously patrolled that same area in connection with previous disturbances during the prior six or seven days?

A. Yes sir, I had.

Q. Who were you patrolling with?

A. Officer B. G. Mayo.

Q. In a car or on foot?

A. We were in a patrol car.

Q. Did you see crowds on that night at various places at various times?

A. I did, sir.

Q. Did you see either or both of the defendants among those crowds?

A. I did notice one of the defendants, yes sir.

Q. Which one?

Officer W. L. Mann

A. Mr. Owens.

Q. Do you remember when and where?

A. Yes sir in front of the Presto Cafe on Preston Avenue, after the arrest of Woodson Fry.

Q. Did you see him there at the time when Lieutenant Moore gave any order to the crowd?

A. Yes sir I did.

Q. Do you remember what that order was?

A. Lieutenant Moore ordered us to form a line in
page 120 } front of this establishment, this Presto Cafe—
ordered the people on the sidewalk to disperse that they were there unlawfully.

Q. How far were you from the Defendant Owens at that time?

A. Approximately 10 feet from him.

Q. Did he disperse? Did he leave?

A. Not right away, no.

Q. When he left did he leave with the crowd or otherwise?

A. The crowd as far as I could determine broke into two predominate groups, one continued west on Preston Avenue, the other to the parking area, Harper Motors.

Q. Now during the course of your patrol that night, did you have any difficulty with any of these crowds?

A. Yes sir, I did on several occasions.

Q. What is the worst difficulty you had with them?

A. Well I had several objects thrown at me. I guess the worst I had was a bottle of gasoline burst on the sidewalk beside me and drenched my coat with gasoline.

Q. Was there any indication that that was anything other than just a bottle of gasoline?

A. Yes sir when I first noticed—well previous to this we—there were still several small groups milling about and we were pushing these groups, just walking with them to keep
them moving. And a bottle was thrown from this
page 121 } group that I was proceeding with. I noticed in
the air—a flame—it was the flame itself which fell to the ground and I thought that it was just a rag or something that had been thrown in the air and then this bottle hit the street, not more than a foot beside me and burst.

Q. Did it light, did it burst into flame?

A. No sir, it didn't?

Q. How far from where the bottle hit had the flame fallen?

A. Oh, I'd say a distance of some 40 feet.

Officer W. L. Mann

Q. Tell the Court some other things that happened that night to you or you and your companion on patrol?

A. There was an officer new on the force, comparatively new—he radioed for help when the car in which he was in was under attack by a group of subjects which . . .

Lowe: Objection Your Honor. This is hearsay and he's getting just a little too . . .

Court: I think this is a little . . .

Camblos: Did you respond to a call from another officer?

A. Yes sir, we responded to a distress call.

Q. Where did you go?

A. We went to the playground area just west of 10th on Preston Avenue known as Washington Park.

Q. What did you find when you got there?

page 122 } A. There was a police car that was pulled into the parking—park area of the park. We arrived not knowing where the police car was. A little west of 10th Street on Preston Avenue there was a group of some ten to 12, maybe more, subjects running from the park towards Preston Avenue. We stopped our car, our police car, the one I was in and a rain of bottles and bricks and so forth begin to hit around the car, on the car and the sidewalk beside us. I was afraid to open the door to get out. I did not have on a safety helmet at that time and I pulled my revolver and fired two shots in the air and they dispersed and ran back into the park.

Q. Did you proceed to the police car that you were headed for originally?

A. By this time the police car had made its way from the park and was on the street at this time.

Q. Well did you see any evidence of it having been attacked in any way?

A. Yes sir, I did.

Q. What did you see?

A. There were dents on the car caused by objects that had been thrown against it. There was also debris where the car had been parked.

Q. There was what?

A. There was debris where the car had been parked.

Q. What kind of debris?

page 123 } A. Soft drink bottles, rocks, parts of bricks, sticks . . .

Q. Now were you present when Donald Moore, Lieutenant Moore gave the order to make arrests?

Officer B. G. Mayo

A. No sir, I was not.
Q. Did you take any part in that activity?
A. No sir, I was called away from that area at the time to the fire.
Q. To the what?
A. To the fire at the plumbing and heating establishment.
Q. How long prior to—did you hear that order given over the radio or were you . . .
A. No sir, I was not in the patrol car.

Witness with you.

CROSS EXAMINATION

By Mr. Lowe:
Q. This incident with the car in Washington Park, I didn't catch what time you said that took place?
A. This was sometime after eleven thirty—we had since left the fire and began our patrolling again.
Q. And this was when the police car was stopped over at Washington Park with these kids or whoever it was that was . . .
A. Yes sir.
Q. And this was following this incident that took place at the Nite & Day Market?
page 124 } A. Yes sir.
Q. Now as nearly as you can recall Lieutenant Moore gave the order to the crowd telling them to move on, that they were unlawfully present on the street, that they were unlawfully there—what is your recollection of the exact words he used if you can recall?
A. As well as I can recall Lieutenant Moore after our line had been established on the street in front of this Presto Cafe was that "All of you people here" and he called some of them by name and I don't recall the names that he called—the people that he called—"You are here unlawfully, disperse or you will be arrested" as well as I can remember.
Q. And that was around nine thirty or something like that?
A. Something like that, yes sir.

No further questions.

OFFICER B. G. MAYO, having been duly sworn, testified as follows:

Officer B. G. Mayo

DIRECT EXAMINATION

By Mr. Camblos:

Q. State your name please sir?

A. B. G. Mayo.

Q. And your occupation?

A. Police Officer for the City of Charlottesville.

page 125 } Q. How long have you been on the police force?

A. 6 and ½ years.

Q. Were you on duty on the night of September 8th of this year?

A. I was.

Q. Did you observe the crowd from the vicinity of Preston Avenue to the Presto Cafe?

A. Yes sir, I did.

Q. It has been testified to that you patrolled with Officer Mann?

A. That's correct, yes sir.

Q. Were you with him the entire evening?

A. Most of the time. There were times we were out of the patrol car when we were not together.

Q. Were you present when Officer Moore gave any orders to the crowds?

A. Yes sir, I was.

Q. Once or more than once?

A. Once.

Q. And when and where was that?

A. This was in front of the Presto Cafe on Preston Avenue.

Q. Do you remember what he told the crowd?

A. Not the exact words. I remember him telling them to go home, break up and get off the streets.

page 126 } Q. Did they do so?

A. Not right away.

Q. Did they anytime soon thereafter?

A. I don't remember the exact time from the time that he told them to—in small groups—I don't know exactly how long it was before all of them left.

Q. Were you present at the Nite & Day Market when the arrests were made?

A. No sir, I was not.

Q. Did you at anytime that night recognize in any of the crowds either or both of the defendants?

A. I recognized one, the one that is sitting in the middle in front of the Presto Cafe.

Q. Was he there when Officer Moore gave the order to disperse?

Officer B. G. Mayo

A. Yes sir.
Q. Is your memory as to events as to which Officer Mann testified any different from Officer Mann's memory as to those events?
A. No sir.

Witness with you.

CROSS EXAMINATION

By Mr. Lowe:
Q. Following Lieutenant Moore giving this order for the people to move on and disperse after—you said
page 127 } not right away but within a few minutes thereafter didn't they break up into small groups and some go out Booker Street, some go down Preston, some go to Preston Plaza, some go out Rose Hill Drive and generally move out of the area?
A. Well they did but I couldn't tell you how long, whether it was thirty minutes, an hour or how long.
Q. But they did follow instructions . . .
A. Eventually they did.
Q. They did follow his instructions that he had given to move out?
A. Later on.

No further questions.
Camblos: The Commonwealth rest Your Honor.
Court: All right, thank you. You may stand aside.
Lowe: Would the Court like to hear a constitutional argument at this time? I also have a motion to strike and I would like to argue that . . .
Court: No, the constitutional *argrument*—I want to hear all of the evidence—I mean I don't want to hold these other witnesses here while you argue that . . .
Lowe: I just want to make sure the record reflects that I'm not being negligent in not making the argument at this time. Your Honor I move to strike the Commonwealth's evidence and dismiss these charges. Putting aside the question of warrants and constitutionality of the statute
page 128 } and all of that, I'm just addressing myself to the merits of the offense. The Commonwealth has simply not proven the offense as it is written in the book. The first thing we have is the Commonwealth's own witnesses tes-

tifying that Lieutenant Moore gave the order to move in and arrest everybody they could get their hands on for failure to obey the order to disperse which he had given around nine thirty earlier to a large crowd down in front of Presto Cafe. Now first of all the testimony is uncontradicted that that crowd in fact did disperse. Now I don't think that there was any instructions that they had to break up in groups of ones and twos. There is certainly no authority in law to require everyone of them to go into their own house. They were ordered to disperse. The testimony from the Commonwealth's witnesses is uncontradicted, that they broke up into small groups and went in all different directions. One small group of which went to the Presto Cafe—or to the Nite & Day Market. This was approximately an hour and a half before the arrests were made. Now by no stretch of legal imagination can it be said that those people sitting in front of that cafe, right then were laboring under the impression that they were suppose to break up smaller than 15 to 18, assuming that they were all the same people that had been earlier at the Presto Cafe—that an hour and a half earlier that that order to disperse while the police were sitting in the police cars watching them, in full view of the people in front of the Presto Cafe, that no one there would think that they were sitting there under that order and being subject to arrest if they did not move. For the better part of it—however long it was that they were parked in the service station—there was no attempt by any police officer to go in and order them to disperse again. If they were in fact riotously assembled or unlawfully assembled, why did the police sit there as long as they did. If this were under an order which had been given an hour and a hour earlier, with the police constantly in the area, constantly patrolling, are we to understand or are we to assume that our police officers would allow an unlawful situation to exist for an hour and a half and not do anything about it. Your Honor I submit that the situation to which they reacted was a situation which occurred at about eleven o'clock that evening. It was a situation which developed afresh, completely separate from the Presto Avenue or Presto Cafe affair. There's not this—not virtually their testimony that the exact same people were even there, that had been down to the Presto Cafe—that there weren't some new people and some had come and gone—that's not very clear at this point. But an hour and a half had passed from the time the order to disperse had been given and followed. There was no other order to disperse given. Officer Jones said he walked in and placed them under arrest. He may have said "All right, you're under arrest for not moving on an order to disperse" but that just doesn't follow the statute. In

page 129

addition there has been absolutely no shown of
page 130 } concert or cooperation or participation or conspiracy or agreement or anything else to connect
these defendants with any of the acts of violence that took place, to connect them with any threats of violence that took place in front of the Nite & Day Market. As a matter of fact there is no testimony that there were any threats of violence. We have testimony that there were some bottles that flew through the air. No testimony as to who threw them. No testimony that anyone in the crowd actually threw them, just that the bottles were flying through the air. There is nothing in anyway to tie these two in to six or more persons, assuming again the validity of the act—that there were six or more persons assembled together. And I point out to the Court very carefully the language "Any unlawful use of force or violence by six or more persons acting together." There is no testimony whatsoever, not one shred that these two men were acting with any of the other group of 15 to 18 or that any of the group of 15 to 18 were acting together. Not one shred of evidence. If they were not acting together they are not guilty of the offense. If there was no order to disperse there was no offense. Now the Commonwealth has gone to great pains to portray something that sounds a little bit like Sodom and Gomorrah. Nothing but broken windows and tried *futiley* to establish that it was arson. I say *futilely* because there was not one shred of evidence to tie the fire at C. P. Martin with any mob action or any individuals in any way except the highest one of speculation. And by doing this
page 131 } trying to set a framework within which to say therefore, these people must have been rioting
and these people must have been in an unlawful assembly. Their assembly is no evidence to convict under the statute as it is on the books. The charge specifically alleges that they did unlawfully or riotously with six or more persons acting together, use force or violence and with other such persons be unlawfully or riotously assembled and while so assembled and so using such force or violence failed to disperse. There simply is no evidence. We must ask that the Commonwealth's evidence be stricken and that the charges be dismissed.

Court: Does the Commonwealth want to reply to that?

Camblos: May it please the Court this legislation adopted as emergency legislation at the last session of legislature, was adopted and I'm proud to say that had some little part in framing it and working on it, was adopted for the purpose of handling situations exactly like the one the police were faced with during this week in September here in Charlottesville.

Without such legislation the police would be as they have been in so many other places nearly helpless to cope with such a situation. It then becomes a matter for a police officer seeing and being able to identify a person committing a specific crime and when you have a mob of 100 people throwing brick bats or bottles or whatever, this becomes extremely difficult if not almost impossible. Therefore the legislature adopted this legislation. Now it is claimed that there is no evidence

page 132 } that these people acted together. The testimony is—I think that it is complete and thorough—that at Presto Cafe some 75 or 100 of these people acted together in moving towards the police cars in such a manner that the officer in charge, Lieutenant Moore had formed a line of police between the police car and the mob. They were acting together. If they had been acting one by one, why the police would have had no problem. They could have arrested them one by one but they weren't so acting. They came at the police car as a mob. They then together, after being ordered to disperse and after failing to do so immediately as required by the statute, acting together they moved together from there over to Jim Williams and the Volkswagon parking lot. One group of them went up to Washington Park where they stoned the automobile with Officers Mann and Mayo. Another group of them apparently stayed there at the Jim William's Buick and the Volkswagon place. And there were again told by Lieutenant Moore to disperse. Some of them did, some of them went across the street and up a half block to the Nite & Day Market where they still acted together, to stay together in disobedience to the order to disperse immediately. There they were watched until they then started throwing bottles, breaking windows across the street and so forth. Your Honor if this did not with all of the attendant property damage that was committed in that immediate area, in that area that night, make that area from approximately the southern tracks to Washington Park and from, oh the Street over

page 133 } there that goes from down to Washington Park over to about West Street, if that wasn't then a riot area, I don't know how one would be established or defined Your Honor. Now the statute doesn't say that persons ordered to disperse when a riot is in progress move across the street or walk a half block up the street. This isn't what the statute is aimed at Your Honor. The wording of the statute "Every person except public officers and persons assisting them remain present at the place of any riot, rout or unlawful assembly after having been lawfully warned to disperse shall be guilty of a misdemeanor. Now what is the place of this riot? The place of this riot is an area of several square blocks Your Honor. The crowd—an unlawful assembly doesn't

mean that each person in the crowd must stand at least two feet from any other person or at least five feet from any other person or ten feet from any other person to keep him from coming under the definition of an unlawful assembly. When this crowd, this mob, is in this area creating this havoc, conducting this riot and these same—this same mob stays within that area and the fact that they may be 25 feet from somebody else doesn't mean that they dispersed Your Honor. I think it's perfectly clear what this statute means. When it says disperse, it means go away from there, get out of the troubled area, not from the spot at which you happened to be standing at the moment. To disperse doesn't mean moving two feet from one side and then say I dispersed, I moved. I think the evidence is clear and complete Your Honor and I

page 134 } think that these defendants are clearly in violation of it and I think the motion should be denied.

Court: Anything you want to . . .

Lowe: Yes sir. Checking into the authorities I'd like to bring to the attention of the Court . . .

Court: Just a minute. If you're going to bring any authorities then you'll have to give him a chance to reply to them.

Lowe: I'd be happy to. This is in rebuttal of what he has said. The case of *White* against the *Commonwealth,* 174 Va. 528, which was a 1940 case, two deputies *persuing* I believe a moonshiner, both of them having come upon him at the same time—they both shot at him at the same time. And one of the deputies apparently it was a civilian deputy who had been requested for that purpose had been charged with the killing. The Court there held on a charge that was given to the jury that this was conspiracy and you can tell so by the simultaneous action of these two deputies that they were acting together, distinguished between concert of action and independent simultaneous action. Now when a group of people sitting in front of the Nite & Day Market are just sitting there and if there is no evidence that in fact there was concert of action, then what we have is simultaneous independent action. They just happened to all be there at the same time. There is no evidence to show that they were conspiring together or agreeing together or conversing or in any other way acting—at that point in time, at the Nite &

page 135 } Day Market, that they were acting together. In addition what the Commonwealth is contending basically is that there is no need for guilty minds, for mens re or guilty mind for intent, in order to have this offense be proven. The United States Supreme Court in a case of *Morrissette* against the *United States* which is found in 342

United States, 246 which is a 1952 case involved a common law offense which had ben codified by the Federal Government. It related to stealing basically. In that case the Federal Government's position was that it was not necessary to prove intent or to actually feloniously take and keep the property of the Government because the offense had been written into the books without a requirement for intent. And the Supreme Court in that case laid down the law that as to common law offenses which are later codified, if the codification does not refer to intent, it is presumed to still require intent as required by the common law offense. Now that is relevant here because unlawful assembly and riot are both common law offenses. I have authority on that if the Court would like it. Both of them require mens re, or guilty mind or intent in order to be guilty of unlawful—participating in an unlawful assembly of a riot. The Commonwealth has not proved intent. By not proving intent they have failed to prove an essential element under the Riot Act which is a codification of the common law offense. For that reason all of this argument about the circumstances and the riot area and everything else must fall because there is no intent for these people to par-
page 136 } ticipate in it. There is no shown of concert of action and there is no proof of the elements of the offense. I would just like to add two factual extension or particularly one. There is no testimony at all that any of these groups moved up and did the damages to the officer's car, simply that somebody did. And if there was any testimony as to that I certainly missed it. I believe that's all.

Camblos: May it please the Court...

Court: Do you want to reply to what he has just said...

Camblos: Well, only in this Your Honor that it's one of the most known principals of law—is that people are presumed to intend to do that which they do. And these people after having been told that they were unlawfully assembled, after being told to disperse from that unlawful assembly stayed. I take it that the Defense Counsel is arguing that we must in order to prosecute under this statute some how or other get the defendants to agree to be psychoanalyzed so that we can determine what was in their minds. The only way we can determine what was in their minds is by their actions. Their actions clearly show an intent to remain in this unlawful assembly, to refuse to disperse when ordered to do so, to disobey the mandates of this Riot Act.

Court: Well, I'll overrule the motion. I think that if this was a jury, it would be a case to go to the jury and the Court sits as a jury. The evidence is that they were—these two defendants were identified as being at the Presto Cafe at the

time that the order was given to disperse. That
page 137 } then a group moved up and apparently under this
surveillance of the officers moved up to the—eventually to the Nite & Day Market and then all of a sudden things started flying around. And to say that that was all independent—I mean of course no two persons threw the same object but I think that the evidence is ample to carry it to the jury that there concerted effort to throw those things and it was done. And these defendants were there and it can't be any contradiction about that they were there. And there's previous evidence that they were in the group below so that there's enough evidence to overrule the motion.

Lowe: I'll respectfully except Your Honor.

JOSEPH TURNER, JR., having been duly sworn testified as follows:

DIRECT EXAMINATION

By Mr. Lowe:

Q. Would you please state your name?

A. Joseph Turner, Jr.

Q. Where do you live Mr. Turner?

A. I live at 918 Henry Avenue.

Q. On the evening of September 8th which you've heard described in some detail here this afternoon, will you relate to the Court what your activities were, starting with early in
the evening and what observations you made
page 138 } which are relevant to this hearing?

A. Well I mean—well I made observations on police officers arresting Woodson Fry and the officers tried to keep the crowd off the—to try to keep the crowd from interfering with the arrest of Woodson Fry. And I also observed the arrest of Mr. Owens and I observed the crowd after being told to disperse that they dispersed. And . . .

Q. Now when you say that are you *refering* to the crowd in front of the Presto Cafe or in the front of the Nite & Day Market?

A. The Presto Cafe.

Q. And about what time was this that this took place—the arrest?

A. The arrest took place about nine and the crowd dispersed about nine thirty or nine forty-five.

Q. Now that was the arrest of Woodson Fry? I should have *clarfified* that.

Joseph Turner, Jr.

A. Yes sir.

Q. Do you recall what—well first of all do you recall who gave the order to disperse or to move?

A. Lieutenant Moore told the crowd—just told the crowd to stay on the sidewalk. I didn't hear him say "All right, let's disperse because you are unlawfully assembled." I didn't hear that at all.

Q. Where were you in relation to Lieutenant Moore at the time he was giving these instructions?

page 139 } A. Maybe several feet.

Q. Was he speaking in a reasonably loud clear voice so that you could hear what he was saying?

A. Not really. He just said stay on the sidewalk and then he put his men to form a line.

Q. Could you hear clearly what he was saying?

A. Yes I could.

Q. If he had said anything about unlawful assembly or riot would you have heard it do you think?

A. Yes I would have.

Q. What happened to the crowd that was there by Presto and by Jim William's Buick after he gave these orders?

A. The crowd dispersed from the larger group and then they formed several small ones.

Q. Were you in one of those groups?

A. Yes, I was. I was with the group in front of the Nite & Day Market.

Q. How long were you at the Nite & Day Market would you estimate? At what time did you arrive at the Nite & Day Market with this group?

A. About nine thirty.

Q. Somewhere around nine thirty?

A. As far as I can be sure.

Q. What time did the police officers take up their position in the service station?

page 140 } A. About nine forty-five.

Court: About what . . .

A. About nine forty-five.

Q. Were you aware that they were at the police station at that time watching you? (I believe instead of police it should be service station but this is what was said)

A. Yes sir.

Q. Do you think the other people in the crowd were generally aware that they were there?

A. Yes they were.

Joseph Turner, Jr.

Q. Were the people in the crowd—let me rephrase that. Were you with anybody in the crowd as such?
A. No.
Q. At what point if you remember did Mr. Owens join the group?
A. This was about ten thirty. Mr. Owens he come up to—came up the sidewalk to the store and then I was talking to him about five or ten minutes.
Q. Did he come up when the group which we heard about dispersing came up to the Nite & Day Market or did he come up later?
A. He come up later.
Q. About how much later would you estimate?
A. About thirty or forty-five minutes.
Q. What did he do while he was there in your presence prior to his being arrested?
page 141 } A. He did nothing. We just discussed the arrest of Woodson Fry and I was telling him they had just carried him off to jail . . .

Court: Just a minute. I couldn't hear that.
Lowe: Speak up . . .

A. We discussed the arrest of Woodson Fry and I just told him that Woodson Fry had just been carried off and I was telling him why he had been.
Q. Now at that point where were you physically located and what were you physically doing?
A. I was in front of the—I was sitting on the walk in front of the store and I was writing.
Q. What was Mr. Owens doing while you were talking?
A. He was just sitting on the walk beside me.
Q. Were the two of you talking alone?
A. Yes sir.
Q. Was Mr. Ferguson in the group at that time?
A. No he wasn't.
Q. To your knowledge had Mr. Ferguson been in the group when the group migrated up to theNite & Day Market?
A. No, not to my knowledge.
Q. What can you tell us about the composition of this group of 15 to 18 that you've heard described?
A. Well it changed—people would leave and others would come up—it changed.
Q. Do you remember specifically when Mr. Fer-
page 142 } guson arrived or what . . .

Joseph Turner, Jr.

A. I didn't see him at all—you know until after they had carried him to jail. I didn't see him until then.

Q. Can you tell us about the closing of the Nite & Day Market on that evening a little bit?

A. Mr. Brooks was left in charge and he closed the store at the regular time, 11 o'clock.

Q. Mr. Brooks is a young negro man?

A. Yes he is.

Q. And he was left alone and locked up the store himself, is that what...

A. Yes he did.

Q. Now what happened to him at the time he was locking up the store? Would you tell the Court what happened?

A. Officer Tomlin arrested him for disorderly conduct. I think he pointed out—I think he said something to Officer Tomlin and he pointed at him and he arrested him for disorderly conduct.

Q. So that the arrest took place at the same time or just ...

Camblos: Your Honor I have kept silent but I object to his extremely leading the witness.

Court: All right, objection sustained.

Lowe: I'll withdraw that question. Were you aware of certain bottles breaking in the vicinity of where you were?

page 143 } A. I saw two bottles.

Q. Can you tell the Court where the bottles came from if you know.

A. The bottles came from down the street from the store, from towards—I mean from the Presto Cafe direction, in that direction and not from the group in front of the Nite & Day Market.

Q. About how far from the group would you say this was as a minimum if you can tell?

A. It would be between fifteen or twenty yards.

Q. Where was the source of bottles if you can tell with reference to Booker Street?

A. It was possibly—well they were coming from maybe a few yards from Booker Street.

Q. Were there any windows broken during the time you were sitting there?

A. There was one window broken down the street at the Volkswagon place.

Q. When was that broken?

Joseph Turner, Jr.

A. This was after they arrested Mr. Fry and before the officers made their arrests.

Q. Was this before the group moved up to the Nite & Day Market?

A. Yes. You see . . .

Q. You want to clarify your answer—go ahead?

page 144 } A. I was just going to say that this group they was quiet—you know, but they wasn't making any noise. They were quiet. They were just there.

Q. Was anything thrown at anytime by anyone in the group in front of the Nite & Day Market?

A. No.

Q. Were there any loud boisterous language or cursing by anyone in front of the Nite & Day Market?

A. There wasn't any cursing or anything.

Q. Was there any other form of violence perpetrated by anyone in front of the Nite & Day Market?

A. No.

Q. Did you hear any conversation which threatened any violence or any sort of action?

A. No.

Q. How would you characterize the nature of the 15 to 18 people there in so far as you could observe of your own knowledge as to whether they were all in one group, in small groups, individual groups—how would you characterize the group from what you observed?

A. Well—they were—after separate groups were made of two or three persons, and they were just talking about what had happened—there wasn't any kind of conspiracy as if they were going to form a group and go out and take some

page 145 } sort of positive action—you know—they were just discussing what had happened prior to their coming up there to the store.

Q. Is your home in this general vicinity you've heard described?

A. Yes it is.

Q. Do most of the people who were in that group live in that area, do you know?

A. Most of them do.

Q. Is it common for people to congregate in front of this Nite & Day Market in your experience on evenings?

A. Yes it is, sometimes.

Q. Is it common for groups this large to sometimes gather there?

Joseph Turner, Jr.

A. Not quite as large but they do congregate there—you know just to talk.

Q. Were you present at the time of the trial in Municipal Court of this matter?

A. Yes I was.

Q. Did you hear all of the testimony that was given at that trial?

A. Yes I did.

Q. Were you in a position in the Courtroom to hear everything that was said?

A. Yes.

Q. During the course of that trial did you hear Lieutenant Moore testify?

page 146 } A. Yes I did.

Q. Did you hear Officer Jones and Granger and Jackson testify?

A. Yes I did.

Q. At anytime during that trial did you hear anyone identify either of these two defendants as having been present?

A. No I . . .

Camblos: Object Your Honor.

Court: Objection sustained.

Lowe: May I ask the grounds of objection Your Honor.

Camblos: Leading . . .

Court: You're leading.

Q. With reference to the testimony that was given in Municipal Court, can you tell the court of any inconsistencies that you observed from the testimony that you've heard here today?

Camblos: Object Your Honor.

Q. If there are any?

Court: On what ground?

Camblos: On the ground that this witness's appraisal of what is inconsistent and what isn't inconsistent is not proper evidence here today. As to the questions to be asked him, if he's to impeach some testimony why I think it should be asked him directly—not ask him to wonder all over the street.

Court: Well I think that you're bringing that

page 147 } along by the objection to the leading nature. I'm quite sure he was trying to—but I think it was leading—but I think that he's got to be permitted to ask this

witness—and I think maybe if he—instead of any inconsistencies whatsoever if he directs his attention to—if . . .

Lowe: All right, I'll try to march down the middle. I was trying to avoid the objection Your Honor. Can you tell the court of any inconsistencies, if there were any, that you have heard between the testimony that day and the testimony today that would relate to the warning given by Lieutenant Moore to the crowd at the Presto Cafe?

Camblos: Object Your Honor. Again while it might be perfectly proper or would be perfectly proper to impeach police officers or other witnesses through this witness, the mere fact that inconsistence as such does not impeach anyone. Now contrary statements, yes. The fact that they may have been asked at a prior hearing to identify such and such a person and did so or did not do so and that they did something different in the same question would be impeachment. But the fact that they did not identify a witness or party at prior trial but did today would be inconsistent but not impeachment unless it's shown that they were asked at the prior trial.

Court: I think he can ask him whether or not particular witnesses identified these defendants as being at a particular spot in their testimony at the previous trial.

page 148 } Camblos: Well I think he has to first establish Your Honor that they were asked the question. The mere fact that they did identify them today didn't . . .

Court: I understand. I think that he can get it out in that fashion.

Q. I will go into a little more detail. Do you recall hearing Lieutenant Moore testify as to the sequence of events and the instructions and orders which he gave to certain persons assembled at the Presto Cafe on the evening of September 8th?

A. Yes sir.

Q. Will you tell the Court what inconsistencies, if any, there were between his testimony at that trial and his testimony at this trial concerning the instructions that he gave or the orders or warnings he gave to the persons assembled at the Presto Cafe?

Camblos: Object Your Honor. This witness has already testified and has undertaken to quote exactly what Donald Moore said and has further testified that that was all he said. He's already covered that ground.

Joseph Turner, Jr.

Court: He's just asking about what Lieutenant Moore testified down at the police court as I understand it. I'll permit the question.

Camblos: All right.

Q. Please answer the question?

page 149 } A. Well at the other trial I think he stated that from his position—where—his position that he was parked that he could not recognize any of the...

Camblos: Now I object Your Honor that's not in response to the question...

Lowe: I know. I'm about to correct the witness. Directing your attention now to the point when the crowd was in front of the Presto Cafe and Lieutenant Moore and the other police officers gave instructions and orders to the crowd that they are to disperse. At that point in time anything that was said or not said which was inconsistent between the Municipal Court trial and this trial?

Court: On the part of this...

Lowe: On the part of Lieutenant Moore...

Court: Yes.

Q. I think we're getting so confusing...

A. The only thing that I can possibly say now is what I heard the officer say at the time they were making the arrests.

Q. Let me ask you a direct question. If Mr. Camblos wants to object he can...

Camblos: If its going to be leading, I object in advance if that's what you're talking about.

Court: Well what are you trying—let me speak with counsel a minute because we've been here for some little time and I think that a question is permissible but I think we ought...

Judge met with counsel in his chambers.

page 150 } Q. What did you hear Lieutenant Moore say as to the warning that he gave the crowd at the Presto Restaurant—at the Presto Cafe?

A. He said that—he told the crowd that they were unlawfully assembled and they should disperse.

Q. Now did he say—well in view of our conference back there I don't believe it's any necessity to ask that question now. With relation to the testimony of Officer Jones, did you

hear him give any testimony relating to the presence or absence of these two defendants in the crowd at the Presto Cafe. And if so what testimony you recall hearing?

A. At the other trial?

Q. Yes?

A. I don't recall him ever saying he saw these two defendants.

Q. Do you recall hearing anyone testify at that trial about seeing these two defendants at the Presto Cafe?

A. No.

I believe that's all I have of this witness.

CROSS EXAMINATION

By: Mr. Camblos:

Q. As I understand it the Judge in the lower court let you off, not on the basis that you were unlawfully assembled but on the basis that you were leaving, isn't that correct?

A. Yes sir.

age 151 } Q. So that you were unlawfully assembled yourself then, weren't you?

Lowe: Object Your Honor that's a legal conclusion and I don't see what relevance it has either.

Court: I'll sustain the objection.

Camblos: All right. Now what time did you get to the Presto Cafe that night?

A. That night?

Q. Yes?

A. About eight thirty.

Q. Were these two defendants there when you got there?

A. No I didn't see them.

Q. Do you say they weren't there or no that you didn't see them, which?

A. I didn't see them.

Q. You're not trying to testify that they weren't there though?

A. I said I didn't see them.

Q. All right. All right, now you say that you left the Presto Cafe shortly after Mr. Fry was arrested?

A. I left shortly after he was arrested.

Q. Where did you go?

A. I went up to the Nite & Day Market.

Joseph Turner, Jr.

Q. Directly up to the Nite & Day Market?
A. No.
page 152 } Q. Did you go over in the Jim Williams Volkswagon parking lot?
A. No.
Q. Where did you go?
A. I walked up the street towards the Nite & Day Market.
Q. Where did you—did you just stop somewhere along the way?
A. I stopped and talked to a couple of friends.
Q. Was there a crowd of people all around that area all night?
A. Yes.
Q. And you were a part of that crowd all night?
A. No.
Q. You weren't?
A. I was there . . .
Q. Who were parts of the crowd that was around that whole area that night and who wasn't parts of the crowd?
A. Well . . .
Q. How could you tell which were parts of the crowd and which were not parts of the crowd if the crowd was all around?
A. Well I'm just saying that I wasn't a part of the crowd.
Q. Well what distinguishes one in the crowd from part of the crowd? How do you tell the difference?
page 153 } A. How do I tell?
Q. Yes?
A. I can only say that I wasn't a part of the crowd.
Q. Were you right there with the crowd?
A. I was there where the crowd was.
Q. You were with—it was all around you but you weren't a part of it?
A. I wasn't a part of it.
Q. Now is that the same thing you mean when you say that these defendants weren't a part of the crowd?
A. I didn't. . .
Q. *By* they were surrounded by it and it was all around them but they weren't a part of it?
A. I didn't see Mr. Ferguson. I saw Mr. Owens once.
Q. You saw him once, when?
A. He was talking to me in front of the Nite & Day Market.
Q. You never did see Ferguson?
A. No.
Q. So is it your testimony that Ferguson wasn't at the Nite & Day Market?

Joseph Turner, Jr.

A. My testimony is that I didn't see him at the Nite & Day Market.

Q. So you don't know who all was then?

A. No.

page 154 } Q. Now if you don't know whether or not Ferguson was there, can you testify anything as to when he got there if he was there?

A. I didn't see him arrive. I didn't see him there and I didn't see him leave.

Q. Now where had Owens come from when he got to the Nite & Day Market? You said you saw him somewhere?

A. From the restaurant up at the Presto Plaza.

Q. Was that where all the windows were being broken? Was he up there when those windows were being broken?

A. I wasn't up there.

Q. What?

A. I wasn't up there when the windows were being broken. I don't know.

Q. Well at the Presto Cafe—you say you were somewhere either at the Presto Cafe or the Nite & Day Market, or somewhere in between. Now none of those places is more than about a block from that Presto Plaza was it?

A. About a block.

Q. About a block. Well you knew the windows were being broken didn't you?

A. Was I there?

Q. Did you know the windows were being broken?

A. No.

Q. You didn't hear them?

page 155 } A. No.

Q. Did you hear the one that was broken over at the Volkswagon place?

A. Yes.

Q. Did you see who threw the brick?

A. No?

Q. Or rock or bottle?

A. No.

Q. So the only person that you know anything about really that night is yourself and Owens, is that correct?

A. Yes sir.

Q. Now you say that this was just a quiet crowd, just quietly sitting in front of theNite & Day Market talking?

A. Yes sir.

Q. And that the bottles that were thrown came from the direction of the Presto Cafe?

Joseph Turner, Jr.

A. In that general direction.

Q. Now half way between the Presto Cafe and the Nite Did they throw the bottles, the policemen or did the people & Day Market, about two or three police cars were parked. right there at the policemen throw the bottles?

Lowe: Objection Your Honor. There's no testimony that there were any police cars down there.

Camblos: There is too, Your Honor. The testimony is that the whole area was sealed off at both ends.

page 156 } Lowe: There's no testimony that there were any there between the Presto Cafe and the Nite & Day Market. The testimony is that they were down below the Presto Cafe.

Q. All right, did you see any cars between Preston Cafe and the Nite & Day Market while you were at the Nite & Day Market?

A. No.

Q. They were not there?

A. No.

Q. Were you looking?

A. I was looking at the cars on the other side of the Nite & Day...

Q. So when you testified that bottles came from that direction, you don't know what direction they came from if you weren't looking in that direction, do you?

A. I saw the bottles coming from that direction.

Q. What—did they come from that direction?

A. Yes.

Q. Did you look in that direction to see if they came from that direction?

A. I saw them coming across...

Q. Oh, across which way?

A. From this way.

Q. That's across the street you mean?

A. What?

page 157 } Q. Across the street?

A. No, on the same side that I was on but down further.

Q. What?

A. On the same side of the street that I was on but they were coming from down the street further...

Q. You looked down the street just far enough to see a little bit across the street but not far enough to see whether any police cars were parked down there?

Joseph Turner, Jr.

A. I saw the bottle coming through the air.
Q. A bottle?
A. Yes.
Q. Now did you see where the brick came from as the car from up at Washington Park passed in front of the Nite & Day Market and break—broke a window in the car?

Lowe: Objection Your Honor. I don't know that there's any testimony about such a brick breaking any window.
Court: I don't remember any testimony to that.
Camblos: Well—I'm sorry.
Lowe: Well there isn't, that's the point.

Q. Did you hear any cursing as the police officer passed there on its way down—east on Preston Avenue?
A. No.
Q. Didn't hear anybody shouting "Honkey, mother fucker" that kind of language at the police officers as they went by?
A. No.
page 158 } Q. Could that have happened without your hearing it?
A. Huh?
Q. Could that have happened without your hearing it?
A. Possibly.
Q. Could a brick have been thrown from that crowd and broken a window in the police car as it went by without your knowing it?
A. From the crowd that I was in?
Q. In front of the Nite & Day Market?
A. No I don't think so.
Q. If that had happened you would know it?
A. I would have known it.
Q. Did you see a police car go by there?
A. Saw several go by.
Q. Did you see one going by just about a few minutes after eleven o'clock, at the time when there was a fire at Martin Plumbing?
A. I didn't—eleven o'clock—I don't know the time that they passed by.
Q. Do you know Officer Mann?
A. No I don't.
Q. Know Officer Mayo?
A. No.
Q. You've seen them here in the Courtroom today?

Joseph Turner, Jr.

A. Yeah, I saw them today.

page 159 } Q. Did you see them pass by in a police car a few minutes after eleven o'clock or about eleven o'clock?

A. I didn't—as I said I don't know what time they passed by and I don't know them anyway so I wouldn't know.

Q. Well you've seen them here today. Did you see them there that night?

A. No I didn't see them.

Q. Now why did you leave there when the police officers showed up?

A. Why did I leave?

Q. Yes?

A. I was about to leave.

Q. Oh, it just happened that you were leaving anyhow?

A. No—yes—no—Officer Jones he came to the crowd and said "All right, let's move."

Q. When was this?

A. This was just before the officers began making arrests.

Q. And it's your testimony that nobody had ever given any crowd that you were in any orders to disperse that night?

A. I didn't hear any.

No further questions.

REDIRECT EXAMINATION

By: Mr. Lowe:

Q. At the time that Officer Jones made that

page 160 } statement what was he doing?

A. He was walking towards the crowd.

Q. All right. Had he approached anyone in particular and was he talking to anyone particular at that point?

A. Yeah. As he spoke he approached Mr. Owens.

Q. All right...

A. And he said "You are the main one anyway. You come on and go with me."

Court: He said what? You had better repeat that.

A. You are the main one anyway. Come on and go with me.

No further questions.

Camblos: I have no further questions.

Court: All right, you may stand aside. All right, Mr. Lowe are you ready to proceed?

Lowe: Just one moment Your Honor.

Recessed for ten minutes.

Lowe: I would like to call Defendant Roy Lee Ferguson.

Court: Now you have explained to him, of course, that he doesn't have to...

Lowe: I have explained that they have a right to remain silent or to testify and that there can be no presumption from their standing silent.

Court: If they do take the stand they are just like any other witness as far as being examined.

page 161 } Lowe: Yes sir.

R. L. FERGUSON, JR., having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lowe:

Q. Would you tell the Court your name please?

A. Name, R. L. Ferguson, Jr.

Q. Where do you live?

A. 128 Short 10 1/2 Street, N. W.

Q. Are you employed?

A. Yes sir.

Q. Where do you work?

A. I work at Sprouse's Aluminum Sheet and Metal Company.

Q. Now do you have another job in addition to that?

A. Yes sir, I do yard work for private families.

Q. You've heard the testimony here this evening without going through the background, would you tell the Court at what time, if at all, you were at the Presto Cafe on the evening in question and what you actions were during the course of that evening?

A. Well on September 8, 1968, I were at the Presto Cafe around about fifteen minutes to ten—that's to the hour—and the crowd was just standing around. I had just come up from home and they told me that they arrested Woodson Fry. I asked them what was he charged with and they
page 162 } said some disorderly or something, said they had just got him. So I said "Well don't tell me"—myself and a friend of mine, we were together. So I told him I was going over to a friend's house of mine and I would be back later on, to get my golf clubs. And so I stayed over there

I'd say, round about until eleven thirty, something like that—I mean ten thirty, something like that. Then I came back and stopped by the Nite & Day Market. That was about a quarter to eleven. I seen Mr. Owens and Mr. Turner sitting there on the walk and I went on in— they had their back turned, just sitting on the walk with their back to me looking down the street. And I went in and started talking to Brooks. I was drinking a pepsi cola out of a can, one of these cans of coke colas. I left the Nite & Day around about—I'd say about fifteen minutes before eleven, something like that. And when I came down the road—I didn't know nothing about—you know nobody had made orders to dispersing or nothing because I wasn't there at the time. And so I just come on down the street by myself and I seen Mr. Owens in the car. And hollered across and said "Tell my mother that they got me." I said "Okay I will." That's when Mr. Jones came across the street and got me and told me to put my soda on the sidewalk.

Court: He told you what?

A. To put my soda on the sidewalk and come on over with him. And I kept after him what was he arresting me for.

page 163 } Q. Had you been present when Lieutenant gave orders to the crowd in front of—I guess it's Jim William's Buick?

A. No, that was before I got there, or after I left.

Q. You said that you were there around a quarter of ten or something like that. .

A. Yeah. .

Q. How accurate could you say that time was? Could you be off by some if this were not quite consistent with some of the times that have been testified to earlier. . .

A. I didn't quite understand it.

Q. Well let me rephrase the question. Regardless of what time it was by the watch, had you left prior to Lieutenant Moore telling the crowd that you were in anything that you have heard him say today?

A. Did I hear him say anything at the time—at the time. . .

Q. Had he addressed the crowd and addressed you prior to the time you left?

A. No sir.

No further questions. Witness with you.

R. L. Ferguson, Jr.

CROSS EXAMINATION

By Mr. Camblos:

Q. Now he hadn't addressed the crowd prior to the time you left when?

A. That was in front of the Cafe sir.

page 164 } Q. How do you know that?

A. Because they done told me that he said disperse and that was before I left for my friend's house. I had left.

Q. They told you he said—told them to disperse?

A. Yes sir that's what he told me.

Q. Joseph Turner then does not tell the truth when he says Lieutenant Moore didn't tell them to disperse, is he, according to what your friends told you?

A. Sir?

Q. Your witness Joseph Turner must not be telling the truth then, is he? He says that Lieutenant Moore never said that?

A. Maybe he didn't hear him just like I didn't hear him. I don't know whether he said it or not.

Q. He said he heard Lieutenant Moore say and he quoted him but he says that no part of it was to disperse. Now is he not telling the truth here today?

A. Well maybe he might have heard it as far as I know but I'm just going by what somebody else told me.

Q. And you say that Lieutenant Moore had said this before you were there?

A. Sir?

Q. You say that Lieutenant Moore had said this before you got there?

A. Yeah, before I got there.

Q. And nobody said anything after you got

page 165 } there?

A. No sir.

Q. So you knew that the order had been given, didn't you? You were perfectly aware that that crowd had been told to disperse by lawful authorities of the City of Charlottesville?

A. I did.

Q. And you didn't do it? You stayed there...

A. I did disperse.

Q. Where did you go?

A. I went over to Henry Avenue...

Q. Where—who?

A. Robert Gordon.

Q. Robert Gordon and where does he live?

A. I think it's 921 Henry Avenue. And his parents was there, he wasn't there. I stayed there until about almost ten thirty.

Q. What time did you get there?

A. I'd say around about—ten o'clock or something.

Q. You were there at ten, you left at ten thirty?

A. Yes sir, I...

Q. Were you talking to his parents during that time?

A. I talked to his step father.

Q. Now you say you got back to—on your direct testimony you said you got back to the Nite & Day Market at 10:45?

A. No I didn't say 10:45.

Q. What time did you get there then?

page 166 } A. I'd say around about quarter to eleven, something like that.

Q. Well 10:45 and quarter to eleven is the same thing, isn't it?

A. Well that's right.

Q. Well is that what you said, 10:45...

A. Yes.

Q. And you said you left there at 10:45 on direct testimony?

A. didn't say I left there. I say I left there in five minutes...what did you say?

Q. All right, when did you leave the Nite & Day Market?

A. I left at five minutes to eleven as far as I can remember because it didn't take that long to get...

Q. Were you watching your watch pretty closely that night?

A. No because Brooks was getting ready to close.

Q. And it's on the basis of his getting ready to close that you know when you left?

A. Yes sir, I looked at the clock when...

Q. You left before he closed?

A. Yes sir.

Q. And walked on the way down the street?

A. No I had started down the street. I didn't make it no further than the pole.

page 167 } Q. Than where?

A. The telephone pole—that's where Officer Jones picked me up.

Q. At the time you got to the telephone post, he had finished closing, the police got there and arrested a bunch of people is that correct?

A. Sir?

R. L. Ferguson, Jr.

Q. By the time you were able to walk to that telephone pole, Brooks had finished closing the place, the police had gotten there and they had arrested Brooks, they had arrested Owens, they had arrested Ferguson and several others?

A. No sir. The way it were, when they arrested me I was by myself.

Q. Had they arrested the other people first?

A. Yeah, they had Owens and Mr. Mitchell.

Q. And you were still there—how far from that place to the telephone pole you're talking about?

A. I'd say about as far as from here to that wall.

Q. And during the time that Brooks was closing up—well you say getting ready to close up—had he actually started closing up when you left?

A. No sir, he was stocking the shelves.

Q. So he was stocking the shelves when you left—before you could walk as far as that blackboard there, why he had finished closing up and gotten himself arrested...

page 168 } A. I did not say he had closed up...

Q. Did he not close up?

A. Well if he did it was after they had locked me up. Because you see they picked him up afterwards.

Q. They did...

A. He was inside then. He just couldn't throw the stuff, you know, up on the shelf and walk out. He might have been in there fifteen or twenty minutes after I left as far as I know.

Q. Well do you know when he was arrested?

A. I was already in jail then sir.

Q. How do you know that?

A. Because I know he did.

Q. Do you know that he wasn't arrested before you were?

A. He wasn't.

Q. How do you know?

A. Well when we got there they put myself and Mr. Owens and Mr. Mitchell—we had another little boy with us. They put us back in this room and I don't think they had him because after a while Mr. Turner came in and he said that they...

Q. I'm not interested in what he said. I'm talking about what you know. Do you know he wasn't arrested before you were?

A. No I don't know.

page 169 } Q. You don't know do you?

A. No.

Q. Did you see anybody else get arrested?

A. I didn't see nobody get arrested but me.

Q. You didn't see Owens get arrested?

A. No sir.
Q. Did you see the police come?
A. Police come where, sir?
Q. To the Nite & Day Market?
A. No sir.
Q. You were as far as the witness stand to this blackboard from it, a whole flock of police cars drive up there and you didn't see them? Is that what you're telling me?
A. It wasn't nobody on the street but me at that time. When they arrested me I was by myself. I had come from over my friend's house like I said. And I didn't see no one around—only thing I seen was Officer Granger driving—and Officer Jones coming—you know—coming on the sidewalk to arrest me.
Q. When you came out of the Nite & Day Market just before you walked as far as that witness box to this blackboard, there wasn't anybody else around the Nite & Day Market?
A. No sir.
Q. Now do you know where the police arrested Owens?
A. No sir.
page 170 } Q. And he wasn't anywhere near the Nite & Day Market when you went in or when you came out?
A. Yeah, the police car was parked on the righthand side, on the righthand side of the street across from this little T. V. place, right there..
Q. On the same side of the street as the Nite & Day Market or across the street from the Nite & Day Market?
A. It was parked right by the post—this post on the lefthand—parked right across the street on the righthand side. The post was on this side and the car was on this side.
Q. Now is it on the same side of the street as the Nite & Day Market or acorss the street from the Nite & Day Market?
A. It was across the street, sir.
Q. Just one police car?
A. That's all I seen—Officer Granger and Officer Jones.
Q. For the purpose of the record, what is it about 20 feet over from here where you are sitting, to this blackboard?
A. I would say a little better than that.
Q. 25 or more?
A. I don't know. I don't have a ruler.
Q. It's half the width of this courtroom, isn't it?
A. Sir?
Q. It's half the width of this courtroom, isn't it, approximately?
A. What did you say?

R. L. Ferguson, Jr.

page 171 } Q. From you to that blackboard it's approximately half the width of this courtroom, isn't it?

A. Yeah, I'd say.

Q. And you were that close to the Nite & Day Market and didn't see anyone else around the Nite & Day Market at the time?

A. No sir, it wasn't a soul on the street but me.

Q. Now did you see Brooks, the man that was operating the Nite & Day Market?

A. Yeah, I talked to him I told you.

Q. Did he come outside of the Nite & Day Market?

A. You say did he come out?

Q. Yes. Did he come outside.

A. He didn't come out when I was there.

Q. So you never saw him on the street?

A. No sir, I didn't see him on no street.

Q. Did you see any glass broken around the Nite & Day Market?

A. No sir but I did see some paper and stuff.

Q. You didn't see where any glass had been broken?

A. No sir.

Court: You didn't see what? I didn't get that.

A. Some paper and you know—boxes over there with trash in them.

page 172 } Q. Now right by the door as you go in the—or that night as you went into the Nite & Day Market by the door there was a big drink box machine, wasn't it?

A. Yes sir.

Q. Was there glass in it broken or not?

A. I don't know sir.

Q. Was the front window of the Nite & Day Market broken or not?

A. No sir.

Q. You are positive it was not?

A. If it were I didn't see it.

Q. And it certainly couldn't have gotten broken while you were there without your hearing it, could it?

A. Not the window of the Nite & Day.

Q. And you never heard it get broken?

A. No sir.

Q. And you were arrested and taken away after Owens was arrested?

A. They had him in the car, sir.

Q. And you are positive that this was before eleven o'clock?

A. No, it was exactly eleven o'clock—about eleven or something. It was before—by the time they put me in the car—and I say by the time they put me in the car and we got to Presto, probably would have been about eleven o'clock.

Q. Tell me why you happened to be watching
page 173 } your watch so close that night?

A. I wasn't watching my watch sir. I always find out the time—I mean because sometime it can be important.

Q. So you keep track of the time all along?

A. Yes sir.

Q. All right, tell me what time was it when they called the first witness in this case this morning?

A. I don't keep that kind of time?

Q. What kind of time do you keep if you are always keeping time so correctly—so carefully?

A. You see because I have to go to work on Monday morning, and I told my parents I would be back before eleven thirty.

Q. And this is how you know that you got to the Nite & Day Market a few minutes before eleven?

A. I said quarter to eleven.

Q. Quarter to eleven?

A. Right.

Q. And did you look at your watch at that time?

A. Sir?

Q. Did you look at your watch?

A. I don't wear a watch—you see I...

Q. What did you look at?

A. They got a big clock in the Nite & Day.

Q. Inside the store?

page 174 } A. Yes sir.

Q. Now were you watching the clocks over at your friend's house on Henry Avenue?

A. See I didn't need to because they had to go to bed.

Q. What has this got to do with the time?

A. See what I was doing I was waiting for—I thought maybe Robert was coming home that night and I could get my clubs.

Q. Well what difference as to what time you say it was at that point?

A. What difference?

Q. Yes.

R. L. Ferguson, Jr.

A. You see I had told my parents that I was coming back home—you know...

Q. This is a whole lot earlier in the night when you were over there at your friend's house on Henry Avenue. You had plenty of time to get home...

A. I was going to make a couple more stops.

Q. What?

A. I wanted to make a couple more stops before I got home.

Q. Where did you find out what time it was over there?

A. Over where?

Q. On Henry Avenue? What clock did you look at over there?

A. They got clocks.

page 175 } Q. Who?

A. Mr. Gordon—I mean Mr. and Mrs. Gilbert.

Q. And where are they?

A. In the house.

Q. Whereabouts in the house?

A. Well one in the kitchen on the wall. They got another one in the bedroom. They got a radio clock. They got another big clock.

Q. Did you look at all of them?

A. No, I'm just telling you where they're at because that's just how close a friend—I'm familiar with it.

Q. Now you say Officer Jones was across the street and when you told Owens that you would tell his mother, that's when Jones came over and arrested you?

A. Yes sir, he might have thought I was saying something else, you know...

Q. Why would he have thought you were saying something else?

A. Because he just come over there and grabbed me.

Q. Well why would he have thought you were saying something else?

A. Because they was just arresting people just like that (clicking his fingers together).

Q. I thought you said that there weren't any other people on the street?

page 176 } A. There wasn't.

Q. Well then who were they arresting?

A. They had arrrsted them and I know...

Q. Arrested who?

A. Mr. Owens, Mr. Mitchell and I think it was a young boy named Winston.

Officer Mann

Q. Where did they find them, if there wasn't anybody else on the street? Where did they get these people from?
A. Where did they get what people?
Q. Mitchell and Owens and these other people they arrested? You said there wasn't anybody else on the street?
A. There wasn't.
Q. Well where did they find them to arrest them?
A. They had already arrested them before—you know...
Q. Before what?
A. Before they got me.
Q. Well when were they arrested?
A. I don't know.
Q. You mean the officers had arrested them a long time earlier and were just carrying them around in their cars?
A. No.
Q. Oh, I see. No further questions...
A. As far as I know they didn't.

Court: Any more questions?
Lowe: I have no further questions.
page 177 } Court: Who did you go to see? You were telling Mr. Camblos about the clocks?
A. Mr. and Mrs. Harry Gilbert—I mean that's right.
Court: I thought you said something about going to Robert Gordon's.
A. Yeah, but that's his mother and father.
Court: I see. I have no further questions. You may stand aside.
Lowe: Defense rest Your Honor.

REBUTTAL

OFFICER MANN recalled to the witness stand.

DIRECT EXAMINATION

By Mr. Camblos:
Q. Mr. Mann you previously testified that you and Officer Mayo were in a patrol car in that area that night, I will ask you whether or not you were called to the scene of the fire at the Martin Plumbing place?
A. I was sir.
Q. Did you respond to that call?
A. We did sir.
Q. How soon after the call was made were you able to go there?

A. Immediately.
Q. Where were you when you got the call?
A. We were at the Triangle Service Station.
page 178 } Q. In going from there to Martin Plumbing and Heating establishment did you pass the Nite & Day Market?
A. We did sir.
Q. Was there a crowd there at the time?
A. Yes sir, it was.
Q. Was it all in front of the Nite & Day Market or was part of it there and part of it elsewhere?
A. It was part of it elsewhere other than in front.
Q. Where was the other part?
A. Directly across the street.
Q. Did anything happen as you passed there?
A. Yes sir, it did.
Q. What?
A. There was an extremely loud sound of glass breaking.
Q. Where was the glass breaking?
A. In the vending machine which was right in front of the Nite & Day Market. It has a big glass front on it.
Q. Did any other glass there in front of that market get broken besides the glass in the vending machine?
A. Yes sir, it did.
Q. Where was Lieutenant Donald Moore when you left to go to the fire at the Martin Plumbing and Heating?
A. He was still parked at the service station—Triangle Gulf Service Station.
Q. Would you estimate how many people you
page 179 } saw there in front of the Nite & Day Market as you passed?
A. Mr. Camblos it was just a quick glance. We were in route to this fire but I would estimate at least 10 or more persons.
Q. Was anything said—did you hear anything as you went by?
A. Yes sir, I did.
Q. What?
A. We were called "Honkey"—some words I'd rather not repeat here.
Q. Well—if I may lead Mr. Lowe—and if you want to object you can because I'm about to—were the expressions you heard vile and profane?
A. Yes sir, they were.
Q. How loud were these things that you were called?

A. Well enough for us to or for me anyway to hear inside the police car and I was on the opposite side.

Witness with you, sir.

Lowe: No questions.

Court: What is your best estimate of the time you passed for the Nite & Day?

A. This was going—I'm using the fire officials form as to when the fire was..

Court: It was after the fire had been reported, wasn't it?

page 180 } A. It was simultaneous to the reporting of the fire by the dispatcher who dispatched our unit to the fire to assist the Fire Department.

Court: I see.

A. We arrived before the fire company got there.

Camblos: Just one second—when the fire box is pulled, does that sound at the police station as well as the fire house?

A. Yes sir, it does.

Q. I see, thank you.

Court: Do you have any questions Mr. Lowe?

Lowe: Yes.

CROSS EXAMINATION

By Mr. Lowe:

Q. I'm not quite sure of the situation at the Triangle. Do I understand that you had been parked with Lieutenant Moore at the time at the Triangle Service Station?

A. We had not been in the car with him. We had had our police car parked in that same vicnity only a few feet away from Lieutenant Moore.

Q. Where were you at the time you got the call? Maybe I misunderstood you?

A. I was in our police car.

Q. All right, where was the police car?

A. It was parked in the driving area of the Triangle Gulf.

page 181 } Q. How many cars were with you at the time? Just Lieutenant Moore or were there others?

A. No there were others, sir. I recall there was probably three, maybe four.

Q. This is before the arrests were made that you've heard described in great detail here?

A. Yes sir, I was actually at the fire when the arrests were made.

Officer B. G. Mayo

No further questions.
Camblos: Thank you very much.

OFFICER B. G. MAYO, recalled to the witness stand.

DIRECT EXAMINATION

By Mr. Camblos:
Q. Mr. Mayo were you with Mr. Mann when you got the call to the Martin Plumbing fire?
A. Yes sir, I was.
Q. What did you all do on receipt of the call?
A. We proceeded to go to C. P. Martin's.
Q. Did you proceed immediately?
A. Yes sir.
Q. Did you pass Nite & Day Market on the way?
A. Yes sir, we did.
Q. Did anything happen as you passed it?
page 182 } A. Yes sir, just as we got in front of the Nite & Day Market, we heard glass breaking. At that time I didn't know where it was at. I knew it was close by. We turned around in Harper Motors lot and came back and saw what had been broken at the Nite & Day.
Q. What had been broken?
A. A big glass out in front of one of the drink boxes—a vending machine and also the glass in the store.
Q. You mean the store window?
A. A small window, yes sir.
Q. Was anything said to you as you passed there?
A. Yes sir, it was.
Q. What was the nature of what was said. I won't ask you to repeat the words?
A. Very bad, nasty.
Q. How loud was it?
A. I would say you could hear it for 20 to 25 feet, maybe more.
Q. Did you have any trouble hearing it as you passed by in the police car?
A. No sir.
Q. Could you tell where it came from?
A. Yes sir.
Q. Where did it come from?
A. From the Nite & Day Market.

Witness with you.

page 183 } CROSS EXAMINATION

By Mr. Lowe:

Q. Do I understand that when you went by and heard this sound, you stopped and turned around in the Volkswagon place and went back?

A. I did.

Q. Do you have any way of knowing what broke or do you simply know that when you got back there you observed those two pieces of glass had been broken at some time?

A. I didn't know what had been broken. I saw this glass broken on the drink box or vending machine. It was sitting right beside the door as you go into the Nite & Day Market.

Q. Isn't it possible that that might have been broken out, let's say the night before and the sound you heard was some other glass being broken somewhere?

A. It's possible.

Q. You've heard testified that bottles were flying through the air at one point or another—I mean these sounds—you don't know for sure that that window in that drink box was broken out as you went by, do you?

A. Well the glass was still on the sidewalk. I'm sure if it had been broken the day before, it would have been cleaned up.

Q. We have a pretty good street cleaning crew in the city that go out on Saturdays and Sundays and

page 184 } clean up broken glass?

A. I don't have any idea of what they do.

No further questions.

Camblos: The Commonwealth rest Your Honor.

Lowe: Your Honor in view of the procedure that we have gone through on the constitutional issues, holding them until last, I wonder whether the Court will entertain a motion to strike and so forth prior to going into that or do you want to follow the...

Court: Let me see if all the evidence is in. You don't have anymore evidence?

Lowe: No sir.

Court: Let me ask Mr. Moore—did you know when those officers left?

Moore: Your Honor I heard the call. I cannot say that I am cognizant of the minute they pulled out. Of course I knew

about the fire. I knew what was going on. But I cannot say with any degree of certainty that I saw them leave, no sir.

Camblos: Can you say whether or not they left before any arrests were made?

Moore: They must have left before arrests were made.

Court: Well let me ask you this. Were any arrests made before—in front of the Nite & Day Market before you heard the call to the fire?

Moore: The fire followed the arrests. The fire was a little bit behind the arrests, just a very few minutes
page 185 } behind the arrests—the call that come out just a very few minutes behind the arrests.

Camblos: Mr. Moore, take the stand. I would like to inquire into this a little further since Your Honor has asked.

C. D. MOORE, was recalled to the witness stand.

DIRECT EXAMINATION

By Mr. Camblos:

Q. Mr. Moore, can you say whether Mr. Mann and Mr. Mayo left on the fire call at the time the arrests were made?

A. Mr. Camblos I, prior to the arrests, was parked at this Triangle Service Station and I went directly from the Triangle Service Station to the point of arrests—where the arrests were made.

Q. Where were Officers Mann and Mayo when you went to make the arrests?

A. I don't know. I don't know where they were. He just said he was in the parking lost with me. I was not aware of that. I was not aware of his presence there.

Q. Do you remember whether he left you to go to the fire call as he said he did...

Court: Now he said he wasn't aware that he was in there in the parking lot.

A. I wasn't aware that he was sitting that
page 186 } close to me. I didn't know where he was at that time.

Q. Are you certain as to whether the fire call came first before or after the arrests?

A. It's my...

Q. Where were you when you got the fire call?

A. I don't know. I don't know where I was. But I am reasonably certain that the fire call was after the arrests.

C. D. Moore

Q. All right...

A. Reasonably certain that it was. I don't know where I was when the fire call come in. I don't recall that.

Q. Do you remember whether you had made an arrest?

A. It's my recollection that the arrests were made, we had moved in on this crowd of people at the little store—made the arrests and the fire call come in, right on the tail, right behind it.

Q. All right, no further questions.

Court: Let me ask you this. Did you put an order out over the radio to go forward and arrest these people?

A. Yes sir. I'm in a car—I'm in a radio car with one man—had one man with me. And when I concluded that it was time to make arrests I announced over my microphone "Move in on this crowd and arrest everybody that you can as far as we have manpower."

Court: Let me also ask you this. Would you have heard the—the fire call would have come out over the radio, would it?

page 187 } A. The call from the dispatcher would. Now we've got a device in our office that picks up the calls and notifies our man in the office. But he would have to broadcast it on the radio and...

Court: Well did you hear that on the radio or otherwise? I mean did you hear the siren...

A. Judge I'm reasonably certain—I'm morally certain I heard it on the radio. I'm morally certain I heard it on the radio but where I was I don't know. I cannot be sure about that.

CROSS EXAMINATION

By Mr. Lowe:

Q. As I understand your testimony you're also morally certain that it occurred after the arrests that you heard this?

A. In my mind I'm convinced that it was slightly behind or almost simultaneous with the arrests.

Q. It was after you had accomplished the arrests though?

A. After the arrests had been perfected.

No further questions.

Court: All right, thank you, you may stand aside. Does that conclude the evidence.

Lowe: Yes sir.

Court: All right.

Lowe: Your Honor I think if I may be a little optimistic, it might save some time if I made the motion to
page 188 } strike and since we're reserving...

Court: I don't see the point. I think we will take up the constitutional issue at a later time.

Lowe: Well as I say if I might make a motion to strike at this time...

Court: I said this morning we were going to wind this thing up tonight but I'm not going to hold you all to it. But make your motion to strike and then we'll see what happens.

Lowe: Because I think in our position of course that the constitutional argument will be unnecessary. These men are charged under this Riot Act with an offense which requires that six or more persons act together first of all. I renew my position that we took at the conclusion of the Commonwealth's evidence that there is no evidence here to show that these persons, these two defendants were acting together, first of all with six or more persons, second of all with anyone who in anyway committed violence or threatened violence or in any other way violated this statute, assuming that it is constitutional for the time. There simply is no evidence that they were acting together with anyone. Secondly, there is no evidence that an order to disperse was given. In the Commonwealth's testimony Officer Jones said and the other officers that the order referred to was the order that Lieutenant Moore had given an hour and a half earlier, that that was what they were acting upon, that this group had not dispersed. They were still up there. This statute is hard enough to read and to figure where you fall on
page 189 } criminal conduct and non-criminal conduct, without requiring that an hour and a half's time since the command had been given and particularly as to Mr. Ferguson who was never present. He had hearsay that some order to disperse had been given, certainly nothing was said, an order to disperse under a Riot or an unlawful assembly. He was in the market or at least was not present when the arrests actually were made and was arrested when he was trying to talk with Owens, as Mr. Owens was in the police car after the arrest. Certainly as to Mr. Ferguson there was never an order to disperse given to him. There is no testimony to this. For that reason certainly Mr. Owens must be dismissed—excuse me Mr. Ferguson. As to Mr. Owens, it is simply an unconscionable stretch of the imagination that an hour *an* a half after an order is given with the police

sitting and watching the group for an hour and a quarter—an hour at least—with the group knowing they were being watched by the police, that the police would come in and arrest people for failing to disperse upon the order that had been given an hour ago when a group of 75 to 100 where it was now down to around 15 persons, in a different location by—the Court knows how far the Presto and the Nite & Day Market are from each other. This is certainly outside of the provisions of this statute and outside the provisions of fundamental fearness without getting into the constitutional arguments as I said. There has been no proof of concert. There has been no proof of acting together which is an essential element of the offense. If for no other

page 190 } reason it must fall for that reason. And we would move that the Commonwealth's evidence be stricken and that these two men be dismissed of the charges before them.

Court: Do you want to reply to that Mr. Camblos?

Camblos: May it please the Court I think one of the critical factors here that the Defense Counsel is over-looking is that the statute prohibits one after being ordered to disperse under the situation such as the one proven here today—the statute prohibits him from remaining present at the place of any riot. Now first what is the place of a riot. It's not a point, it's not a single square foot of ground. The place of a riot includes the area effective by the riot and not merely the sidewalk in front of the Presto Cafe or the sidewalk in front of the Nite & Day Market. It has been proven that this thing was going on over an entire area in the city comprising several blocks. Now it is argued that Ferguson was never given an order. Well the evidence is that he was present when Donald Moore—Lieutenant Donald Moore gave the order to disperse telling the people there assembled that it was an unlawful assembly. Now, of course, Ferguson has denied this. But let's look into Ferguson's other testimony as to whether his testimony is reliable. One of the first and foremost in his testimony Your Honor as to reliability, is the fact that he says at the time he was arrested nobody else was on the street. Now if some 12 or 15 police officers are absolutely lying, why then we can believe him.

page 191 } Unless they are absolutely lying, you can't believe him. They had all been sitting there, there was some five or six or seven police cars, full of police officers, sitting there on that street watching a riot going on, part of it that was going on in front of the Nite & Day Market. And they've all testified that from 12 to, I think the high estimate is 30 people, there in front of the Nite & Day Market for a considerable period of time raising the devil, and when the

police officers saw them start to break things up well they moved in. Now if those police officers are telling the truth, then this Defendant Ferguson is not. The testimony is that the order was given directly to him. Now it is argued that was an hour and a half later, that we arrested—well Your Honor if we had given the order and waited ten seconds to arrest them for not dispersing immediately as required by the statute, then their argument would be that you hadn't given them a chance. Now we give them all the chances in the world so they turn the argument around on us and say we gave them too much chance. So the order is no longer valid, even though the riot is still going on full force. Your Honor I respectfully submit that the motion to strike should be overruled at this time.

Lowe: May I say first that we take a far more charitable view of the Police Department if we assume that the Defendant is telling the truth. We by no means say that this means they are lying. What we are saying is that these page 192 } police officers have all testified or enough so that we get the picture that they have seen and been in contact with a number of these people that they know very well. Throughout the course of the week that have seen them in different assemblages. There is a time factor here as to whether they were present before or after the arrests. It would be certainly within human nature and the power of suggestion for these police officers sitting in this courtroom and hearing the testimony to remember incorrectly or to just simply make a mistake. We feel this is quite consistent with the story. We by no means say that the police officers have to be lying or the defendant has to be lying. It's very possible that the police were simply mistaken as to the time or the identity. Secondly, a very puzzling problem here is what do we do with all of these people that were in front of the Nite & Day Market that lived in this so-called riot area which is broadened considerably. Are they not allowed to go home because they are now in the riot area? Is this the intention of the Commonwealth that a man who goes home peaceably and sits there is still guilty of failing to disperse when ordered to do so and could be given a year in jail for doing so. That's hardly the result we would expect. There was no declaration. Now the case of the Commonwealth would be much stronger here if there had been a declaration of some sort, saying that we hereby declare this area a riot area or this is an unlawful assembly. Now if it was an unlawful assembly, that doesn't extend to an area. If you want to say this was a riot area, the statute does not couch

page 193 } on those particular terms in so far as the charge here is—well it says a place. But if it was some designation that said "I hereby designate from here to here and to here as a riot area"—then that would be a little different. They would be on some notice. But these people live in this area. They habitually reside and frequent these areas. They are habitually frequenting the Nite & Day Market. This is not people moving from one side of town to another and being told to go home. They are home. How do you order somebody to leave their own home area? Where do you go? We want them to go down to Rugby Road or out to Farmington or something. I think that the crowd dispersed clearly. It broke up into small fragmental groups and went different directions. It left the immeidate scene of the disturbance down by the Presto Cafe and Jim William's Buick. If the police had thought that moving a small group in all these different directions, particularly the Nite & Day Market, had not been enough, then they should have told them that that was not enough. They should have given them some reasonable notice. This is one of the requirements of our law, is that a man have a reasonable notice as to when his guilt is criminal or his acts. These men had no way of knowing that their conduct was criminal. And this is why we feel that the charges should be dismissed.

Court: Well a motion to strike doesn't resolve conflicts in the evidence. That is not the purpose of a motion page 194 } to strike and the Court has to overrule the motion to strike and we'll go forward with the case. I'm inclined to think however that we're going to have to take a separate time probably to argue the constitutionality. I think you all in making your motion to strike have—I mean in your argument on that have to some degree argued the case but I know you will want to argue some more.

Camblos: If Defense Counsel will agree Your Honor I'll be perfectly willing that even though the defendant has had opening and closing in that argument, I'm perfectly willing to let the Court consider that argument on the case as the question of guilt. We have not touched upon the punishment.

Lowe: I am not sure I quite understand what you—you mean the argument we just made to be the argument on the case?

Camblos: Yes.

Court: I'm certainly not going to cut you off because the case has been going on all day. That was not a very long argument.

Lowe: Again I just want—I realize we have discussed this and carried it along on the constitutionality. I want to be

sure that I'm preserving properly the constitutionality argument but I think as far as the argument on the facts are concerned, I think we have probably covered them pretty well here in both motions to strike.

page 195 } Court: I think under the circumstances before ruling in the case, I ought to hear the argument on the constitutionality.

Camblos: Yes sir. My suggestion was to conclude the case as of this time subject to his point on constitutionality depending upon how the Court decides that and then argue the question upon it.

Court: Yes. If that's agreeable—I'm not trying to cut you all off. As I say you all didn't know that this was going to be a final argument when you were just arguing so if you want to argue some more later on, well I'm going to let you do it but...

Camblos: The facts are fresh in our minds and in the Court's mind too at this point Your Honor—more so than they will ever be again.

Court: That's right...

Lowe: Well I frankly feel betwix and between a little bit Your Honor. First of all I don't know when we'll have an opportunity to do this again and to have you hear it. I would certainly prefer to have the facts fresh in your mind. I don't know how you can properly consider the case on the argument that you've had now without the *consitutional* argument to go with it and I would...

Court: I'm not going to cut you off. You're going to have a chance to argue the constitutionality and I'm not going to rule on the case until you have that opportunity.

page 196 } And it may be necessary to do it some Saturday but we'll have to do it. At that time if you want to argue some more on the facts, well I'll give you that opportunity but not in great detail because neither one of you knew when you argued the motion to strike, that that was what might be treated as the argument. I think actually you pretty well covered it. I think the only thing to do is to adjourn as of now and I'll have to meet with counsel—I want to wind this thing up as promptly as we can.

Court Adjourned.

December 5, 1968
9:30 a.m.

Constitutional argument was heard on the constitutionality of the Riot Act Provisions.

Court: The court feels that in this prosecution and for this purpose the statute is constitution.

Lowe: We will except.

Camblos: May it please the Court the evidence in the case you heard several days ago, I noticed that during the testimony the Court took notes, which having lots of things on my mind, I did not do. I'm sure that the evidence to the Court is much more clear and definite than it is in my own mind. However, I think that I should touch on that evidence. I believe that evidence showed beyond any doubt that a riot in every sense of the word, including the definition
page 197 } set out in the statute, was in progress at the time these arrests were made. In fact I believe the evidence showed that for sometime previously there had been a condition of riot or near riot in the city. The city was in turmoil. It was a question as to whether law and order or law and the jungle would prevail in the City of Charlottesville. These defendants were both identified by several witneses as being in a crowd of people who were carrying further the insurrection of law and lawlessness, the refusal to abide by a proper constituted authority that was going on and had been going on for some time. One of the defendants took the stand and denied being present at a time when other witnesses said he was present when this crowd was told to disperse. That same witness however, testified as to assertives, particularly when he claimed that there was no one on the street at the time of his arrest. He claimed that he had left the Nite & Day Market, that there was nobody there and that he had walked from this witness chair, a distance as far as that blackboard, which is six steps and that there was then no one on the street. But his friend had—immediately prior to that had been arrested at a time when some 6 or 7 other people were arrested and a crowd of 15 to 18 persons were dispersed. Well, this of course is absurd. He was specifically and definitely identified as having been present at the time the orders were given to disperse. The other defendant Owens was likewise specifically and definitely identified as having been present at the time the orders were given to
page 198 } disperse. Several officers testified to these facts and I think these facts are proven beyond a reasonable doubt. Now Your Honor what happened after the police finally came to the conclusion that the matter had to be stopped by force in order to protect the lives and the property of the citizens of this community. It has been argued here earlier on constitutional grounds that the statute didn't make sufficiently clear what the duty of these defendants was. Your Honor that has been decided and of course we don't go

into it any further. But I think it's significant from the standpoint of what did happen is the fact that the officers initially confronted a group estimated from 75 to 100 persons. They ordered them to disperse. Some of the persons did so and that was the end of it as far as they were concerned. Upon the second order to disperse being given, more of the group did as they were ordered. Then their duty under the circumstances was perfectly clear and they obeyed the law. They did disperse even though their activity up to that point may have been unlawful. But a large core of that group estimated at a low of 12 and a maximum of 20 or 25, I forget what the evidence was, still refused to obey the orders of lawfully constituted authority. They hadn't at that point taken the law into their own hands. They had said "We are above the law. We will do as we please. We will destroy as much property as we please. We will not abide by lawful authority." They, staying together and acting together, went from a
page 199 } place where they were last ordered to disperse, across the street and up the street, a block or so and staying together, eventually got more and more riotous until the police could not longer tolerate the situation, could no longer tolerate wanting destruction of property, the endangering of life and moved in to stop them as they had to do. Your Honor these defendants were still there. They were still in what was left of the same group. That group was smashing windows, throwing bottles, hurling objects at the police cars, hurling epithets at the police cars, doing everything they could to bring on a more serious riot. They failed and God willing I hope that those black minds will continue to fail in this City. I think Your Honor that their guilt has been proven beyond all reasonable doubt under this statute. It remains a question of how serious is their activity, how serious is their crime. Your Honor we are not trying a case of one who fails to obey a police order in and of itself. We have provision in the City Code for one who fails to move on when the police tell him to and what not becomes subject of punishment. That isn't what we're talking about. We're talking about complete insurrection. We're talking about those who would reduce our society to a society of complete lawlessness, who bring on the shooting, killing, the looting that has occurred elsewhere if it were not stopped. Here we stopped it as I hope we can continue to do. Your Honor this is a serious crime. When persons take it upon themselves to substitute their own desire, their own wishes, their
page 200 } own greed, their own angry for law by which our society is regulated, then our society is seriously

in danger. More serious than a crime between individuals which by and large only effects individuals. The police testified as to the *quanity* of windows smashed. There's testimony as to arson, one of the most serious crimes we have. We have not undertaken to set a dollar value of any property destruction. From the description that has been given by the police I'm sure the Court is aware that that dollar value is great, very great. Those property owners have lost their property through *wanting* useless and senseless destruction but even that is not the serious point. The serious point is that these defendants have put themselves above the law. And I think the law must step in and teach them and others of like mind once and for all that we are all subject to the law and that we must obey it. I noted Your Honor the punishment meted out by the lower court, just about half of what it might have been. I think it was low enough. I think that if the court saw fit to impose greater punishment, I think it would constitute a very real safeguard to the citizens of this community and perhaps to other communities. I think it is our duty when we have this attitude on the part of persons which they are willing to carry out, to let it be known that such action will not be tolerated and cannot be tolerated because Your Honor it cannot be. We must have a society of law or we have no society whatsoever and I feel that the punishment meted out by this court if it agrees that these defendants are guilty page 201 } should be very severe.

Lowe: Your Honor please as a preliminary matter I would like to be sure to renew and preserve any objections made earlier in the trial. I don't think it necessary to go into great detail again on it unless the Commonwealth particularly wants to. We certainly do not intend to abandon any objections that we've raised during this trial. I'd like initially to object to one of the comments made by the Commonwealth Attorney in his argument. And that was his reference to any lower court sentencing. That lower court proceedings is a complete nullity. This is a trial of *de novo* and when they say *de novo,* that's exactly what they mean. It's not relevant. It's highly prejudicial, it's inflammatory and unfortunately as everyone sitting here well knows the damage is done. And there's no mistrial with a judge sitting—with a jury you might have a mistrial. I can only ask Your Honor to not consider that matter. I think it's completely improper. I think this court must reach an independent determination of whether it's less or more than the severity of the lower court —has absolutely nothing to do with what did happen down there. The charge before the court as set forth in the warrant contains several elements which must be proven, each one of them beyond a reasonable doubt by the Commonwealth. The

first element which I shall address myself to, is the fact that there must be six or more persons acting together. The second thing is there must be use of force and vio-
page 202 } lence and they must be unlawfully and riotously assembled. I'm taking from the text of the warrant. The third element which is recited is that they did remain present at the place of the riot or unlawful assembly and the fourth, that they did so after having been warned to disperse. Now the first thing which I think is one of the most significant facts that must be considered in the court—by the court, not only as to guilt or innocence but also as to the that there should be a punishment imposed—and that fact is seriousness if the court finds a conviction and determines that there is not one shred of evidence before the court that either of these two defendants did any act of force or violence, made any threat, used any abusive language or in any other way took part in an act under the terms of the Riot Act, except as they might have been in proximity to others who may have done this or in the general area where these acts took place. There is no evidence by anyone that saw or testified to either of these two defendants doing any of these matters. I feel this is quite important. Secondly, there is no evidence whatsoever of concert, no evidence of agreement, no evidence of conspiracy, no evidence that they talked with others and decided to do anything. There is no evidence whatsoever of any concert. The only evidence is that they happened to be in the same place at the same time as some others. The so called simultaneous independent action. The court cannot infer concert from the evidence which is
page 203 } before it. A common pre-disposition to certain action is also not enough to convict in this case. It may be that in a given group everyone there were angry, everyone there may have been thinking very minor thoughts, that does not constitute concert, does not constitute acting together. And of course we by no means concede that either of these two defendants participated in such a way in any event. Another situation which we feel is very relevant to the application of this statute, to the fact situation, is that there was no designation of any riot area. Now throughout the testimony and the arguments on motions to strike the Commonwealth kept referring to the riot area—an area which I gather encompassed some twelve or sixteen city blocks if I followed the description by streets. There was no such riot area. In fact I would contend that the only evidence before this court are isolated, unconnected incidents which did not take place generally in this whole area. The only incidents

we've heard of in fact were those that took place in front of Jim Williams Buick, an incident with a police car up at Washington Park, and the very vain attempt, futile attempt to tie in somehow the C. P. Martin fire with some act of violence. That is futile because there was no evidence that it had been done by anybody in particular, that the group of people had done it—there was no evidence really that it was arson—very highly speculative guessing—that maybe the hole in the window was caused by a pepsi bottle, maybe the pepsi bottle had some sort of petroleum product in it, maybe that page 204 } caused the fire, maybe this, maybe that, nothing but pure speculation. There is no direct evidence which the court can use to tie that into these incidents. Now the statute says place, it doesn't say riot area. A place that the unlawful assembly took—or occurred according to Lieutenant Moore's testimony was down in front of Jim Williams Buick at which time he—I guess it was the Presto Cafe, virtually across the street—at which time he advised the group of from 75 to 100 persons that they were unlawfully assembled, according to his testimony and ordered them to disperse. Now that was the place. It must be kept in mind that most of these people who were ordered to disperse live in this immediate area. They, as a matter of common pattern, as was testified to, assembled at the Presto Cafe or the Nite & Day Market or in that general area. When we say place and we have 75 to 100 persons assembled and a police officer orders them to disperse and they in fact disperse, which is uncontested, they broke up into five or six different groups, they scattered to the winds, five or six different directions, different streets, and they in fact dispersed. And the police evidentally agreed that they dispersed and they evidentally felt so because there was no further action to pursue these groups and say "All right, break up into small groups or go home" or anything else. And in fact the testimony is uncontradicted that after some of these people went to the Nite & Day Market and were joined there by some other people who had not been in the larger group of 75 to 100—and page 205 } I might add that it's uncontradicted that there were some people in that group who had not been in the earlier group. After this had been done, the police took up watchful positions and observed them without interfering with them in any way for an hour and a half. Are we to assume that Lieutenant Moore who so determinely asserted on the witness stand that he was going to enforce the law or he was going to resign his position or some words to that effect—quit his job—that he was going to enforce the law, that he would sit by for an hour and a half and watch a riot in progress which he had ordered to disperse and just

sit there and let the public life and property be jeopardized. I think that stretches the imagination to the point of being absurd. There was no such attention or feeling on their part that those people standing in front of the Nite & Day Market were unlawfully assembled in violation of his previous order. If there had been, I think the court can well be aware that they would have swooped in earlier if they felt that that was the case. What actually happened I think is very clear also. At a certain point they made the arrests. As an after thought or after analysis they realized that they had failed to give an order to disperse, that they were charging these men with an offense which had not been properly consummated. As an after thought, "ah, ha, we gave an order an hour and a half ago to disperse so we'll rely on that." This is simply not reasonable notice. These men dispersed—in fact they walked up to the Nite & Day Market. The police observed
page 206 } them up there. The police took up positions and watched them for an hour and a half. Are we to assume or is a reasonable man in those circumstances to assume that he's participating in a riot or an unlawful assembly? Hark! In any event these men are not charged with the actual acts. They are not charged with rioting—they are charged with failing to leave a place of unlawful assembly or riot and ordered to disperse. I think that as I mentioned earlier in the trial, there is some question that if they were suppose to disperse, where were they suppose to go? I said factitiously Farmington—but that's not so factitious. Where are they suppose to go? This is the area that they normally assemble in, they normally live in—I think they dispersed clearly, or least thought they dispersed. And for that reason alone, if nothing else, they obeyed the order. There was no follow up order that would have applied to the group at 11 o'clock in front of the Nite & Day Market. It's uncontradicted quite plain from the testimony of the witnesses that people in front of the Nite & Day Market realized they were being watched by the police. They knew the police were there —they sat there and realized the police were there. Any man sitting for an hour and a half and being watched by the police is certainly not on notice that the police are going to swoop down an hour and a half later and claim that they were relating back to an order given a block away and an hour and a half before. There is no testimony whatsoever that any of the group standing in front of the Nite &
page 207 } Day Market, that any one particular individual made any act of violence or force or threat. The testimony which is before the court is that some bottles were thrown. The testimony is contradicted that the windows were

broken. A man sitting right out on a stoop in front of the Nite & Day Market says there was no windows broken there. There was some testimony where a couple of police officers said as they drove by there were insults and windows breaking and Lieutenant Moore stated that it was a moral certainty that this occurred at a time which by other testimony makes it plain that these men had already been arrested and taken off. Lieutenant Moore stated that it was a moral certainty first of all that he didn't remember seeing those police officers and second of all, that the fire call had come after the arrests had been made. Some doubt perhaps, but I think the Commonwealth is bound by Lieutenant Moore's testimony and certainly we have to view it from his standpoint. In any event there is no testimony that either of these two had done it. There is no *testimoney*—even those officers said they couldn't testify there were any windows actually broken. They saw some panes out but they couldn't testify whether it had happened the night before or a week before. Now we get to Mr. Ferguson, whose testimony is that he was not present when the group was assembled and given the order. He said he heard about it. The statute does not refer to people who know

page 208 } an order had been given but to those to whom an order had been given. I think the testimony of Lieutenant Moore and his inaccuracy or memory, absolute lack of memory on so many things, couldn't remember whether it was night or day, couldn't remember Defense Counsel being in court, couldn't remember any details but specifically remembered these two men being present out of a crowd of 75 to 100 people. I think this must be taken . . .

Court: I don't think it was Lieutenant Moore—if you're talking about the first time, I don't think he identified these people as being there.

Lowe: It is my recollection that he said—if that's the case —my recollection was that he had said he had. I stand corrected if he did not . . .

Court: Not on that particular night I don't think.

Lowe: Well—the other police officer—we have 75 to 100 people assembled. You've got a situation that by their testimony was brought to attention as a minimum—and yet they remember these two specific people. Now, can they remember at exactly what moment these people were there or do they just remember generally that these people were in the area—that they remembered them from other occasions. I think there was a considerable amount of doubt in that. But it is uncontradicted that Mr. Ferguson was not present when the arrests were actually made and when this violence was taking place in front of the Nite & Day Market, if there was vio-

page 209 } lence taking place there and that's been contradicted also by defense witnesses. He states that he was not there and Commonwealth makes great weight of the fact that he says there was nobody on the street when he came out. Well if there were people in the police cars being taken away and there was nobody on the street, that's quite consistent with exactly what Mr. Ferguson testified to. Namely, that he told Mr. Owens who was in a police car that he would call his mother and at that point he was arrested. Mr. Ferguson being the only one on the street, meaning outside of the cars. I think that's a fair statement of what Mr. Ferguson said. He may not have been as articulate as he could have been on it. It certainly is not inconsistent with what he said and was the general—certainly is the interpretation which I think would be derived from Mr. Ferguson's statements when he said there was nobody on the streets. He did testify that there was a police car and Mr. Owens was in it and he was talking to him at the point when Officer Jones arrested him. So that Mr. Ferguson was not even present with that group at a point when this offense, if it related back, was committed. The police officers testified that they did not see specific people throwing bottles or hurling insults or what in front of the Nite & Day—they don't identify anybody. How can these men be guilty of doing one of these acts with six or more persons if there is no identification of who did the acts. It is impossible. In order to do an act with six or more persons they have to identify who did the act, they cannot do

page 210 } that—the throwing of bottles—if they came from the group and the testimony from Mr. Turner was that it came from down the street. And he certainly was in a better position to see it than the police were some 60 yards away. Mr. Turner gave direct testimony that the bottles were not thrown by someone in the group. So we get down to the basic fatal areas in the Commonwealth's case (1) there is no shown that these people acted together or anyone who actually performed acts which would fall under the provisions of the Code. Nobody that anyone has specifically attested to threw a bottle or threw a rock or hurled an insult and that six or more persons acting together, we have to know who the persons are. And that's part of the element of proof beyond reasonable doubt. Now the Commonwealth argues quite understandingly that this makes it very difficult to obtain arrests or convictions in a situation like this. Well the Supreme Court of the United States, the Virginia legislature, the Virginia Supreme Court of Appeals, time and again have struck down laws which would make it easier for police to get convictions and make arrests because

that in itself is no justification for either an *unconsitutional* law or for an unlawful application of a constitutional law. So that this argument is without demurrer in this court.

Court: Let me ask you this Mr. Lowe. Do you think that it's encumbent on the Commonwealth in this case to show that these two defendants actually threw a bottle or took part in it?

page 211 } Lowe: No sir, I think it's significant that they did not prove that. But I think they would at least have to show that they were acting together with specific people who were observed doing these acts. I think very definitely that's part of it if they are going to claim that they were in an unlawful assembly. Because an unlawful assembly requires that six or more persons acting together take part in these acts or three or more persons I should say.

Court: Excuse me, I didn't mean to interrupt you—go ahead.

Lowe: The second fatal portion I think a reasonable construction of this statute must be that the order to disperse must be contemporaneous, reasonably contemporaneous, with the failure to disperse. Clearly two or three days later coming back and saying "Ah, ha, you're still in this neighborhood. I know you live here but that doesn't matter." Well that would be ridiculous. How much time is reasonably contemporaneous here? An hour and a half is not reasonably contemporaneous under these circumstances where the group in fact disperses. A reasonable man would think that they had complied with the order of the police department—any reasonable man would have. When you say disperse you mean break up and fragment and this group in fact did break up and fragment. There is no order to leave the riot area or leave an area, it was to disperse and the group in fact dispersed. For these

page 212 } *reason* we believe it is fatal. Now we come to the question of how serious this is. Well first of all I think it must be borne in mind that these men are not being charged or tried for acts of violence, for the property damage which is alleged, by no means proven with this group. They are not being tried for this. The offense they are being tried for is failure to disperse when properly ordered to do so. And if we assume that they are guilty of that offense, without certainly conceding, but assuming that the court would find them guilty the question is, what is the character of their guilt? It is uncontradicted that these men offered no resistence when the police officers arrested them. They were not actually doing acts of violence or hurling threats or swearing at the police officers or in any way doing anything but passively sitting there in the case of Owens, or attempting to help a friend by

telling him he's going to call his mother in another case. These are not serious acts of failure to disperse. If they had had weapons and threatened the police officers, if they had resisted arrest, if they had used abusive language or fought—this would be perhaps serious. If they had broken off bottles and threatened "You come near us, we'll cut your bloody throat" —this would be serious. It is inconceivable of a less serious failure to disperse than the one which is charged. And again it must be separated from the actual acts of violence which Mr. Camblos has very carefully attempted to build up, because they are not being charged with those acts. They page 213 } are being charged with failure to disperse. It is inconceivable of a less serious failure to disperse and this is very important because it could impose serious penalties on these defendants for the manner in which they behaved. What do you do in a case where there is an offer of violence or resistence of some sort which does not actually bring it within one of the more serious provisions of 254.2 for example. Just resisting with fists, for example or perhaps offering some sort of violence with weapons that wouldn't fall within the other provisions. Cursing, abusive language, resistence, fall down with the resistence to the arrest and the order to disperse. These men did not take part in this. And this again is very significant that there's no evidence that these men took part in any acts. They are as far as the evidence before the court is concerned, by-standers who, if they are guilty of anything, are guilty of the violation of being curiosity seekers or what it might be, standing in the group watching and not dispersing when an order was given to disperse. Now that is the evidence before the court and that is —the court should not properly go beyond that to speculate that they may have earlier in the week participated in any violence or unlawful acts or earlier on that day. There is no evidence of these acts. So what we have here Your Honor, we feel is perhaps one of the least serious offenses that could actually be charged under this provision. And we believe that accordingly the court should, if it finds a convic- page 214 } tion, should mete out some punishment but should reserve the serious punishment for serious offenders. We think that the purpose was accomplished by the police action that evening. They were trying to—there has been no further great disturbance. I think that many people felt that this was a very well executed police maneuver whether it was within the provisions of the statute or not. They accomplished the purpose they were trying to *accomplished.* The offense which is charged is not a very serious

offense in the overall spectrum of those offenses which would fall within that provision and we ask that the court would consider that. The only other point I would like to mention—I did mention a little earlier in argument—Mr. Camblos referred to the fact that they were rioting at the time they were arrested. There is absolutely no evidence whatsoever of rioting at the time they were arrested of these two defendants, none whatsoever. And in fact there is no evidence that a riot under the provisions of this—the Code Section—was taking place in so far as these defendants were concerned. There was no acting together. They couldn't testify where the bottles came from or who threw them so I just ask the court to disregard that comment as not being an accurate statement of what took place there.

Court: All right, Mr. Camblos.

Camblos: May it please the court it is argued that this wasn't very serious because if they had been doing something different from what they were doing, it would page 215 } have been more serious. I don't follow this. He says if you treat this seriously, then what will you do if they broke off necks of bottles and used those at the police when they came after you. Well it's obvious what you do, you charge them with a felony as the statute provides. It's argued that there was no riot going on. A riot is unlawful use of force or violence by six or more persons. There were estimated 12 to 20 some persons there all down in front of that store, heaving bottles and other objects at police cars and buildings and breaking windows and what not. Well I don't think there's any question but what a riot was going on. It's argued that Lieutenant Moore didn't sit there and watch an unlawful assembly. Well how does this argument fit in with his failure to make arrests when they went across the street to the Nite & Day Market from Jim Williams Buick? How does this argument fit in with the fact that the police had been trying to handle this thing with kid gloves for a week without making arrests in the face of riots, disorder, window smashing, arson and what not? The police tried to give these defendants and their friends every chance they possibly could to behave themselves. These defendants and the others put themselves above the law. I think that they should be punished in accordance with the seriousness of that approach that they made. I don't believe Your Honor that it's necessary to refer to anything. This court can, under these charges, sentence these defendants up to 12 months in jail and a page 216 } substantial fine. I don't think that it would be too much.

Court: All right, gentlemen. In this case I think it's necessary for the Commonwealth to prove that a riot took place,

riot or unlawful assemblage took place as defined in Section 18.1-254.1. And I think that that has to take place—you have to come under that Section first. And I think that the evidence is sufficient to show that. The evidence was that they went there to arrest—I believe it was Woodson Fry—and the crowd as one of the officers testified almost exploded and they had to put a restraining line to keep them away from the car transporting Woodson Fry away from there. Now I don't think it's necessary for the Commonwealth to have to prove that these people participated in the riot. But I think it is necessary under Sections 254.4 and 8 that they be lawfully warned to disperse. And the testimony of Officer Moore was that he gave the warning twice. The testimony of one of the officers was that he knew both of these defendants, that they were there at that time. I think that's sufficient for the warning to disperse. Now I disagree with Mr. Lowe's interpretation—the testimony as I follow it was that some did disperse and some of them went off in groups but that this crowd—a crowd remained there and went over to the Jim Williams Buick lot where they were again warned to disperse and that from there they went over in front of the Nite & Day Market. Now not, mind you, not every person—I mean there's no testimony one way or the other—nobody could say

page 217 } that every person was at every point. But the point is that—I think by the fact that they stayed together there constituted in my judgment a failure to disperse and shows that it corroborates the original common intent of acting together by their very failure to disperse—that shows a common intent, acting together. Then when they again started—the thing again flared up in front of Nite & Day Market, that again corroborates the acting together and the common intent. Now Mr. Lowe said that the Commonwealth is bound by Mr. Moore's testimony. Unlike a plaintiff in a civil action, who can rise no higher than his or her own testimony. The Commonwealth I don't think is bound by any one witness and in particular Mr. Moore. As I recall it, at the start of his testimony, over objection, he testified that the reason why he gave the order to move in was that he had gotten notice of the fire at the—at C. P. Martin's. Now at the end he testified as to his moral certainty that he didn't get that notice until after he gave the order to move in. But I think that the evidence of the two officers who were stationed there with him—they got the notice of the fire and went pass the Nite & Day Market and they were met with curses and abuse, and articles thrown and so on and then they turned and came back and then went on down to the fire. So I don't think that the Commonwealth is bound by that. In any event

I think there is ample evidence that the group who had—it's the same primary group that started out down there when Woodson Fry was arrested, went over to the Jim
page 218 } Williams Buick and then went over to the Nite & Day Market, that they mainly stayed together. And these people were, the testimony is, they were there when the original warning was given. Throughout the course of the trial a good deal has been made of the delay. Mr. Watson's article here has been quoted by or referred to by everyone for their own purposes and the court should be no exception. I noted on page 1,032 after noting that the Senate of Virginia had revised the original bill as passed by the House, will eliminate the "must arrest" to "may arrest" and he has this comment "Rather than imposing an absolute obligation upon an officer to make immediate arrest the statute merely states that he may use force to disperse or arrest rioters or potential rioters. This wording preserves the officer's discretion to let the assembly subside naturally rather than moving in immediately to make the arrest, such discretion is essential in a disorderly situation in which serious violence has not occurred and where an experienced policeman might realize that arrests would provoke much more violence than could otherwise be expected." So actually rather than criticize the officers, the court commends them. And it's again note worthy that nobody in this case has—this is no Chicago affair—nobody in this case has criticized the manner in which the officers arrested them. And I commend them and I think that the fact is that as long as they quieted down, the officers held back. But then when it flared up again, I think that they very properly carried out the law. Now it's the judg-
page 219 } ment of this court that these defendants be found guilty. Now you come to the punishment. Of course this is a problem that has sprung up all over the country and it's the most serious problem, probably that has come along since—in 100 years—it's the very existence of all the Government in the country itself. And the primary weapon in fighting this type of thing is to get people to disperse because so frequently as Mr. Lowe points out, you cannot point your finger and say this is the man who threw the bottle or this is the man who did thus and so. But if you can't get them to disperse, you have no control whatsoever. So I think it's note worthy—I believe that out of this entire to do, the only people that were arrested were the people failing to disperse. The people who threw things could not be sufficiently identified. The fact that they did something worse than these people still doesn't minimize the offense of these defendants. And I feel that it is serious and that the right of the police to get

people under these circumstances to disperse must be enforced. Accordingly I'll now give judgment on them. Roy Lee Ferguson, will you stand? The court finds you guilty as charged in the warrant and I sentence you to serve a term of six months in jail.

Lowe: Your Honor I'll reserve my comments until you sentence both.

Court: All right. William Sylvestor Owens, will you stand please? The court finds you guilty as charged in the warrant and sentences you to serve a term of six months in jail.

page 220 } Lowe: Your Honor we respectfully except to the finding of the court and would ask the court to take under advisement a motion for suspension of sentences to be heard at a later time appropriate to the court.

Court: All right, sir, I feel that we've had Mr. Mann scheduled on this *hapeas corpus* case and there's some people here that want to witness the case. I didn't want to cut anyone short in this—this is a very important case that we've just tried but I think that anything along that nature should wait until later.

Lowe: Yes sir, on one other matter may I—would the Commonwealth join in an agreement or a recommendation that the bonds be continued since this has been sort of a sentence that they have been under during the period of time since the lower court. The bonds have been put up by two local ministers. I don't feel any increase in bond would put anymore of a strain on these men. It will be a long time during appeal if there is an appeal planned. I think $1,000 property bond would be sufficient in this case. It would be quite a hardship if raised.

Camblos: May it please the Court I feel that the bond set before the initial trial is one thing. I think that after that trial and conviction, there's every reason in the world that the bond should be increased. It wasn't in this case. I feel that now the bond certainly should be increased. These two

page 221 } defendants are a great deal closer to a jail cell at this moment than they have ever been before.

Court: Does the Commonwealth have any suggestions?

Camblos: I would suggest twice the amount of the bond as of this moment, Your Honor. There have been substantial sentences. Neither one of them has any substantial roots to hold them here. They are perfectly mobile and from Your Honor's experience you know how extremely difficult it might be to have to apprehend them if they did decide to leave.

Lowe: Your Honor I think Mr. Camblos has made a statement which is not supported in fact to testimony that they have no roots here. Both of these gentlemen have families in town. Both of them are employed. There is no reason to think that they are going to leave, particularly now. Certainly they've been under a six month's jail sentence from Municipal Court. They were advised that they were appealing to this court. There was no reason why they should not have departed after that point. We intend to take this appeal to the Virginia Supreme Court of Appeals and if necessary to the Supreme Court of the United States. This is going to take, in all due probability, would take at least a year for the Appellate process. These boys do not have any means. $1,000 would mean as much to them as $2,000 certainly. If they are going to—any attempt to flee is going to be just as much to one as the other, particularly in view of the fact that it's only through the benevolence of local ministers that they are going to be out on bail at all. I realize that the court
page 222 } generally has in the past gone along with the Commonwealth's recommendation. And it would be in the act of passion and mercy in this case at this stage to allow this bond to continue. I don't think there's any indication to suspect that these boys are going to take off and go anywhere. They have roots here. They have families and they have jobs. I would ask the court to perhaps make an exception in its usual policy and allow these bonds to remain as they are so that *they* boys can continue to work and continue to participate in the community

Court: You have anything more Mr. Camblos?

Camblos: No.

Court: Mr. Hamm has called my attention to one thing here. I think that probably since this is a *misdeameanor* where the court at anytime can take up the question of suspension, rather than take that under advisement and drag the thing out from the standpoint of the final judgment—from the standpoint of time in which the appeal runs—from the standpoint of maybe possibly having another bond hearing when that's over, I think I'll just go ahead and not take it under advisement but, of course, then as a matter of law it remains in the breast of the court.

Lowe: May I speak to that before you make a final ruling?

Court: All right, sir.

page 223 } Lowe: Your Honor is well aware that a court in the manner of this magnitude, constitutional issue be it raised and otherwise, is going to involve a considerable amount of work on appeal. And we hope that by having a hearing at a later date would give the defense a little bit more time to prepare and work on the appeal. Now

if Your Honor deems it necessary to enter the order immediately well, naturally that's what will happen but this would be one of the reasons . . .

Court: Well as a practical matter, certainly in felony cases, the Attorney General's Office doesn't even argue that they are not in time—I mean they give them almost unlimited time to appeal a felony.

Lowe: Well I just offer that for your consideration.

Court: I think we had better go ahead from the standpoint of winding that part of, the court will not take it under advisement. Now the question of bond, I feel that always after a conviction in this court, it's always a matter to come before it of the bond—however I don't know, through no fault of these defendants, who already had to give one additional bond when you successfully attacked the original warrant, Mr. Lowe, and they were then without any bond whatsoever. I would not want to fix it so they couldn't make bond or the appeal and I'm afraid that if I would raise it right much, that might be the situation . . .

Lowe: Yes sir, that's my concern.

Court: I think this could run on for quite a
page 224 } length of time. So if they are going to run for
$1,000, I don't *belive* $2,000 would stop them. I'm going to leave the bonds as they originally were.

Lowe: Thank you very much.

Court Adjourned.

STATE OF VIRGINIA AT LARGE:

I, Jean D. Easton, Notary Public, do hereby certify that the foregoing trial proceedings were taken by me and is a true and correct transcript of same.

Given under my hand this 21st day of January, 1969.

My Commission expires May 17, 1972.

Jean D. Easton
Notary Public

STATE OF VIRGINIA AT LARGE:

I, Catherine K. Lane, Notary Public, do hereby certify that the foregoing trial proceedings were taken by me and is a true and correct transcript of same.

Given under my hand this 21st day of January, 1969.

My Commission expires March 8, 1969.

Catherine K. Lane
Notary Public

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded— Record No. 7400	1
Writ of Error and *Supersedeas* Awarded— Record No. 7401	2
Record No. 7400	3
Warrant of Arrest	3
Judgment of the Municipal Court September 12, 1968	3
Warrant of Arrest	5
Order—December 5, 1968	5
Order—December 23, 1968	7
Judgment—April 30, 1969	7
Notice of Appeal and Assignments of Error	8
Record No. 7401	10
Warrant of Arrest	10
Judgment of the Municipal Court—September 12, 1968	10
Warrant of Arrest	11
Order—December 5, 1968	12
Order—December 23, 1968	13
Judgment—April 30, 1969	14
Notice of Appeal and Assignments of Error	14
Records Nos. 7400-7401	17
Proceedings	17, 25, 59, 83, 91, 102, 127
Witnesses:	
C. D. Moore	23, 31, 54, 125
Lionel S. Key	51
Charles L. Marshall	56
B. R. Blake	61
Wayne Marshall	68
Officer F. D. R. Jackson	69
C. D. Jones	73, 84
Harold R. Granger	80, 85
Officer W. L. Mann	86, 120
Officer B. G. Mayo	89, 123
Joseph Turner, Jr.	97
R. L. Ferguson, Jr.	111