215 Va. 816

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SUPREME COURT OF VIRGINIA
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OCT 28 1974
RICHMOND, VIRGINIA

APPENDIX

In the

Supreme Court of Virginia

At Richmond

Record No. 740492

JAMES HENRY DAVIS, JR.,

Appellant,

versus

COMMONWEALTH OF VIRGINIA

Appellee.

HARRIS, TUCK, FREASIER & JOHNSON
Professional Associates, Inc.
3805 Cutshaw Avenue
Richmond, Virginia 23230

Robert L. Harris
Robert N. Johnson
Counsel for Appellant

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ASSIGNMENTS OF ERROR

That the Court erred in its refusal to grant the motion of Robert L. Harris, Esquire, court appointed attorney, to suppress all statements and confessions made by the appellant to the police since his arrest on the charges of murder and robbery for the reason that any statement or confessions made by the appellant were made involuntarily and upon the advice of incompetent or ineffective legal counsel in violation of the rights afforded him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and by Article I, Section 8 of the Constitution of the Commonwealth of Virginia.

That the Court erred in its refusal to grant appellant a new preliminary hearing on the charges of murder and robbery for the reason that he was denied the effective assistance of counsel at the abbreviated preliminary hearing held October 3, 1973, in violation of the rights afforded him by the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States and by Article I, Section 8 of the Constitution of the Commonwealth of Virginia.

That the Court erred in limiting defense counsel's cross-examination of Freddie Lee Bey, who testified on behalf of the Commonwealth of Virginia.

1
2
3 RALPH B. ROBERTSON, intro-
4 duced on behalf of the defendant, on motion to suppress, being
5 first duly sworn, testified as follows:
6
7 DIRECT EXAMINATION
8 BY MR. HARRIS:
9 Q Sir, would you state your full name
10 for the record, please?
11 A Ralph B. Robertson.
12 Q And what is your address?
13 A Business or home?
14 Q Business address?
15 A 427 North Addison Street in the
16 City of Richmond.
17 Q And what is your age?
18 A Thirty years of age.
19 Q What is your occupation?
20 A I'm an attorney in the City and
21 Commonwealth's Attorney for the City of Richmond.
22 Q And would you give me a brief
23 comment on your education qualifying you to be an attorney?
24 MR. DAVIS: I'll stipulate that Mr.

1 Robertson is a qualified attorney, he serves
2 on my staff.
3 THE COURT: Do you accept the stipu-
4 lation?
5 MR. HARRIS: Yes, sir, Your Honor.
6 Q Do you -- well, let me ask you this
7 one question, do you teach any courses?
8 A Yes, sir, I do, I teach criminal
9 law.
10 Q You teach criminal law?
11 A Yes, sir, I do.
12 Q Mr. Robertson, how many felony con-
13 victions -- excuse me, felony cases, preliminary hearings
14 would you estimate that you have participated in since you've
15 been practicing law?
16 A Probably a couple hundred (the wit-
17 ness remains too far from microphone)
18 Q How many robbery hearings have you
19 participated in, approximately?
20 A Twenty-five or thirty, I'd say.
21 Q How about murder preliminary hearings?
22 A Probably about the same number,
23 twenty or thirty.
24 Q In your capacity as an attorney and

1 also as an assistant Commonwealth Attorney how many of the
2 defense attorneys in and around this vicinity have you seen
3 practice, observe practice in Court?
4 A I would say that every member of the
5 Richmond Criminal Bar I've seen practice as well as -- before
6 I came in the Commonwealth's Attorney's office, most of the
7 lawyers who practice in Petersburg and in the surrounding
8 counties (the witness remains too far from microphone.)
9 Q Have you ever observed or partici-
10 pated in a case that Clair Sager participated in?
11 A Two or three.
12 Q I see, and have you observed and
13 participated in others when you weren't prosecuting?
14 A No, sir, I don't believe I have, I
15 think the only place I've ever seen Mr. Sager was whenever I
16 was the prosecuting attorney (continuing too distant from
17 microphone)
18 Q Now, regarding Daniel Terry, have you
19 ever participated in a case where he was involved?
20 A To the best of my knowledge, the
21 only case that I can recall that I participated in where he
22 was involved was I think the case in question here today and
23 one previous case that Mr. Sager had in my court because I
24 never had any dealings with him other than working with Mr.

1 Sager (the voice continues distant).

2 Q Now, do you recall the first time

3 that James Henry Davis was brought to Court after he was

4 arrested for this subject offense, offenses?

5 A Well, in my court there were two

6 times, the first time I guess he was brought in the next

7 morning after, and I remember that because of course, the case

8 did create a good deal of sensationalism or whatever you want

9 to say, he came in then and he advised the Court at that time,

10 I believe, or Mr Sager came forward, I forget which, but in

11 any case, he advised the Court at that time that he had

12 retained counsel and that his retained counsel was Mr. Sager.

13 Q Did you observe Mr. Sager's reaction

14 following that?

15 A Well, that was the first time, now

16 the case was continued at that time for about three weeks,

17 that was just a standard run type of thing then; the case was

18 continued, I think, for about two or three weeks, and at that

19 time when the two defendants were brought in at the same time,

20 Mr. Simmons represented one and Mr. Sager and Mr. Terry were

21 present in Court and they represented the other, and when they

22 came before the Court it was almost a total lack of recognition,

23 in fact, Mr. Sager -- I don't think Mr. Terry made any signs

24

1 of recognition of anybody, I mean it wasn't a question of
2 misidentification . . . at all, but Mr. Sager identified the
3 wrong defendant as being his client and in all honesty this
4 disturbed me a great deal because I knew the seriousness of
5 the offense with which this defendant were charged, and even
6 though that the matter was continued on that date for another
7 date, it bothered me a great deal at that time.
8 MR. DAVIS: Judge, if it please the
9 Court I don't see what the relevancy is to what
10 happened sometime prior to a statement being
11 taken, I believe we're here on a motion to
12 suppress a statement that was taken on November
13 the 29th, 1973, I don't see what relationship
14 that's got to do with what occurred in the
15 Courtroom sometime prior to that and I object
16 to the testimony.
17 THE COURT: Mr. Harris, the Court's
18 inclined to agree, I don't think -- there may be
19 many answers to misidentification such as a
20 client and attorney having seen his client one
21 time so unless you have something to tie this
22 in, it would appear irrelevant.
23 MR. HARRIS: Well, Your Honor, the
24 purpose of this is to show that Mr. Sager, I

1 think, is -- as is generally known but maybe I
2 shouldn't put it that way, Mr. Sager is senile.
3 Mr. Terry is not much better as far as senility
4 is concerned, and I think like Mr. Robertson
5 said, the seriousness of this case, to have a
6 senile individual who had defended this indi-
7 vidual previously and I will bring -- he has --
8 Mr. Sager had defended Mr. Davis on a previous
9 offense arising within a very short period of
10 time prior to this offense, so if he couldn't
11 recognize his client who he'd already defended
12 within a month or so prior, I certainly show --
13 I think it goes to show the extent of his
14 senility and his ability to perform effectively
15 in a case of this serious nature.
16 THE COURT: Well, all of what you
17 have -- none of what you have just said is
18 evidence --
19 MR. HARRIS: All right, sir, but as
20 to where I was going to tie it in, Your Honor --
21 THE COURT: All right, go ahead.
22 Q Do you know yourself, Mr. Robertson,
23 whether or not Mr. Sager and Mr. Terry had defended James Henry
24 Davis on another robbery charge, do you have knowledge of that

1 yourself?

2 A No, sir, I do not.

3 Q Now, in observing Mr. Sager and Mr.

4 Terry, do you have an opinion, based upon your experience as

5 a prosecuting attorney and as an attorney, whether or not

6 their action in previous cases and also in this case from what

7 you observed was up to the standards of the other lawyers in

8 this area as far as effectiveness of counsel?

9 MR. DAVIS: Judge, if it please the

10 Court, I object to Mr. Robertson testifying to --

11 any opinion being given Mr. Robertson, although

12 I recognize he's a qualified attorney and he's

13 a member of my staff, he has testified he's only

14 seen these gentlemen operate on one -- one other

15 occasion other than this and . . . . submit that

16 under the circumstances he's qualified to form

17 an opinion of these two on two cases.

18 THE COURT: Sustained for the

19 additional -- the Court agrees with that, plus

20 there's no proper foundation.

21 MR. HARRIS: Your Honor, are you

22 saying there's no proper foundation for him

23 giving an opinion as an expert attorney?

24 THE COURT: No proper foundation for

1 the question.

2 Q Let me ask you this, Mr. Robertson:

3 Have you -- have you had many occasions where a person, I mean

4 any occasions where a person was charged with murder, where

5 his attorney urged the defendant to make a statement,

6 confession?

7 A That would all depend on the circum-

8 stances, I mean I --

9 Q All right, without some kind of a

10 understanding or promise of a recommendation from the prose-

11 cuting attorney, could you see of any justification for an

12 attorney urging his client to make a complete confession in

13 a murder case?

14 MR. DAVIS: Judge, if it please the

15 Court, I object to that question as not being

16 relevant to the issue before the Court period,

17 because -- depends on the circumstances of the

18 case, just asking for a broad statement or

19 speculation on the part of the attorney --

20 MR. HARRIS: Well, I think I quali-

21 fied it, Your Honor, where there's some kind of

22 a understanding with the prosecuting attorney as

23 far as recommendation is concerned, I'm asking

24 whether or not an attorney would be justified in

1 urging his client to make a statement to the
2 police, a confession to the police, and I think
3 that is sufficient for the witness to answer as
4 to whether or not it would be any justification
5 for making a confession without some kind of
6 consideration . . . . . to the defendant.
7 THE COURT: The objection is sus-
8 tained, Mr. Harris.
9 Q Mr. Robertson, did you have a dis-
10 cussion with Mr. Terry -- ever have a discussion with Mr. Terry
11 and Mr. Sager regarding their representation of this client?
12 A I discussed the matter, I believe,
13 one time in the cafeteria out there with Mr. Terry.
14 Q Did he appear to be aware of the
15 issues involved?
16 A Let me just try and state whether I
17 understand the situation to be, Your Honor, because I don't
18 want to hedge on the questions at all: Mr. Terry I got to
19 know by him being with Mr. Sager and in talking with them and
20 in discussing with them -- in discussing with Mr. Terry and
21 talking to him, I got to know he'd been a conductor on the
22 railroad for twenty-seven years, I'm not sure that that's
23 relevant to this case, but it seems to me that during that
24 twenty-seven years of full-time . . . . as a conductor he's

1 just not kept up, I guess you'd say, with the procedures or
2 the constitutional requirements of the Courts, the criminal
3 justice courts in any case.
4 THE COURT: Mr. Robertson, I don't
5 understand, are you stating this as a fact that
6 he had not kept up --
7 A I'm saying this is my opinion in
8 discussing this thing with him, in other words, I didn't quiz
9 him as to do you know what the Miranda decision rights are, or
10 do you know what the Escabedo case is or in re _____, or
11 anything like that, but in discussion with him it was almost
12 as if he would not . . . . . (unintelligible) and in talking
13 to him the one morning that I recall talking to him, this was
14 after the case has been through our court and I don't know
15 the date, but it was in my courtroom, nor do I know the date
16 the defendant gave the statements, but I do believe that this
17 was after the statement were made and at that time they thought
18 that it was -- there was no substance to it, there was nothing
19 to worry about as far as the statements being made, that it
20 could only help him, and at that time I just -- I can't imagine
21 why he let him make a statement like that unless he had some,
22 you know, promise of leniency, and it was a passing conversa-
23 tion . . . . . type thing, I wasn't going to prosecute it,
24 it had already been transferred to Judge Davila's Court and

1 that was it as far as I was concerned. I mean it almost seemed
2 like he said in passing, something well, we went down with
3 Detective Harding and got the defendant to give full confession.
4 There was no reason for it or anything else, there may have
5 been a reason that I was unaware of, but he didn't state it,
6 he didn't give me any reason for it, and I did make a state-
7 ment I can't imagine why he'd do that unless there had been
8 some promise of cooperation, ...
9 MR. HARRIS: That's all I have, Your
10 Honor.
11
12 CROSS EXAMINATION
13 BY MR. DAVIS:
14 Q Mr. Robertson, you don't know of
15 your own knowledge whether or not he gave a statement to Mr.
16 Harding, do you?
17 A No, sir, I do not.
18 Q You don't know the date it was given
19 on either, do you?
20 A No, sir, I do not.
21 Q Do you recall the date that the
22 preliminary hearing was held?
23 A I recall November the 20th was, I
24 believe, one of the three dates involved, but I do not recall

1 the dates . . . . .

2 Q Do you recall what Mr. Davis looked

3 like, the defendant looked like, on November the 20th, 1973,

4 the date of the preliminary hearing --

5 A The defendant -- I was thinking he

6 was dressed just about exactly as he is right now, in fact,

7 I think he had the same clothes on.

8 Q All right, sir, I'm going to ask

9 you to take a look at this photograph and ask you if you know

10 who that is?

11 A It's the defendant, I believe.

12 Q Would you have known that had you

13 not seen the defendant sitting in the Courtroom today, sir?

14 A No, sir, I don't believe I would

15 have.

16 Q All right, sir.

17 MR. DAVIS: If it please the Court,

18 I move to introduce that as Commonwealth's

19 Exhibit No. 1, Your Honor.

20 Q Mr. Robertson, I assume that you took

21 the Virginia State Bar Exam to become a lawyer, attorney in

22 the Commonwealth of Virginia, is that correct?

23 A That is correct.

24 Q Would it be your opinion of having

1 taken the Virginia State Bar exam that it's a easy ordeal to
2 go through, sir?
3 A Well, I don't agree with the Virginia
4 State Bar exam, is that what you mean?
5 A No, sir, do you feel like that you
6 have to know something about the Bar in Virginia in order to
7 pass the Virginia State Bar exam?
8 A A very little bit.
9 Q A very little bit?
10 A Yes, sir.
11 MR. HARRIS: Your Honor, I think --
12 Q Do you feel that you have to know
13 anything about law in general in order to pass the Virginia
14 State Bar exams?
15 A I think that would be a closer
16 evaluation, I personally . . (mumbling) I just don't like
17 the Virginia State Bar exam, I don't think it's a relevant --
18 Q I don't -- I'm not asking you for
19 opinion
20 A education . . . . . of the law.
21 Q of the Virginia State Bar -- whether
22 or not you like the Virginia State Bar exam, I'm asking you,
23 sir, whether or not you think that you have to know something
24 about law in order to pass it?

1 MR. HARRIS: Your Honor,
2 A Yes, sir, I do.
3 MR. HARRIS: I would object to this,
4 I think Mr. Terry and Mr. Sager are both in
5 their -- probably seventies, maybe Mr. Sager
6 might be --
7 MR. DAVIS: Judge, it's about time
8 for counsel stopped testifying now --
9 THE COURT: There's no evidence . .
10 the things that have been said.
11 MR. DAVIS: But I do think the
12 questions relevant based upon the fact that Mr.
13 Robertson's testified that -- that -- what he
14 thinks about Mr. Terry being a conductor and so
15 forth and submit that he's an attorney under
16 the law apparently because he's practicing law
17 in the Commonwealth.
18 THE COURT: All right, objection's
19 overruled, Mr. Harris.
20 A If you're referring to the law I
21 would say yes, you have to know a good deal of law, but --
22 Q Do you think that a person that's
23 a conductor on a railroad that had no background of law would
24 be able to pass the Virginia State Bar exam?

1 A I don't know when he took the Bar
2 examination.
3 Q Do you think he would have had to --
4 been able to the date that you took it?
5 A If he'd taken it twenty-seven years
6 previously and passed it and hadn't done any studying and
7 brought himself --
8 Q I didn't ask you that question, Mr.
9 Robertson, I asked you if you thought that the date that you
10 took the Bar exam if a conductor on the railroad would have
11 been able to pass the Bar exam with no background of the law?
12 A No, sir.
13 Q Thank you, sir, I have no further
14 questions.
15 MR. HARRIS: That's all --
16 Q Wait a minute, I do have a few --
17 excuse me: Mr. Robertson, you were present or were you not
18 present when this case against Mr. Davis was tried in a pre-
19 liminary hearing?
20 A I was present at the last part of it.
21 Q You weren't present -- you didn't
22 actually prosecute this case yourself --
23 A No, sir, I did not pro -- it was
24 prosecuted in Judge Davila's court.

1 Q And the hearing was held on the date
2 in question was a preliminary hearing to determine whether or
3 not probable cause existed, is that correct, sir?
4 A I didn't know it was the date in
5 question.
6 Q I mean whatever date it was handled
7 on, the 20th of November or whatever day it was tried on?
8 A As far as I know, that was the
9 purpose, yes, sir, preliminary hearing (the voice is faint)
10 Q Now, did you see whether or not both
11 Mr. Cox and Mr. Davis, the co-defendant, Mr. Cox and Mr. Davis,
12 were tried together, on the same day rather?
13 A I know they weren't because when I
14 arrived Mr. Cox, the co-defendant, they were, I guess, in the
15 last ten or fifteen minutes of that, closing it up.
16 Q Cox was tried on the same day in the
17 same court?
18 A Same day, same court, and immediately
19 preceding this defendant.
20 Q All right, sir, now, when you arrived
21 did you see Mr. Sager and Mr. Terry in that Courtroom?
22 A I don't consciously remember them
23 being present, but I remember that as soon as the Cox case
24 was over, they were there so I don't remember seeing them

1 sitting in the place but I assume they . . . (mumbles) some-
2 where in the Courtroom.
3 Q All right, sir.
4 MR. DAVIS: Judge, I don't have any
5 further questions.
6 MR. HARRIS: Let me pursue this
7 just one moment, Your Honor.
8
9 REDIRECT EXAMINATION
10 BY MR. HARRIS:
11 Q Do you know whether or not Mr. Sager
12 and Mr. Terry held a preliminary hearing for Mr. Davis?
13 A Well, I have to be honest, my memory
14 was somewhat refreshed this morning, I remembered at the time
15 Mr. Simmons represented the co-defendant, and as I guess we all
16 know Mr. Simmons could be somewhat vocal, excitable and that
17 sort of thing, and had done so at length and the last . . . .
18 even the part that I saw he had done so, and then when he came
19 in, Mr. Terry and Mr. Sager and this defendant was brought in
20 on the side and they all walked up and there was some -- some-
21 thing was said to the effect that everything would -- we would
22 stipulate that everything concerning the robbery as far as,
23 you know, the background, the evidence, the items that were
24 taken, I think the medical examiner's report and this sort of

1 stuff, we'll stipulate, we just want to know what -- any
2 specific evidence that goes to this defendant,
3 Q Yes, sir?
4 A but the reason I do remember that so
5 well is my memory was refreshed this morning.
6 Q You discussed it with Detective
7 Harding?
8 A No, sir, I've just seen the transcript.
9 Q I see. So there was no vigorous
10 examination of witnesses on behalf of Mr. Davis then?
11 A Well, that's kinda hard to say
12 because if you -- if you had seen Mr. Simmons cross examine
13 Mr. Silverman, I guess he had torn him apart about as good as
14 any attorney was going to do and they certainly didn't make
15 any attempt to do that at all.
16 Q They didn't do that at all?
17 A No, sir.
18 Q That's all.
19
20 RECROSS EXAMINATION
21 BY MR. DAVIS:
22 Q Did you recall, Mr. Robertson, a
23 gentleman by the name of Sidney Silverman testifying right
24 after they adopted the -- stipulated the testimony of the

1 previous trial, the co-defendant?

2 A As I say, I don't know his first

3 name at all, even with your recalling it now, I do remember

4 there was an elderly, white-haired gentleman who was supposed

5 to work down at the store at that time testified.

6 Q Did you hear Mr. Sager's cross

7 examination of him?

8 A I remember, I believe I do, it was

9 sort of like -- as I said I wasn't there for the whole pre-

10 liminary hearing that Mr. Simmons conducted, and it was I

11 walked in at the tail's end, I guess, and it was roaring, full

12 of sound and fury and then it sorta died out and they brought

13 this defendant in and it seemed like to me the Commonwealth's

14 case as well as the defendant's case were handled within a

15 couple of minutes, I mean I walked over because I wanted to --

16 Q What are you talking about, Mr.

17 Simmons or Mr. --

18 A No, Mr. Sager's.

19 Q Well, you were present when Mr.

20 Sager's case was handled, weren't you?

21 A Well, I'm saying I don't recall it,

22 explicitly, I had come over to see Mr. Simmons handle his case.

23 Q All right, sir, I don't have any

24 further questions.

1 MR. HARRIS: That's all.

2 THE COURT: All right, any reason

3 he cannot be excused?

4 MR. HARRIS: No, sir, not on my part.

5 THE COURT: All right, you are

6 excused.

7

8

9

10 WITNESS STOOD ASIDE.

11

12

13

14

15

16

17 JAMES HENRY DAVIS, JUNIOR,

18 the defendant, on motion to suppress, being first duly sworn,

19 testified as follows:

20

21 DIRECT EXAMINATION

22 BY MR. HARRIS:

23 Q Now, Mr. Davis, I want you to look

24 at His Honor and speak up loud and clear, would you state your

1 full name, please?

2 A James Henry Davis, Jr.

3

4

5 Transcriber's Note:

6 Adjustment is necessary in amplification micro-

7 phone, it is causing a distortion in sound.

8

9

10 Q And what is your age?

11 A Twenty.

12 Q Now, Mr. Davis, how much education

13 have you had?

14 A Eighth grade.

15 Q When did you first meet Mr. Terry

16 or Mr. Sager?

17 A August the 20th -- 27th.

18 Q Of seventy-three?

19 A Yes, he was my lawyer on this first

20 charge I had.

21 Q Now, at the time you were arrested

22 and brought before the Court on this -- these charges, did --

23 had you been interviewed by Mr. Sager and Mr. Terry on the

24 previous charges?

1 A The first charge?
2 Q Uh huh?
3 A Yea.
4 Q You had, how many times had they
5 seen you?
6 MR. DAVIS: Judge, I object, I don't
7 see what relevance that's got to the case before
8 the Court at this time.
9 MR. HARRIS: Your Honor, I think it's
10 a matter of --
11 THE COURT: I will allow it, go
12 ahead. Now, when you said the first charges,
13 this is something totally unrelated
14 MR. HARRIS: That's right, Your
15 Honor.
16 THE COURT: to this robbery or murder
17 charge?
18 MR. HARRIS: Yes, sir, concerning the
19 Standard Drug --
20 THE COURT: Would you establish the
21 date of the charge and arrest?
22 Q Do you recall when you were arrested
23 for
24 THE COURT: The first.

1 Q the Standard Drug Store offense?

2 A Do I recall --

3 Q Pardon?

4 A I don't understand your question.

5 Q Do you remember when you were arrested

6 for the first offense?

7 A August the 22nd.

8 Q All right, do you remember how many

9 times you were interviewed by Mr. Sager and Mr. Terry, how

10 many times they saw you before you came to Court on this

11 offense, between the first offense and the second offense?

12 A Twice.

13 Q Twice. All right, now, at the pre-

14 liminary hearing were you given an opportunity to -- did they

15 ask you if you wanted to testify?

16 A What case you talking about?

17 Q Now, this was on these two -- this

18 case?

19 A No, sir.

20 Q All right, how long did your prelim-

21 inary hearing last?

22 A About five minutes, see, I went in

23 after Milton, he went in first.

24 Q Milton Cox went in first?

1 A Yea, see when I went in (the voice
2 is unintelligible, adjustment in equipment continues necessary)
3 . . . . . .
4 Q Now, did an occasion arise when
5 Detective Harding came to the City Jail to take a statement
6 from you?
7 A I ain't understand that question?
8 Q All right, did Detective Harding
9 come to the City Jail to talk with you?
10 MR. DAVIS: Judge, I object to that
11 now, he's testifying for the witness, if he
12 knows who Detective Harding is he can ask him,
13 but just to point to him --
14 MR. HARRIS: Well, Your Honor --
15 Q Do you know this gentleman here?
16 A Yes, I know him.
17 Q All right, who is he?
18 A Detective Harding.
19 Q Has he ever been down to the City
20 Jail to talk to you?
21 A Yes.
22 Q Now, did you request that he come
23 down or why did he come down?
24 A I didn't request for him to come

1 down,

2 Q All right --

3 A my lawyer came down first.

4 Q Tell His Honor what happened?

5 A My lawyer came down first and was

6 talking to me and he was telling me to plead guilty to the

7 charge and I told him I ain't want to plead guilty to the

8 charge, so he talk about two hours, then he go in the Court-

9 room, say he was going to get me a whole lot of time if I

10 didn't plead guilty.

11 Q How much time did they say they were

12 going to give you?

13 A Two life sentence.

14 Q And what did he say they would do

15 if you pleaded guilty?

16 A He say they might give me fifty years.

17 Q And did you want to plead guilty?

18 A No, I didn't want to plead guilty.

19 Q Did you want to make a statement to

20 Detective Harding?

21 A I didn't know he was down there, he

22 didn't tell me he was . . . . . I didn't know he was down

23 there at all.

24 Q All right, did -- when -- after you

1 found out he was down there, did you want to make a statement
2 to him?
3 A I still didn't want to make a state-
4 ment, but he said about withdrawing from my case and then I
5 asked him why was he withdrawing from my case, I say why can't
6 we go to court to fight it out, he say -- he said -- the other
7 man . . . . . was off the case so he had to get off the
8 case too.
9 Q Well, was this before you made the
10 statement,
11 A Yea --
12 Q before you talked to Detective
13 Harding?
14 A Yea, that's when me and my lawyer
15 was talking.
16 Q And how long did he talk to you
17 before you agreed to talk with Detective Harding?
18 A About a hour.
19 Q How many times did you tell them
20 that you did not want to make a statement?
21 A . . . . . kept talking and trying
22 to . . . told him I didn't want to plead guilty to it.
23 Q Did you tell him you didn't want to
24 make a statement?

1 A I told him I didn't want to make no
2 statement.
3 Q Well, why did you finally end up
4 making a statement?
5 A He said if I went into court to fight
6 it out they would give me two lifetimes.
7 Q And did you -- concerning this fifty
8 years did he tell you that,
9 A He say --
10 Q what was said about the fifty years?
11 A Then he say I might go on and get
12 fifty years.
13 Q Now, was it your intention after
14 making the statement that -- to plead guilty?
15 A After I made the statement, I call
16 him the same night, say I want to see him, 'cause I want to
17 change it, change back to not guilty and he came down the next
18 day and asked me why I did that, so he send me a . . . . . .
19 say he was withdrawing off of my case, ...
20 I had to get a new lawyer.
21
22
23 Transcriber's Note: The
24 reception in witness microphone needs adjustment.

1 a distortion has occurred continuously.

2

3

4 Q Now, did he tell you that the state-

5 ment could not be used against you since -- if he withdrew

6 from the case, did he tell you --

7 MR. DAVIS: Judge, I object to

8 counsel leading the witness --

9 THE COURT: That's leading, Mr.

10 Harris.

11 MR. HARRIS: All right, sir.

12 Q What did he . . . . . say about the

13 statement after you called him up?

14 A After I -- he came back the next

15 day he told me that it was best for him to get off my case and

16 I get another attorney and all the statement and stuff I made,

17 it will be used against me, he say that's the best thing for

18 him to do, get off my case.

19 Q Did he discuss the possible defenses

20 that you might have if you fought the case out, that is, if

21 you pleaded -- if you plead not guilty, did he discuss with

22 you what could be brought out in your fave?

23 A No.

24 Q At no time did he discuss . . that's

1 all.

2

3 CROSS EXAMINATION

4 BY MR. DAVIS:

5 Q Mr. Davis, you talked to Detective

6 Harding on what date, sir?

7 A I don't remember the date.

8 Q You don't remember the date; you

9 don't recall at all talking to Detective Harding, you just

10 testified, I believe, that you said you gave a statement to

11 Detective Harding, is that correct?

12 A Yea, I give it to him.

13 Q All right, what date was it, before

14 or after your preliminary hearing?

15 A The case was in high Court.

16 Q So it was after your preliminary

17 hearing,

18 A Yea --

19 Q after you were indicted, is that

20 correct, sir?

21 A Right.

22 Q Now, what brought up the question of

23 the fifty years that you are talking about?

24 A My lawyer, he brought it up, he say

1 he might could get --

2 Q But he didn't tell you anybody

3 promised you fifty years, did he?

4 A No, he say he might, he didn't say

5 he promise, he say he might.

6 Q And he also told you that you could

7 get up to the two life sentences for your crime, is that

8 correct, sir?

9 A No, he say if I fight it out.

10 Q But he didn't tell you you would get

11 two life sentences, did he?

12 A No, he ain't say that.

13 Q Now, when you decided to withdraw

14 the statement, wasn't it after you had talked to an attorney

15 by the name of Reid Simmons later on the day after you --

16 A No --

17 Q during the day?

18 A No.

19 Q You never talked to Mr. Simmons?

20 A I called him the same night I made

21 this statement.

22 Q And then you called back your other

23 attorney and told him that you didn't wish -- that you wished

24 to withdraw your statement, isn't that correct, sir?

1 A Not -- I ain't talked to no Reid
2 Simmons.
3 Q Who did you talk to?
4 A I talked to --
5 Q You didn't talk to an attorney repre-
6 senting Milton Cox, Jr.?
7 A I talked to the lawyer in the jail.
8 Q Right, wasn't that the attorney that
9 represented Milton Cox?
10 A No, he -- this dude is in jail
11 locked up.
12 Q A lawyer in jail?
13 A Yea.
14 Q What's his name?
15 A Leroy Jones.
16 Q Leroy Jones, he's not a lawyer, is
17 he?
18 A He got some knowledge . . . . . .
19 down jail.
20 Q I see, he's a jailhouse lawyer,
21 that's what you
22 A Yea.
23 Q are talking about?
24 A Yea.

1 Q All right, sir, now, I believe that
2 you -- when you talked to Mr. Harding, do you recall him
3 telling you that he was a detective with the Richmond Bureau
4 Police and that he was not in a position to make any promises
5 to you whatsoever?
6 A Yes, he told me . . . . .
7 Q Did he also tell you that you have
8 to write to an attorney or at least that your attorney is
9 present at the time and then went on to tell you that you have
10 to write to an attorney?
11 A Already had an attorney . . .
12 Q Did he -- I'm going to read you this
13 and ask you if he didn't in effect read you this, sir: The
14 law requires that you be advised that you have been charged
15 with the felon -- following crime of murder of Mr. Louis Wein-
16 stein; you have an absolute right to remain silent and your
17 silence will be guarded by the police; that anything you say
18 may be used against you in a court of law; that you have the
19 right to the presence of an attorney during this and any
20 future interviews; Mr. Terry, your attorney, is present, and
21 if you cannot afford an attorney one will be appointed for you
22 prior to any questioning, if you so desire; if you fully
23 understand these rights which have been explained to you, they
24 may be waived and you can, if you so desire, make a statement

1 to me. Do you understand what I have explained to you?
2 A Yes.
3 Q Isn't that the answer you gave also
4 to Mr. Harding, yes?
5 A Yes.
6 Q I don't have any further questions.
7
8 BY THE COURT:
9 Q Mr. Davis, this Standard Drug Store
10 charge, is that --
11 A That --
12 Q is that still pending, has that been
13 disposed of?
14 MR. HARRIS: That's been disposed of,
15 Your Honor.
16 MR. DAVIS: Judge, if it please the
17 Court, I'm not sure it's the Standard Drug Store
18 charge, I believe it was
19 A Siegel's.
20 Q Siegel's Supermarket.
21 THE COURT: Siegel's Supermarket,
22 Mr. Terry or Mr. Sager represented you to the
23 conclusion of that case?
24 A Yes, and plus he was on that case I

1 had --

2 THE COURT: What --

3 A he --

4 THE COURT: What?

5 A he was on the murder-robbery case,

6 too,

7 THE COURT: All right.

8 A but he said if he withdraw from it

9 on the statement that I -- that I made, it wouldn't be held

10 against me.

11 THE COURT: Is the status of the

12 Siegel's case that it is presently pending before

13 this Court?

14 MR. HARRIS: Your Honor, it has been

15 heard in Judge Wilkinson's Court and he was

16 sentenced to twenty years in the Penitentiary

17 on that charge, isn't that right?

18 THE COURT: All right.

19 A Yes, twenty years.

20 Q Mr. Davis, for the record did you

21 hire Mr. Sager and Mr. Terry or were they appointed by the

22 Court?

23 A No, see, my mother's boyfriend hired

24 them.

1 Q They were not appointed?
2 A No,
3 Q All right.
4 A my mother's boyfriend --
5 THE COURT: Go ahead.
6
7 BY MR. DAVIS:
8 Q One other question, didn't at one
9 point, Mr. Terry discuss his withdrawing from the case and
10 you objected to him leaving?
11 A Yea, I told him we go and fight out
12 and he kept telling me to plead guilty, plead guilty.
13 Q But you wanted Mr. Terry to represent
14 you, didn't you?
15 A Yea, 'cause I couldn't -- he was my
16 lawyer, he was so deep in the case.
17 Q All right, sir, so he had gotten
18 deep in the case, is that what you are telling the Court?
19 A Yea.
20 Q I have no further questions.
21 THE COURT: Take your seat.
22
23
24 WITNESS STOOD ASIDE.

THE COURT: I understand Mr. Simmons has a pre-sentence report in another Court, is he -- you would have him as a witness also?

MR. HARRIS: I only wanted to call him as a witness, Your Honor.

NOTE: At this time there is an adjournment, after which:

THE COURT: This is picking up hearing on the motion in the matter of James Henry Davis, Jr., and Mr. Harris has indicated the next witness will be Reid Simmons.

MR. HARRIS: Yes, sir, Your Honor.

THE COURT: All right, Mr. Simmons.

1
2
3 REID A. SIMMONS, on motion
4 to suppress, being first duly sworn, testified as follows:
5
6 DIRECT EXAMINATION
7 BY MR. HARRIS:
8 Q Would you state your full name, sir?
9 A Reid A. Simmons.
10 Q And your business address?
11 A 3309 Hull Street.
12 Q What is your occupation, sir?
13 A Attorney at Law.
14 Q How long have you been an attorney?
15 MR. DAVIS: I'll stipulate Mr.
16 Simmons' qualifications as an attorney at law.
17 THE COURT: All right, stipulation
18 acceptable, I take it?
19 MR. HARRIS: Yes, sir, and you will
20 stipulate he's an expert in the field of law,
21 criminal law?
22 THE COURT: The Court will recognize
23 that.
24 MR. DAVIS: I suspect that Mr.

1 Simmons is an expert.

2 MR. SIMMONS: I want to thank you.

3 MR. DAVIS: I recognize that too.

4 Q How long have you been practicing

5 law, Mr. Simmons?

6 A Passed the Bar in September of 1966.

7 Q And what is your primary field of

8 practice?

9 A Ninety percent of it is criminal law.

10 Q How long have you been in private

11 practice?

12 A Well, I started in the Commonwealth's

13 Attorney's Office, City of Richmond, July 1, 1968, prosecuting

14 criminal cases and have been in private practice since Decem-

15 ber of 1972.

16 Q Would you estimate how many murder

17 cases you've participated in while you were prosecuting cases?

18 A (The reply is partly unintelligible,

19 because the microphone has not yet been brought into proximity

20 with the witness) fifty to . . . . . I guess.

21 Q How about robbery cases?

22 A Approximately same . . . . . .

23 Q Since you have been in private

24 practice, how many cases have you been involved in, robbery

1 and murder cases?

2 A That I have defended clients in?

3 Q Yes?

4 A Approximately a dozen, ten or twelve,

5 Q I see?

6 A of each.

7 Q Now -- of each?

8 A Yes.

9 Q Mr. Simmons, did you defend Milton

10 Cox?

11 A Yes, I did. (The operator of the

12 recording device has not yet adjusted or caused to be adjusted

13 the witness microphone and the transcriber cannot guarantee

14 each word uttered by the witness)

15 Q Well, was he the co-defendant to

16 James Henry Davis?

17 A Yes, he was.

18 Q Do you know who defended or who was

19 involved as an attorney for Mr. Davis initially?

20 A Yes, the preliminary hearing for Mr.

21 Davis and Mr. Cox was set at the same day down in Judge Davila's

22 Court, I asked for separate preliminary hearings. My case was

23 tried first, Cox's case.

24 Q Why did you ask for a separate

1 preliminary hearing?

2 A Because I wanted the Commonwealth

3 to concentrate their witnesses on my client, I don't want . .

4 mumbo-jumbo of somebody else being involved, I want to know

5 what they got against mine knowing that he is the co-defendant

6 with somebody else, I don't want it all mixed up, I want to

7 know what I can expect when I go into Court, what witnesses

8 are going to say as far as my client is concerned and I asked

9 for separate preliminary hearings. Mr. Sager and Mr. Terry

10 both were there. They were agreeable to having them tried

11 together, but I asked for and did get separate preliminary

12 hearings, my case was tried first, Milton Cox, and Mr. Harding

13 . . . . . was there.

14

15

16 Transcriber's Note: The

17 operator of the recording device has not yet

18 made the necessary adjustment in microphones

19 and the audio is not good.

20

21

22 Q Mr. Simmons, were there any defenses

23 that could be asserted in the Cox case and in the Davis case,

24 were you familiar with the facts surrounding the allegations

1 against Mr. Davis as well as Mr. Cox?

2 A Well, I was -- I knew a whole lot

3 more about Milton Cox than I did Davis because I had never

4 talked to Davis, I had talked to Milton Cox, my client.

5 Q But were you familiar with the poss-

6 ible defenses that could be asserted on behalf of Mr. Davis?

7 A (No audible response)

8 Q Let me ask you this way, if you had

9 been representing Mr. Davis, what would -- were there any

10 defenses that were apparent that should be asserted in the case?

11 A Well, I don't know, I don't know

12 what you're trying to drive at, I know that Cox was alleged

13 to have not been the trigger man, I knew that Davis was alleged

14 to have been the trigger man, and in that respect I knew or

15 I thought I was going into the preliminary hearing not repre-

16 senting the trigger man, so I want to know what the Common-

17 wealth's evidence is against my client, he's not the one with

18 the gun, so he's obviously got to be something other than the

19 man who fired the gun.

20 Q Well, did you make any effort to

21 elicit testimony concerning the person who did have the gun

22 then?

23 A Well, I forcefully as I could,

24 brought it out in the preliminary hearing, brought it out that

1 my man was not the one who fired the shot, therefore, leading
2 me to Davis, or the allegation that Davis was the one that
3 had the gun. I wanted to get everything I can off of my
4 client, and I wanted to do it at preliminary hearing,
5 Q Uh huh?
6 A if it meant putting it on Davis in
7 preliminary hearing, that's what my purpose was.
8 Q All right, Mr. Simmons, if you had
9 been representing Mr. Davis, would you have had a preliminary
10 hearing?
11 A There's no question about it, yes.
12 Q Did Mr. Davis have a preliminary
13 hearing?
14 A Did he have a preliminary hearing,
15 yes.
16 Q Mr. Davis I'm talking about now?
17 A Mr. Davis had a preliminary hearing.
18 Q Would you tell His Honor the extent
19 of the preliminary hearing on behalf of Mr. Davis?
20 A Well, I'm using preliminary hearing
21 in a rather broad term there, he did have a preliminary hearing,
22 immediately after mine,
23 Q Uh huh?
24 A but it wasn't a preliminary hearing

1 as far as I'm concerned.

2 Q Explain what you mean by that?

3 A Because Mr. Terry and Mr. Sager

4 stipulated the testimony that I had elicited from Mr. -- I

5 believe his name is Silverman -- and I don't recall whether

6 Mr. Harding took the stand or not, but I did go into great

7 detail with Mr. Silverman. He was positive as far as identi-

8 fication of my client, Milton Cox. I elicited from him that

9 he was practically blind in one eye and had glaucoma in another

10 eye, which fluctuates, I suspect, between twenty to twenty-

11 five, maybe twenty to twenty-five, somewhere in that area,

12 which I thought was important, because he was so positive in

13 his identification of Milton Cox, and I was able to elicit

14 from him that he was to all practical purposes, blind in one

15 eye and couldn't see very well out of the other, and that was

16 what I figured the Commonwealth's case was all about, positive

17 identification; if it hadn't been for Silverman I doubt my

18 client would ever been in Court, so he was a crucial witness

19 for . . . . . .

20 Q Now, did you observe or listen to

21 the cross examination of Mr. Silverman by Mr. Sager?

22 A Yes, I stayed in Court specifically

23 for the purpose of determining what Mr. Sager and Mr. Terry

24 could elicit from Mr. Silverman other than what I had elicited

1 or something maybe I'd missed, I wanted to see if he would
2 testify the same thing to find out really what defenses I
3 could raise or what they could bring out that I didn't, I
4 wanted to learn what they were going to say as far as Davis
5 was concerned, because I knew Davis was co-defendant of my
6 client.
7 Q How thorough was the cross examina-
8 tion of Mr. Silverman on behalf of Mr. Davis?
9 A Well, after they stipulated -- well,
10 I'm not bragging, I'm just telling the truth what happened
11 down there, they came up and congratulated me on what a good
12 job I'd done
13 Q Well, what did they do?
14 A on my hearing of . . . . . .
15 Well, they stipulated.
16 Q But they -- did they ask a few
17 questions --
18 A They asked a few questions of Silver-
19 man.
20 Q Mr. Simmons, as a practicing criminal
21 lawyer in the City of Richmond, have you had occasion to
22 observe very many criminal lawyers in action?
23 A I remember them all, I think (the
24 microphone is quite distant from the witness)

1 Q Now, I'd ask --

2 A but that couldn't be true, I have not

3 observed all of them, but the noted criminal lawyers, which

4 I consider noted criminal lawyers, and I think Bobby Cabell,

5 Richard Ryder, Mike Morchower, Jerry Davis --

6 THE COURT: You might miss somebody,

7 so should you -- are you endeavoring to name all

8 the --

9 A No, I'm not endeavoring to name all

10 of them, I understood Jerry Davis, Thomas Taylor --

11 MR. DAVIS: Appreciate that.

12 Q Now, Mr. Simmons, then, do you

13 think --

14 A Bob Harris.

15 Q thank you -- think -- do you think

16 Mr. Davis, because of the seriousness of the case, should have

17 had a thorough preliminary hearing on his behalf by a competent

18 defense counsel?

19 MR. DAVIS: Judge, I object to the

20 question of competence, I don't know that there's

21 been anything shown about competence in this

22 particular instance, or incompetence.

23 THE COURT: The question -- the

24 objection to the question asked is sustained.

1 MR. HARRIS: Well, let me rephrase
2 the question, then, Your Honor.
3 Q Mr. Simmons, is it your opinion --
4 what is your opinion with respect to whether or not Mr. Davis
5 should have -- should have had a thorough probing preliminary
6 hearing?
7 MR. DAVIS: Object to the question
8 again, Judge --
9 THE COURT: Well, Mr. Davis should
10 have had a what?
11 MR. HARRIS: Thorough probing --
12 THE COURT: Sustained.
13 MR. HARRIS: Well, if Your Honor --
14 well, let me ask it this way then.
15 Q If you had been representing Mr.
16 Davis, Mr. Simmons, would you have had a thorough preliminary
17 hearing even though Cox had had a preliminary hearing prior
18 to that?
19 A No question about it.
20 Q You would have?
21 A Yes, sir.
22 Q Now, have you --
23 A I emphasize that I would, because
24 he's charged with murder and I want to find out what -- as I

1 look at a preliminary hearing it is a stage wherein the defense
2 attorney -- you're not going to like this word, Mr. Davis --
3 but discovers what the Commonwealth's evidence is against you,
4 that's the one and only time the people are under oath, if
5 I'm going to find out what they are going to say in Court,
6 I would have had a thorough preliminary hearing in a murder
7 case if I were representing Davis, as I did, I thought I did,
8 with Cox.
9 Q How many cases would you say --
10 have you seen Mr. Terry and Mr. Sager defend defendants other
11 than in this case, Mr. Simmons?
12 A Yes.
13 Q Do you have an opinion as to whether
14 or not they are capable of handling a case of this serious
15 nature?
16 MR. DAVIS: Objection.
17 THE COURT: On what ground?
18 MR. DAVIS: Judge, he hasn't laid
19 the proper ground work to show whether or not
20 they are capable of representing this particular
21 case, he just asked if he'd seen trial of crimi-
22 nal cases and he has not shown that they are
23 incompetent or incapable of representing the
24 defendant or anything else, all he's done is

1 going on out on a limb to get Mr. Simmons to do
2 it for him and I submit that the proper ground-
3 work to show that they didn't properly act in
4 this case has not been laid.
5 MR. HARRIS: Your Honor, I said a
6 case of this serious nature did he have an
7 opinion based upon his observation of these
8 attorneys, did he have an opinion as to their
9 capability of handling a case of this serious
10 nature.
11 THE COURT: Well, you've shown the
12 witness to be experienced, qualified attorney
13 in the handling of criminal cases, it would
14 seem to me -- Mr. Simmons, would you handle
15 every case identically to some of the attorneys
16 you've named,
17 A No --
18 THE COURT: or would you handle them
19 differently?
20 A I don't think any two attorneys
21 would handle a case exactly the same way. I think . . . .
22 the individuality of the attorney will dictate how he's going
23 to handle the case, I wouldn't handle the case the same way
24 as Ryder does

1 Q What --

2 A in many respects I would.

3 THE COURT: All right, Mr. Harris,

4 your question really seems to me to get down

5 to the ultimate issue and I don't think any

6 witness' opinion on the ultimate issue should

7 be received so the objection is sustained.

8 MR. HARRIS: Well, Your Honor,

9 maybe I can rephrase the question this way:

10 Q Based upon your experience, Mr.

11 Simmons, and your familiarity with the Davis case and your

12 observation of other attorneys in the Richmond -- practicing

13 in the Richmond area -- do you feel that Mr. Davis got the

14 minimum assistance of counsel as required by the Sixth Amend-

15 ment of the Constitution of the United States at his prelimi-

16 nary hearing stage?

17 A I testified earlier that he had a

18 preliminary hearing.

19 Q But did he have --

20 A He had a preliminary hearing, but,

21 in effect, as far as I'm concerned he didn't have one.

22 Q All right, sir. Now, Mr. Simmons,

23 have you been made aware that Mr. Davis -- Mr. Davis gave a

24 statement to Detective Harding at the preliminary hearing?

1 A That was my understanding from hear-
2 say.
3 THE COURT: After the preliminary
4 hearing?
5 MR. HARRIS: After the preliminary
6 hearing.
7 THE COURT: After?
8 MR. HARRIS: Yes, sir, after.
9 THE COURT: All right, go ahead.
10 Q Did Mr. Cox make a statement to --
11 A No, sir.
12 Q Now, did the idea or thought cross
13 your mind to have Mr. Harding or any other police officer go
14 down and take a statement from your client?
15 A Yes, it crossed my mind.
16 Q Explain what you mean by that?
17 A I made sure he wasn't going to make
18 any statement.
19 Q Why?
20 A . . . . . .
21 Q Why?
22 A Because he has a right not to testify,
23 he has a right to remain silent. My job, I look at it, is
24 to defend him . . . . the Commonwealth prove the case beyond a

1 reasonable doubt and he has to help.

2 Q Would you consider helping then if

3 you had --

4 A Well, I specifically told Milton Cox,

5 do not talk to the police, do not make a statement.

6 Q Now, based upon your experience --

7 A I'm not trying to withhold anything,

8 but I do look at it as my duty to represent him and his best

9 interests, and his best interests as far as I was concerned

10 was not make a statement.

11 Q Could you visualize under any cir-

12 cumstances where it would have been to your client's best

13 interest to have made a statement?

14 A No, and one of the reasons -- well,

15 there is such thing as plea bargaining, this was a serious

16 case, and I think Mr. Davis will agree that we talked about

17 this case before it was tried with a jury and Mr. Davis was

18 talking in terms of seventy-five years, so as far as I'm con-

19 cerned if my client has got absolutely nothing to gain and

20 with the jury system, I couldn't visualize -- now, he could

21 potentially get two life sentences -- I couldn't visualize,

22 if they come back with a number of years, that it would run,

23 reach anywhere near seventy-five, which it could have done,

24 Q But what --

1 A but every defense attorney has got --
2 play the probabilities, I guess -- (the witness microphone is
3 badly situated, and the witness cannot always be heard in
4 every word)
5 THE COURT: Before you go to your
6 next question, I don't want to cut you short
7 by any means, but do you anticipate much more
8 direct examination?
9 MR. HARRIS: No, sir, Your Honor.
10 THE COURT: And cross examination?
11 MR. DAVIS: Probably ten minutes,
12 I guess.
13 THE COURT: Is this the last witness?
14 MR. HARRIS: Yes, sir.
15 THE COURT: Mr. -- well, let's --
16 let's go ahead with this.
17 MR. HARRIS: Your Honor, I think the
18 defendant does want to explain one other point
19 to the Court, I don't want to mislead the Court
20 as far as --
21 THE COURT: Another witness?
22 MR. HARRIS: No, sir, the defendant
23 wants to explain one fact that I did not bring
24 out during the direct examination previously.

1 THE COURT: You mean you will recall --
2 MR. HARRIS: I will recall the
3 defendant.
4 THE COURT: All right.
5 Q Now, Mr. Simmons, based upon your
6 experience as a criminal lawyer and your experience as a
7 prosecuting attorney and the fact that from what you said
8 there was no agreement on the part of the prosecuting attorney
9 that there would be any leniency if there was a statement
10 given, do you have an opinion as to whether or not an attorney
11 who would take a detective down to the jail and have his client
12 make a full statement, as to whether or not that is effective
13 assistance of counsel?
14 MR. DAVIS: I object, that's the
15 issue before the Court now, as I see it --
16 MR. HARRIS: Well, I think he is an
17 expert, Judge, he's a practicing attorney and
18 I -- I think he's certainly competent expert to
19 testify as to whether or not such an act was
20 effective assistance of counsel.
21 THE COURT: Well, he's already
22 indicated what he would do or would not do and
23 he's already indicated that other attorneys may
24 handle matters differently, so the objection's

1 sustained.

2 Q Do you know how old Mr. Sager is?

3 A He's -- I think he's in his seventies,

4 is my understanding.

5 Q Do you know how old Mr. Terry is?

6 A He's not quite as old as Mr. Sager,

7 I don't believe, though just from appearance, I don't know.

8 Terry -- I doubt if I've seen the man a half a dozen times in

9 my life.

10 Q Now, have you observed Mr. Terry

11 during the last years and how he has conducted

12 A I have never --

13 Q himself --

14 A I have never seen Mr. Terry try a

15 case.

16 Q How about Mr. Sager?

17 A Yes, I have.

18 Q And would you state whether or not

19 Mr. Sager gives his clients adequate representation?

20 A That's impossible for me to answer,

21 I can't answer that, I don't know what his clients told him, I

22 don't -- I don't know -- unless I'm familiar with the client

23 I can't testify as to whether the man is adequately being

24 represented, I know his actions in Court, I think Mr. Sager is

1 -- he's hard of hearing, yet he had the representation at one
2 time of being an excellent criminal attorney, but over the past
3 years I think that his health has deteriorated and I think
4 probably his effectiveness as a defense attorney has deter-
5 iorated. Clair Sager is a fine fellow as far as I know, but
6 I don't think he's effective at this point.
7 Q That's all I have.
8
9 CROSS EXAMINATION
10 BY MR. DAVIS:
11 Q Well, you're not, of course, Mr.
12 Simmons, an expert on medicine also, are you, sir?
13 A On what?
14 Q Medicine also?
15 A No, sir.
16 Q So you don't know of your own know-
17 ledge whether or not -- what condition Mr. Sager's health is,
18 do you, sir, except from observation?
19 A I think he's had a heart attack
20 recently.
21 Q Now, Mr. Simmons, did you -- can you
22 estimate how long it took for you to try your preliminary
23 hearing in the lower court?
24 A I say somewhere between forty-five

1 minutes and an hour, it was a lengthy --

2 Q Would it be safe to say that the

3 majority of that time, during that preliminary hearing, was

4 spent on cross examination by you of the witness, Mr. Silver-

5 man?

6 A There's no question about it, because

7 that was the man that could hang my guy.

8 Q Would it be safe to say also that

9 Mr. Silverman was also, as you've just said, I guess, was the

10 only eyewitness to this event?

11 A I thought so at the time.

12 Q As far as the inside of the particu-

13 lar establishment was concerned, do you think that Mr. Silver-

14 man was the only eyewitness at the --

15 A (The reply is unintelligible)

16 Q Were you able to solicit -- elicit

17 I believe you said -- were you able to elicit from Mr. Silverman

18 that there were other eyewitnesses in the Courtroom, that there

19 were other eyewitnesses to this event, Mr. Simmons?

20 A (The reply is inaudible)

21 Q Obviously you weren't because you

22 say at the time?

23 A There was -- there was -- a Mr. Day

24 was in the Courtroom that day I found out after the preliminary

1 hearing but insofar as being in the store, I think Mr. Silver-
2 man, and I got this from Harding, he was the only one who
3 could positively identify my client so it was Mr. Silverman,
4 the crucial witness.
5 Q Therefore, Mr. Silverman would
6 likewise been the only person that could have identified
7 anyone else who participated in the robbery, don't you think,
8 Mr. Simmons?
9 A I assume that's correct.
10 Q Now, don't you feel, Mr. Simmons,
11 that you did a very adequate job on cross examination at the
12 preliminary hearing stage?
13 A I did the best I could.
14 Q And do you think that based on what
15 you've testified here today that Mr. Sager or Mr. Terry would
16 have done any better job had they tried to cross examine the
17 same witness over and over again?
18 A Now, you asked me the question, I'm
19 going to give you the answer.
20 Q Yes, sir?
21 A I represented Milton Cox, if I had
22 represented Davis, Silverman would have been on through the
23 same thing that he went through when I went through with Cox,
24 now, I'm not saying --

1 Q In the same manner, wouldn't you,
2 Mr. Simmons?
3 A If I had represented Davis?
4 Q Yes, sir, either you would have
5 elicited from Mr. Silverman in the same manner that you did
6 from Mr. Cox --
7 A He would have had to tell me,
8 Q Yes, sir?
9 A I don't care what he told Sager or
10 Terry he'd have to tell me under oath in my case at my prelim-
11 inary hearing.
12 Q I understand that, sir. Now, do you
13 think -- let me ask this, do you think that in effect that the
14 preliminary hearing is the trial stage of a trial or the
15 probable cause stage of a trial?
16 A I think that is the most important
17 stage for the defendant.
18 Q What would have happened, Mr. Simmons,
19 had the Commonwealth chose to indict these two parties and not
20 had preliminary hearing
21 A I would --
22 Q by way of a warrant?
23 A I would have given you a bill of
24 particulars about two pages long.

1 Q But you would have had any bill --
2 you wouldn't have had any chance to cross examine the witnesses,
3 would you, sir?
4 A Not unless I made a motion to suppress
5 which I might have done.
6 Q But I'm talking about before you get
7 into the motions on your bill of particulars, you wouldn't
8 have any ability to get the cross examination of the witnesses
9 in it?
10 A That's correct.
11 Q Would you have thought that your
12 representation of your client would have been inadequate then?
13 A Yes.
14 Q But it would have been all you could
15 have done under the law, wouldn't it, Mr. Simmons?
16 A Yes.
17 Q Now --
18 A If I don't -- if I don't get the
19 preliminary hearing I don't know what type of appearance the
20 witness is going to make, I think that's the crucial stage
21 of the defense.
22 Q I understand?
23 A . . . . like you say, I don't even
24 know what your witness looks like and I really don't have a

1 chance to get to see him before he gets on the stand, he may
2 make a good witness, he may make a bad witness and I'm really
3 guessing when I want jury trial or don't want a jury trial,
4 because I don't know what
5 Q But you --
6 A . . . . . I got.
7 Q you would have gone out and dug to
8 find out, wouldn't you, Mr. Simmons?
9 A I don't under -- you mean go out
10 and dig to see what kind of witness a person will make?
11 Q Right?
12 A If I knew who he was.
13 Q Right?
14 A I'm not at all sure I could -- I
15 don't think the Commonwealth is required to give you the names
16 of all witnesses
17 Q Sir --
18 A even a . . . . .
19 Q what you know --
20 A . . . inspection.
21 Q Yes, sir, but you would have taken
22 some effort to try to find out, wouldn't you?
23 A I like to think I would have.
24 Q Well, you don't know of your own

1 knowledge whether or not Mr. Terry or Mr. Sager did that prior
2 to this preliminary hearing, do you, Mr. Simmons?
3 A Have no idea.
4 Q And you don't -- and -- you do know,
5 however, that they were in the Courtroom when you had your
6 preliminary hearing?
7 A I think they were, I think they were
8 seated --
9 Q All right, and you -- can you esti-
10 mate over the years of experience as a Commonwealth --
11 Assistant Commonwealth's Attorney, I believe you say and as a
12 trial defendant, how many trials that you have seen, not that
13 you've participated in but that you've seen other lawyers
14 take in the preliminary stage that took as much as an hour to
15 try?
16 A An hour, a preliminary hearing that
17 takes as long as an hour is rare,
18 Q Very unusual event,
19 A rare,
20 Q normally they take a very short time,
21 don't they, Mr. Simmons?
22 A because I don't . . . . . Judge,
23 you get on the wrong end of the list, all kinds of things, you
24 don't -- preliminary hearings don't usually take very long.

1 Q Even with some of the lawyers you've
2 named like Mr. Ryder and Mr. Janus and Mr. Harris and other
3 people, isn't that correct, Mr. Simmons?
4 A That's right.
5 Q And you don't consider them to be
6 . . . . . .attorneys, do you, sir?
7 A No.
8 Q I don't have any further questions.
9 A . . . . . numerous . . .
10
11
12 Transcriber's Note: The
13 microphone remained in need of adjustment to get
14 every word spoken by the witness, and was adjusted
15 as the witness went on redirect examination.
16
17
18 REDIRECT EXAMINATION
19 BY MR. HARRIS:
20 Q Mr. Simmons, this was not a typical
21 case, would you say?
22 A No, I wouldn't say so, this case
23 had -- this was a highly publicized case, lot of feelings, lot
24 of writings about it, it was a terrible case, a man seventy-

1 two years old in the daytime was shot and killed, merchants
2 didn't like it, nobody liked that.
3 Q And that was one of the reasons you
4 took as long as you did in representing your client at the
5 preliminary hearing?
6 A Not necessarily, I didn't -- I mean
7 insofar as I was concerned personally he was another client
8 I represented for murder and robbery which is a serious case
9 in any event, but this particular case had more publicity and
10 so forth, I didn't give any more effort to this case that I
11 would one that -- I don't think I would have did.
12 MR. HARRIS: That's all I have,
13 Judge.
14 THE COURT: All right, is there any
15 objection to Mr. Simmons being excused?
16 MR. DAVIS: Not far as I'm concerned.
17 THE COURT: All right, Mr. Simmons,
18 you're excused.
19
20
21
22 WITNESS STOOD ASIDE.
23
24

1
2
3 JAMES H. DAVIS, JR., being
4 recalled, having been duly sworn, testified as follows:
5
6 REDIRECT EXAMINATION
7 BY MR. HARRIS:
8 Q Mr. Davis, you've testified previous,
9 you're the defendant in the case, is that right?
10 A Yes.
11 Q All right, now, Mr. Davis, on the
12 day that you gave a statement at this talk with
13 A Mr. Harding?
14 Q Mr. Harding, how long did you talk
15 with Mr. Terry prior to talking with Mr. Harding?
16 A How long did all three of us talk?
17 Q No?
18 A Just me and Mr. Terry?
19 Q Terry, right?
20 A We talk about a hour.
21 Q Now, what did Mr. Terry say, if
22 anything, would happen if you did not give a statement?
23 A He said that St. Clair was withdraw
24 from the case and he had to withdraw too because he was under

1 St. Clair.

2 Q And why did you -- did you want to

3 give the statement?

4 A No, I didn't want to give the state-

5 ment, 'cause I told him I be lying if I say I did --

6 Q And how many times did you tell Mr.

7 Terry that?

8 A We talk about a hour so then he went

9 up front and I heard him when, you know, went up there through

10 the gate and . . . . . when I came back we talk some more

11 then he said he had . . . . . he ask me what was I go do,

12 you know, about the case, so then I say all right.

13 Q That's all.

14

15 RECROSS EXAMINATION

16 BY MR. DAVIS:

17 Q Did I understand you to say, Mr.

18 Davis, that you gave Mr. Harding a statement?

19 A Yea, 'cause my attorney told me to

20 give it.

21 Q Did Mr. Harding force you to give

22 him a statement?

23 A No, he didn't force me to give him

24 a statement.

1 Q I believe you already testified
2 earlier that when I read the rights that you -- that you say
3 that you understood those rights?
4 A Yea, I understood the rights.
5 Q And you were giving the statement
6 voluntarily, is that correct?
7 A Right.
8 Q Freely under no threats or promises?
9 A No promises or nothing.
10 Q Nothing? As a matter of fact, Mr.
11 Harding told you he was a police detective did he not, sir?
12 A I know he was a police officer.
13 Q And that he couldn't make you any
14 promises?
15 A Right.
16 Q And did you likewise tell Mr. Harding
17 while you were giving this statement that you were the guy
18 that pulled the trigger and shot Mr. Weinstein --
19 MR. HARRIS: Now, Your Honor, I
20 think that this is a statement surrounding
21 giving the statement, now as far as the merits
22 of the case are concerned, I don't think this
23 is a preliminary --
24 THE COURT: All right.

1 MR. HARRIS: I mean a proper form --
2 THE COURT: Mr. Davis, what does
3 this have to do with the motion?
4 MR. DAVIS: Well, Judge, I'm impeach-
5 ing him now, I suppose, because he just said
6 that he -- that what he said wasn't true, and I
7 think I had a right to do it, even the Supreme
8 Court said that.
9 MR. HARRIS: I don't think -- in a
10 motion to suppress, Your Honor, I think the --
11 the defendant's got a right to take the witness
12 stand to explain what happened as to whether or
13 not the statements are voluntarily given or it
14 was some coercion involved --
15 THE COURT: Let me ask you both --
16 MR. DAVIS: I don't have any further
17 questions, Judge, I'll withdraw any further
18 questions.
19 THE COURT: All right, there's a
20 question in my mind as to whether inspection of
21 the statement would be of any assistance in this
22 case.
23 MR. HARRIS: I think, Your Honor,
24 that if the Court sees the statement the Court

1 will certainly understand why defense counsel
2 is so adamant about keeping the statement --
3 THE COURT: You want to offer it
4 into evidence for the motion hearing?
5 MR. HARRIS: For the motion hearing,
6 yes, sir, for the motion hearing.
7 THE COURT: Are you through with
8 your client at this time?
9 MR. HARRIS: Yes, sir --
10 MR. DAVIS: Judge, I object to the
11 introduction of the statement in that fashion,
12 he has to properly introduce before the Court,
13 THE COURT: All right.
14 MR. DAVIS: to just take a copy over
15 and hand it to the Court is not the proper
16 fashion to do it.
17 THE COURT: All right, you want to
18 call Mr. Harding to the stand and --
19 MR. DAVIS: Judge, isn't the point
20 moot now for this witness to testify, he said it
21 was freely and voluntarily given, seems to me to
22 be that the motion to suppress has to fall on
23 its own merits by the witnesses -- the defendant
24 himself and the witnesses called by the defense.

1 MR. HARRIS: I disagree, Your Honor,
2 the lawyer had been down there coercing the --
3 a case for an hour into making a statement which
4 he says he didn't want to make and when the
5 detective came in, he said that there was no
6 coercion on the part of Detective Harding. My
7 contention isn't that the police have done
8 anything wrong, Judge, I don't think there's
9 anything wrong at all as far as the police is
10 concerned. My contention is that the accused
11 was coerced into taking -- into giving a state-
12 ment by the worst possible person, the worst
13 possible person was --
14 THE COURT: You're getting into
15 argument on the motion now, the statement will
16 be received for inspection in the motion hearing
17 once it is properly --
18 MR. DAVIS: Well, if that's going to
19 be the case, no sense in wasting the Court's
20 time, go ahead and take it, I'll withdraw my
21 objection.
22 THE COURT: All right, Mr. James
23 Henry Davis, Jr., take your seat, please.
24 WITNESS STOOD ASIDE.

1 THE COURT: Does that conclude the
2 witnesses?
3 MR. HARRIS: Yes, sir, Your Honor.
4 THE COURT: Mr. Davis, do you have
5 any witnesses?
6 MR. DAVIS: No, sir, I see no need
7 for witnesses.
8 THE COURT: All right, gentlemen,
9 do you wish to argue the motion at this point?
10 MR. HARRIS: Yes, sir.
11 THE COURT: How long do you want,
12 Mr. Harris?
13 MR. HARRIS: I would say no more
14 than ten to fifteen minutes, Your Honor.
15 THE COURT: How long will you want,
16 Mr. Davis?
17 MR. DAVIS: It won't take me but
18 about five.
19
20
21
22 NOTE: At this time there
23 is off-record discussion as to matters
24 concerning the Court's schedule,

1 Q He explained to you, and you under-
2 stand your right to a trial by jury in event of a plea of not
3 guilty?
4 A Yes.
5 Q And it is your intention to exercise
6 your right to be tried by a jury?
7 A Yes.
8 Q All right, you may be seated.
9 THE COURT: Gentlemen, before
10 calling -- there are no jurors in the Courtroom,
11 are there? Before calling the Jury in, there
12 are two motions:
13 As to the motion regarding another
14 preliminary hearing, the opinion of the Court is
15 that this defendant, or counsel, have available
16 all the advantages of preliminary hearing of the
17 co-defendant, plus, according to the evidence at
18 the motion hearing, certain unascertained
19 questions and answers proffered by former
20 counsel, this due to the stipulation that was
21 indicated at the motion hearing.
22 All parties to this case concurred
23 that there was excellent counsel, who did a very
24 thorough job for the co-defendant in preliminary

1 hearing, so all those advantages available --
2 are available to this defendant, and he is
3 perfectly -- and transcripts and what-have-you
4 are perfectly available to present counsel.
5 Therefore, arguably this defendant is better
6 position after the preliminary hearing than his
7 co-defendant, and parenthetically, it might be
8 noted that this defendant's position is further
9 enhanced by nature of the fact that the co-defen-
10 dant, having been tried first, any testimony
11 of witnesses in that case may be subject to
12 scrutiny by present counsel. Therefore, the
13 motion as to another preliminary hearing is
14 denied, exception, of course, is noted.
15 As to the motion to suppress, it
16 seems to the Court that the questions boil down
17 to, was the statement voluntary, was there
18 coercion?
19 There are utterly -- there is
20 utterly no showing of any premises, no showing
21 of any threats, and what the Court looks at is
22 what the police did, and speaking of police, it
23 narrows doen to Detective Harding, so the
24 question would seem to resolve itself to Detective

1 Harding's role. It is most important, and the
2 Court recognizes that there is not the slightest
3 suggestion or hint of any impropriety on
4 Detective Harding's part.
5 The defendant was represented by
6 counsel at the time he gave the statement,
7 counsel was present. No proffer exists as to the
8 reason that Counsel may have advised the state-
9 ment, although, when I say counsel there I mean
10 former counsel, although he, or they were readily
11 available. The Court is not going to try to
12 determine the reasoning process of former counsel,
13 it's recognizable that no two attorneys are
14 going to handle a case identically, so that
15 their steps are limited only by their ingenuity.
16 There was further evidence that the
17 defendant objected for former counsel withdraw-
18 ing at one time. This defendant, upon an exami-
19 nation of the statement, was advised of his
20 Constitutional rights by Detective Harding;
21 this defendant said he understood those rights.
22 There is nothing in the statement to show
23 coercion, and that it was other than voluntary.
24 Further, Detective Harding, not once,

1 but again reiterated rights to this defendant,
2 and the defendant reiterated his understanding.
3 As far as former co-counsel may be concerned,
4 the statement was made regarding his advancing
5 years, and yet there is no evidence of incom-
6 petency. Claim of ineffective counsel in
7 Virginia would seem to be appropriately handled
8 in a habeas corpus proceeding. Mr. Harris, the
9 Court would say that it felt -- it feels you
10 ably handled the matter at the hearing. The
11 motion is denied, your exception is noted.
12 Bring the Jury in, Sergeant.
13
14
15
16 NOTE: At this time the
17 venire entered the Courtroom, and
18 the hearing continued as follows:
19
20
21
22 THE CLERK: Thursday, January 24th,
23 1974, in the Circuit Court for the City of
24 Richmond, the case of the Commonwealth v. James

1
2
3 FREDDIE BEY, introduced on
4 behalf of the Commonwealth, being first duly sworn, testified
5 as follows:
6
7 DIRECT EXAMINATION
8 BY MR. DAVIS:
9 Q Mr. Bey, would you state your name
10 for the ladies and gentlemen of the Jury?
11 A Freddie -- Freddie Bey.
12 Q Mr. Bey, where are you presently
13 residing, sir?
14 A At City Jail.
15 Q Have you ever been convicted of a
16 felony before, sir?
17 A Yes, sir.
18 Q All right, sir, now, I call your
19 attention to February the 20th -- or excuse me, August the
20 20th, 1973, Mr. Bey, did you have occasion to be out of the
21 City Jail at that time, sir?
22 A Yes, sir.
23 Q All right, sir, did you have occasion
24 on that day to be at or near the intersection of Fifth and

1 Broad Streets, in the City of Richmond?

2 A Yes, sir.

3 Q Do you know what time of day or

4 night that was, sir?

5 A It was around about -- I would say

6 it was somewhere close to two-thirty or about three o'clock.

7 (The microphone remains distant from this witness also; an

8 adjustment is necessary for better audio)

9 Q And why were you at that intersection,

10 sir?

11 A . . . . I just come from down off --

12 down off this -- this rehabilitation place around on Clay

13 Street, and I was walking downtown.

14 Q Where is the rehabilitation place

15 located?

16 A It's -- I think it's Ninth and Clay,

17 I think it is, Ninth or Tenth and Clay, I'm not sure.

18 Q Now, on which street were you, sir,

19 Fifth Street or Broad Street?

20 A I was on Broad, where Fifth run into

21 Broad.

22 Q Now, while you were at that inter-

23 section, sir, did anything unusual happen?

24 A Yes, sir.

1 Q All right, sir, what, and
2 relate it to the ladies and gentlemen of the Jury?
3 A Well, I was standing here, I was
4 waiting, the traffic was coming from Fifth, going into Broad,
5 and while I was standing there, I see these two guys run --
6 break out this store, run down the street, so when they got
7 to the corner, they hesitated, you know, because the traffic
8 comes in here broke around that corner, then when they got
9 down a little ways down past a colored restaurant where the
10 trash cans is, they slowed up a few minutes, then they broke
11 out fast speed again and they ran all the way down to where
12 the Salvation Army place at, and turned the corner, like going
13 up back around the other side of the bus station, back of the
14 bus station, where the bus be parked at the fence around there,
15 around by the Salvation Army place.
16 Q Could you explain to the ladies and
17 gentlemen of the Jury when you say running, how they were
18 running?
19 A Well, when they first come out of
20 there, they was running, you know, running, they was running
21 pretty fast, but when they got down to where you enter Kelley's,
22 where Fifth runs -- Broad -- Fifth run into Broad, they
23 hesitated, you know, for a minute, then they broke around the
24 corner, and they ran, ran around the -- down towards where the

1 trash can set between Kelley's and the bus station, that little
2 archway-like place, ... stop at the elevator for a few
3 minutes, then they broke out fast running again.
4 Q Now, did you see what store they came
5 out of?
6 A Yes, sir, they -- I seen what store
7 they came out of.
8 Q All right, sir, what store did they
9 come out of?
10 A Old Mr. Weinstein's Jewelry.
11 Q And where is Mr. Weinstein's Jewelry
12 Store located in relationship to Fifth and Broad Street?
13 A Fifth and Broad -- it's either --
14 it's about one or two doors from Kelley's Restaurant.
15 Q Now, when the parties ran -- never
16 mind, just disregard the question -- do you see in the Court-
17 room today, Mr. Bey, either one of the parties that you saw
18 run out of Weinstein's store?
19 A Yes, sir.
20 Q All right, sir, would you indicate
21 to the ladies and gentlemen of the Jury to whom you're refer-
22 ring?
23 A The gentleman over here, sitting down
24 over there, Davis.

1 MR. DAVIS: If it please the Court,
2 let the record indicate he identified the
3 defendant as the party.
4 THE COURT: All right, sir.
5 Q Did you know the defendant, James
6 Henry Davis, before August 20th, 1973?
7 A No, sir, never seen him before.
8 Q Now, after -- after you saw these
9 parties run, what did you do then, sir?
10 A . . . . . a few
11 people had started gathering around the place, you know, and
12 I went over there and I see people went inside, and I went
13 inside, and the lady that works next door, I think it is, in
14 a clothing store, she said, somebody get the ambulance, get
15 the ambulance, you know, so I told her to get -- get a glass
16 of water, you know, and so she kept hollering get a ambulance,
17 somebody get a ambulance, call the doctor, something like that;
18 and by that time -- a few minutes later, there were a couple
19 of patrolman on feet, they came in there, you know, and they
20 took and, I think, closed -- yea, they closed -- shut the doors.
21 Q Did you remain at the scene until
22 the police arrived, Mr. Bey?
23 A Yes, sir.
24 Q Did you recall -- do you know

1 Detective Harding?

2 A Yes, sir.

3 Q Is he in the Courtroom today, sir?

4 A Yes, sir.

5 Q Where is he?

6 A Detective Harding right there.

7 Q All right, sir, did you give him --

8 did you give him any information as to these parties?

9 A Yes, sir.

10 Q All right, what kind of information

11 did you give him, sir?

12 MR. HARRIS: Your Honor, I object

13 to, what kind of information, I think that the

14 witness is here to testify, and he can describe

15 the . . . . that he saw running,

16 MR. DAVIS: The Commonwealth --

17 MR. HARRIS: but I can't see any

18 point in him giving the information here that he

19 gave then just to pull it up by its bootstraps.

20 THE COURT: All right, do you wish

21 to question him as to the description of the

22 person he saw running?

23 MR. DAVIS: Judge, I don't intend

24 to try to pull anything up by the bootstraps,

1 but just get the facts before the ladies and
2 gentlmen of the Jury, and I submit that if he
3 gave a description to Detective Harding, it is
4 pertinent to the case.
5 THE COURT: All right, do you wish
6 to question him on that description?
7 MR. HARRIS: No, sir, note an
8 exception, Your Honor.
9 THE COURT: All right.
10 Q Did you give a description of the
11 parties to Detective Harding, Mr. Bey?
12 A Yes, sir.
13 Q All right, sir, would you relate to
14 the ladies and gentlemen of the Jury what description you
15 gave, please?
16 A Well, the description I give was
17 both of them had on -- I know the tennis was white, I can't
18 describe whether they was high tops or low -- low boys, but
19 they were white tennis, and both of them had on shirts
20 similarity to the . . . . . , you know, around that age, like
21 that there, with that type of waistline with the waist here,
22 you know, skin around here, and they had on some kind of --
23 I don't know what kind of hats you call them hats, some people
24 call them spire hats, or something like that, spiral hats, but

1 I do know, I could see, I do know I could see -- I knew they
2 had Afros, because Afros hairdos, push them up under their
3 hats.
4 Q Now, Mr. Bey, did you go home after
5 this event took place?
6 A No, sir -- no, sir, after -- that
7 was before -- when the officers -- while I was at the store,
8 I was carried in custody because the officer, he had a warrant
9 for me for a check.
10 Q Did you know the warrant was out for
11 you at the time you stayed there?
12 A No, sir.
13 Q All right, sir, answer Mr. Harris'
14 questions, please.
15
16 CROSS EXAMINATION
17 BY MR. HARRIS:
18 Q Mr. Bey, you say you were out of
19 jail on this date, is that right?
20 A Yes, sir.
21 Q And in fact, weren't you arrested
22 on July the 21st, 1973?
23 MR. DAVIS: Judge, if it please the
24 Court, I object, Counsel's conduct is getting

1 deplorable, he knows that the only question he
2 can ask is whether or not he's been convicted of
3 a felony, regardless of what . . . .
4 MR. HARRIS: . . . . he said he was
5 out of jail, I certainly can go into why he was
6 out of jail, and this is impeachment, this is
7 not the person that's charged, Your Honor, and
8 I can go into anything which would affect his
9 credibility.
10 MR. DAVIS: As to the rules of
11 evidence, it says that you can ask if he's been
12 the victim of felony or misdemeanors involving
13 moral turpitude, and no more, if it please the
14 Court.
15 MR. HARRIS: Not when it's a witness,
16 Your Honor, and you're impeaching a witness,
17 this is a witness that -- whose testimony -- his
18 credibility is up to this jury to decide whether
19 they can believe him or not.
20 THE COURT: Mr. Harris, as you know,
21 he can be asked whether he's been convicted of
22 a felony. He has also testified he was arrested
23 at the scene, and that he didn't know a warrant
24 was outstanding, the objection's sustained.

1 MR. HARRIS: All right, sir.

2 Q So you were arrested on that date,

3 is that right?

4 A Yes, sir.

5 Q Now, Mr. Bey, have you been sentenced

6 for the felony -- on that particular felony?

7 A Well, I'm on pre-sentence report.

8 Q All right, let's see then, you were

9 -- weren't you arrested and taken to --

10 MR. DAVIS: Judge, you've overruled

11 on that one time, and now he's just going right

12 back into it.

13 THE COURT: Well, I haven't heard

14 the questions, what's the question?

15 MR. HARRIS: All right, sir.

16 Q Weren't you tried on that felony on

17 the -- the preliminary hearing on the 19th of September?

18 THE COURT: He can answer that, go

19 ahead.

20 Q I was -- I was put on pre-sentence

21 report.

22 Q I understand, but you were -- were

23 you -- did you have your preliminary hearing on September the

24 19th?

1 A September the 19th preliminary,
2 which is in the lower court, right?
3 Q That's right?
4 A I can't recall exactly the date now.
5 Q But it was sent to the higher court,
6 and you had a hearing in the Circuit Court on the 24th of
7 October, is that right?
8 A I can't recall the date exactly, but
9 I was -- it was in -- it was in -- I don't know if it was in
10 October, let me see, I'm not sure, but I do know I was passed
11 through one court to another court.
12 Q All right, and you -- this pre-sen-
13 tence report was scheduled to be -- and you were scheduled to
14 be sentenced on December the 19th, isn't that correct?
15 A Well, I know sometime in December,
16 I think around -- around the 19th.
17 Q And you hadn't testified against
18 this young man at that time, had you?
19 A . . . . first time I been to Court.
20 (The microphone continues to need adjustment into closer
21 proximity with the witness)
22 Q All right, sir, so your sentencing
23 was postponed then until next week, or January the 29th, is
24 that right?

1 A I believe the Court January the 29th.
2 Q That's when you're supposed to be
3 sentenced, is that right?
4 A Yes, sir, ...
5 Q All right, now, Mr. Bey, you said
6 you were standing in front of the camera shop, what camera shop
7 are you referring to?
8 A Kodak -- I think it's Kodak, on the
9 corner there, Kodak.
10 Q What's the name of it?
11 A I say, I think it's Kodak, . . .
12 that's what I seen on the building, you know.
13 Q Is it Adams Camera Shop?
14 A It might be Adams Kodak Camera Shop,
15 that might be it.
16 Q You say you were coming from a
17 rehabilitation --
18 A The place down there where -- under
19 the Welfare, where you apply for jobs, see my -- my case worker
20 told me that I -- that she would doubt that I would get a
21 regular job, so she told me if I go around there and talk with
22 them around there, she had set up appointment for me.
23 Q All right, now, Mr. Bey, what is
24 the -- is that -- would that be the northeast corner of Broad

1 Street that you were standing on?

2 A Well, northeast -- I know that it's

3 right across the street from -- from Kelley's Restaurant.

4 Q What store is on the other side of

5 the street?

6 A On the other side of the street, I

7 can't call -- I can't recall right offhand what it was, you

8 mean on the other side -- you know, the other side of Broad?

9 Q Right?

10 A I can't recall on right offhand.

11 Q Well, what's on the -- across?

12 A Straight across?

13 Q Right?

14 A Straight across from here, like from

15 here over there, like that, it's

16 Q I know --

17 A straight across in front of me,

18 right?

19 Q But on your left-hand side, which

20 would be the southwest corner, what's on that corner?

21 A I don't know, I can't recall.

22 Q You don't know that either?

23 A No --

24 Q How wide is the street between the

1 Camera Shop and the -- and Kelley's?

2 A I mean, I understand what you're

3 saying, but I couldn't say --

4 Q Don't know how wide it is?

5 A I couldn't tell you exactly, I

6 couldn't exactly tell you . . . . . estimate on it . . ..

7 Q . . . two people that came out of --

8 came by there, they were across the street from you, is that

9 right?

10 A Yes, sir.

11 Q And you don't know how wide the

12 street is, though?

13 A No, sir.

14 Q Could it be fifty feet, or seventy-

15 five feet, do you have any idea?

16 A I would say -- I would say the street

17 may be the distance from where I'm sitting to the wall, I mean,

18 you know, probably about that distance counting the sidewalks,

19 I mean, you know, the edge of the sidewalk to the street,

20 Q Uh huh?

21 A it may be a little wider, I can't

22 say.

23 Q Uh huh.

24 MR. HARRIS: Let the record reflect,

1 Your Honor, it may be -- sixty feet? Fifty?
2 THE COURT: Well, if counsel want
3 to agree on what the estimated distance is from
4 where he sits to the wall?
5 MR. DAVIS: It couldn't be no more
6 than forty feet, as I see it, Judge, but the
7 Jury can look at it for their ownselves --
8 MR. HARRIS: Let the Jury
9 THE COURT: All right, sir.
10 MR. HARRIS: decide the credibility,
11 Judge.
12 Q All right, and the two people ran
13 down the street, is that right, they hesitated briefly,
14 A Yes, sir.
15 Q and then headed down the street?
16 A Because the traffic was coming --
17 going across, like, crossing, they would turn into Broad.
18 Q All right, and you say the cars in
19 front -- between you and the two individuals?
20 A Yes, sir.
21 Q And they -- were there people between
22 you and the two individuals?
23 A Were there any peoples? Yes, there
24 was probably one -- about one or two people walking down the

1 street.

2 Q How many cars passed between you

3 and the two individuals as they were running down the street?

4 A See, otherwise, just as I got up to

5 the -- got to the corner, a moment or two before that, that's

6 when the traffic started going into Broad, so I can't -- I

7 can't say how heavy the traffic was, it was right heavy.

8 Q Pretty heavy traffic, were there

9 any trucks?

10 A Trucks? No, at this particular time

11 it was cars going through there.

12 Q Were the cars little or, you know,

13 regular size cars, five or six feet high?

14 A Well, they was -- I was -- you know,

15 they was -- I could see over them, you know.

16 Q You could see over them?

17 A Yes, sir.

18 Q Now, Mr. Bey, what is your age?

19 A Thirty-two.

20 Q What is your name?

21 A My name? My name is Freddie Bey,

22 Freddie Bey, Junior.

23 Q And do you also go by Howard Johnson?

24 A No, sir, I ran the name one time

1 years ago.

2 Q And do you ever go by Charlie Lee

3 Brown?

4 A I had that name years ago.

5 Q Do you ever go by Fred William --

6 Fred Williams?

7 A No, sir.

8 Q Did you ever use that name?

9 A No, sir, I ain't never used that

10 name.

11 Q Have you ever used -- you say you

12 have not used Howard Johnson?

13 A No, the other one you called, the

14 last one you called.

15 Q Have you ever -- you say you have

16 not used Charlie Lee Brown, Junior, have you ever used that

17 name?

18 A No, sir, I haven't never used that

19 name.

20 Q Have you ever given your age as --

21 or your birthdate as being 11/15/41?

22 A Eleven, fifteen, that is my birthday,

23 November 15th, 1941.

24 Q Have you ever given your birthday as

1 11/15/38?

2 A Not as I recall, it might have been

3 a mistake made on it.

4 Q Have you ever given your birthday

5 11/15/41?

6 A My birthday is 1941.

7 Q All right. Are you -- were you born

8 in Glen Allen, Virginia?

9 A Yes, sir.

10 Q Have you ever given your place of

11 birth as Richmond, Virginia?

12 A I was -- I was living here when I

13 was going to Central Hospital, if that's what you mean. My

14 mamma -- I was living in Richmond, my people live out in

15 Glen Allen.

16 Q Now, where did you use these other

17 names, Mr. Bey?

18 MR. DAVIS: Judge, I object, I don't

19 see what relevance that has got to the trial of

20 this case.

21 MR. HARRIS: I think so, Your Honor,

22 if he used these names at the times when he was

23 lying, trying to cover up something --

24 MR. DAVIS: Well, Judge, he's making

1 accusations, now he hasn't laid any groundwork,
2 and I submit that that's not conduct becoming
3 an attorney --
4 MR. HARRIS: Well, that's what I'm
5 trying to do, is lay the groundwork.
6 THE COURT: Mr. Harris, you may lay
7 the groundwork, but, as you know, evidence can't
8 be adduced indirectly which couldn't be adduced
9 directly, you may ask him, did you use some of
10 those names, Mr. Bey?
11 A Yes, sir.
12 THE COURT: All right.
13 Q How long have you been using Freddie
14 Lee Bey?
15 A Freddie Lee Bey, ever since I joined
16 the Islamic Faith.
17 Q And when was that?
18 A Oh, that been about six -- about six
19 years, seven years ago.
20 Q Now, Mr. Bey, your pre-sentence,
21 you've already testified your pre-sentence is scheduled for
22 next week, is that right, that's when you'll be sentenced on
23 your felony?
24 A That's right.

1 Q Now, was the felony -- the pre-
2 sentence report delayed until after you testified against this
3 man?
4 A I don't know anything about it, it
5 never been brought to me.
6 Q Well, you certainly expect some --
7 some consideration for testifying against Davis, don't you?
8 A No, sir, because I -- ain't nobody
9 told me nothing about that either.
10 Q You're just telling this Jury that
11 you don't expect any consideration from the Commonwealth for
12 testifying in this case, is that what you're telling this jury?
13 A Yes, sir.
14 Q Have you ever testified for the
15 Commonwealth before, in any other incident prior to this --
16 this incident here?
17 A No, sir.
18 Q Now, Mr. Bey, do you remember seeing
19 me yesterday afternoon?
20 A Yes, sir.
21 Q Do you remember -- who was present
22 when I talked with you?
23 A Davis was present, and two more --
24 two more guys in the City Jail was --

1 Q Was Sergeant Winston standing there?
2 A Yes, sir, he was.
3 Q And did I ask you to let me interview
4 you so I could represent my client?
5 A No, sir, that's not what you told me.
6 Q Did I ask you to -- could I interview
7 you, would you talk with me?
8 A This is what you asked me, you asked
9 me, you say you wanted to talk to me because you wanted to
10 know something about Davis' case.
11 Q All right, is that what I asked you?
12 A Yes, sir.
13 Q And you said, I don't want to talk
14 to you, you refused to talk to me, didn't you?
15 A First I asked did I have to, and you
16 said, no, ... like I heard,
17 MR. DAVIS: Judge,
18 A and you said, no --
19 MR. DAVIS: what relevance has that
20 got to this case, he's got a right to talk to
21 who he wants to.
22 MR. HARRIS: Well, I think --
23 THE COURT: Well, that's true, but
24 Mr. Harris can ask if he talked to him, go ahead.

1 Q So the outcome was that you refused
2 to talk to me?
3 A But I asked you did I have to, and
4 you told me no.
5 Q Okay, then you did?
6 A Yes, sir.
7 MR. HARRIS: Your Honor, I have some
8 other questions that I think are relevant, but
9 perhaps I should approach the bench, or ask them
10 outside the presence of the Jury to get a ruling
11 before I go into them.
12 THE COURT: Of this witness?
13 MR. HARRIS: Yes, sir.
14
15 BY THE COURT:
16 Q Let me ask one thing, Mr. Bey, I
17 understood in your description -- did you use the word Safari
18 hats?
19 A . . . . . it's a
20 hat, it's -- come in different colors, you know, with band
21 around it, . . . different colors.
22 Q Different colors, with what?
23 A With a little band like thing go
24 around -- around here.

1 Q All right.

2 THE COURT: All right, Mr. Harris

3 and Mr. Davis, do you want to approach.

4 (There is a pause)

5 THE COURT: Any further examination

6 of this witness, gentlemen?

7 MR. HARRIS: Yes, sir, Your Honor.

8 Q Mr. Bey, have you -- you've been

9 down to the City Jail, have you conferred with anybody else

10 about this case, or any other inmates?

11 A Have I conferred with any other

12 inmate on this case?

13 Q Have you talked with Leroy Jones

14 about this case?

15 A Leroy Jones?

16 Q Uh huh?

17 A No, Leroy Jones have confronted --

18 come to my cell several times, --

19 Q Have you had any conference with him

20 at all?

21 A No, sir, I haven't. And every --

22 the time that he came, Davis was with him -- present with him

23 at the time he came . . .

24 Q Was he present yesterday when I asked

1 to confer with you, to interview you, was he present yesterday?
2 A Was he present yesterday, well, there
3 was a fellow by that name, you know, was in the room with Davis
4 and another fellow.
5 Q Right, and when I came outside the
6 door, and asked you, in the presence of Sergeant Winston if
7 you would let me interview you, is that right?
8 A Well, you didn't ask me that.
9 Q Well, when I was down to talk with
10 you, and you refused to talk to me, was Mr. Jones present with
11 Mr. -- Mr. Davis?
12 A Was Jones in the room?
13 Q That's what I mean, he was?
14 A But you asked me could you -- you
15 told me, say, you wanted -- you wanted -- you wanted to get
16 some -- some details on -- on Davis' case from me, I mean
17 that's what you told me.
18 Q Uh huh, and you refused to give me
19 any details on Davis' case, didn't you?
20 A Well, I asked you first -- I asked
21 you did -- did I have to, you said, no, and then that's when I
22 told you that, no.
23 Q And you refused to talk with me,
24 that's right.

1 A After I asked you whether I had to
2 or not.
3 Q Now, when you were in front of
4 Kelley's -- excuse me, in front of the Adams Camera Shop, and
5 across the street where the cars were coming in between you,
6 and you saw two people running down the street, did you see
7 anything in either one of them's hand?
8 A No, I didn't see nothing in their
9 hand, but like I tell you before, when they got down about
10 where the -- between that little place where the Greyhound --
11 and the Trailway, where them little trash cans sits out there --
12 Q I understand that, but did you see
13 anything in anybody's hand?
14 A No, I didn't see nothing in their
15 hand.
16 Q Uh huh, and when they -- you say the
17 two individuals paused in front of Kelley's, was it a matter
18 of two or three seconds, or ten or fifteen seconds, or how
19 many seconds?
20 A Well, otherwise, when he came -- when
21 he came towards Broad -- came towards Broad, they -- they
22 didn't never, you know -- I ain't going to say -- say -- they
23 didn't what you call complete, never stop --
24 Q They never stopped?

1 A Not complete.

2 Q Uh huh, and they ran on down the

3 street?

4 A No, they was running, you know,

5 like -- like they ought to decide whether to go across the

6 street there . . . . . the corner, and when they got down

7 there by that place, they slowed up a minute, or a second

8 anyway -- about a second, I guess, I can't estimatehow long,

9 it was -- it was just about probably a split-second, then

10 that's when they picked up speed again and running real fast.

11 Q When you were due to be sentenced

12 on December the 19th, did you -- were you brought over here

13 for the case to be continued, or did you stay in the jail?

14 A Did I stay in the jail?

15 Q Or were you brought over here when

16 the case --

17 A I brought back in the Court, yea,

18 I was in Court.

19 Q And they postponed the case until

20 next week?

21 A Did they postpone the case?

22 Q Continue it, postpone it?

23 A Otherwise I would gone -- . . . . .

24 my probation officer wasn't here.

1 Q Okay, and they waived it -- and they
2 postponed it until January the 29th, next week, and that's
3 when you're supposed to be sentenced?
4 A I say, my probation officer wasn't
5 here that day when I came that day.
6 Q Okay. All right.
7 THE COURT: Mr. Davis, is that it?
8 MR. DAVIS: No, sir.
9
10 REDIRECT EXAMINATION
11 BY MR. DAVIS:
12 Q Mr. Bey, did you have occasion to
13 see the defendant, James Henry Davis, this morning?
14 A Yes, sir.
15 Q Where?
16 A At the time, the officer was -- was
17 getting the guys to bring them to Court this morning, and they
18 had me in -- in another section, so when the man called my
19 name, Henry Davis looked through the door, and he said -- he
20 said, no, he don't go with us, because if you put that mother-
21 fucker in here, we going to kill his ass, we going to kill him.
22 Q I have no more questions, thank you.
23 MR. HARRIS: Just a moment, Your
24 Honor.

1 RECROSS EXAMINATION

2 BY MR. HARRIS:

3 Q Were there -- how many people were

4 in there?

5 A How many was there?

6 Q Yes?

7 A I can't recall exactly how many was

8 there, but I could see them in the doorway, you know, because

9 where I was, you can see the glass in the doorway.

10 Q You say, but --

11 A I can't say exactly how many people --

12 Q Were there more people there?

13 A Yes, sir, it was some more guys

14 waiting for the Court in the room.

15 Q Who were they?

16 A I don't know, but --

17 Q You don't know them?

18 A But he was standing in the doorway

19 of the place,

20 Q Uh huh?

21 A and he was the one that make the

22 statement, and the officer there was counting down to bring

23 them to Court this morning, he was worried about what Davis

24 said, but Davis --

1 Q Who was the officer?

2 A I don't know his name, but he -- he

3 was the only white officer there that transport guys back and

4 forward --

5 Q He's a white officer?

6 A Yes, sir.

7 Q Okay, you don't know his name?

8 A I don't know his name, but he heavy

9 set, I know him when I see him, he been down here this morning,

10 been back here this morning.

11 Q Does he have short hair?

12 A His hair -- he more -- wear hair

13 more conservative style, wear glasses.

14 Q He wears glasses?

15 A Yes, sir, black glasses.

16 Q Did he have a name tag on?

17 A Yea, but I never -- I never -- I

18 never was that close to see it, because he didn't bring me

19 down here this morning, but I could see him when he was opening

20 the door, put handcuffs on the guy to bring them to the Court

21 this morning, because they call them up two by two and handcuff

22 them together, and when he called my name, that when Davis come

23 up like in that doorway where I could see him from where I was --

24 Q All right, let me ask you this, were

1 the -- any of the people who were in the wagon at that time
2 or around, are they here now?
3 A Any of them here? The only person
4 that I heard make a statement, though, was Davis.
5 Q I'm not talking about that, I'm
6 talking about anybody was present?
7 A Present? Well, like I say, the only
8 person I seen was the man who was -- call guys to the door and
9 handcuff two of them together then send them back until they
10 get so many of them, then they bring them downtown, I guess.
11 Q Well, who was the guy that was hand-
12 cuffed to Davis at that time then?
13 A Who was the guy?
14 Q Yes.
15 A Well, he called -- listen, I didn't
16 say I seen Davis -- I seen Davis in the doorway, otherwise, a
17 man had been handcuffed to him, but, see, I -- I was . . . .
18 see from a glance or anything, you know, and the man called
19 my name, that when Davis made his statement.
20 Q And you don't know how many people
21 were around at that time?
22 A I can't -- no, I can't say exactly
23 how many was in the door -- one dude, one of the guys that he
24 was talking to, he was standing out inside of the room, I

1 don't know his name though,

2 Q All right,

3 A that was --

4 Q was anyone handcuffed to you?

5 A Huh?

6 Q Was anybody handcuffed to you?

7 A No, wasn't nobody handcuffed to me

8 because I was -- I was in another room and he -- me and another

9 guy named Lacy, and Lacy -- Lacy heard what he said, too.

10 Q Lacy did?

11 A Yea, he heard -- he heard what Davis

12 said.

13 Q What's Lacy's full name?

14 A I don't know Lacy's full name.

15 Q Is he black or white?

16 A White.

17 Q That's all.

18

19

20

21 WITNESS STOOD ASIDE.

22

23

24

CERTIFICATE OF SERVICE

I, Robert L. Harris, hereby certify that I have filed twenty-five (25) copies with the Clerk of this Court this 28th day of October, 1974, and have mailed three (3) copies of the foregoing "Appendix" to the following:

The Honorable Andrew Miller
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