216 Va. 185
SUPREME COURT OF VIRGINIA
RECEIVED
APR 4 1975
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 741208

JAMES E. WASHINGTON

v.

COMMONWEALTH OF VIRGINIA

APPENDIX

Murray J. Janus
Edward D. Barnes
BREMNER, BYRNE, BABER & JANUS
Suite 1500 - 7th & Franklin Building
701 East Franklin Street
Richmond, Virginia 23207

Counsel for Appellant

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* * * *

February 8, 1972

The grand jury charges that:

On or about November 22, 1971 in the County of Powhatan JAMES EDWARD WASHINGTON did feloniously kill Raul Mederires Monte against the peace and dignity of the Commonwealth.

Va. Code 53-291
53-291 (1)
A True Bill

/s/ Charles M. Hogg
Foreman

* * * *

O R D E R

It appearing of record that James Edward Washington stands indicted, in this Court, of a felony, to-wit: did feloniously kill Raul Mederires Monte, that by order entered March 24, 1972, Richard R. Ryder and Thomas R. Lewis were appointed by the Court to defend the said James Edward Washington; that on May 23, 1974, for reasons satisfactory to the Court, the said Ryder and Lewis were allowed to withdraw and remove themselves as counsel for the defendant, that the defendant is now without counsel of his own choosing and has requested the court to appoint counsel to represent him in his defense;

Whereupon, the Court doth appoint Murray J. Janus, an able, competent and experienced attorney at law, to defend him.

ENTER 4/June/1974

/s/ James B. Wilkinson
Judge Designate

* * * *

* * * *

MOTION

Comes now the defendant, by counsel, and moves this Court to dismiss the indictment on the ground that Va. Code Section 53-291 is unconstitutional on its face, or in the alternative that it is unconstitutional insofar as it is applied to the defendant.

* * * *

MOTION

Comes now the defendant, by counsel, and moves this Court to dismiss all charges now pending against the defendant on the ground that he has been denied his right to a speedy trial in accordance with U. S. Constitution, Amendment VI, Virginia Constitution, Article I, Section 8, and Va. Code Ann. Section 19.1-191.

* * * *

MOTION

Comes now the defendant, by counsel, and moves the Court to dismiss the charges presently pending against him on the ground that the prosecution of the matter herein violates the former jeopardy (double jeopardy) provisions of the United States and Virginia Constitutions. U. S. Constitution, Amendment V; Va. Constitution Article I, Section 8 (1971). See Memorandum attached.

* * * *

MOTION FOR BILL OF PARTICULARS

Comes now the defendant, by counsel, and moves the Court to order the Commonwealth to particularize the charge against the defendant

as follows:

1. State who it is the Commonwealth alleges fired the fatal shot in this case.

2. If it is the defendant, James E. Washington, that the Commonwealth alleges is the one who fired the pistol from which the fatal bullet came, state further:

(a) At the time of the shooting was the defendant attempting to escape?

3. Under which subsection of Va. Code Ann. Section 53-291 is the Commonwealth proceeding?

* * * *

ANSWER TO MOTION FOR BILL OF PARTICULARS

Comes now the Commonwealth, by counsel, and for its bill of particulars sets out the following:

1. The Commonwealth is unable to specify which inmate fired the fatal shot.

2. In view of the answer to question number 1. above, questions number 2. and number 2.(a) need not be answered.

3. The Commonwealth is proceeding under Section 53-291(1) in trying the defendant.

* * * *

O R D E R

This day came the Defendant, James Edward Washington, by counsel, and the designated Attorney for the Commonwealth, on the Defendant's motions for Change of Venue; appointment of additional counsel; Dismissal of the charges because of a Plea of Double Jeopardy; Discovery; Bill of Particulars; Dismissal of the indictment on the ground

that Va. Code Ann. Section 53-291 is unconstitutional; Dismissal of the indictment on the grounds that there was systematic discrimination in the selection of the Grand Jury; and Dismissal on the grounds of denial of his right to a speedy trial.

And it appearing to the Court, after argument of counsel, that it is proper to do so, it is therefore ORDERED that the Motion for Change of Venue be, and the same hereby is, granted for the reasons contained in the opinion letter of this Court of July 22, 1974; and

It is further ORDERED that the Commonwealth shall voluntarily give the information requested in the Motion for Discovery, and if same cannot be accomplished voluntarily, counsel shall seek a date with the Court for specific rulings thereon; and

It is further ORDERED that the requests contained in the Motion for Bill of Particulars be, and the same hereby is, granted, and the Commonwealth shall answer the Bill of Particulars in writing on or before August 1, 1974; and

It is further ORDERED that Edward D. Barnes be, and he hereby is, appointed as co-counsel for the Defendant.

The Motion regarding the plea of double jeopardy is taken under advisement with leave granted to the Defendant to put on evidence on the morning of the trial relative to this matter.

It is ORDERED that the Motion to Dismiss the Indictment on the ground that Va. Code Ann. Section 53-291 is unconstitutional, be, and the same hereby is, denied for the reason stated in the aforesaid opinion letter, to which ruling the Defendant, by counsel, objects and excepts.

The Defendant's Motion to Dismiss the Indictment for a lack of a

speedy trial is hereby denied for the reason likewise stated in the opinion letter of July 22, 1974.

The Motion regarding systematic discrimination in the selection of the members of the grand jury is hereby denied.

It is ORDERED that this case be set for trial by jury in the Circuit Court of the City of Virginia Beach, Virginia, on August 12, 13 and 14, 1974.

ENTER: 7/25/74

* * * *

MOTION

Comes now the defendant, by counsel, and moves this Court to dismiss the indictment on the grounds that Va. Code Section 53-291 is unconstitutional on its face, and in its application to the defendant, because it violates the defendant's rights under the Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

* * * *

MOTION

Comes now the defendant, by counsel, and moves the Court to dismiss the charge against him on the ground that the statute under which he is being prosecuted, Va. Code Section 53-291(1) is unconstitutional on its face in that it denies due process and equal protection.

* * * *

MOTION TO DISMISS

Comes now the defendant, by counsel, and moves the Court to dismiss the indictment against him on the grounds that the statute under which the Commonwealth is proceeding, Va. Code Section 53-291(1), is

unconstitutional in that it violates Virginia Constitution Article 4, Section 12.

* * * *

INSTRUCTION NO. 1

The Court instructs the jury that the credibility of witnesses is a question exclusively for the jury, and in determining the weight to be given to the testimony of the different witnesses in this case, they are authorized to consider the relationship of the witnesses to the parties, if the same is proven; their interest, if any, in the result of the trial; their temper, feeling or bias, if any has been shown; their demeanor while testifying; their apparent intelligence; and their means of information; and to give such credit to the testimony of such witnesses as under all the circumstances such witnesses seem to be entitled to.

* * * *

INSTRUCTION NO. 2

Failure of the defendant to testify creates no presumption against him, and in considering his innocence or guilt, his failure to testify is not a circumstance which the jury is entitled to consider.

* * * *

INSTRUCTION NO. 3

The defendant is presumed to be innocent of the offense with which he is charged and this presumption of innocence goes with him through the entire case and applies at every stage thereof and is sufficient to require you to find the defendant not guilty unless and until the Commonwealth upon whom the burden rests, proves his guilt beyond a reasonable doubt, and the Court further tells you that it is not sufficient that facts and circumstances proved be consistent with the

guilt of the defendant, but they must be inconsistent with every reasonable hypothesis consistent with the innocence of the defendant.

* * * *

INSTRUCTION NO. 4

The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged against the defendant. It is not sufficient that the jury may believe his guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction, but the evidence must porve his guilt beyond a reasonable doubt. The jury shall not speculate or go outside of the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the defense, and unless you believe upon a consideration of all the evidence before you that guilt of the defendant has been proven beyond a reasonable doubt as to every material and necessary element of the offense charged against the defendant, then you shall find him not guilty.

The burden resting upon the Commonwealth to prove guilt of the defendant beyond a reasonable doubt does not require that such guilt be proven beyond every imaginable, conceivable or possible doubt, but only beyond a reasonable doubt. The jury must limit its consideration to the evidence introduced, and you are not to go outside of the evidence to hunt up doubts, nor must you entertain doubts which are speculative or conjectural. And if upon a consideration of all the evidence you are satisfied of the guilt of the defendant beyond a reasonable doubt then you shall find him guilty.

* * * *

* * * *

INSTRUCTION NO. 5

The fact that the defendant may have committed a prior criminal offense may not be considered by the jury as any proof that he did the act for which he is being tried.

* * * *

INSTRUCTION NO. 6

The Court instructs the jury that if you believe beyond a reasonable doubt that the accused, James Edward Washington, by himself or with another planned to escape and in pursuance of such plan and during such plan or attempt to escape Captain Raul Mederires Monte was killed by the accused James Edward Washington or Malcolm Marvin Jefferson, then you shall find him guilty of murder.

* * * *

INSTRUCTION NO. 7

The Court instructs the jury that every principal in the second degree and every accessory before the fact may be indicted, convicted, tried and punished in all respects as if a principal in the first degree.

* * * *

INSTRUCTION NO. 8

Principals in the first degree are those who are the actual or immediate perpetrators of the crime. Principals in the second degree are those who did not with their own hands commit the act which constituted the crime, but who were present, aiding and abetting in its commission.

The test for a principal in the second degree is: was he encouraging or inciting the commission of a crime by words, gestures, looks or signs, or in some manner offer aid and consent to its commission.

Principals in the second degree are liable to the same punishment as principals in the first degree.

* * * *

INSTRUCTION NO. 9

The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the accused, James Edward Washington, while a convict in the State Penitentiary did unlawfully and feloniously kill Raul Mederires Monte, then a guard therein, all as charged in the indictment, then you shall find the accused guilty and fix his punishment at death.

* * * *

INSTRUCTION NO. 10

Where the Commonwealth undertakes to prove the guilt of the defendant by circumstantial evidence, it must not only prove the circumstances relied upon, but it must overcome the presumption of innocence of the defendant and establish his guilt beyond a reasonable doubt. All necessary circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt, but they must exclude every reasonable hypothesis except that of guilt. The chain of circumstances must be unbroken and the evidence as a whole must be sufficient to satisfy the jury that guilt of the defendant has been proven to the exclusion of any other reasonable hypothesis.

* * * *

INSTRUCTION NO. 11

When the Commonwealth relies upon circumstantial evidence in order to secure a conviction, it is the duty of the jury to scan such evidence with great care and caution; and unless the circumstances proven are of such a character and tendency as to produce in the mind of the jury a moral conviction of guilt of the defendant beyond a reasonable doubt, then you must find the defendant not guilty.

* * * *

INSTRUCTION NO. 12

Circumstantial evidence is legal and competent, and a person charged with a crime may be convicted upon circumstantial evidence alone, or upon circumstantial evidence connected with other evidence, if the jury believe beyond a reasonable doubt from such circumstantial evidence that the person so charged is guilty; therefore, the jury have the right to convict the defendant upon circumstantial evidence alone, or upon circumstantial evidence coupled with other evidence, if from all the evidence the jury believe that guilt of the defendant has been proven beyond a reasonable doubt.

* * * *

INSTRUCTION NO. 13

The mere presence of a person at the scene of commission of a crime is not sufficient to constitute him a principal in the second degree, nor is his mere consent to the commission of a crime sufficient. And unless you believe from the evidence beyond a reasonable doubt that the defendant was not only present but that he was present, aiding and abetting Jefferson in the commission of murder and that he shared in the criminal intent of the said Jefferson,

then you must find the defendant not guilty.

* * * *

INSTRUCTION NO. 14

The Court further instructs the jury that the form of your verdict should be as follows:

1. NOT GUILTY

We, the jury, find the accused not guilty.

_____
Foreman

2. GUILTY

We, the jury, find the accused guilty as charged in the indictment and fix his punishment at death.

/s/ Evelyn D. Grones
Foreman

* * * *

INSTRUCTION #A

Murder in the first degree is the wilful, deliberate, premeditated and malicious killing of a human being, and if you believe from the evidence, beyond a reasonable doubt, that the defendant wilfully, deliberately, premeditatedly and maliciously killed the deceased, then you shall find him guilty of murder in the first degree and fix his punishment with death or by confinement in the penitentiary for life, or for any term not less than twenty years.

* * * *

INSTRUCTION #B

Murder in the second degree is the unlawful killing of a human being with malice and without premeditation and deliberation, and if you believe from the evidence, beyond a reasonable doubt, that the defendant unlawfully killed the deceased with malice but

without premeditation and deliberation you shall find him guilty of murder in the second degree and fix his punishment by confinement in the penitentiary not less than five nor more than twenty years.

* * * *

INSTRUCTION #C

Voluntary manslaughter is the unlawful killing of another without malice, upon sudden heat of passion, upon reasonable provocation, or in mutual combat.

* * * *

INSTRUCTION D

If from all of the evidence taken together there is reasonable doubt whether the defendant killed Guard Snyder intentionally or Guard Snyder had his hand on the pistol to prevent the defendant from using the pistol, and in the ensuing scuffle the pistol was accidentally discharged wounding Captain Monte, from which wound he died, then you must find the defendant not guilty.

* * * *

D#2743 F#7923

Upon an Indictment for Murder

The Court doth again order for the recording verbatim of the evidence and incidents of the trial of this case by Betty Browning, a court reporter of Jaime & Browning.

Whereupon again came Aubrey M. Davis, Jr., the Attorney for the Commonwealth and Robert W. Duling co-counsel and the accused James Edward Washington and also again came Murray J. Janus, Edward D. Barnes and James R. McKenry, attorneys for the accused, and also came a jury

heretofore sworn, and after hearing all of the evidence and argument of counsel, retired to their room to consider of a verdict, and after some time returned into Court with the following verdict to-wit: "We the jury, find the accused guilty as charged in the indictment and fix his punishment at death."

Whereupon the defendant by counsel moved the Court to set aside the verdict of the jury as being contrary to the law and the evidence, which motion the Court doth overrule.

It being demanded of the accused if anything for himself he had or knew to say why the Court should not now proceed to pronounce judgment against him accoring to law, and nothing being offered or alleged in delay thereof, it is adjudged, ordered and decreed by this Court that the said James Edward Washington, age 26 years, be and hereby is sentenced to death by execution on January 10th, 1975 in the Penitentiary of this Commonwealth.

And it is ordered that the Clerk of this Court forthwith transmit to the Director of the Division of Corrections a copy of this judgment and that the Sheriff of this City when required to do so, deliver the said James Edward Washington to the guard authorized to receive him who shall remove and safely convey him from the jail of this City to said Place designated by the Director of the Division of Corrections, therein to be kept imprisoned and treated in the manner directed by law.

Whereupon, the defendant, by counsel, excepted to the action of the Court, and expressed an intention of applying to the Supreme Court of Appeals of Virginia for a Writ of Error and supersedeas to the judgment therein.

Whereupon the Court doth rule that notice of appeal and assignments of error must be filed within thirty (30) days from this date.

And the prisoner is remanded to the Custody of the Sheriff of this City.

* * * *

NOTICE OF APPEAL
AND
ASSIGNMENTS OF ERROR

This day came the Defendant, James E. Washington, by counsel, and gives Notice that he is aggrieved by a judgment of the Circuit Court of the City of Virginia Beach wherein he was found guilty of violating Va. Code Ann. Section 53-291(1) and sentenced to death on August 15, 1974, and assigns the following errors:

1. Va. Code Ann. Section 53-291(1) is vague and overbroad and therefore violates the Due Process and Equal Protection clauses of the United States Constitution, as contained in the 5th and 14th Amendments, and of the Constitution of Virginia.

2. The death penalty is cruel and unusual punishment and therefore imposition of such sentence violates the 5th, 8th, 9th and 14th Amendments to the United States Constitution.

3. The death penalty under Va. Code Ann. Section 53-291 is unconstitutional because prosecution is discretionary and therefore violative of the ruling of the Supreme Court of the United States in Furman v. Georgia.

4. The Circuit Court erred in denying Defendant's Motion to Dismiss the indictment on the ground that the trying of the Defendant placed him twice in jeopardy and therefore violated the Double Jeopardy provisions of the 6th Amendment of the United States Constitution, as well as the Virginia Constitution.

5. The trial court erred in denying the Defendant's Motion to Dismiss the indictment on the ground that the trial of the Defendant denied him his constitutional right to Speedy Trial under the 6th Amendment of the United States Constitution.

6. The trial court erred in refusing to dismiss the indictment on the ground that Va. Code Ann. Section 53-291(1) violates Article 4, Section 12 of the Virginia Constitution in that the statute contains more than one object and that those objects are not contained in the title to said statute.

7. The trial court erred in refusing to strike the Commonwealth's evidence at the close of its evidence in chief on the ground that the evidence was insufficient to prove that the Defendant killed Raul Monte.

8. The trial court erred in granting Commonwealth's Instruction Number 6.

9. The trial court erred in granting Commonwealth's Instruction Number 7.

10. The trial court erred in granting Commonwealth's Instruction Number 8.

11. The trial court erred in granting Commonwealth's Instruction Number 9.

12. The trial court erred in granting Commonwealth's Instruction Number 13.

13. The trial court erred in refusing to grant the Defendant's Instructions A, B and C on the grounds that the Defendant was indicted for common law murder and that Instructions A, B and C encompassed the statement of the law of first degree murder and the lesser included offenses of

second degree murder and voluntary manslaughter.

14. The trial court erred in refusing Defendant's Instructions D and E.

15. The court erred in sentencing the Defendant in that the imposition of the sentence violates the 5th, 8th, 9th and 14th Amendments of the United States Constitution.

16. The court erred in refusing to strike the Commonwealth's evidence at the conclusion of all of the evidence.

17. The court erred in refusing to set aside the verdict as being contrary to the law and evidence.

18. The court erred in allowing any Instructions for the Commonwealth on the theory of escape because the Bill of Particulars stated that the Commonwealth elected to proceed under Va. Code Ann. Section 53-291(1) and that at no time did it ever inform the Defendant that he was being prosecuted under sub-section (3) or any other sub-section of the statute.

19. The court erred in giving any Instructions to the jury on the theory that the Defendant was a principal in the second degree because there is no statutory provision for being a principal in the second degree to a violation of Va. Code Ann. Section 53-291(1).

20. The court erred in refusing to grant Defendant's Motion for a Mistrial during the Commonwealth's argument because the argument constituted a comment on the Defendant's failure to testify in the case and therefore violated his 5th Amendment privilege against being required to give evidence against himself.

21. The court erred in refusing to permit counsel for the Defendant in his closing argument to read a description of an electrocution, since the

sole punishment the jury could grant was death in the electric chair, and it was proper to inform the jury of the consequences of their verdict.

22. The trial court lacked jurisdiction to try the Defendant.

A written transcript of the proceedings will be filed.

* * * *

NOTICE

PLEASE TAKE NOTICE that on the 8th day of October, 1974, I will deliver the transcripts of the proceedings and incidents of trial of the within styled case to the Clerk of the Circuit Court of Virginia Beach in accordance with Rule 5:9 of the Rules of the Supreme Court of Virginia.

* * * *

1 THE COURT: I notice that the prisoner's
2 dressed in prisoner's clothes, but I understand
3 that he did not want to put on civilian clothes.
4 Is that correct, Mr. Davis?
5 MR. JANUS: No, your honor, he has chosen
6 to remain in the garb he has on.
7 THE COURT: The court will give him an
8 opportunity if he so desires to be dressed in
9 civilian clothes.
10 Would you rather be tried in those
11 clothes?
12 THE DEFENDANT: Yeah.
13 THE COURT: All right. He may be tried
14 in those clothes.
15 I also understand, Mr. Janus, you had a
16 motion about the other jury that was empaneled
17 in the Circuit Court of Powhatan.
18 MR. JANUS: Yes, sir.
19 THE COURT: My recollection that jury
20 was empaneled and sworn and ready for opening
21 statements at the time the mistrial was taken.
22 Would that suffice?
23 MR. JANUS: Your honor, no members in the
24 courtroom now are a member of the panel that
25 day.

1 THE COURT: No, sir, the jury is
2 excluded.
3 MR. JANUS: Before we get into that, just
4 for clarification in the record, Mr. Barnes, my
5 co-counsel, would like to go over the motions
6 that have been filed and the disposition, just
7 so the record can be brought up to date.
8 THE COURT: Excuse me. Let the clerk
9 swear the reporter.
10 (The reporter was sworn.)
11 MR. BARNES: Good morning, your honor.
12 THE COURT: Good morning, sir.
13 MR. BARNES: We have filed previously
14 several motions in this case. All but a few have
15 been acted on by your honor.
16 THE COURT: I think the one I had,
17 Mr. Barnes, I hadn't acted on, which I hadn't
18 ruled on, is the plea of former jeopardy. I
19 have not formally ruled on that.
20 MR. BARNES: Yes, sir.
21 We have delivered to Mr. Davis this
22 morning three additional motions that do not
23 really add anything new, but they do clarify and
24 specify a little more the motion that we had
25 that the statute itself is unconstitutional.

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2 excluded.
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4 for clarification in the record, Mr. Barnes, my
5 co-counsel, would like to go over the motions
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18 ruled on, is the plea of former jeopardy. I
19 have not formally ruled on that.
20 MR. BARNES: Yes, sir.
21 We have delivered to Mr. Davis this
22 morning three additional motions that do not
23 really add anything new, but they do clarify and
24 specify a little more the motion that we had
25 that the statute itself is unconstitutional.

1 The first is that 53-291 sub one is
2 unconstitutional on its face in that is it
3 overboard, encompasses other acts under some
4 circumstances which could be innocent conduct
5 and does not require criminal intent.
6 Second is just enumerating the specific
7 amendments to the U. S. Constitution upon which
8 we rely, that is, the Fifth, Eighth, Ninth, and
9 Fourteenth Amendments, in our contention that
10 the statute itself is unconstitutional both on
11 its face and as applied to this defendant.
12 And thirdly, under the Virginia
13 Constitution Article 4 Section 12, which states
14 that every statute shall contain one object,
15 and that object shall be stated in its title.
16 It is our position that 53-291 is defective and
17 contains more than one object and only one
18 object is stated in the title.
19 We have also filed a speedy trial motion
20 which your honor has already overruled.
21 Former jeopardy, I believe we are going
22 to present evidence on that this morning.
23 Insofar as your honor ruled on it --
24 there was a motion also to disqualify your honor.
25 Have you ruled on that yet, your honor?

THE COURT: I'll overrule that motion. I had not ruled on it. As a matter of fact, this is the first I have heard about it -- not the first I have heard about it, but formally.

MR. BARNES: It is in the record.

THE COURT: All right, sir, I will overrule that motion.

MR. BARNES: We had a motion regarding the systematic exclusion of the defendant's race, and we would expand that to include members of his age group. We have noted on the jury list that the --

MR. JANUS: This was on the grand jury.

MR. BARNES: This race discrimination is on the grand jury point.

Insofar as the jury panel that we have seen this morning and the ages stated, we will have evidence on that.

Those are our points, your honor. I tender these originals of the motions to the court.

THE COURT: All right. I'll overrule the motions.

MR. JANUS: With respect to the motion of double jeopardy, we would call today to

present evidence from the defendant James Washington and we would ask that he be allowed to testify from right where he is, next to counsel.

THE COURT: All right.

MR. JANUS: Mr. Clerk, will you tender these?

------oOo------

JAMES EDWARD WASHINGTON, defendant, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JANUS:

Q You are James Edward Washington, the defendant in this case. Is that right?

A Right.

Q You were brought to trial in the Circuit Court of the County of Powhatan on May 22, 1974. Is that correct?

A Correct.

Q At that time Mr. Richard R. Ryder, a

lawyer from Richmond, had been court appointed to represent you, along with a co-counsel Mr. Thomas Lewis of Powhatan, Virginia. Is that correct?

A That's correct.

Q On May 23, 1974, the jury was questioned by your lawyers and lawyers for the Commonwealth --

MR. DAVIS: Judge, I object to the leading questions.

THE COURT: I am going to overrule the objection. He is just bringing it up to date.

BY MR. JANUS:

Q The jurors were questioned by the lawyers and the court on that date. Is that correct?

A Right.

Q Was the jury sworn in after it was selected?

A Right.

Q Now, on the next morning you came back for the second day of the trial. Is that correct?

A Right.

Q That would have been May 23, 1974?

A Correct.

Q That evening did you see Mr. Richard Ryder?

A I saw him briefly that morning.

Q Where did you see him?

A I talked to him in the prison van.

Q You did not see Mr. Thomas Lewis that night, did you?

A No, I didn't see him that night.

Q At any time after court recessed first day until you were brought into court the second day did you talk with Mr. Thomas Lewis?

A No.

Q That evening or after court did you have any argument or misunderstanding with Mr. Ryder?

A No.

Q Of course you would have none with Mr. Lewis either, if you didn't see him.

A No.

Q On May -- how many years of schooling have you had of formal education, Mr. Washington?

A Nine.

Q On the day of May 23, 1974, were you ever in the judge's chambers for any discussion that took place between the Commonwealth attorney, Mr. Davis, the judge, and your lawyers?

A No.

Q Do you know what took place in chambers?

1 A No, not really.
2 Q Did there come a time later that morning
3 when Mr. Ryder told you he didn't want to be your lawyer
4 anymore?
5 A Right.
6 Q Would you tell the court what reaction
7 you had to that, what your thought was?
8 A Well, he first told me he wanted to
9 withdraw from the case. I didn't have any reaction at
10 all whatsoever, because I felt if he wanted to withdraw
11 it was totally up to him.
12 Q Did Mr. Lewis ever tell you he wanted to
13 withdraw?
14 A No.
15 Q What was your position as to whether or
16 not you wanted the case to go on and get over with?
17 A I wanted to get it tried as soon as
18 possible. I wanted to get it over with.
19 Q Did you want Mr. Lewis to go ahead with
20 the trial?
21 A I would consented with Mr. Lewis handling
22 the case.
23 Q To your knowledge did Mr. Lewis have any
24 conflict with you that morning?
25 A No.

1 Q Did Mr. Lewis have any health problems,
2 any emotional or physical illnesses that would have
3 prevented him from going forward?
4 A None that I know of.
5 Q Do you know of any reason that you can
6 tell the court why Mr. Lewis couldn't have gone ahead that
7 morning after the jury had been empaneled and tried your
8 case?
9 A No.
10 Q Did anyone explain to you the fact that
11 you had been put in jeopardy?
12 A No.
13 Q Now, in the record you agreed and
14 consented to Mr. Ryder withdrawing. Is that correct?
15 A Right.
16 Q And you consented to a mistrial?
17 A Right.
18 Q Do you know legally what your consent to
19 the mistrial meant?
20 A No.
21 Q Did anyone explain that to you?
22 A No.
23 Q Did you know whether or not that if you
24 had not consented to it after having been put in jeopardy
25 and a mistrial was granted that possibly you could have

never been tried again?

A No.

Q To your knowledge was Mr. -- did Mr. Ryer look physically ill to you?

A No.

Q You had entered a plea already in the case of not guilty. Is that correct?

A Right.

Q That morning did Mr. Lewis ever talk to you and explain anything to you or tell you that he wanted to withdraw?

A No.

MR. JANUS: Mr. Washington, answer any questions that Mr. Davis may have of you. Or Mr. Duling.

CROSS-EXAMINATION

BY MR. DULING:

Q Mr. Washington, after the night -- day in court were you taken back to the penitentiary that night?

A Yes.

Q Did Mr. Ryder come down there to see you that night?

1 A Yes.
2 Q Did you-all have a discussion at that
3 time about his withdrawing from the case?
4 A No.
5 Q Did you advise him that you had certain
6 witnesses you wanted called in the case?
7 A (Pause) No.
8 Q You did not?
9 A No.
10 Q Did you at any time ask Mr. Ryder to call
11 Jefferson as a witness?
12 A No, not really. This was his suggestion
13 alone.
14 Q Did you ask him that night to call anyone
15 as a witness?
16 A I think it may have been maybe one.
17 Q What was his name?
18 A I wanted him to talk to Coles.
19 Q Holt?
20 A Coles.
21 Q Coles. Did Mr. Ryder talk to Coles?
22 A I think he said he would talk to Coles,
23 you know, soon as he finished talking to me.
24 Q Was Mr. Coles present in Powhatan County
25 on the day of the alleged offense?

1 A No.

2 Q You were present in court when the judge

3 questioned Mr. Ryder about his -- this judge questioned

4 Mr. Ryder about his withdrawal, were you not?

5 A Yes.

6 Q And did you hear him direct the questions

7 to both Mr. Ryder and to Mr. Lewis?

8 A After court reconvened, sure.

9 Q After court reconvened?

10 A Yeah.

11 Q And the court directed questions to you

12 as to whether or not you agreed and consented to it, did

13 it not?

14 A It asked me did I agree to Mr. Ryder

15 withdrawing from the case.

16 Q And you agreed to it, did you not?

17 A That's right.

18 Q And you were aware another lawyer would

19 be appointed and you would be retried. Isn't that correct?

20 A Yeah.

21 Q The court questioned you about whether

22 or not you could afford an attorney and you laughed about

23 that, didn't you?

24 A I won't say that I laughed about this.

25 This is you are saying.

1 Q You knew you were being questioned about
2 whether or not a lawyer would be appointed for you for
3 another trial, did you not?
4 A Mr. Lewis could handled the case as far
5 as I was concerned.
6 Q You didn't say that in court?
7 A Nor was I asked that.
8 Q You were aware from what the court said
9 both of them were being relieved?
10 A Mr. Ryder was being relieved. Mr. Lewis
11 later stated he wanted to withdraw.
12 MR. DULING: That's all I have.
13 THE COURT: All right.
14
15 BY MR. DULING:
16 Q Have you ever written or directed any
17 communication to Mr. Ryder that you did not want him as
18 your lawyer?
19 A Maybe indirectly.
20 Q Hum?
21 A I said maybe indirectly.
22 Q Does that mean somebody else wrote it
23 for you?
24 A No, I am not saying somebody wrote it
25 for me. You asked me whether I had written Mr. Ryder

1 asking him did I want him for a lawyer, and I said maybe
2 I have indirect.
3 Q Tell me what you mean by indirect?
4 A Well, I can say that maybe I said some
5 things on a more or less spirit of the moment.
6 Q Do you want Mr. Ryder to represent you
7 at this time?
8 A Mr. Ryder already asked to withdraw from
9 the case. Why would I want him to represent me now?
10 Q Do you want Mr. Lewis to represent you
11 at this time?
12 A Mr. Lewis could have represented me the
13 day he was over in Powhatan.
14 Q That wasn't my question, Mr. Washington.
15 Today --
16 MR. JANUS: Your honor, I object to it
17 as being immaterial. It is immaterial what he
18 wants now.
19 MR. DULING: I withdraw the question.
20 THE COURT: He's withdrawn the question.
21 MR. JANUS: We have no further evidence
22 on that motion, sir.
23 THE COURT: I think the record in
24 Powhatan speaks for itself. I don't know how
25 you could really elaborate on it.

1 MR. JANUS: Your honor, I can elaborate
2 on it to this extent: The court spent from
3 approximately 9:30 A.M. on May 23, 1974 until
4 sometime shortly 3:00 P.M. on that afternoon in
5 court. Mr. Davis and Mr. Duling know far better
6 than defense counsel, because the three of you
7 were there. But the entire portion of the vast
8 majority -- eighty-nine percent of the testimony
9 concerned itself with a colloquy between Mr. Ryder,
10 the court, and Mr. Davis. The court does not
11 concern itself one bit with Mr. Lewis, who is an
12 able, competent, discrete attorney practicing
13 in Powhatan who was appointed with Mr. Ryder.
14 It is not as if Mr. Lewis was coming into
15 this case unprepared. Mr. Lewis had been present
16 at a first trial at which there was a hung jury.
17 Mr. Lewis had been present and prepared for a
18 second trial at which a mistrial was granted,
19 and this was the third trial. The case had been
20 pending for approximately two years at that point.
21 The court concerns itself, and the record
22 so shows, with Mr. Ryder -- Richard Ryder's
23 feelings, emotional, irreconcilable differences,
24 physical, his competency and ability to go
25 forward. But the court only on three occasions

1 even refers to Mr. Lewis, and on each occasion
2 the court prefaces its remarks to Mr. Lewis,
3 "and also Mr. Lewis," "and is your feeling the
4 same, Mr. Lewis?" It is almost as if any thoughts
5 directed to Mr. Lewis were anciliary and
6 superfluous, and I submit to the court they were,
7 because it was Mr. Ryder's motion and Mr. Ryder's
8 evidence that he had irreconcilable differences
9 and Mr. Ryder's statement to the court as an
10 officer of the court that he had talked to the
11 defendant the night before and a difference of
12 opinion had arose. Mr. Lewis hadn't even talked
13 to the defendant that night.
14 Mr. Ryder's basis, if your honor please,
15 was that he was emotionally and physically
16 unable to go forward. And I quote from the
17 transcript at page 11: "I have no control over
18 them, and as a result I am not mentally or
19 physically capable of effectively representing
20 Mr. Washington in this trial, sir." Now, how
21 can one attorney incorporate by reference or
22 incorporate in any manner with the emotional and
23 physical feelings of another person? I
24 respectfully submit that he cannot.
25 For those reasons we would move the court

1 to dismiss the indictments on the ground that
2 this man has been put in jeopardy. The jury was
3 empaneled, he had been arraigned, and a mistrial
4 was granted. The law on this is that only at
5 this point can the court grant a mistrial without
6 the jeopardy having attached is if it is a
7 manifest necessity, and I submit to the court
8 where there was co-counsel available -- and with
9 the majority of cases you wouldn't have had
10 that situation -- but here you have got two
11 attorneys. The Powhatan attorney -- and the
12 court knows this trial was to be in the Circuit
13 Court of Powhatan County -- and an attorney who
14 had been through this at least two times before
15 and a case that had been pending for at least
16 two years. There was no manifest necessity at
17 that time that the court couldn't have controlled,
18 and there was no reason -- justifiable reason
19 why this case couldn't have gone on at that time.
20 For all those reasons we make our motion.
21 THE COURT: Mr. Janus, I was at the
22 Powhatan trial as you well know, and I know
23 Mr. Lewis's feelings in the situation. I think
24 that the court ruled if Mr. Lewis went on with
25 the trial on that particular morning he would

1 have had to go to the hospital. The one thing
2 the record doesn't show but the eyes do see is
3 the nervousness of the counsel, both Mr. Ryder
4 and Mr. Lewis.
5 As I recall when I said the record speaks
6 for itself, that I asked the defendant, because
7 once I relieved Mr. Ryder -- and I think he had
8 no longer right to represent him -- and I asked
9 the defendant personally did he agree to the
10 mistrial and he did, it is my recollection of
11 the record. Of course the record will speak
12 for itself on that situation.
13 Accordingly, the court is of the opinion
14 it will overrule your motion.
15 MR. JANUS: We respectfully note our
16 exception to the court's ruling.
17 THE COURT: Anything further, gentlemen?
18 MR. JANUS: No, sir.
19 Before the jury is brought in we would
20 request that they be selected from the panel by
21 lot and that they be voir dired individually.
22 THE COURT: I was going to do that. I
23 was going to leave them all outside and have
24 them come in one by one.
25 MR. JANUS: I would request that they

1 come in having been drawn by lot.

2 THE COURT: All right. Gentlemen, the

3 court's going to take a short recess.

4 Sheriff, take charge of the prisoner.

5 (At 10:45 A.M., August 12, 1974, the

6 court recessed, and reconvened at 11:05 A.M.,

7 Agust 12, 1974.)

8 THE COURT: All right, gentlemen, we

9 ready to arraign the defendant?

10 THE CLERK: Mr. Washington, will you stand

11 up, please, sir.

12 In the Circuit Court of the County of

13 Powhatan, February 8, 1972, the grand jurors charge

14 that on or about November 22, 1971, in the county

15 of Powhatan, James Edward Washington feloniously

16 did kill Raul Mederires Monte, against the

17 peace and dignity of the Commonwealth, Virginia

18 Code 53-291, 52-291(1).

19 What say you, guilty or not guilty?

20 THE DEFENDANT: Not guilty.

21 THE CLERK: A venire is now about to be

22 called from which twelve lawful persons are to

23 be taken to pass between the Commonwealth and

24 you upon the charge of which you stand indicted.

25 For cause shown you may challenge each vinereman.

THE COURT: All right, gentlemen, you-all prepared to go forward?

All right, sheriff, bring the jury back in.

(The venire entered the courtroom.)

THE COURT: All right, sheriff, they may take their strikes.

(A jury was empaneled and sworn.)

THE CLERK: Mr. Washington, you stand, please, sir.

Members of the jury, look upon the accused and harken to his cause. Upon this indictment the accused has been arraigned. Upon his arraignment he pleaded not guilty and for his trial has put himself upon the country, which country you are. Your charge thereforewill be delivered by the court.

You may take your seat.

THE COURT: All right. I am going to ask the ladies and gentlemen of the jury to step into the jury room a moment, please, sheriff.

(The jury withdrew from the courtroom.)

THE COURT: Gentlemen, I see no reason why we have to have an alternate jury -- juror, excuse me. At this time, unless counsel brings

1 proof, a verdict of not guilty.
2 THE COURT: All right, Mr. Davis,
3 call your first witness.
4 MR. DAVIS: Ms. Webster, please.
5
6 ------oOo------
7
8 SNOW WEBSTER, called as a witness on behalf of
9 the Commonwealth, having been first duly sworn, was
10 examined and testified as follows:
11
12 DIRECT EXAMINATION
13
14 BY MR. DAVIS:
15 Q Will you state your name, please,
16 ma'am?
17 A Snow Webster. S-N-O-W.
18 Q Ms. Webster, you have to speak up
19 so all the ladies and gentlemen can hear you.
20 THE CLERK: Ms. Webster, if you will
21 move closer to the microphone.
22
23 BY MR. DAVIS:
24 Q What is your occupation?
25 A I am chief accountant, Virginia state farm.

1 Q As such what are your duties?

2 A I am in charge of all the budgetary

3 and accounting and I am also in charge of all personnel

4 records and personnel responsibilities.

5 Q How long you been so employed by the

6 State Penal System?

7 A About ten and a half years, going on

8 eleven years.

9 Q As a personnel lady at the state farm

10 do you keep the records -- did you keep the records on

11 November 22nd of 1971?

12 A Yes, I did.

13 Q Were you familiar with one Raul M. Monte?

14 A Yes, I was.

15 Q What was his position with the Virginia

16 state farm at that time?

17 A He was a prison farm captain.

18 Q All right. Do you have Captain Monte's

19 record with you?

20 A Yes, I do.

21 Q Was he commissioned by the Penal

22 System as a penitentiary guard?

23 A Yes, he was.

24 Q Do you have a copy of the commission

25 there?

A Yes, I do.

Q May I see it, please?

MR. JANUS: Your honor, it is not necessary. We'll stipulate that Captain Monte was a guard and a captain at that time.

THE COURT: If that's agreeable with the Commonwealth.

MR. DAVIS: We have no objection to that, your honor.

THE COURT: All right, ladies and gentlemen of the jury, the defense and the Commonwealth have stipulated that Captain Monte was a guard at the Virginia State Penitentiary at the state farm.

MR. DAVIS: On November 22, 1971.

THE COURT: On November 22, 1971.

Would there be anything further of this witness?

MR. DAVIS: I have no further questions of the witness.

MR. JANUS: I have no questions.

THE COURT: May she be excused?

MR. DAVIS: She may be excused.

THE COURT: You may be excused, ma'am. You no longer have to remain in court.

What is the next witness?

MR. DAVIS: Call Mr. Wright.

------oOo------

L. G. WRIGHT, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Mr. Wright, would you state your name for the record, please?

A L. G. Wright.

Q What is your occupation, Mr. Wright?

A Supervisor of records for the Virginia Department of Corrections.

Q And how long have you been employed by the Department of Corrections?

A Seven years.

Q As a supervisor of the division of records, sir, do you have the duty of keeping the records and the supervision of keeping the records of the inmates at the Virginia State Penitentiary?

A Yes, sir, that's correct.

Q Does that include the entire state?

A Yes, sir.

Q All right. Now, calling your attention to the date of November 22, 1971, sir, do your records indicate whether or not a party by the name of James Edward Washington, the defendant in this case, was an inmate at the Virginia State Penal System?

A Yes, sir, he was.

Q Do your records indicate that one Malcolm Marvin Jefferson was an inmate in the Virginia Penal System on November 22, 1971?

A Yes, sir, that's correct.

Q Now, do your records indicate where they were being housed on that date, sir?

A Yes, sir.

Q Where were they being housed?

A At the Virginia state farm.

Q All right, and where is that located?

A In Powhatan, Virginia.

MR. DAVIS: Thank you, sir, would you answer Mr. Janus's questions.

CROSS-EXAMINATION

BY MR. JANUS:

Q Mr. Wright, do you have your records on Mr. Washington here today?

A Yes, sir.

Q Your records of course indicate that he is still an inmate in the penitentiary and his release date I believe is September 4, 1990?

A That's correct, sir.

MR. JANUS: No further questions.

THE COURT: All right. May this witness be excused, gentlemen?

MR. DAVIS: No, I have no further questions, your honor.

THE COURT: All right. May the witness be excused?

MR. DAVIS: He may be excused, your honor, as far as the Commonwealth is concerned.

THE COURT: Defense?

MR. JANUS: Yes, sir.

THE COURT: Mr. Wright, you may be excused and no longer have to remain in court.

THE WITNESS: Thank you, sir.

THE COURT: Next witness?

I trust that will be sufficient. I imagine everybody feels the penitentiary has maximum security. So if you will do that, Mr. Thorne, just say M Building.

THE WITNESS: Yes, sir.

THE COURT: All right, return the jury.

(The jury returned to the courtroom.)

THE COURT: All right. Gentlemen, all the jurors have returned. You may continue your questioning, Mr. Davis.

BY MR. DAVIS:

Q Mr. Thorne, I again call your attention to November 22, 1971. Did you have occasion to see the defendant James Edward Washington on that date, sir?

A Yes, sir, I did.

Q All right. Where did you first see him?

A It was in the M Building doorway.

Q All right. Did you have occasion or what was your occasion for seeing the defendant Mr. Washington?

A I had to dress him out to go to court

that morning.

Q All right. Was he by himself at that time, sir?

A Right.

Q Now, would you explain to the ladies and gentlemen of the jury and the court when you say you had to dress him out --

A Well, at the area I was at the man would come through stripped down nude. I would search him and then give him new clothes, new shoes, all belongings to put on to go to court, make sure he didn't have any contraband on him.

Q Now, did you search Mr. Washington that morning, sir?

A Yes, I did.

Q How did you do that?

A He came out, I used a metal detector, went over him head to toe, searched him down good.

Q All right. Now, was he furnished with new clothing and dress?

A Right.

Q All right. Did you do anything else as relates to Mr. Washington that morning, sir?

A Yes, sir, I chained him up and cuffed him to put restraints on him.

Q Now, would you explain what you mean when you say you chained him up and cuffed him and how it was done?

A It is a chain goes around the waist, then the cuff goes through the chain, put on the wrists.

Q I'm going to hand you these two items, sir, and ask you if these are similar to the chains and handcuffs you used on the day in question?

A Yes, sir, it is.

Q All right. Would you show the ladies and gentlemen of the jury how the handcuffs and chain were secured on the defendant, sir? Do you need somebody to help you? If you have got a key I'll be happy to come up there.

A The chain would go around his waist and fasten.

Q Speak up so they can hear you, Mr. Thorne, please?

A The chain would go around his waist. The cuff goes through the chain. This is the way it goes.

Q Is that the fashion in which the defendant was secured on the morning in question?

A Yes, sir, it was.

Q Now, once the handcuffs and chains are placed on the defendant is there any mobility?

A Yes, sir, give him a little bit of play so he can smoke once he got them on.

MR. JANUS: Could the record show Mr. Thorne is moving his hand looks like upward and four inches.

BY MR. DAVIS:

Q Now, Mr. Thorne, when you say a person can smoke, do you normally furnish the cigarettes for them yourself?

A Yes, sir.

Q Now, how are those handcuffs opened, Mr. Thorne?

A (Opening cuffs.)

Q Stand up, Mr. Thorne. I believe they can see better.

What are you using to open those handcuffs with?

A Key.

Q Mr. Thorne, have you ever seen handcuffs opened with anything other than a key?

MR. JANUS: I object to that, your honor, as being immaterial as to whether he's ever seen it or not.

THE COURT: All right, Mr. Davis, what do you have to say?

A Yes, sir, give him a little bit of play so he can smoke once he got them on.

MR. JANUS: Could the record show Mr. Thorne is moving his hand looks like upward and four inches.

BY MR. DAVIS:

Q Now, Mr. Thorne, when you say a person can smoke, do you normally furnish the cigarettes for them yourself?

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Q Mr. Thorne, have you ever seen handcuffs opened with anything other than a key?

MR. JANUS: I object to that, your honor, as being immaterial as to whether he's ever seen it or not.

THE COURT: All right, Mr. Davis, what do you have to say?

same morning in question to see an inmate Malcolm Marvin Jefferson, Mr. Thorne?

A Yes, sir.

Q All right. Would you relate to the court -- to the ladies and gentlemen of the jury where you first saw him?

A After Mr. Washington came out, Mr. Jefferson came out later stripped down the same way, was searched the same way, and he was chained and cuffed by Lieutenant Tait.

Q Was he chained and cuffed in your --

A Presence.

Q -- presence? Was he chained and cuffed in the same fashion as you have just demonstrated, sir?

A Yes, sir, he was.

Q Now, when the two inmates left your presence, Mr. Thorne, were they secure?

A Yes, sir, they was.

Q Mr. Thorne, do you know where -- did you know on that morning where Washington and Jefferson were going?

A All I know they supposed to go to court.

Q Did you know what court?

A Powhatan County.

Q Do you know where the Powhatan County court is located, sir?

A Yes, I do.

Q Where is it located?

A I guess it is about five miles from the -- five or six miles from the state farm.

Q What county is it in?

A Powhatan County.

Q Did you go to the courthouse with these people?

A No, sir, I didn't.

MR. DAVIS: Could you answer counsel's questions, please?

THE WITNESS: Yes, sir.

CROSS-EXAMINATION

BY MR. JANUS:

Q Mr. Thorne, you strip-searched the defendant Washington. Is that correct?

A Yes, sir.

Q In addition to that you -- did you run your hands through his body and through his hair?

A Yes.

Q In addition to that you ran a metal

1 detector over him?

2 A Yes, sir.

3 Q The same thing was done to Malcolm

4 Marvin Jefferson. Is that correct?

5 A Well, I ran a metal detector over

6 him. He was a little sketchy about putting my hand

7 in his hair.

8 Q But you ran the metal detector over

9 his whole body?

10 A Yeah.

11 Q When the cuffs were put on both of the

12 inmates the key was to the inside, wasn't it, the keyhole?

13 A No.

14 Q You don't remember or --

15 A No, it was to the outside.

16 Q You recall testifying in Mr. Jefferson's

17 case on November 30, 1972, sir?

18 A Yes, sir.

19 Q You recall being asked the question by

20 Mr. Davila: All right, now, if you will, describe how

21 the handcuffs and chain were situated on Malcolm Marvin

22 Jefferson and James Edward Washington? Answer by Willie

23 Thorne: The lock key had been turned to the inside the

24 chain around his waist and his hands here and he could

25 move from here to here.

A I was guard.

Q All right. How long had you been a guard at that time, Mr. Franklin?

A Around twelve years.

Q Calling your attention again to that date, sir, did you have occasion in your capacity as a guard to see the defendant James Edward Washington?

A Yes, sir, I did.

Q Where did you first see him?

A In his cell.

Q Did you have occasion also to see an inmate by the name of Malcolm Marvin Jefferson on this date, sir?

A Yes, sir, I did.

Q All right, where did you first see him?

A In his cell.

Q All right. What, if anything, did you do in relationship to those two inmates?

A Well, I got them out that morning and stripped them down and put them through the gate in the hall to be transported out to the courthouse.

Q Now, did you subsequently come to the Powhatan County courthouse on that date, sir?

A I did.

Q How did you get there, sir?

A I was in the truck with Captain Monte tailing the paddy wagon.

Q All right. Now, when you arrived at the courthouse -- I assumed you arrived there. Is that correct?

A Yes, sir.

Q All right. When you arrived at the courthouse what, if anything, did you do?

A Well, I was shotgun guard out in front of the courthouse.

Q All right. When you say out in the front of the courthouse relate to the ladies and gentlemen of the jury what you mean by that?

A Well, I was out to the right in front of the courthouse. I was security guard.

Q All right. Now, did you subsequently see the defendant James Edward Washington and Malcolm Marvin Jefferson again on that date, sir?

A I seen them when they went in the courthouse.

Q All right. Who did they go in the courthouse with?

A They went in the courthouse in front of Lieutenant Netherland and Captain Tait and also Officer Snyder.

1 Q Now, after the inmates went into the
2 courthouse, sir, what was your assignment, if anything?
3 A I was security guard.
4 Q And did you stay in the position you were
5 in?
6 A Yes, sir, I did.
7 Q Mr. Franklin, I'm going to hand you a
8 picture and ask you if you can identify what's in that
9 picture?
10 A Yes, sir. This is the courthouse at
11 Powhatan.
12 Q Now, would you take -- let me ask you this:
13 What view do you see looking at the picture of the courthouse?
14 A I see the front of the courthouse.
15 Q All right, now, would you take the
16 picture and indicate to the ladies and gentlemen of the
17 jury where you were standing in relationship on the
18 outside as you say?
19 A I was standing out under this big tree
20 between the --
21 Q You have to hold it up so they can see,
22 Mr. Franklin, because they --
23 A Well, it doesn't show here where I
24 was standing. I was standing out farther away from the
25 courthouse out near the road.

Q As you look at the front of the courthouse would that put you standing to the left of the courthouse?

A To the left side of the courthouse.

Q All right. So what you are saying is you were standing somewhere that the picture didn't pick up. Is that correct?

A That's right.

Q All right, would you take the picture and in the margin mark your initial F on there, please, sir, on the side that you were standing?

MR. JANUS: Your honor, I don't think he can mark to the side he was standing if he's testifying where he was standing isn't depicted in the picture, sir. He's testified he was farther out closer to the road to the left of the courthouse. If he wants to initial it for the purpose of identifying it as the courthouse, that's fine, but his initial would be misleading to the ladies and gentlemen of the jury.

MR. DAVIS: Well, they have heard, judge. He's testified that he was standing -- the picture wasn't wide enough and there's a limitation on how big you can make pictures I assume. I assume it could be blown up four

1 times that size. There is a limitation how
2 wide you can do it. The jury has heard the
3 evidence and it is just to indicate what side
4 he was standing on as far as the evidence is
5 concerned.
6 THE COURT: I don't think he can
7 mark the picture if the picture doesn't show
8 where he was standing, other than for
9 identification. I sustain the objection.
10 You can introduce the picture as the courthouse.
11 MR. DAVIS: All right. Move to
12 introduce it as Commonwealth Exhibit Number 1.
13 THE COURT: All right, that will be
14 Commonwealth Exhibit Number 1.
15 (So marked by the court.)
16
17 BY MR. DAVIS:
18 Q Now, Mr. Franklin, were there any
19 other vehicles proceeding ahead of the paddy wagon in
20 your trip to the Powhatan County courthouse?
21 A There was another car; Lieutenant
22 Netherland was driving -- Captain Netherland was driving
23 it and Guard Snyder was with him.
24 Q Do you know who was in the van besides
25 the inmates, sir, the paddy wagon?

A Guard Berryman and Lieutenant Tait.

Q Now, what were your observations when the inmates went into the courthouse as to the condition of their hands, sir?

A Well, they looked to me that they were still handcuffed. And waist chain on.

Q Now, did any of the guards come back out of the courthouse after the prisoners went in?

A Yes, they did.

Q Who, sir?

A Captain Netherland and Lieutenant Tait came back out.

Q Now, after -- did you ever see Guard Snyder or Captain Monte come out of the courthouse, sir?

A No, sir, I did not.

Q Now, after Captain Netherland and Lieutenant Tait came out of the courthouse you hear anything unusual happen, sir?

A Yes, sir, I heard some shooting.

Q All right. Can you relate to the ladies and gentlemen of the jury how long it was after Captain Netherland and Lieutenant Tait came out of the courthouse when you heard the shooting?

A Well, I couldn't say exactly, but couldn't have been but just a few minutes after they came out.

Q Did you hear any number of shots?

A Well, I heard numbers of shots, but I don't know how many.

Q Did any of the guards ever go back into the courthouse after the shooting?

A Yes, sir, they did.

Q All right, who?

A Captain Netherland and Lieutenant Tait went back in.

Q Did you ever go into the courthouse after the shooting started,sir?

A No, sir, I did not.

Q Did you hear any shots after Captain Netherland and Lieutenant Tait went into the courthouse?

A Yes, sir.

Q Do you know how many, sir?

A No, sir, I do not.

Q Can you say how long it was after they went into the courthouse when you heard the first shot?

A Well, almost as they went in I heard it.

Q Now, where was the prisoner -- what they call the paddy wagon, is that what you said?

A Yes, sir.

Q Where was that situated when the

inmates were unloaded from the paddy wagon?

A That was on the right-hand side in the front. They were unloading on the right-hand side in the front.

Q Did the paddy wagon stay in that position?

A Lieutenant Tait and Captain Netherland came back out and moved it up a little so Guard Berryman could sit in it. That's what they were doing outside when the shooting began.

Q What position would that put the paddy wagon in at that time?

A That would still have been on the right-hand side I'd say, oh, halfway the center of the courthouse on the right-hand side. Somewhere near there.

Q When you say right-hand side, is that looking --

A Looking from the front.

Q Now, Mr. Franklin, were there any other prisoners in that van besides Mr. Jefferson and Mr. Washington?

A No, sir.

Q I believe you said you were armed. Is that correct?

A Yes, sir.

Q Did you ever fire any shots on that date, sir?

A No, sir, I did not.

Q Was Mr. Berryman armed on that date, sir?

A Yes, sir.

Q To your knowledge did he fire any shots?

A No, sir.

Q Were there any other inmates besides Jefferson and Washington brought to the courthouse on that morning, sir?

A No, sir, not that I know of.

Q What county is the courthouse located, sir?

A Powhatan County.

Q Is that in the state of Virginia?

A Yes, sir.

Q And did all the events you related to the ladies and gentlemen of the jury occur at the Powhatan County courthouse?

A Sir?

Q Did all of the events that you related to the ladies and gentlemen of the jury as to the shooting you heard and so forth occur at the Powhatan County

1 A They had inmate clothes, brown --
2 You mean before --
3 Q When they were finally dressed up how were
4 they dressed?
5 A In brown inmate clothes.
6 Q Now, did you accompany the two inmates
7 to the Powhatan Circuit Court on that morning, sir?
8 A Yes, I did.
9 Q How did you get to the courthouse?
10 A I was riding in the same panel with
11 Washington and Jefferson, and Lieutenant Tait was driving.
12 Q Where were you seated, sir?
13 A On the right-hand side.
14 Q Now, when you left the state farm
15 where were the inmates seated in the paddy wagon?
16 A Well, Jefferson was seated behind me to
17 the right and Washington was seated to the left.
18 Q Now, were they seated in that position
19 when they arrived at the courthouse in Powhatan County?
20 A No; during the route Washington shifted
21 his position over right behind me, directly behind me.
22 Q Were you able to easily see them when they
23 had gotten into that position, sir?
24 A It was a little more difficult, because
25 I was looking over my shoulder.

Q Can you give a description of how -- what a paddy wagon looked like or that particular paddy wagon looked like?

A Well, this one was -- it is more or less a panel truck and it had a divider between it with little small windows like and screen.

Q Now, when you arrived at the courthouse, sir, what, if anything, did you do?

A Well, when we arrived at the courthouse I was positioned outside of the vehicle and the vehicle was pulled up and they was taken out of the vehicle after the guards had been posted.

Q Now, did you see the two inmates taken from the vehicle?

A Yes.

Q All right. What was there -- what were your observations as to the security devices? Did they have any on?

A They appeared to have been handcuffed and chained.

Q Were any other inmates in that wagon, sir?

A No, sir.

Q Were any other inmates brought to the Powhatan Circuit Court while you were there, sir?

A No, sir.

Q How many vehicles left the state farm on that morning, sir?

A I don't really know, but it was about three I imagine.

Q Three. How many guards came with you on that morning?

A (No reply.)

Q Can you name the guards?

A Well, there was Captain Monte, Captain Netherland, Lieutenant Tait, Charlie Franklin, Snyder, and myself.

Q Do you know guard Herbert L. -- and yourself you say?

A Yes.

Q Did you see any of the guards go into the courthouse?

A Well, the way I was positioned I could only see Guard Snyder was standing up to the front of the courthouse, but Franklin, I couldn't see his position.

Q Did Guard Snyder to your observation ever go into the courthouse?

A Yes, later on he went in.

Q All right. Now, when you first arrived at the courthouse, Mr. Berryman, where was the wagon situated?

A We was sitting on the side of the courthouse -- well, like this courthouse is sitting it was on the left side of it.

Q Did it remain in the same position the whole time you were there?

A The vehicle?

Q Yes.

A After the inmates were taken out the vehicle was backed up for me to be posted there, because it was real cold out there.

Q How far back was it placed?

A Well, it was backed up past the door, past the building where I could observe the front, one side, and the back.

Q Were you armed?

A Beg pardon?

Q Were you armed?

A Yes.

Q What were you armed with?

A .38 and a shotgun.

Q Did you ever fire either one of those vehicles on that date?

A The weapons you mean?

Q Yes.

A No.

1 Q Now, do you recall who accompanied
2 the two inmates into the courthouse?
3 A Well, Lieutenant Tait and it was one
4 that got him out of the vehicle, but I don't know who
5 actually went into the courtroom.
6 Q While you were situated in your van,
7 Mr. Berryman, did anything unusual happen?
8 A Well, Captain Netherland and Lieutenant
9 Tait, they came back and they moved the vehicle. That's
10 the time they moved the vehicle back for me and told me to
11 get in, and I was to stay in the vehicle. And at that time
12 I heard some shots, and Captain Netherland said, "They
13 are shooting in the courtroom," and him and Lieutenant
14 Tait took off for the courtroom.
15 Q Where was Captain Netherland at the
16 time he made that statement, sir?
17 A He was standing beside the panel.
18 Q Did you ever go into the courthouse?
19 A No, sir.
20 Q Why?
21 A Well, I was supposed to be guarding the
22 outside of the perimeter.
23 Q Did you subsequently -- let me ask you
24 this: Do you know how many shots you heard?
25 A Well, the first sounded like two or

1 three shots, then it sounded like about three more.
2 Q Now, did you hear any shots subsequent --
3 following Lieutenant Tait and Captain Netherland leaving
4 your presence?
5 A Well, there was -- like I say, when I
6 first heard the shots it was about two or three, and before
7 Captain Netherland got up round the front I heard about two
8 or three more.
9 Q You ever hear any after Captain Netherland
10 went out of your sight, sir?
11 A Yes.
12 Q How many? Do you recall?
13 A I would say about two, three.
14 Q And you weren't able to observe the
15 front of the courthouse from where you were sitting,
16 were you?
17 A No.
18 Q Now, did you -- later on that day did
19 you have occasion to see these two inmates again,
20 Washington and Jefferson?
21 A Yes.
22 Q When was this?
23 A When they brought them out of the
24 courtroom I was riding in the vehicle behind the paddy
25 wagon that carried them to the penitentiary.

Q Is that the same area that they had come from originally?

A No; they had come from the state farm.

Q Where were they taken?

A To the penitentiary in Richmond.

Q Coming to the courthouse, Mr. Berryman, did anybody else ride in the back of the van besides the two inmates?

A No, sir.

MR. DAVIS: Would you answer counsel's questions, please, sir?

THE COURT: Any questions, Mr. Janus?

CROSS-EXAMINATION

BY MR. JANUS:

Q Mr. Berryman, were you present when both Mr. Jefferson and Mr. Washington were stripped-searched and metal detectors were run over their body?

A Yes, sir.

Q They were given new clothing. Is that right?

A Yes, sir.

Q New shoes as well?

A Right.

Q When the cuffs were put on them the key -- keyhole was towards their body, inside, wasn't it, sir?

A Well, I didn't -- I wasn't -- I didn't put them on there. I couldn't say which way he had turned them.

Q You had said in the past that's the way it was done on that occasion, hadn't you?

MR. DAVIS: I object to that question.

A That's the way we normally do it.

MR. JANUS: I think it is a proper questions. Prior inconsistent statement, your honor.

MR. DAVIS: Judge, Mr. Janus is well aware counsel has to lay the groundwork if he is to impeach the witness by the date and where he made such a prior inconsistent statement.

THE COURT: I just asked him if he made the statement before.

MR. DAVIS: I ask the court he stay within rules.

MR. JANUS: I will be happy to do that.

BY MR. JANUS:

Q Do you recall testifying in the case of Mr. Jefferson on November 30, 1972?

1 MULLIN J. UTT, called as a witness on behalf
2 of the Commonwealth, having been first duly sworn, was
3 examined and testified as follows:
4
5 DIRECT EXAMINATION
6
7 BY MR. DAVIS:
8 Q Mr. Utt, would you state your name for
9 the record, please?
10 A Mullin J. Utt, Powhatan, Virginia.
11 Q What is your occupation, Mr. Utt?
12 A I'm retired.
13 Q Mr. Utt, calling your attention to the
14 22nd day of November 1971, did you have occasion to go to
15 the Powhatan County Circuit Court that day?
16 A Yes, sir.
17 Q What was your purpose for going there,
18 sir?
19 A On jury.
20 Q Do you recall what time of the day or
21 night you arrived there, sir?
22 A About twenty minutes till ten o'clock.
23 Q Was that in the morning, sir?
24 A Yes, sir.
25 Q Did you go into the courtroom, sir?

A Yes, sir.

Q Was anybody in the courtroom when you arrived there, sir?

A Mr. Monte was setting to my left as I went in the door.

Q Did you know Mr. Monte prior to the date November 22nd?

A I have knowed him about five or six years.

Q Was anyone else in the courtroom, sir?

A It was a guard over to -- standing in the rail over next to -- on the right.

Q All right. Now, did you observe any inmates in the courtroom when you arrived there, sir?

A Yes, it was two boys setting up to my right up at the front.

Q Do you recall where they were sitting, sir?

A Well, they were setting inside the rail.

Q Was Mr. Monte sitting in the front or in the back of the courthouse?

A He was in the back.

Q To your left or to your right?

A Left.

Q Mr. Utt, I'm going to hand you this

photograph, sir, and ask if you are able to identify what it depicts?

A Yes, sir, that's right.

Q What does it show, sir?

A It shows the boys setting where this bunch of clothes is right here.

Q It shows what, sir?

A Some clothes or something laying up there.

Q Is that the area where the inmates were sitting?

A That's where the inmates were sitting.

Q Would you hold it up so the jury can see so you are not talking to yourself?

All right, what does that show?

A Well, the inmates were sitting right inside, inside the rail, and right here is where the first shots were fired.

Q Just identify the picture now, sir.

And they were sitting inside the rail?

A Yes.

MR. DAVIS: Could I have that a minute, sir, and then I will give it back to you.

Judge, could this be marked a Commonwealth's exhibit number?

THE COURT: It will be Commonwealth Exhibit Number 2.

(So marked by the court.)

BY MR. DAVIS:

Q Mr. Utt, were there any other inmates in the courtroom at that time, sir?

A Not as I have seen.

Q Now, did you initially notice any of the inmates doing anything, sir?

A No, they was just setting there. I had been in there I guess a minute or two and one raised up and said he wanted to go to the bathroom and he asked the guard where the bathroom was at, and the guard told him it was in the back and he'd take him back there.

Q All right. Now, did he in fact take him back to the bathroom?

A Yes, he went, and I was talking to Mr. Monte, wasn't looking over that way, and it was a shot fired, so I looked over there and they was in this walkway that stepped up into the clerk's -- they was all piled in there wrestling, the two inmates and the guard was.

Q Now, I'm going to hand you another picture -- after I show it to Mr. Janus.

I'm going to ask you, Mr. Utt, if you can identify what that picture shows, sir?

A Well, that shows the place where they was wrass ling in here.

Q All right. And would you point from the photograph point to the jury where the wrestling, as you call it, was taking place?

A Right in here where you step up.

Q Where does that go? Do you know, sir?

A That goes to a backroom in there.

Q All right. And the wrestling was taking place right in this area?

A Right in that area.

Q Would you take this ballpoint pen and mark the area in which you observed -- in the area where the wrestling was taking place, sir?

A (Did so.)

Q Right in this area, is this what you marked? Is that the mark you just put there?

A Yes.

MR. DAVIS: Judge, I'd ask the court that this be introduced as Commonwealth Exhibit Number 3, I believe it is.

THE COURT: All right.

(So marked by the court.)

BY MR. DAVIS:

Q Now, Mr. Utt, what, if anything, did Captain Monte do then, sir?

A Well, when the first shot, Mr. Monte jumped up and run by me and around and went down the aisle and he caught his foot in some seats and fell down. So it was another fired, shot went off. I got down behind the seats.

Q Now, when you talk about running around the aisle, is there more than one aisle in that courthouse?

A It's three aisles

Q All right. Now, which aisle did Mr. -- is there more than one entrance coming into the courthouse from the outside?

A Just one.

Q Did you come in the front entrance when you arrived at the courthouse?

A Yes.

Q Now, in relationship to coming into the front entrance of the courthouse did -- is there an aisle to the right and one to the left?

A Yes, that's right.

Q All right. Now, which aisle was it that Captain Monte ran down when you said he tripped and fell?

A He ran down the right aisle.

Q Now, you didn't see whether or not Captain Monte got up?

A No, I didn't.

Q Do you recall which -- what area he was in when he tripped?

A He was right up next to the banisters.

Q Now, did you remain in the courtroom, Mr. Utt?

A I did till someone opened the door, and I went outside.

Q How many shots did you hear fired before the door was opened, Mr. Utt?

A There was about six shots.

Q And after you -- let me ask you this: Did anybody come into the courthouse after they opened the doors?

A Not anyone but the guard opened the door when I went out.

Q Do you know which guard?

A Mr. Netherland I think.

Q After you exited the courthouse did you hear any other shots?

A No, I didn't hear anymore after I went out.

Q Would you -- now, Mr. Utt, at the time

Captain Monte fell had any shots been fired from the back of the courtroom prior to that point?

A No.

Q Now, as the two inmates were situated which of the two asked to go to the bathroom, the one seated on the right or one seated on the left?

A Well, the one on the right, the one on the end of the seat.

Q Were you able to identify either one of the inmates?

A No, I was not. Didn't pay that much attention to them.

MR. DAVIS: Would you answer Mr. Janus's questions, please?

CROSS-EXAMINATION

BY MR. JANUS:

Q Mr. Utt, was there anyone else in the courtroom to your recollection other than Mr. Monte, the guard, and the two inmates?

A Not as I seen. I had my head turned toward Mr. Monte talking with him.

Q I believe when they were wrestling it would be your statement that they were all scrambled together?

A Yes.

MR. JANUS: I have no further questions. Thank you, sir.

THE COURT: May Mr. Utt be excused, gentlemen?

MR. DAVIS: Yes, sir, he may.

THE COURT: Mr. Janus?

MR. JANUS: Yes, sir.

THE COURT: Mr. Utt, you may be excused from further attendance of court.

WITNESS: I can go home?

THE COURT: All right, you may go home.

Next witness?

MR. DAVIS: Spears Williams.

------oOo------

SPEARS W. WILLIAMS, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Mr. Williams, will you pull up to the mike a little bit so it will pick your voice up and the jury will be able to hear?

State your name, sir?

A Spears W. Williams.

Q Mr. Williams, what is your occupation, sir?

A Farmer.

Q Were do you live, sir?

A Powhatan.

Q Mr. Williams, calling your attention to the 22nd day of November of 1971, did you have occasion to go to the Powhatan County Circuit Court on that date, sir?

A I was called for jury.

Q Sir, what time did you arrive?

A Just near as I can get to it, quarter to ten.

Q Now, when you arrived, sir, what, if anything, did you do?

A I come in on the right-hand side -- on the left-hand side, and I was right over there about where that sheriff's at, and I saw Mr. Monte standing

1 right along in front of the judge's desk there. Mr. Snyder
2 was standing right over to the left over here with these
3 two men, and everything was really quiet. And I was looking
4 at some pictures up in the corner, and all at once I heard
5 a scuffle break loose over here on the left, on the
6 other side, and I looked over there, and from what I could
7 see these two men had grabbed Mr. Snyder's gun and --
8 Q Now, when you say these two men, who are you
9 referring to?
10 A These two inmates he had.
11 Q How were they dressed? Do you recall?
12 A I couldn't say exactly. I couldn't
13 say.
14 Q Where was Mr. Monte at that time, sir?
15 A Mr. Monte had left up here, had left the
16 front up here when I looked back around.
17 Q All right. Did you subsequently -- after
18 you saw the scuffling did you hear any shots?
19 A And after I heard the scuffle over here
20 I looked over and I heard three shots come out of that
21 crowd, and of the three men ascuffling I couldn't tell
22 exactly where the shots come from, but they come out
23 that crowd there.
24 Q What, if anything, did Mr. Monte do?
25 A And it was just a few seconds before Mr.

1 Monte jumped up come out the back and come up the side
2 there and he run right on in at them and he hit one of the
3 men with something -- I don't know what it was -- because
4 I saw his head fly back, about that time things was getting
5 pretty rough and I turned and started out and I heard two
6 more shots go off.
7 Q Now, after you left the courtroom did
8 you see anyone coming in?
9 A And I went on down -- well, I got in a
10 little hurry then. I went on down and it is a column sitting
11 twelve feet from the back of the church -- I mean the
12 courthouse, and between that column and the door I saw another
13 guard come running in the door, and --
14 Q Did you hear any shots?
15 A I heard some more shots, I couldn't say
16 how many.
17 Q Did you know who it was came into the
18 door?
19 A No, I certainly don't. I been seeing his
20 face, but I didn't know him by name.
21 Q Now, were you able to see the gun
22 itself, sir?
23 A No, I didn't see no gun.
24 Q Did you see any other inmates in the
25 courtroom, sir, other than the two that were scuffling?

A No, I did not.

MR. DAVIS: All right. Would you answer Mr. Janus's questions, please?

THE COURT: Mr. Janus?

MR. JANUS: We have no questions, sir.

THE COURT: No questions?

MR. JANUS: Right.

THE COURT: May this witness be excused?

MR. DAVIS: Yes, sir, Mr. Williams can be excused as far as the Commonwealth is concerned.

THE COURT: Just a minute, sir.

May this witness be excused?

MR. JANUS: Certainly.

THE WITNESS: Can I go home?

THE COURT: Yes, sir, you may go home.

Who is your next witness?

MR. DAVIS: Brown E. Snyder.

THE COURT: Who, sir?

MR. DAVIS: Mr. Snyder.

Judge, prior to Mr. Snyder, there's a matter I need to take up with the court, so I'd ask the jury be excused.

THE COURT: All right, gentlemen, the jury's returned.

------oOo------

BROWN E. SNYDER, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Mr. Snyder, would you state your name for the record,please?

A My name is Brown E. Snyder.

Q Mr. Snyder, what is your occupation, sir?

A I am a correctional corporal at the Virginia state farm southside.

Q Calling your attention on the 22nd day of November 1971, were you so employed on that date, sir?

A Yes, sir.

Q Were you a corporal on that date, sir?

A No, sir.

Q Since that time have you been promoted?

A Yes, sir.

Q Call your attention again, sir, to the 22nd day of November 1971, did you have occasion to see the two defendants -- excuse me, see the defendant James Edward Washington, sir?

A Yes, sir.

Q All right, when did you first see him on that day?

A In the M Building, southside.

Q Where is that located, sir?

A Southside.

Q Of what, sir?

A State farm.

Q What county is that situated in, sir?

A Powhatan, sir.

Q What was the purpose for seeing him on that morning, sir?

A I was working the control room at the time, and he was brought out front to be dressed out.

Q All right. Now, what -- did you also have occasion to see one Malcolm Marvin Jefferson on that date?

A In the hallway, yes, sir, right.

Q Was he likewise brought out to be dressed out?

A Yes, sir.

Q Do you know where they were going, sir?

A Yes, sir, they were going to court.

Q What court?

A Over Powhatan.

Q Did you accompany the two inmates to the Powhatan County Circuit Court, sir?

A Yes, sir, I did.

Q How did you arrive -- how did you arrive at the courthouse?

A I was in a state car with Captain Netherland.

Q How did the inmates arrive at the courthouse?

A They was in the paddy wagon driven by Lieutenant Tait and Officer Berryman.

Q Were any other inmates in that wagon besides Jefferson and Washington?

A No, sir.

Q Were you present when the two inmates were placed in the wagon, sir?

A Yes, sir.

Q All right. What was your observation as to their hands?

A They were handcuffed with chains around

1 them, sir.

2 Q Did they appear to be secure, sir?

3 A Yes, sir, they did.

4 Q Were you present when the inmates were

5 removed from the van at Powhatan County Circuit Court?

6 A Yes, sir, I was.

7 Q What were your observations as to their

8 hands at that time, sir?

9 A Secured.

10 Q Now, did you assist in taking the two

11 inmates into the courthouse, sir?

12 A No, sir. I was posted out in front

13 of the courthouse as they were taken out of the paddy

14 wagon.

15 Q All right. On what side of the courthouse?

16 A I was in the front. It would have been

17 on the right-hand side.

18 Q Would that be looking towards the

19 courthouse or away from it?

20 A Looking towards the courthouse.

21 Q Now, did you subsequently later go into

22 the courthouse, sir?

23 A Yes, sir, later Captain Netherland

24 motioned for me to come into the courthouse. I went into

25 the courthouse. He told me to stay in there. I took my

1 position on the right-hand side of the courthouse in the
2 back. He then said he was going back out to check things
3 outside, and he also told me at the time to relieve Captain
4 Franklin -- Officer Franklin outside in about thirty minutes
5 because it was awfully cold that day, so I looked at my
6 watch and it was about nine thirty-five.
7 Q All right. Now, what did Captain
8 Netherland do, sir?
9 A He went back outside.
10 Q Where were the inmates at that point
11 when you arrived in the courthouse, sir?
12 A They were placed up in front of the
13 courthouse. It was a little -- it was a bench up in
14 front and also it was a chair setting there.
15 Q All right. Do you recall which position
16 each of the inmates were seated?
17 A Yes, sir, Jefferson was seated on the
18 bench and Washington was seated in the chair on -- it would
19 be the right-hand side.
20 Q Were there any other inmates in the
21 courthouse?
22 A No, sir.
23 Q Were there any other inmates in that
24 courthouse while you were there that day?
25 A No, sir.

Q Now, was there any other guards in the courthouse while you were there, sir?

A Yes, sir; Captain Monte was.

Q And where was Captain Monte situated?

A He would have been on my left -- from me standing in the back of the courthouse he would have been on my left about the second bench down. He was sitting there doing some writing on a pad.

Q Mr. Snyder, how were you dressed on the day in question?

A I had on a winter uniform, sir, which the coat would have been -- it was this type coat. Pants were the same color. The shirt was identical to this. This is a winter shirt, too. I would say it is a greenish gray.

Q How were the inmates dressed?

A Kind of rusty colored pants. Shirt and jackets were a darker brown.

Q Is that -- the jacket that you have there, sir, is that similar to the jacket you were wearing on the day in question, or is that the same jacket?

A No, similar to it. It is not the same jacket.

Q Same color?

A Yes, sir.

MR. DAVIS: Judge, if it please the court, I move to introduce Mr. Snyder's jacket as Commonwealth Exhibit whatever it is.

THE COURT: Do you have any objection?

MR. JANUS: No, sir, whatever probative value it has. He's testified it wasn't the same jacket,it was similar in color.

MR. DAVIS: We move to introduce it.

THE COURT: All right, it will be Commonwealth Exhibit 4 if there is no objection.

(So marked by the court.)

MR. JANUS: Your honor, may Mr. Davis and I approach the bench one second?

THE COURT: Not about this case?

MR. JANUS: Sir?

THE COURT: Not about this case?

MR. JANUS: Yes, sir.

THE COURT: Well, you can't approach the bench for that reason, no, sir. You want me to excuse the jury?

MR. JANUS: Yes, sir.

THE COURT: Laides and gentlemen of the jury, would you retire to the jury room, please?

(The jury withdrew from the courtroom)

BY MR. DAVIS:

Q Mr. Snyder, I'm going to hand you this clothing and ask you if this clothing is similar to the clothing that was worn by the inmates in question on that date?

A Yes, sir, it is.

MR. DAVIS: Judge, to keep the chain I would like this marked for identification purposes at this time.

THE COURT: All right. This will be Number 5.

(So marked by the court.)

BY MR. DAVIS:

Q Mr. Snyder, were both the inmates dressed in that type clothing?

A Yes, sir.

Q How was Mr. Monte dressed?

A He had on the same thing -- clothes I had, sir.

Q Was that the same type you had then or now, sir?

A Then, sir.

Q Now, while you were posted in your position, Mr. Snyder, did you ever have any conversation with either one of the inmates?

A Yes, sir, one.

Q Which one, sir?

A Washington.

Q Is that the defendant in this case, sir?

A Yes, sir.

Q All right. What transpired between you and Mr. Washington?

A As I was standing in the back Washington turned from his seat and he asked me about going to the bathroom. At first I didn't understand him. So he repreated himself. So when -- Captain Monte asked me what did he want, so I told him he wanted to go to the bathroom.

Q Speak up, Mr. Snyder. I can't hear you.

A Captain Monte asked me what he wanted. I told him he wanted to go to the bathroom. So Captain Monte told me to go ahead and take him, that he would keep an eye on Jefferson.

Q Now, did you in fact start to take him, sir?

A Yes, sir, I did.

Q All right, What did you do and what transpired, if anything?

A I started up the right-hand side of the aisle. As I was going up Washington had already got up from

his seat and was heading for the stairs. The bathroom is right behind the judge's chambers on the right-hand side, the door marked "Private."

Q All right. Now, from where you were standing in the courtroom before you started to move -- I believe you testified you were standing to the right. Is that right?

A That's right.

Q Where in relationship to where you were standing would the rest room have been located, the bathroom?

A Directly in front of me. Right straight up.

Q Straight down the aisle in that direction?

A Straight down.

Q All right, go ahead.

A As I approached Jefferson I stayed to the right-hand side of the aisle and went around side of him where I could watch him too, and Washington had already started towards the steps.

Q What steps?

A Two little steps goes up towards where the bathroom is.

Q Excuse me a moment.

MR. DAVIS: Judge, may I have Commonwealth Exhibit I believe it is 2?

BY MR. DAVIS:

Q Mr. Snyder, would you look at that and see if you can identify what's in that picture?

A Yes, sir. Judge's bench is there, bathroom's back here in the back.

Q Could you relate your comments to the jury, because if you hold it to yourself they can't see it.

A The bathroom's right back here in the back. This here two steps, he started up the steps.

Q All right. Now, go on with your testimony, please, Mr. Snyder?

A Well, as I got to the steps Washington was right on the top step; I had my foot on the first step. Just as I started up Washington turned on me, turned around. On that instance when he turned he grabbed for me.

Q All right. Wait a minute until the jury finishes looking at the picture.

A All right.

THE COURT: That's all right, Mr. Hillman, leave the picture there, sir.

BY MR. DAVIS:

Q All right, now, go ahead, Mr. Snyder.

A Well, as he grabbed for me I realized his hands were free, so as he was grabbing, one hand went down my side towards where my gun was.

Q Show the ladies and gentlemen of the jury how he grabbed you.

A He just grabbed me, one hand was down to my side where he was grabbing for my gun. Other one I was trying to hold him; I was trying to hold him with one hand. I put one hand by the side where the gun was to hold it to keep him from getting it. About that time I was attacked from the back.

Q All right, go ahead.

A All right. We struggled there for a little bit. Next thing I remember I picked myself off the floor.

Q Now, would you say -- you say I believe his hands were free. What do you mean by this?

A Both hands were free. Was no cuffs. No cuffs that I seen at that time.

Q Did you suffer any injuries as a result of your scuffle?

A I was struck during the scuffle, which at the time I don't know when, but I was struck during the scuffle.

Q All right. Now, what type of gun were you carrying on the morning in question, Mr. --

A Carrying a .38 four-inch barrel police special.

Q Now, I'm going to hand you -- let me show it to Mr. Janus.

Mr. Snyder, I'm going to hand you a picture, sir, and ask if that depicts the condition you were in following the scuffle with the two inmates?

A Yes, sir, it is.

Q Was that taken on the day in question?

A Yes, sir, it was.

MR. DAVIS: Judge, please the court --

THE COURT: That will be Commonwealth Exhibit 5.

MR. DAVIS: Judge, we have got five others.

THE COURT: One of them you didn't introduce.

Well, I guess it is marked for 5. It will be 6.

(So marked by the court.)

BY MR. DAVIS:

Q Were you armed on that day in question, sir?

A Yes, sir, I was.

Q What type of weapon you have?

A .38 police special four-inch barrel.

Q Did it have any ammunition in it, sir?

A Yes, sir.

Q All right. How many rounds did it have in it?

A Had five rounds.

Q How many rounds did it hold?

A Hold six rounds.

Q Why did you just have five in it?

A It is the policy back the farm everybody carries five rounds for security reasons.

Q All right. Where was the empty cylinder located on the weapon?

A Behind the hammer, sir.

THE COURT: Keep the pistol over there. If Mr. Janus wants to see it he can come over there.

BY MR. DAVIS:

Q Mr. Snyder, the gun that Mr. Duling just handed to you, sir, can you identify that gun?

A Yes, sir, it is my gun, sir.

Q How are you able to identify it?

A For one thing, has my serial number on

it.

Q What is the serial number?

A D103565.

Q What is the serial number on that gun?

A D103565.

Q Now, what type of gun is that, sir, what make is it?

A Smith and Weston.

Q And what calibre is it?

A .38.

Q What -- do you recall what type of ammunition you were carrying in that gun on the day in question?

A Yes, sir, it was copper-coated shells, sir.

Q How did you know there were five rounds in the gun on that day, sir?

A Sir, we are asked whenever we take our weapons out to check them.

Q Did you check them on that morning?

A Yes, I did.

Q Were all four of the bullets copper coated?

A Yes, sir.

MR. DAVIS: All right. Please the court,

I move to introduce the weapon.

THE COURT: It will be Number 7. Sheriff, would you get that pistol for me, please?

(So marked by the court.)

BY MR. DAVIS:

Q Mr. Snyder, Mr. Duling's handed you a holster. Can you identify that, sir?

A Yes, sir, it is my holster.

Q Is it the holster you were carrying November 22, 1971?

A Yes, sir, it is.

Q All right, now, what is the condition of that holster at this time, sir?

A At this time, sir, the strap has been broken from it.

Q Was it broken from it when you put it on on the morning of November 22, 1971?

A No, sir, it wasn't.

Q Was it broken after the struggle transpired?

A Yes, sir.

Q Now, did you have the strap across the gun to hold it in place when you had it in your holster

that morning, sir?

A Yes, sir.

MR. DAVIS: Your honor, if it please the court, I move to introduce the holster as Commonwealth's Exhibit Number 8.

(So marked by the court.)

BY MR. DAVIS:

Q Now, Mr. Snyder, getting back to the area where you scuffled, where was that located -- I mean excuse me. I withdraw that question.

What was your position after the struggle was over?

A In other words, during the struggle now or after it was over?

Q After the struggle was over, sir, what was your position on the floor?

A After I got up from the floor, now, first thing I noticed was Captain Monte laying on the floor. When I seen him laying on the floor I seen the gun laying beside of him, so I made a dive for that gun to pick it up and I picked it up and turned around and backed up behind the -- it is a little kind of bench going across like it is there, backed up behind them and I was crouched down on my knees. At the time I was backing up

I got a glimpse of the door opening and shutting marked "Private" and something going through it, but I couldn't make out what it was.

Q Now, was the gun that you picked off the floor your own gun?

A At the time I didn't know it was not. No, it was not my own gun. At the time I thought it was.

Q Now, Mr. Snyder, Mr. Duling handed you another gun, sir. Is that the gun you found lying beside Captain Monte's body?

A Yes, sir, it looks like it.

Q After you found that gun, sir, and crouched behind it, did you subsequently turn that gun over to anybody?

A Later on I turned it over to Investigator Hillman.

Q Do you know whose gun that is, sir?

A Yes, sir; it is Captain Monte's.

Q What calibre -- do you know what calibre that gun is?

A I believe it is .32-20 sir.

Q Do you know the make?

A No. No, I don't. I can't say I do, unless I look at it.

Q Well, you got it in your hand, you can

look at it. Does it say what make it is?

A It is pretty well wore down, sir.

MR. DAVIS: All right. Please the court, I move to introduce Captain Monte's gun as Commonwealth's Exhibit Number 9.

THE COURT: It will be Number 9.

(So marked by the court.)

BY MR. DAVIS:

Q Now, Mr. Snyder, would you relate to the ladies and gentlemen of the jury whether or not Mr. Washington when he turned on you was facing you?

A Yes, sir, he was.

Q Were you both looking face to face at that time?

A At that time, yes.

Q And when the party jumped on your back, that put you in between two individuals?

MR. JANUS: Your honor, this is a leading question. I object to the form of the question.

THE COURT: All right, change the form, Mr. Davis.

BY MR. DAVIS:

Q All right, what was your position in relationship to the individuals involved in the struggle when it took place -- when it started?

A Sir, one was in front of me and the other was behind me, sir.

Q Which one was in front of you, sir?

A Washington was in front of me, sir.

Q And which one was behind you?

A I presume it was Jefferson, sir, because -- I never seen him come up, but I know I was struck from the back and he's the only other man in there as far as an inmate.

Q Would you relate to the ladies and gentlemen of the jury what you mean when you say you were struck from the back?

A I was just jumped on from behind and also at the same time I felt two hands beside my gun at the same time when I was trying to hold them off.

Q Now, did you go to the floor, Mr. Snyder?

A Yes, sir, I ended up in the floor.

Q Did you fall down facedown or faceup?

A Facedown, sir.

Q Did Mr. Washington go to the floor

1 under you, sir?

2 A Sir, I have no idea.

3 Q Did you fire your weapon in the

4 courtroom that day, sir?

5 A No, sir, I did not.

6 Q Did you fire your weapon at all that

7 day, sir?

8 A I did not.

9 Q Did you hear any shots fired?

10 A I heard a few shots fired, yes, sir.

11 Q When did you hear them fired, sir?

12 A It was during the struggle, sir. I heard --

13 if I recall right, it was two or three shots, then

14 I heard some rapid firing, and I couldn't say how many

15 that was all together, because everything just happened so fast.

16 Q Did you lose possession of your

17 pistol, Mr. Snyder?

18 A At the time the incident happened I didn't

19 know I had. But I had lost possession of it, yes. I don't

20 know when it left my person, but it did leave.

21 Q Were you unconscious during the struggle,

22 Mr. --

23 A I was dazed a little bit. As far as

24 unconscious, no. But I was dazed a little bit. For a

25 little bit I didn't know what was going on.

1 Q Now, when you saw Captain Monte
2 lying on the floor what was his position, sir?
3 A He was faceup, sir, with his head
4 towards the back of the courtroom, his feet were down
5 towards the judge's bench.
6 MR. JANUS: May the jury be excused?
7 THE COURT: Laides and gentlemen of the
8 jury, will you retire to your jury room a
9 moment, please?
10 (The jury withdrew from the courtroom.)
11 THE COURT: All right, jury's retired.
12 MR. JANUS: Your honor, we would object
13 to the introduction of this picture which purports
14 to show looks like a chalk marking of a body with
15 what would appear -- certainly appear to the jury
16 to be a blood stain. The testimony has been
17 that the head -- he was lying faceup with the
18 head towards the rear. Whatever probative
19 value the picture has could certainly be
20 depicted verbally, as has already been done,
21 and additionally by Mr. Snyder pointed to some
22 other picture that's already been introduced to
23 the spot where the body was found. The blood
24 stain has no probative value whatsoever except
25 to prejudice the jury. For those reasons we

1 Commonwealth Exhibit Number 9 under that
2 theory. I believe this is 10, excuse me.
3 Return the jury.
4 MR. JANUS: We respectfully note
5 our exception to the court's ruling.
6 THE COURT: All right.
7 (So marked by the court.)
8 (The jury returned to the courtroom.)
9 THE COURT: All right, gentlemen,
10 jury's returned.
11
12 BY MR. DAVIS:
13 Q Mr. Snyder, can you identify what that
14 picture depicts, please?
15 A Yes, sir, it is a drawing of the
16 position that Captain Monte was laying on the floor.
17 Q Now, with that -- well, the
18 photograph speaks for itself.
19 Had the body been movedprior to the arrival
20 of the investigators on the scene?
21 A I don't recall, sir.
22 Q Now -- you can just lay that up there,
23 Mr. --
24 MR. DAVIS: Move to introduce that.
25 I think it's already been introduced as Commonwealth's

Exhibit 1.

MR. JANUS: Your honor, we have an additional motion it could not come in on the grounds this officer testified he doesn't know whether the body had been moved. There is no testimony who made the chalk mark.

MR. DAVIS: He said that's where he fell.

THE COURT: That's what he said I understand.

What did you say, Mr. Snyder? Didn't you say that was the position he fell, or what did you say?

THE WITNESS: I said that was the position he was laying in.

THE COURT: All right. Sheriff, hand me the photograph.

BY MR. DAVIS:

Q Now, after the scuffle was over, Mr. Snyder, did you ever see the inmates again?

A Yes, sir, later we did. By that time Lieutenant Tait and Captain Netherland entered the courtroom -- I never seen them come in, but they were in at that time, and then we hollered for Jefferson to come

out, which he was in the door on the right-hand side marked private.

Q On the right-hand side of what, sir?

A The courthouse, sir, in other words, going towards where the bathroom was, hollered to him a few times, finally he came out. He had his hands in the air.

Q Would you show the ladies and gentlemen of the jury how is hands were?

A They was up. (Demonstrating.) He come over and sit down I believe, if I recall, on the first or second step, sit there. Later we called for Washington to come out. He hesitated a little bit before he come out. He made some remarks, but I don't recall right now what they were. Then --

Q Where did he come from, sir?

A He was on the opposite side the room, in other words, in the back, where it was another -- where the jury room would be, he was in that room.

Q That would put him on the right or left side of the court building?

A Facing it it would have been on the left side.

Q So that would have been the opposite door from where Jefferson came out?

A Yes, sir.

Q Go ahead.

A Finally we called to him and I believe Jefferson said something to him about coming on out and when he come on out he had both hands in the air then.

Q What were the condition of their hands? Were they still secure or were they free?

A No, sir, they had their hands in the air.

Q Were they secure or were they free?

A They were free, sir.

Q Did you ever hear anything out of Captain Monte?

A I heard one little groan, but I don't recall exactly when it was, but I did hear a groan.

MR. DAVIS: All right. Would you answer Mr. Janus's questions, please?

MR. JANUS: Your honor, I would anticipate cross-examination of Mr. Snyder is going to take a little while. It is one o'clock. I would prefer to have a break now for lunch.

THE COURT: All right. That's possibly a good procedure. We will break for lunch. Sheriff, will you take charge of the jury and see that they are fed and bring

return the jury.

Mr. Snyder was on the witness stand ready for cross-examination.

Mr. Snyder, you may take your seat back.

(The jury returned to the courtroom.)

THE COURT: All right, gentlemen, all the jurors are in the box.

You may proceed with your cross-examination, Mr. Janus.

CROSS-EXAMINATION

BY MR. JANUS:

Q Mr. Snyder, did you testify on direct examination that you saw Captain Netherland come into the door?

A No, sir, I did not.

Q You didn't see him come in the door?

A I did not see him come in the door.

Q Sir, I'm going to hand you a photograph and ask if you can identify this? That accurately reflects the picture taken from the rear of the Powhatan courthouse, doesn't it?

A Yes, sir.

MR. JANUS: Your honor, we would move to introduce this as Defendant's Number 1.

THE COURT: All right.

(So marked by the court.)

BY MR. JANUS:

Q I'm going to hand you another photograph, sir, and ask you if that doesn't depict the area in which the struggle took place that you previously described?

A Yes, sir, that looks the same corner.

Q The right-hand corner?

A Yes, sir.

Q That shows the two steps?

A Yes, it does.

Q Mr. Snyder, the defendant was on the top step and you had taken -- put your feet on the first step. Is that correct?

A Yes, sir.

MR. JANUS: Your honor, we would move to introduce this as Defendant's Exhibit.

THE COURT: All right, it will be Defendant's Number 2.

(So marked by the court.)

BY MR. JANUS:

Q I'm going to hand you third photograph, Mr. Snyder, and ask if that doesn't reflect the counsel table and the bench and chair inside the rail that you previously described?

A Yes, sir, that does look like it.

Q I believe it was your testimony that Mr. Washington would have been in the chair and Mr. Jefferson would have been on the bench?

A Right.

MR. JANUS: Your honor, we would move to intreduce this picture --

THE COURT: Defendant's Number 3.

MR. JANUS: -- as Defendant's Number 3.

MR. DAVIS: We have no objection.

(So marked by the court.)

BY MR. JANUS:

Q I hand you now a fourth photograph and ask you if that doesn't depict a closer view of the door marked "Private" that as you face the judge's bench would be the door on the right?

A It looks like the door. I can't see the words where it is marked "Private," but looks like the same door.

Q I don't mean to imply you can see the word "Private" here. That's the same door you have described with the word "Private" on it. Is that correct?

A Yes, sir, the same door.

MR. JANUS: That would be Defendant's Exhibit Number 4, your honor, which we would move to introduce.

THE COURT: All right.

(So marked by the court.)

BY MR. JANUS:

Q The fifth picture I hand you, sir, and ask you if you can identify that as picture showing -- taken from approximately the area of the jury box looking to the judge's bench and depicting both doors?

A Yes, sir.

MR. JANUS: Your honor, we move to introduce that -- this picture as Defendant's Exhibit Number 4.

THE COURT: 5.

MR. JANUS: 5, excuse me.

(So marked by the court.)

BY MR. JANUS:

Q And the sixth photograph, Mr. Snyder,

I ask you if that doesn't show the door to the left in the same area?

A Yes, sir, it does show the door to the left.

MR. JANUS: Move to introduce that as Defendant's Exhibit Number 6.

THE COURT: All right.

(So marked by the court.)

BY MR. JANUS:

Q The bench was there that day, the bench that is depicted in Defendant's Exhibit Number 2, wasn't it, sir? Or a bench in that approximate area?

A Yes, sir.

Q Later, after the struggle was over, Mr. Jefferson was seen by you to come out of this door that's in the right in Defendant's Exhibit Number 1. Isn't that correct?

A Yes, sir, the right door.

Q And Mr. Washington, the defendant, came out of the door to the left, would be over --

A Yes, sir, left door.

Q Would it be fair to say that things happened in a hurry?

A Yes, sir, they did, very fast.

1 Q And you are not sure of a lot of the
2 details and the order in which they occurred, are you,
3 sir?
4 A Only what I have said here today, sir.
5 Q You don't even -- can't recall specifically
6 even what calibre of bullets you had in your gun that day,
7 could you?
8 A Calibre, sir?
9 Q Yes, sir.
10 A Only it was .38, sir, when I checked
11 this morning -- that morning.
12 Q Had you prefiously testified you
13 didn't know what calibre they were?
14 A I think I said .38, sir. The make of
15 them, no, I didn't.
16 Q Do you recall testifying in the Jefferson
17 case on November 30, 1972, in Powhatan County?
18 A No, sir, I don't recall.
19 Q November 30, 1972, you don't recall
20 testifying?
21 A To what calibre, sir?
22 Q No, in the Jefferson case, just do you
23 recall testifying that day in the Jefferson case?
24 A Yes, sir.
25 Q You recall being asked the question by

Mr. Davila on page 142,line 9: Do you recall what type or calibre of ammunition you were carrying in the gun that day? Answer: No, sir.

A I believe that's what I said, sir.

Q Well, that was just a year after this took place, wasn't it, Mr. Snyder?

A Yes, sir.

Q Wouldn't your memory have been better on that occasion than it is some close to three years afterwards?

A Possibly, but I didn't remember.

Q How many times have you talked to the state trooper Investigator Hillman or the Commonwealth's attorneys about this case and your testifying in it? Dozens?

A No, sir.

Q How many times?

A I don't recall. Three, four, maybe something like that. Maybe more.

Q It's been more than three or four times, hasn't it, sir?

A Could be.

Q When Mr. Washington turned in to you you were approximately one foot away from him. Isn't that correct?

A About that, yes, sir.

1 Q You have admitted previously that you
2 made a mistake in judgment on that day, didn't you?
3 A Yes, sir, I have.
4 Q The mistake you made was that you were
5 taught in prison regulation and law enforcement regulation
6 not to follow a prisoner that close. Isn't that correct?
7 A Yes, sir, when he is unsecured.
8 Q Well, you are taught not to follow
9 someone that close, aren't you?
10 A Yes, sir.
11 Q After the shooting you ducked behind
12 the rail. Is that correct?
13 A I backed up behind the rail, yes, sir.
14 Q Did you duck down so that your person was
15 protected?
16 A Where I was protected, but I could
17 still see over the rail, sir.
18 Q And would that have been -- if I could
19 see the pictures again. Can you see?
20 A Yes, sir, I can see.
21 Q Would that be the rail over here on the
22 far right?
23 A See where the rail is right here, it
24 would be the rail to the far right against the wall.
25 Q And that would be Defendant's Exhibit

1 Number 3 that we are referring to.

2 In Defendant's Exhibit Number 1 it would be

3 to the far right of the picture behind here. Is that

4 correct?

5 A That's correct.

6 Q Mr. Snyder, just two more questions,

7 sir.

8 You can't tell these ladies and gentlemen of the

9 jury that this defendant got your gun out of your holster,

10 can you, sir?

11 A No, sir, I cannot.

12 Q One time you had your hand on your

13 revolver?

14 A Yes, sir, I did.

15 Q And last question: You can't tell the

16 ladies and gentlemen of the jury that this defendant

17 James Edward Washington shot Captain Monte, can you, sir?

18 A No, sir, I cannot.

19 MR. JANUS: I have no further

20 questions.

21 THE COURT: All right. Any redirect,

22 Mr. Davis?

23 MR. DAVIS: Yes, sir.

24

25

REDIRECT EXAMINATION

BY MR. DAVIS:

Q Did you ever regain possession since this incident occurred, Mr. Snyder, of your revolver?

A No, sir, I have not.

Q Have you ever since this incident occurred removed any of the live or spent rounds from the chamber of the gun?

A No, sir.

Q Did you fire your gun on that day in question, Mr. Snyder?

A No, sir, I did not.

MR. DAVIS: Thank you. I have no further questions.

THE COURT: All right, may Mr. Snyder be excused?

MR. JANUS: Just one other question, sir.

RECROSS-EXAMINATION

BY MR. JANUS:

Q Your gun was found near the door marked "Private." Isn't that correct?

A To my knowledge, yes, sir, it was.

MR. JANUS: Let's point that out so we don't -- excuse me, judge, one more time.

MR. DAVIS: Judge, I object to it. The witness is depending on somebody else's testimony. It is hearsay.

THE COURT: What is that?

MR. DAVIS: Where his gun was found, unless he found it himself.

THE COURT: I don't know, did he find it himself or did he see it found?

BY MR. JANUS:

Q Do you know where your gun was found?

A I know where I heard it was found.

Q Who did you hear it from? Lieutenant Tait?

A Yes, sir, I believe it was.

MR. DAVIS: All right. I withdraw my objection. Go ahead.

THE COURT: All right.

BY MR. JANUS:

Q It was found in front of this door marked "Private" here. Is that correct?

GROVER E. HAMILTON, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Mr. Hamilton, will you state your name for the record, please?

A Grover E. Hamilton.

Q Where do you reside?

A Powhatan County.

Q Calling your attention to the 22nd day of November 1971, did you have occasion, sir, to go to the Circuit Court of the County of Powhatan?

A Yes, sir, I was on duty.

Q Do you recall what time of day you arrived, sir?

A At about nine-thirty.

Q All right, sir. When you arrived where did you go, sir?

A Well, I didn't go anywhere. I stood around there for about ten minutes, and I think I went in the courthouse.

Q All right, sir. Now, when you walked

1 into the courthouse what, if anything, did you observe,
2 sir?
3 A Well, when I walked in the courthouse
4 I closed the door. Mr. Williams was with me, and he
5 came in first. I turned around that closed the door, and
6 as I stepped forward up behind the benches there was a
7 scuffle in the courthouse.
8 Q All right, sir.
9 MR. DAVIS: Now, may I see those
10 defense exhibits 1 through 6?
11
12 BY MR. DAVIS:
13 Q Mr. Hamilton, I'm going to ask you, sir,
14 if you can tell the ladies and gentlemen what that
15 photograph right there shows?
16 A As best I can tell, this shows looking
17 from the rear of the courthouse toward the front it
18 looks -- the right-hand corner where the scuffle was taking
19 place.
20 Q All right, sir. Now, when you say a
21 scuffle, was there more than one person involved in the
22 scuffle?
23 A Yes, sir.
24 Q How many people were involved in it as to
25 your observation, sir?

A It was three people.

Q All right, sir. Will you describe the type clothing the individuals had on if you can, sir?

A There were three scuffling. It was a man on the bottom in theprison -- the tan or prison-type garb, and then it was a guard, and I think that's kind of a greenish-type clothing, that was on top of him. And it was anotherperson in the convict-colored garb on top.

MR. DAVIS: I got to have the exhibit we marked for identification, No. 5, the clothing.

BY MR. DAVIS:

Q Mr. Hamilton, I'm going to hand you some clothing and ask what your observations were as to the clothing, if it was similar to that clothing that the inmates had on, sir?

A Yes, sir.

Q I'm going to hand you this jacket, sir, and ask if this jacket is similar to the clothing that the guard had on that you saw in the scuffle?

A Yes, sir.

MR. DAVIS: If the court please, would the record show that was Exhibit Number 4, the second exhibit that was shown to him?

THE COURT: All right, sir, the record will so show.

BY MR. DAVIS:

Q Now, were you able to tell the position of the three individuals as they were scuffling on the floor, sir?

A Yes, sir. The man on the bottom was faceup. The man in the middle was facedown, and the man on top was facedown.

Q Now, did you observe anything else, Mr. Hamilton?

A Yes, sir. From that point the -- I saw the arm with a gun in it come from under the crowd held up in the air in this fashion and a shot was fired from it.

Q Now, were you able to tell what type of clothing was on that arm, sir?

A Yes, sir; it was the prison-type garb. I could see the lighter colored part of it.

Q Were you able to tell the color of the arm, sir?

A Yes, sir.

Q What color was it?

A It was black.

Q Now, what, if anything, did you do after you --

Let me ask you this: Did you see another guard in the courtroom, sir?

A Another guard?

Q Yes, sir.

A Yes, sir. After the first shot was fired -- I hadn't seen him before, but he came from the -- looking from the back of the courthouse it would have been the left rear corner of the courthouse. He came behind me and run around me and up the aisle on the right-hand side.

Q All right, sir. What else did you observe, sir, if anything?

A Well, he stumbled and fell as he came there, and he kind of knocked about three of the benches sideways and he kind of fell to his knees. And he was in -- he had gotten to a little opening there, you know, from the back of the court from the -- well, like this rail over here.

Q Yes, sir.

A From where the other folks are sitting. He got to that point and at that point I turned.

Q Now, how many -- was it one shot the only shot you heard, Mr. Hamilton?

A No, sir.

Q How many shots did you hear?

1 A That shot was fired. As I turned I turned
2 to Mr. Williams and told him to get out of the courtroom, he
3 could get killed, and as I was turning to leave, another
4 shot was fired there, and of course I was right at --
5 almost at the door. As I went through the door the
6 third shot was fired, and as I was on the courthouse front
7 porch the fourth shot was fired, and then I moved on up
8 farther and as best I can recollect there were two more
9 shots fired.
10 Q Now, did you ever see any other guards
11 come into the courthouse?
12 A Well, as I was going out of the courthouse
13 I think there were two guards came running in the
14 courthouse.
15 Q Did you hear any shots fired subsequent
16 to their going into the courthouse?
17 A After they went in?
18 Q Yes, sir.
19 A I think that's when the two shots were
20 fired.
21 Q Do you know who the two guards were that
22 went into the courthouse?
23 A No, sir, I couldn't tell you for sure.
24 Q Did you know either of the two that
25 were already in there, sir?

A At the time, no, sir.

Q What was the position of the gun when you heard the first shot, Mr. Hamilton?

A Position? It was in the arm stretched out like this, and the first shot was fired up, straight up.

Q Mr. Hamilton, is the Powhatan Circuit Court located in the county of Powhatan?

A Yes, sir.

MR. DAVIS: Thank you. Would you answer Mr. Janus's questions, please.

CROSS-EXAMINATION

BY MR. JANUS:

Q Mr. Hamilton, who was in the courtroom with you at the time this took place? Do you recall?

A It happened just as I walked in the door, and there were some people in the left rear corner of the courthouse, but like I say, I just walked in and I couldn't tell you who they were. Four or five people I imagine in the corner. Mr. Williams came in ahead of me. I opened the door for him and closed it behind me.

MR. DAVIS: Your honor, could I see Defendant's No. 1?

BY MR. JANUS:

Q The door to enter the courtroom is in the rear of course. Is that correct? Somewhere back in this area?

A Yes, sir.

Q And you stood back in this area?

A Yes, sir. It is a post right back here and right back of the benches, and I was standing back of the last bench.

Q You never came forward past any of the --

A No, sir.

Q And all of this happened in a very short period of time, did it not, sir?

A Yes, sir.

Q And with the struggle that was just a mass of the three bodies tangled up on the step in this area back here, was it?

A They were in the position I said before, yes, sir. I could see them in this right-hand corner right over here. Right where those steps are.

Q The other inmate -- both inmates were black, weren't they?

A Yes, sir.

MR. JANUS: Thank you, sir. I have no further questions.

THE COURT: Anymore redirect?

MR. DAVIS: No, sir.

THE COURT: All right, may Mr. Hamilton be excused, gentlemen?

MR. DAVIS: Yes, sir, Mr. Hamilton may be excused.

THE COURT: Mr. Janus?

MR. JANUS: Yes, sir.

THE COURT: All right, Mr. Hamilton, you may be excused from further attendance of the court.

Who is your next witness?

MR. DAVIS: Captain Netherland, please.

------oOo------

JOHN D. NETHERLAND, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q State your name for the record, please, sir?

1 A John D. Netherland.

2 Q What is your occupation, Mr. Netherland?

3 A I am a superintendent of Dinwiddie

4 correctional unit.

5 Q Who are you employed by, sir?

6 A The Virginia prison system.

7 Q Calling your attention to the 22nd day of

8 November 1971, sir, were you employed as a -- with the

9 prison system on that date, sir?

10 A Yes, sir.

11 Q What was your assignment then?

12 A I was captain of the guard at the

13 Virginia state penitentiary farm in Powhatan County.

14 Q Is your present position a promotion,

15 Captain Netherland?

16 A Yes, sir.

17 Q Calling your attention again, sir, to

18 November 22nd of 1971, did you have occasion on that date

19 to go to the Powhatan County Circuit Court?

20 A Yes, sir.

21 Q What was your purpose for going there,

22 Captain Netherland?

23 A I was to appear in a case pending before

24 that court on that date.

25 Q Did you have occasion, sir, to see the

1 defendant James Edward Washington and another inmate by
2 the name of Malcolm Marvin Jefferson on November 22, 1971?
3 A Yes, sir.
4 Q Where did you first see them?
5 A I saw them at the state farm in Powhatan
6 County as they were being readied to be transported to court
7 on that day.
8 Q All right. And how were they transported?
9 A They were transported in one of the
10 state farm's paddy wagons.
11 Q Did you accompany that paddy wagon,
12 sir?
13 A I followed it to the courtroom, yes, sir.
14 Q Were you riding alone, sir?
15 A No, sir. Guard Snyder was riding with
16 me in a car. We were behind the -- well, there was the paddy
17 wagon and a pickup truck and then I was in a car following
18 the pickup.
19 Q All right. Who was operating the
20 paddy wagon?
21 A Lieutenant Tait.
22 Q Was he alone, sir?
23 A No, sir. He had Guard Berryman with
24 him.
25 Q All right. Who was in the pickup
truck?

1 A Captain Monte and Guard J. C. Franklin.
2 Q Now, do you recall what time you
3 left the state farm, sir?
4 A We left the farm approximately
5 nine-ten, nine-fifteen A. M.
6 Q Do you recall what time you arrived
7 at the courthouse, sir?
8 A Approximately nine-thirty to nine-
9 thirty-five A.M.
10 Q Now, upon your arrival, sir, what, if
11 anything, transpired far as the inmates is concerned?
12 A The paddy wagon -- when we go to the
13 courthouse the paddy wagon drove around behind the
14 courthouse and up to the south side of the courtroom.
15 I parked the vehicle that I was driving in front of the
16 courthouse on the west side of it.
17 Q All right. Now, were you the officer in
18 charge that particular morning?
19 A Captain Monte and I together, both being
20 captains, we both were considered actually in charge of the
21 detail.
22 Q All right. As to the relationship of the
23 other parties that came to the court what, if anything,
24 did you do with them?
25 A The inmates you speaking of, sir?

1 A Captain Monte and Guard J. C. Franklin.
2 Q Now, do you recall what time you
3 left the state farm, sir?
4 A We left the farm approximately
5 nine-ten, nine-fifteen A. M.
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7 at the courthouse, sir?
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13 courthouse the paddy wagon drove around behind the
14 courthouse and up to the south side of the courtroom.
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16 courthouse on the west side of it.
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18 charge that particular morning?
19 A Captain Monte and I together, both being
20 captains, we both were considered actually in charge of the
21 detail.
22 Q All right. As to the relationship of the
23 other parties that came to the court what, if anything,
24 did you do with them?
25 A The inmates you speaking of, sir?

A No, the other guards.

A Guard Franklin was positioned in front of the courtroom on the west side. Guard Snyder was positioned at a little small bush on the southwest side of the courtroom outside. And Guard Berryman was positioned to the southeast corner outside.

Q Were the inmates removed from the wagon?

A Yes, sir.

Q Were the two inmates Jefferson and Washington the two that were in that wagon, sir?

A Yes, sir.

Q Were they secured in any fashion?

A Yes, sir. They had handcuffs on and then this was fastened to what we call a safety chain.

Q Did you observe them when they were moved from the wagon?

A Yes, sir, visual check.

Q What was your observation as to the handcuffs and chain at that time, sir?

A They appeared to be in order as far as security.

Q Now, were the inmates subsequently taken inside the courthouse?

A Yes, sir.

Q Did you accompany them into the courthouse?

1 A I followed them into the courthouse.
2 Q Were there any other inmates in the
3 courthouse?
4 A No, sir.
5 Q Now, did you observe where the inmates
6 were placed after they went inside the courthouse?
7 A Yes, sir. They went down the -- as you
8 go in the door they went down the aisle to the right and
9 just when they got up in front of a little partition or
10 at least a bar similar to the one in this courtroom,
11 they were positioned right in front of that. And one
12 was seated on a chair and the other one was seated on a
13 bench.
14 Q Were they still secured at that time,
15 sir?
16 A They appeared to be, yes, sir.
17 Q Now, did you remain in the courthouse?
18 A No, sir, I did not.
19 Q Did any guards remain in the courthouse?
20 A Yes, sir; Guard Snyder had come into the
21 courthouse at that point and Captain Monte was also in the
22 courthouse.
23 Q When you left where was Guard Snyder
24 positioned, sir?
25 A He was standing at the back or at the

1 entrance door just to the right facing into the courtroom.
2 Q And where was Captain Monte situated?
3 A He was to the left on the last bench
4 back.
5 Q Now, I suppose then this was at the
6 point you left the courthouse. Is that correct?
7 A Yes, sir.
8 Q All right. Now, after you left the
9 courthouse what, if anything, did you do, sir?
10 A I left the courthouse to go out to
11 advise Guard J. C. Franklin that he would be relieved
12 approximately each thirty minutes. It was pretty cold
13 that morning. And then after I talked to Guard Franklin
14 maybe two to three minutes I went on around to the back of
15 the courthouse. Lieutenant Tait had gone back there to
16 reposition the paddy wagon so that Guard Berryman could
17 sit in the paddy wagon and observe the back of the
18 courthouse and also the side of it. And I went back to
19 check the position of the vehicle and make sure that he
20 would have a clear view of the areas that he would be
21 responsible for.
22 Q Now, did you ever hear any shots,
23 Captain Netherland?
24 A Yes, sir. I heard two shots just
25 about the time that I got to where the vehicle was

1 parked at the back of the courthouse.

2 Q What, if anything, did you do then, sir?

3 A I assumed something was wrong inside the

4 courtroom, and so I started running back toward the front

5 of the courthouse, and so that I could come in through the

6 entrance door.

7 Q Now --

8 MR. DAVIS: May I have Defendant's

9 Exhibits there, sir, and I guess Commonwealth's

10 Exhibit Number 1.

11

12 BY MR. DAVIS:

13 Q Now, Mr. -- Captain Netherland, would

14 you show the ladies and gentlemen of the jury, if you can

15 identify that picture as being the courthouse at Powhatan,

16 where the door you entered is located?

17 A Yes, sir. This is the door of the

18 courthouse. The paddy wagon was parked at this backside

19 of the courthouse. This is where I first heard the shots.

20 And then I started running in this direction and went in

21 through the entrance door behind these columns.

22 Q All right. And what -- is that marked

23 as Commonwealth's Exhibit Number 1 on the back, sir?

24 A Yes, sir.

25 Q Now, where were the -- while you have

the picture would you show the ladies and gentlemen of the jury, if you can, where the other guards were situated outside the courthouse?

A Guard Franklin at the time that we heard the shots Guard Franklin was over on -- back from this corner of the courthouse back this direction. It would be out of sight on this picture.

Q What was his purpose for being there, sir?

A For security of the front of the courthouse plus the blind side as far as the picture is concerned.

Q All right. Thank you. Go ahead, sir.

A Guard Berryman was positioned back on this corner for --

THE COURT: Gentlemen, what relevancy does this have with the case? He was just posting a guard, which he did.

MR. DAVIS: Judge, I'd rather not say it in front of the jury. I'll say it if you would like to have the jury go out.

THE COURT: Well, go on.

BY MR. DAVIS:

Q All right. Now, what was the purpose for Guard Berryman being at the back in the area he was?

1 A To maintain security on the back of the
2 courthouse and also this side.
3 Q All right. Thank you.
4 Now, is there another front entrance to that
5 courthouse, Captain Netherland?
6 A Not another front entrance, no, sir.
7 Q Are there any other doors in that
8 courthouse?
9 A Yes, sir. There's a door leading --
10 leads from the outside into the judge's chambers.
11 Q Now, when you arrived in the courthouse,
12 Captain Netherland, what were your observations?
13 A When I went through the entrance door
14 I looked to the area of the judge's bench, which was
15 straight in front of me, and to my right. It was a door
16 there marked "Private," and this door was about two-thirds
17 of the way open swinging to my right, and it was an inmate
18 in brown prison clothing going around behind that door
19 kind of out of sight.
20 Q What else were you able to see at that
21 time, Mr. Netherland?
22 A I didn't see anyone up in that area in
23 view at all except for this inmate going out of my sight
24 behind the door.
25 Q What, if anything, did you do, sir?

A I had my weapon in my hand when I came through the entrance door, and knowing the jury room -- I mean the judge's chamber room, excuse me, there was an outside door back there and also some windows in that room, and knowing he was going out possibly heading toward that outside door I directed a shot through the door in an attempt to stop him.

Q How many shots did you fire at that door, sir?

A One shot.

Q Was there -- were you able to see anyone in your line of fire when you fired the shot, sir?

A No, sir. Other than the man going around behind the door.

Q Did you see Captain Monte at that point in time, sir?

A No, sir.

Q Now, after you fired that shot, sir, what, if anything, did you do?

A After I fired that shot there was an inmate came out from behind the judge's bench ducking through a door to my left, and I directed a shot in his direction that went low.

Q Captain, I'm going to hand you what is Defendant Exhibit Number 1 and ask if you can identify what

that picture depicts, sir?

A Yes, sir. This is the courtroom as you would view it from the entrance door that I came through. This is the door that I shot the one shot through. Then when I shot that shot then the other inmate came out from behind this judge's bench and went through this door.

Q All right. Then what, if anything, did you do?

A At that point after I fired that shot the door came shut and then a few seconds, I would say, later this door opened up and I could see a man in there in a low position and then I directed another shot through that door.

Q Do you know where that shot went, sir?

A The second shot?

Q Yes, sir.

A Through this door? Yes, sir. It went just a little bit high and to the right of the doorknob.

Q Where did the first shot go?

A The first shot that I shot went through this door over here.

Q Where did the first shot go that you fired at the other door?

A First shot I fired went through this

1 chair -- maybe not this particular chair, but a chair that
2 was setting in front of the attorneys's bench, striking the
3 top of this counter and then glancing up into the door facing.
4 Q Did you fire any more than those three
5 shots?
6 A No, sir.
7 Q Now -- excuse me, while you got that,
8 Captain Netherland, can you show or does that picture show
9 the area in which you were standing when you fired your
10 shots?
11 A No, sir, other than it was back behind
12 these benches.
13 Q How far would you say you were standing
14 or can you say you were standing from the judge's bench
15 at the time you fired the shots?
16 A Clean across the length of the
17 courtroom, which I would say is thirty-five, forty feet.
18 Q How tall are you, Captain Netherland?
19 A Six feet.
20 Q What type of weapon were you carrying
21 on the date of November 22, 1971, Captain Netherland?
22 A I was carrying a Colt revolver six-inch
23 barrel.
24 Q What calibre, sir?
25 A .38 calibre.

Q Captain Netherland, how many rounds were you carrying in your gun that day, sir?

A Five.

Q Why did you just carry five rounds, sir?

A About a year or so prior to this particular incident we had had one of the employes that had knocked a weapon off of a table and the weapon did fire, shooting a man through the leg accidentally. So following that particular incident we issued a directive that there was to be a blank carried underneath the firing pin.

Q How many cylinders did your gun have?

A Six.

Q Where was the empty cylinder located?

A It is located underneath the firing pin.

Q What type of ammunition did you have in your gun, sir?

A I had a regular state-issued ammunition, which was lead-coated bullets.

Q I am going to hand you a gun, sir, a pistol and ask if you can identify that, sir?

A Yes, sir.

Q All right. Whose gun is that?

A This is the weapon that I was carrying that day.

Q Now, after you -- after this was all over, sir, did you turn your gun over to someone?

A Yes, sir, I turned it over to Investigator Hillman.

MR. DAVIS: May it please the court, I move to introduce that as Commonwealth's Exhibit 11, I believe.

THE COURT: Number 11, isn't it?

(So marked by the court.)

BY MR. DAVIS:

Q Did any other guards come in from outside?

A Sir?

Q Did any of the other guards run into the courtroom with you when you came in?

A Yes, sir; Lieutenant Tait followed me in.

Q What was the color of the bullets in your revolver, sir?

A They were lead.

Q To your knowledge did anyone else fire any shots from the back of the courtroom besides yourself?

A No, sir.

Q Captain Netherland, is that the chair that you fired through in the courthouse in Powhatan County that you can see was in the picture, sir?

A Yes, sir.

Q The area where the hole is in I presume, is that the area where the bullet hit?

A Yes, sir, and I --

Q Would you point out to the ladies and gentlemen of the jury where the hole is located?

A The chair was setting in this direction. I was standing back and fired through it. The bullet went through it and came out on this side and struck the bench in front of it.

MR. DAVIS: I am going to introduce that as -- I believe it is Commonwealth Exhibit Number 12?

THE COURT: All right, it will be marked as such.

(So marked by the court.)

BY MR. DAVIS:

Q Now, Captain Netherland, at the time or subsequent thereto were you the keeper of the gun records at state farm?

A At the time the offense took place Captain Monte was the keeper of the records. Following his death then I assumed these duties.

Q All right.

MR. DAVIS: May I see Commonwealth's

Exhibit Number 9, please?

BY MR. DAVIS:

Q I'm going to hand you this weapon, sir, and ask if you can identify that?

A Yes, sir.

Q All right. Whose gun was that, sir?

A This was the weapon being carried by Captain Monte on that day. This is a state weapon. And I have the card on it.

Q Now, Captain Netherland, what type of gun is that, sir? What make of gun is that, sir?

A That's a .32-20 pistol, police positive.

Q Do you know what manufacturer makes it?

A No, sir.

Q Now, Captain, what were your observations after all the shooting was over, sir?

A After I fired the last shot that I fired and I changed positions, went from the back of the courtroom to the left and then up an aisle toward the front, and I stopped just about the area where the railing was, and I was trying to get the two inmates that had went in those two separate rooms to come out, and sometime in this period of time that I was trying to get them to come out I looked over to my right and this is when I saw

1 Captain Monte lying in the floor.

2 Q How was he lying?

3 A He was lying on his back faceup and

4 sprawled out in the floor at the end of the attorneys's

5 bench.

6 Q All right. Now, which direction was his

7 face?

8 A Faceup..

9 Q All right. Was his head away from you

10 or to you, sir?

11 A It was kind of turned over away from

12 me.

13 Q Was his head towards the back of the

14 courtroom or the front of the courtroom?

15 A The head was toward the back of the

16 courtroom as he was lying.

17 Q Would that be towards the door that you

18 come into, sir, or away from the door?

19 A It would be kind of away from the door.

20 He was lying on an angle, not directly toward the back,

21 but on an angle I would say back toward the back corner.

22 Q What do you consider to be the front

23 of the courtroom and what do you consider to be the back?

24 A I consider the entrance door to be the

25 front of it, sir. I guess when I get inside probably the

way I am talking I was talking about the back of it as being the entrance.

Q Now --

MR. DAVIS: Let me see Commonwealth's Exhibit Number 10, judge.

THE COURT: What is it?

MR. DAVIS: Picutre of the chalk marks.

BY MR. DAVIS:

Q I am going to hand you Commonwealth's Exhibit Number 10, Captain Netherland, and ask if that depicts the position of the body as you saw it at that time, sir?

A Yes, sir.

Q All right. Now, where is the entrance of the courtroom in relation to that?

A The entrance to the courtroom is from there, this direction. (Indicating.)

Q Now, did the inmates ever come out of the areas you saw them go into, sir?

A Yes, sir. A few minutes elapsed and then inmate Jefferson came out of the door that was marked "Private," and then he was instructed to be seated on the steps. After he sat down, then Washington later came out

of the other door, the one to my left.

Q Now, what were your observations as to their hands at that time, sir?

A When they came out they had their hands raised in the air with --

Q Were they secure, sir?

A No, sir.

Q All right. What were your observations after that? Were the handcuffs still there?

A The handcuffs were dangling on one arm.

Q On each inmate?

A Yes, sir.

Q And where did they go after they came out the door, sir?

A They were seated on the steps in front of those doors.

Q What were your observations as to the chains, sir? Were they still there?

A No, sir, I didn't see the chains on them at all.

Q Captain Netherland, at the direction of the Commonwealth's attorney's office did you go to the courthouse on May 12, 1972, and stand in the position you were standing on the date that these shots were fired, sir?

A Yes, sir, I did.

1 Q All right. Would you stand up and show
2 the ladies and gentlemen of the jury what position you were
3 standing at the time you fired your gun on the day in
4 question, sir, and how you were firing?
5 A Yes, sir, I had the gun up in this
6 manner. (Demonstrating.)
7 Q Would you explain to the ladies and
8 gentlemen --
9 MR. DAVIS: Well, the record will
10 show because she's taken the position, I assume,
11 that his arm was stretched out parallel to the
12 floor?
13 THE COURT: Yes.
14
15 BY MR. DAVIS:
16 Q Was that the same position you assumed
17 on May 12, 1972, when you went back up there, sir?
18 A Yes, sir.
19 Q Were measurements taken while you were
20 there, sir, as to the relationship of the position of your
21 arm?
22 A Yes, sir.
23 Q Who took those? Do you recall?
24 A Investigator Lloyd.
25 Q Were you standing in the same position

1 distancewise from the front to the back of the courthouse
2 when you fired the gun on May 12th?
3 A Yes, sir.
4 Q Before you turned the gun over to
5 Investigator Hillman, did you remove any of the ammunition
6 from it?
7 A No, sir, I did not.
8 Q Did you add any bullets?
9 A No, sir.
10 Q Tamper with the bullets at all, sir?
11 A Sir?
12 Q Did you tamper with the bullets at all?
13 A No, sir, I never did open the cylinder
14 on the gun at all.
15 MR. DAVIS: Would you answer Mr. Janus's
16 questions, please, sir?
17 THE WITNESS: Yes, sir.
18
19 CROSS-EXAMINATION
20
21 BY MR. JANUS:
22 Q Captain Netherland, you and Captain
23 Monte were the senior guards in charge. Is that correct?
24 A Yes, sir.
25 Q And the other men, Mr. Berryman, Snyder,

1 Franklin, would have been under you. Is that correct?
2 A Yes, sir.
3 Q And they would have had to ask your
4 permission with respect to stationing themselves or
5 relieving each other or what have you. Is that correct?
6 A Captain Monte instructed Mr. Franklin
7 where to stand to start with.
8 Q Did anyone, Guard Snyder or anyone
9 else, ever ask your permission as to whether he could
10 remove the handcuffs or chain from either of the two
11 inmates?
12 A No, sir.
13 Q Captain Netherland, there is another
14 door in addition to the one from the judge's chambers that's
15 on the left side of the courtroom as you face it that leads
16 out from the jury room. Isn't that correct, sir?
17 A I don't recall on that door, sir.
18 I don't believe there is.
19 Q Don't you recall telling Mr. Hillman --
20 Investigator Hillman that you thought there was.
21 A Yes, sir, I do, but I don't believe
22 there was. I believe this whole thing has been remodeled
23 up there and the old section on the back of it has been
24 torn off.
25 Q Didn't you tell Investigator Hillman this

morning or last night that you thought it was your recollection that there was a door?

A Yes, sir.

Q And there are windows off the jury room or that were in the jury room at that time? Is that correct?

A Yes, sir.

Q When you came into the courtroom you did not see Guard Snyder, did you?

A No, sir, I did not.

Q You never saw him until after the shooting was over, did you?

A No, sir, I didn't see him until after I had come up from the entrance of the courthouse up to the rail.

Q You don't know where he was during this time, do you?

A No, sir.

Q And the -- where you would have been in the center of the courtroom you would have been angling your bullets off a little bit to the right, aiming your gun a little bit to the right. Is that correct?

A The first shot, yes, sir.

Q The first shot. And that trajectory would have passed over approximately the area in which

1 Captain Monte was positioned with the chalk marks in the
2 picture. Isn't that correct?
3 Q And, sir, do you receive instruction
4 in firing your weapon?
5 Q Yes, sir.
6 Q As a state guard?
7 A Yes, sir.
8 Q Are you instructed to on any occasion
9 ever to fire it holding both hands on the weapon?
10 A Yes, sir, you are instructed to fire
11 single-handed, also double-handed.
12 Q Are you also instructed to fire your
13 weapon from a semi-crouched position with both hands on
14 it?
15 A Yes, sir.
16 Q Aren't you instructed that that's the
17 most accurate way to fire a weapon, from this crouched
18 position with your knees flexed with both hands on the
19 weapon?
20 A No, sir.
21 Q You are not?
22 A No, sir.
23 Q But that is one of the methods and
24 ways you are taught to fire?
25 A That is one of the ways, yes, sir.

Q Did you ever pick up Captain -- what turned out to be Captain Monte's weapon from the floor?

A No, sir, I did not.

Q You don't recall -- did you ever give that gun to Guard Snyder?

A No, sir.

Q Your weapon was a .38 calibre. Is that correct?

A Yes, sir.

Q That's the same calibre that Guard Snyder was carrying. Is that correct?

A I believe he was carrying a .38, yes, sir.

Q And you had a six-inch barrel on your weapon. Is that correct?

A Yes, sir.

Q Does a bullet come out of a six-inch barrel with any more velocity than one would come out of a four --

THE COURT: He might know.

MR. DAVIS: Objection.

THE COURT: He might know.

BY MR. JANUS:

Q -- if you know?

A I am not that familiar with the velocity on them, sir.

Q Very well, sir.

Your bullet to your knowledge passed through the chair. Is that correct?

A One of the bullets, yes, sir.

Q Things happened rather quickly as you came through the door, did they not, sir?

A Yes, sir, they did.

Q You entered -- you had been running when you came through the door, hadn't you?

A Yes, sir.

Q Because you had heard at least two shots?

A I heard two shots when I was near the vehicle and I heard additional shots as I was running.

Q And as you came in the door your handgun was already drawn, wasn't it?

A Yes, sir.

Q Now, your .38 calibre weapon with the six-inch barrel was capable of going through a human body, wasn't it, sir?

MR. DAVIS: Objection, sir.

BY MR. JANUS:

Do you know?

A I imagine it would. I am not sure.

Q The first person -- the first thing you saw was the inmate who turned out to be Jefferson going through the door on the right marked, "Private." Is that correct, sir?

A Yes, sir.

Q That's when you fired the first shot in that direction?

A Yes, sir.

Q Then a few seconds or sometime immediately thereafter you saw the man that turned out to be Washington diving from behind the judge's bench through the jury room or through the door where the jury stayed. Is that correct?

A Yes, sir.

Q And that door was on the left as you face the judge's bench?

And then you called for the inmates to come out, did you not, sir?

A Yes, sir.

Q And Jefferson came out of the door marked "Private" on the right?

A Yes, sir, to my right, yes, sir.

1 Q And that would have been the clerk's
2 box extended in front of that door, does it not, sir, as
3 the pictures show?
4 A Yes, sir, in the Powhatan courthouse
5 this --
6 Q Well, referring now to Defendant's Exhibit
7 Number 1, that shows how the clerk's box where the clerk
8 sits extends out in front of that door?
9 A Yes, sir.
10 Q You couldn't see whether or not Jefferson
11 dropped anything as he came out, could you, Captain Netherland?
12 A No, sir, I could not.
13 Q And then sometime after that you called
14 for Washington to come out. Is that correct?
15 A Yes, sir.
16 Q Washington said, "Get some people in
17 here before I come out." Isn't that correct? Or words to
18 that effect?
19 A Words to that effect, yes, sir.
20 Q Then people did come in?
21 A Yes, sir.
22 Q And then he came out and sat down on
23 these steps that you can't quite see?
24 A Yes, sir.
25 MR. JANUS: I have no further questions.

Captain Netherland told me to secure the cuffs back on them. Went to Washington, Washington had the cuff off his right arm and fastened to his left and had no chain on. I went up over the judge chambers to look for the chain and I came on over where Jefferson was I found the chain there, went back and chained up Washington and I came on back and Jefferson also had the cuff loose from his right arm and dangling on his right. He had the chain around his waist. I put the cuff back through the chain and snapped it back on Jefferson's right arm.

Q Actually, where --

Let me show you that picture again. I hate to keep --

I show you what purports to be Defendant's Exhibit Number 4. Can you show in that picture where you found the chain, Lieutenant Tait?

A (No reply.)

Q Do you know what that picture depicts, sir?

A No, this don't show where I found the chain. The steps are down here.

Q Let me find one shows the whole view. Suppose you take this picture that shows the view of the whole -- Defendant's Exhibit Number 1, that shows the whole view of the courtroom and see if you can show the

1 ladies and gentlemen of the jury from it?

2 A Right here on the side where the

3 steps going up, that's where Jefferson came out and

4 was sitting. Just on the corner right there is where

5 I found the chain.

6 Q Whose chain was that, sir?

7 A That is the one I presumed came off

8 Washington.

9 Q Jefferson still had a chain on, did he

10 not?

11 A He had a chain on, right.

12 Q Now, did you use the same handcuffs and

13 chains that were in the courtroom to secure these two

14 parties?

15 A I used the same handcuffs that was

16 fastened to their left arm.

17 Q Now, did you subsequently while there

18 find a gun, Lieutenant Tait?

19 A Yes, I did. When I was told by the

20 captain to secure the cuffs on Washington I went over

21 there, like I said, and the cuff was off his right arm

22 and fastened to the left. The chain was gone. I came

23 up over the judge chambers to look for the chain and when

24 I stepped down on this side of the judge chambers I

25 saw a weapon laying in the floor.

1 Q What do you refer to as being the
2 judge's chambers, Lieutenant Tait?
3 A Well, this like we are sitting right
4 here. I found say in this area right here.
5 MR. DAVIS: Could I have Commonwealth's
6 Exhibit Number 7 I believe it is, judge?
7
8 BY MR. DAVIS:
9 Q Mr. Tait -- Lieutenant Tait, I am going
10 to hand you this weapon, sir, and ask you if that's the
11 weapon that you found underneath the -- or found on the
12 day in question?
13 A I haven't examined the weapon at all,
14 but it looks like the weapon I did find.
15 Q All right. What did you do with that
16 weapon after you found it?
17 A When I picked the weapon up I picked
18 it up by the handle, got it by the barrel -- one inmate
19 was sitting on this side; one on this side -- and handed
20 it over the railing to Investigator Henderson.
21 Q Can you take the photograph that you
22 have already used, Defendant Exhibit Number 1, and show
23 the ladies and gentlemen of the jury where you found
24 the gun, sir?
25 A The other photograph shows it better than
this one.

1 Q All right. Is this the photograph you
2 are referring to?
3 A Yes, sir.
4 Q What exhibit is that, sir? Defendant
5 Exhibit Number 4.
6 All right, go ahead and show the ladies and
7 gentlemen of the jury where you found the gun.
8 A I found a weapon laying right in this
9 area right here. It was right in front of the door.
10 Q Do you know what that is, that area
11 is, sir?
12 A That's the area right in front of the
13 judge's chambers.
14 Q All right. And is that a desk that's
15 situated there?
16 A Yes, sir.
17 Q Did you find a weapon under that desk
18 or just lying in the floor in the walk area?
19 A It was right under the edge of the desk.
20 Q Now, Lieutenant Tait, you observed
21 Mr. -- observed Inmate Jefferson come out of the room
22 marked "Private." Is that correct, sir?
23 A That's right.
24 Q Were both of his arms up, or just one,
25 at that time?

A When he came out of the door he had both arms up.

Q Did you ever hear anything hit the floor there at the courthouse?

A No, sir, I didn't.

Q Now, did you transport the two inmates away from the courthouse on November 22, 1971?

A Yes, sir, I did.

Q Where did you take them?

A Took them to Virginia State Penitentiary.

Q Where is that situated, sir?

A That's at --

Q What city is it situated in?

A Richmond, Virginia.

MR. DAVIS: Would you answer Mr. Janus's questions, please?

CROSS-EXAMINATION

BY MR. JANUS:

Q Lieutenant Tait, when you first saw Mr. Jefferson he had his right hand up and his left hand you couldn't see. Is that correct?

A That's correct.

Q And where -- as he came out of the room

1 marked "Private" where were you positioned, sir?
2 A I was positioned so -- I'd say some
3 thirty feet away from the area on an angle towards the
4 door.
5 Q Somewhere back in here, then?
6 A Yes, sir.
7 Q Back in here on Defendant's Exhibit
8 Number 1. Then of course in that position you couldn't
9 see Mr. Jefferson's feet, could you, sir?
10 A No, sir.
11 Q You didn't see Guard Snyder at all when
12 you came in, did you?
13 A When I first came in the court --
14 courtroom I didn't see anyone but Captain Netherland.
15 Q Captain Netherland?
16 A Yes, sir.
17 Q Were you to his right or to his
18 left?
19 A I was to his left like he is -- yes,
20 sir, to his left.
21 Q It wasn't until sometime -- well, at
22 that time Guard Snyder's position location was unknown
23 to you, wasn't it?
24 A Yes, sir.
25 Q You didn't see him until sometime later,

1 did you?

2 A That's right.

3 Q Did you ever see Captain Netherland

4 give Snyder a gun?

5 A No, sir.

6 Q I assume after you and Captain Netherland

7 came in other guards entered the courtroom soon thereafter,

8 didn't they?

9 A Best that I recall -- best I recall

10 there wasn't anyone in there until we got the inmates out

11 except Guard Snyder. Now, he came into the picture just

12 a little later.

13 Q And people were calling -- Captain

14 Netherland and Snyder were calling for Jefferson to come

15 out?

16 A Myself and Captain Netherland were

17 calling for Jefferson to come out.

18 Q And things were rather confused as you

19 came in after the shooting had taken place, were they

20 not, sir?

21 A No, sir, everything was very quiet

22 there. Wasn't anyone in there, but me -- that I could

23 see but me and Mr. Netherland.

24 Q It was quiet at that point?

25 A Yes, sir.

(The jury withdrew from the courtroom.)

THE COURT: Gentlemen, the jury's retired. Sheriff, take charge of the prisoner.

(At 3:40 P.M., August 13, 1974, the court recessed, and reconvened at 4:00 P.M., August 13, 1974.

THE COURT: Sheriff, return the jury. Who is your next witness, Mr. Davis?

MR. DAVIS: Dr. Bradley.

(The jury returned to the courtroom.)

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ROBERT W. BRADLEY, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DULING:

Q Please state your name?

A Dr. Robert W. Bradley.

Q Dr. Bradley, what is your occupation or profession?

A Physician.

Q How long have you been a physician?

MR. MCKENRY: Judge, I am not personally familiar with Dr. Bradley, but Mr. Janus assured me he is a general practitioner and duly qualified as a general practitioner and licensed in the state of Virginia, and we will stipulate his qualifications to that extent.

THE COURT: Ladies and gentlemen, it's been stipulated that Dr. Bradley's a duly qualified physician in the state of Virginia and his qualifications have been stipulated by the defense.

BY MR. DULING:

Q In your profession, sir, do you have any association with the County of Powhatan, Virginia, as such?

A Other than my practice is in Powhatan.

Q Where is your office located in relation to the Circuit Court of Powhatan County?

A It is approximately two blocks from the courthouse.

Q And did you practice your profession in Powhatan County on or about November 22, 1971?

A Yes, sir.

Q Did you have occasion on that day, doctor, to view the body of one Raul M. Monte?

A Yes, sir.

Q Did you have occasion to examine that body?

A Yes, sir.

Q Where was the body when you first saw it, sir?

A It was lying on the floor of the courthouse in the courtroom between the rail and the bench.

Q I will ask you to look please, sir, at Commonwealth's Exhibit Number 10 and tell me whether or not you can describe from that photograph the location of the body when you saw it, sir?

MR. MCKENRY: Turn it around if you will, doctor, so the jury can see what you are describing.

A This is the railing separating the front part of the court from the bench. This is the judge's bench up -- no, this is the railing separating the spectators from the judge's bench, which is up in this area. And this is the witness -- no, this is where the lawyers's table is right here.

BY MR. DULING:

Q And where was the body, sir?

A It was lying on the floor between the railing and the lawyer's bench.

Q There appear to be some chalk marks on that particular photograph, doctor. Can you tell me whether or not that depicts where you found -- saw the body?

A That's true.

Q Now, in relation to the Defendant's Exhibit Number 2, can you compare that area? It may show up better in that photograph.

A The area would be --

Q Turn it a little more.

A -- in this area right in here just off the photograph. It runs off of this photograph.

Q All right. Thank you.

A The position of the body.

Q The body at that time, sir, do you recall was it faceup or facedown?

A It was primarily facedown, slightly rised on the right, his right arm right shoulder was raised slightly.

Q Was the body -- excuse me.

A As well as I remember.

1 Q Was the body clothed or not?
2 A It was fully clothed.
3 Q Would you describe the clothing as you
4 recall it?
5 A The clothing was that of a guard --
6 state farm officer, which consisted of a jacket, shirt,
7 trousers, that were a bluish gray color.
8 Q I'll ask you to look, please, sir, at
9 the Commonwealth's Exhibit Number 4 and tell me colorwise
10 whether or not the clothing appeared to be of that color
11 and of that nature?
12 A Yes, sir, it was approximately that
13 color and style.
14 Q Did you at that time examine that body,
15 doctor?
16 A Yes, sir.
17 Q Relate to the members of the jury,
18 please, sir, what you found?
19 A We found two gunshot wounds, one
20 was a wound that had an entry in the seventh left posterior
21 intercostal space four and a half inches from the midline,
22 with an exit in the eight right anterior intercostal space
23 three and a half inches from the midline.
24 Q Doctor, by way of demonstration, if I
25 stood up there could you point out on my body where the

1 entry and exit was to that particular wound?

2 A Yes, sir. The entry wound was approximately

3 in this area near the shoulder blade. The entry. The

4 exit was about in this area.

5 Q Where would you -- for the purpose

6 of the court reporter where would that be on my body in

7 layman's terms?

8 A Slightly below the nipple and slightly

9 inside from the nipple.

10 Q On which side?

11 A On the right side.

12 Q Would you relate whether or not you observed

13 any additional wounds?

14 A There was a second wound with entry the

15 seventh right intercostal space in the posterior axillary

16 with an exit wound just above the right pelvis.

17 Q Could you point that out, sir?

18 A Approximately this area slightly lower

19 than the wound.

20 Q And where are you pointing for purpose of

21 the court reporter in layman's?

22 A That's again slightly below the

23 shoulder blade and to the lateral edge with exit wound down

24 just above the hipbone on the right side.

25 Q Was the entry on the right side also?

1 A The entry and exit were both on the right.
2 Q Did you have occasion, doctor, to
3 examine the clothing of the body?
4 A Yes, sir.
5 Q Describe, please, sir, what you found
6 when you got to the clothing?
7 A There were tears in the clothing
8 compatible with -- through the jacket shirt and undershirt
9 compatible with the wounds on the body, and in addition
10 to the clothing there was also a wound that went through
11 the clothing of the hip pocket and through the billfold,
12 but did not touch the body itself.
13 Q Where was that in relation to the waistband
14 on the pair of trousers, that third one that you mentioned
15 that did not enter the body?
16 A It was below the waistband.
17 Q What other observations, if any, did you
18 make, doctor, in regard to the clothing?
19 A There was -- of the first wound we
20 described there was some darkening on the clothing of a dark
21 smudge.
22 Q Do you know what that dark mark or
23 smudge was?
24 A It appeared to be powder.
25 MR. MCKENRY: I object to what it

1 appeared to be.

2 THE COURT: All right, objection

3 sustained.

4

5 BY MR. DULING:

6 Q Describe exactly what you saw?

7 A It was a dark powdery material that

8 would smudge -- I mean come off -- rub off on the fingers.

9 Q Which wound was that in relation to?

10 A That was the first one with the entry on

11 the left posterior.

12 Q When you speak of the first and second,

13 sir, are you speaking in terms of your investigation?

14 A I was speaking of the way I described

15 them, presented them just now.

16 Q Doctor, do you know what's meantby the

17 term "contact shot" or "contract wound"?

18 A In general. I don't know -- I am not

19 aware of any technical definition.

20 Q What does it mean to you, sir?

21 MR. MCKENRY; Judge, I am going to have

22 to object based on his response to the question.

23 He is not aware of the technical definitions. He

24 said he knew what it meant generally. I think it's

25 got to be qualified better than that, if the

1 court please.

2 THE COURT: I am going to overrule your

3 objection.

4 MR. MCKENRY: Note our exception.

5 THE COURT: All right.

6 A Contact meaning the muzzle of the

7 gun was close enough to the body or to the object to

8 let the powder from the muzzle of the gun be found

9 on the object that it was fired into.

10 Q In determing whether or not you would

11 consider a wound a contact wound what do you look for?

12 MR. MCKENRY: Judge, I am going again

13 to have to interpose an objection to what he

14 considers. He's not been qualified as an

15 expert in this area. And he has -- in answer

16 to one question he said "generally," but he

17 didn't know the specific technical definition,

18 and I think we are getting pretty far afield

19 as to his qualifications. We have stipulated

20 he is a qualified general practitioner. He

21 is not a ballistics expert.

22 THE COURT: All right, Mr. Duling,

23 what you have to say?

24 MR. DULING: Judge, he has said that

25 the term "contact wound" to him means one in

which the muzzle is in close proximity to the body at the time it is fired.

THE COURT: Yes, sir.

MR. DULING: I am asking him in order for him to make that determination what does he look for.

THE COURT: I overrule the objection.

MR. MCKENRY: All right, note our exception.

A The question was what do I look for?

BY MR. DULING:

Q Yes, sir.

A We look for discoloration of the tissues as well as the cloth. On the object.

Q All right. And in regard to this particular body, the body of Captain Monte, what observations, if any, did you make in regard to those items?

A There was evidence of a contact-type wound.

Q What did you see that led you to that conclusion?

A We saw the dark smudging, so-called tattooing, on the skin of gunpowder.

Q Now, did you remove the body from the

courthouse?

A I examined the body prior to its removal. Then it was removed by the -- by others, the state

Q Were you present when it was removed, sir?

A Yes, sir.

Q Was the body at that time clothed or not, do you recall?

A It was still partially clothed.

Q Now relate to the members of the jury, doctor, at the time you made your observation of the body what observations, if any, you made in regard to life in the body?

A I could find no signs of life in the body at the time that I examined it.

Q And describe exactly what you did to make that determination?

A Listening with the stethoscope for any sounds of heart activity, checking the eyes for pupil reaction as well as corneal reflection.

Q What time did you make your examination of Captain Monte's body?

A At 9:50 A.M.

Q And would you state whether or not, sir, you reached a conclusion as to the cause of death?

A My conclusion was gunshot wound of the chest.

MR. DULING: Answer counsel's questions, please, doctor, thank you.

CROSS-EXAMINATION

BY MR. MCKENRY:

Q Dr. Bradley, as I understand your testimony, you said that you consider a contact wound a wound that the gun is held in somewhat close proximity to the body or object. Is that correct?

A Right.

Q Now, the -- referring to Commonwealth's Exhibit 10, is this the scene as when you arrived? Are the chairs or the chair, is that in the same location, the bench and so forth, when you arrived?

A Yes, sir.

Q All right. And so the body was facing the chair showing in the picture?

A Now, this diagram of the picture is not the position that the body was found when I first saw the body.

Q Where was the body when you first saw the body?

A The body was in this same area, but the body was not lying on the back; the body was --

Q facedown?

A Facedown when I saw it.

Q So the first time you saw the body, which was some five or ten minutes after the shooting, it was facedown?

A Right.

Q And you rolled it over?

A Yes, sir.

MR. MCKENNY: That's it. Thank you, doctor.

THE COURT: All right, gentlemen, any further questions of the doctor? May he be excused?

MR. DULING: Please.

THE COURT: All right, doctor, you may be excused. You do not have to attend court any further.

THE WITNESS: Thank you.

THE COURT: What's the next witness?

MR. DULING: Dr. Fred B. Jordan, please.

------oOo------

FRED B. JORDAN, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DULING:

Q Please state your name?

A Fred B. Jordan.

Q And your profession, please, Mr. Jordan?

A I am a physician and forensic pathologist.

Q What is your present occupation?

A I am an assistant medical examiner for the State of Oklahoma.

Q As of November 22, 1971, what was your profession?

A I was a fellow in forensic pathology in the office of the medical examiner, city of Richmond and surrounding communities.

Q Relate, if you will, please, Dr. Jordan, your educational and professional background that qualified you for that profession?

MR. BARNES: For the purpose of

1 qualification of Dr. Jordan as a forensic
2 pathologist we will stipulate --
3 THE COURT: Again, ladies and gentlemen
4 of the jury, the doctor's qualifications as a
5 pathologist has been stipulated by the defendant
6 and Commonwealth.
7
8 BY MR. DULING:
9 Q Doctor, in your position as medical
10 examiner, back in November 1971, November 22nd, to be exact,
11 did you had occasion to examine the body of one Raul M.
12 Monte?
13 A Yes, sir, I did.
14 Q What was the date and time of that
15 examination, sir?
16 A November 22, 1971, at 12:45 in the
17 afternoon.
18 Q And where was the examination conducted?
19 A At the medical examiner's morgue in
20 Richmond.
21 Q Describe the body, if you will, please,
22 sir, specifically in regard to clothing when you first
23 observed it?
24 A The body was fully clothed when I first
25 observed him.

I would like to refer to my clothing list if I may?

Q Please.

THE COURT: To refresh your memory you may.

THE WITNESS: I didn't hear.

THE COURT: To refresh your memory you may.

A Yes, to refresh my memory.

Clothing list made at the time I initially viewed this body, just the clothing described by me and every item was removed by me, was placed in a container, labeled, and preserved as evidence: One pair of black shoes, one pair of black socks, one pair of white jockey shorts, one pair of gray uniform pants, a gray uniform shirt, one white undershirt, a uniform coat, a black tie, and a leather shoulder holster.

Q Now, subsequent to your examination what did you do with that clothing?

A The clothing was put in plastic sacks and labeled with the name of the decedent and the number of the autopsy. They were given to the evidence technician -- the evidence clerk at the medical examiner's office to be stored there in safekeeping.

Q Did you determine the length of the body or actually the height of Captain Monte?

A Seventy-one inches or five feet eleven.

Q Now, relate to the members of the jury, please, Dr. Jordan, the results of your autopsy on that day.

A The autopsy showed -- well, initially when you do an autopsy initially you examine the clothing as we have discussed, then you externally examine the body just as you would a patient who comes into the office. And the first thing that I noted about Mr. Monte, apart from the gunshot wounds which I will describe, was that there were partial amputations of the thumb and three fingers on the left hand and on two of those fingers were small lacerations or small cuts. Other than that externally the only thing remarkable about this gentleman was the presence of two gunshot wounds of entry in the back, a gunshot wound of exit in the front and a gunshot wound of exit along the right flank.

One gunshot wound had entered the left back just below the shoulder blade. There was powder marks around that entry wound. That bullet had passed through the left lung, through the heart, and bruised the right lung and had exited the body or left the body beneath the right nipple, had entered the left back and exited beneath the right nipple.

The second gunshot wound entered the right back about an inch and a half lower than the first and had

1 traveled very sharply downward just under the skin not
2 ever entering the body and exited the body just above the
3 right hip.
4 Q Now, in your examination of the clothing
5 that was on the body when you received the body, sir, would
6 you state whether or not the tears had been in the clothing
7 were consistent with those wounds, and if so, explain it,
8 please?
9 A Yes, in the shirt -- in the uniform-type
10 shirt and in the undershirt there were holes consistent
11 with those wounds. In the uniform jacket, however,
12 there were not. There was a hole in the jacket in a lower
13 part -- in the lower portion of the jacket would have been
14 near the left lower part of the jacket. In the left rear
15 trousers, the left rear pocket, was a perforation, a gunshot
16 perforation, which was present also on the jacket, but there
17 were no holes in the jacket that I could find corresponding
18 to the gunshot wound that I described to you that entered
19 the left back and injured the heart and lungs or the gunshot
20 wound that entered the right back and traveled sharply
21 downward.
22 Q What about the other parts of the clothing?
23 A As far as tears?
24 Q Yes.
25 A I would have to refresh my memory.

I think that on the shirt there was one small tear, but there was nothing -- no large tears in the clothing at all.

Q Describe exactly what you did see on each portion of the clothing; the jacket, the shirt, the undershirt, and so forth?

A All right. The uniform-type pants we will start with, the shoes and the black socks and white jockey shorts were intact without any holes or tears in them. The uniform pants were secured with a belt and -- a canvas-type belt with a brass-like buckle. Over the left rear of the left hip pocket was a one-eighth by one-quarter inch defect or hole surrounded by a black smudge. And the black smudge measured three-quarters by three-eighths inches around this hole in the left rear pocket. Around this hole the fibers of cloth were deflected inward. One and three quarters inches below this hole and to the right was another defect measuring one-quarter of an inch in diameter. The pants were labeled in the name of the decedent Monte.

The gray uniform shirt bore the insignia of the Virginia state farm. In the left back panel of the shirt was a one and one-eighth by one-eighth -- excuse me, one and one-eighth by one-inch defect or hole in the left rear panel surrounded by a black smudge, and this black smudge measured two by two and a quarter inches overall. On the right rear panel slightly below this hole or

1 this defect was a similar defect measuring a quarter of
2 an inch in diameter. On the right lower anterior panel
3 of the shirt one and a half inches from the seam -- one
4 and a half inches anterior to the seam on the shirt was a
5 linear hole or defect measuring three-quarters of an
6 inch by one-quarter of an inch, and here the fibers were
7 deflected outward. On the right front panel of the
8 shirt three inches from the bottom is a defect measuring
9 one-quarter by one-eighth of an inch that was surrounded
10 by considerable blood.
11 The undershirt had two holes in the back
12 corresponding to the holes that I have described in the
13 back of the shirt. There is also one corresponding to the
14 defect in the right lower front on the side of the
15 undershirt and also one corresponding to the defect in
16 the right front of the shirt as I described a few minutes
17 ago.
18 There is a uniform coat of the same cloth material
19 as the pants. There was a large defect in the back correspond-
20 ing to that described in the hip pocket of the pants. It
21 measured overall one and a quarter by one-quarter inches
22 and it went through all levels -- all layers of the garment.
23 Black tie was intact and the leather holster was
24 intact.
25 Q What is the significance, Dr. Jordan, of

your reference to fibers inward and fibers outward?

A Well, fibers point in the direction that a bullet is passing.

Q Now, doctor, did you have occasion to make an examination in regard to the extent of the bleeding involved?

A Yes, as part of the autopsy.

Q You have made reference at this time to wound one and wound two. What is the significance, if any, of the numbering that you have labeled at this time?

A When we have a case where there is more than one gunshot wound we just will arbitrarily lable them number one, number two, number three, and so forth. In this case the first wound that I described was the wound in the left back below the shoulder blade, and that I labeled number one for the purposes of description. The second wound that I described was the one slightly below it in the right back, and I labeled number two for the purposes of description.

Q By making reference to these numbers, describe what, if anything, you observed in regard to the bleeding of these wounds?

A There was more -- considerably more bleeding around wound number two or the nonfatal wound, the wound that entered the right back and traveled

1 sharply downward. There was much more bleeding around
2 the skin than was in the fatal wound, the wound under the
3 left shoulder blade.
4 Q That's the wound you initially called
5 number one. Is that correct?
6 A That's correct.
7 Q What is the -- what evidence if any,
8 was there, doctor, of what might be described as
9 gunpowder residue on either the clothing or the back?
10 A The black smudges that I described to you
11 in my appraisal of the clothing represented powder, and
12 there was tattooing or actual powder stippling of the
13 skin around gunshot wound number one or the fatal wound,
14 the wound below the left shoulder blade. There was no
15 gunshot -- gunpowder on the skin of wound number 2.
16 Q What does that indicate to you, sir,
17 in your examination?
18 A It indicates both shots were near
19 shots because there was powder on the clothing in both
20 cases. There was also powder on the skin in the case of
21 gunshot wound number one, which would indicate to me
22 that that was a very near shot, number one or the fatal
23 wound was a very near shot.
24 Q What does the lack of bleeding mean to
25 you, sir, in the wound that you described in which there

was a lack of bleeding?

A The lack of bleeding indicates that at the time that wound was inflicted the blood pressure was lower than it was at the time the other wound was inflicted. Bleeding into the skin is a function of blood pressure. There was more bleeding around number two, the one on the right back; therefore, the blood pressure was higher at that time than it was around number one, the wound of the left back.

Q Doctor, in regard to the gunpowder residue what are you talking about distancewise the maximum that would produce such a condition?

A It of course all depends on the type of gun and type of ammunition used, but as a generality eighteen to twenty-four inches. If the gun is eighteen to twenty-four inches away it may not show any powder. If it is within that eighteen to twenty inches away from the target it probably will show powder.

Q Were there any wounds at all in the body below what might be described as the waist or the beltline, sir?

A No, there were not.

Q In relation to where you found the tears in the rear I believe you call it the hip pocket of the pants, were there any wounds in that area, sir?

A No, sir. That was the left hip pocket. The only wound that was low down at all was the exit wound of gunshot wound number two, which was just above the hip area on the right. That defect was present in the left hip pocket and there was not defect in the skin; there was no gunshot wound on the actual body in that area.

Q Doctor, did you have occasion to make measurements either from the head or the toe in regard to the entry and exit wounds?

A Yes, we always do that.

Q Would you relate that information, please?

A Gunshot wound number one, the wound just below the left shoulder, the fatal wound, was seventeen inches from the top of the head to the middle of that wound. That's the point that it entered.

At the point that it exited where it came out the right front chest -- entered the left back and came out the right front -- it was twenty-two inches, so it entered in the back seventeen inches from the top of the head exited from the front twenty-two inches from the top of the head. In other words, traveled downward.

Q What about the size of those wounds, doctor, either circumferencewise or whatever measurements

you may have in regard to the size of the wound, the entry and the exit?

A The entrance wound measured -- it was essentially round and measured three-sixteenths of an inch in diamater. The exit wound was somewhat irregular in shape and measured three-eighths of an inch one way and five-eighths of an inch the other way. So it was somewhat larger in that case than the entrance wound.

Q What conclusion, if any, can you reach as a doctor or a medical examiner in regard to the size of the entry and exit wounds?

A Well, generally speaking, of course the old wives tale is that the exit wound is always larger than the entrance wound. That's not always the case. The exit wound will be larger if the bullet is tumbling when it leaves the body. If it is turning as it hits things, instead of going a straight path it is twisting and turning, if the bullet strikes something and its course is changed, if it enters the body straight and exits at an angle, it would be larger. So it depends on a large number of factors.

Q Does it tell anything about the calibre or type of bullet was used?

A No, sir.

Q What do you mean by your expression

"tumbling"?

A Tumbling is something that happens to a bullet. Just as the name implies, it tumbles, the bullet will start moving around on an axis. And instead of traveling straight as an arrow, so to speak, it will start moving, turning, tumbling. Particularly, if it hits a fluid-filled organ, the heart, as it did in this case, the bullet then starts spinning or tumbling.

Q Did you find any evidence of tumbling?

A I know the bullet tumbled because of the organs it hit and because of the path of destruction. When the bullet hit the heart -- of course we know the bullet went through the skin, made a three-sixteenths of an inch hole. When the bullet hit the heart it tore out almost half of the right upper chamber of the heart, which is just an area almost as big as a fifty-cent piece, so we know that bullet was tumbling at that time because of the amount of destruction that was done.

Q And what effect, if any, does that have on blood pressure, the type of wound that you observed in that particular heart?

A In this particular heart the hole was so large that as soon as the heart began to pump after that injury it would have been pumping -- instead of out into the body it would have been pumping out into the sack

that surrounds it and the blood pressure would not have been maintained for more than a few seconds after the initial injury to the heart, because when the heart pumped instead of pumping through the body it was now pumping out into the chest cavity and into the space around itself.

Q Can you relate that, sir, to what you found insofar as damage to the heart to your explanation in regard to the blood or loss of blood in each of the two wounds?

A Yes, there was considerable bleeding. In wound number two, the one entered the right back, traveled beneath the skin sharply downward, there was considerable bleeding beneath the skin and into the skin around that wound. Therefore, since it was bleeding into the skin we know that there was blood pressure at the time that shot occurred, in other words, blood pressure when injured; the heart was pumping blood out through the body so blood simply leaked out around those injured blood vessels with the passage of the bullet.

However, gunshot wound number one, blood leaked out certainly, but not to the extent that it did around gunshot wound number two, because almost instantaneously after the bullet entered the body it hit the heart and blood pressure immediately began to drop, so we know or I feel I can say certainly in this case that gunshot

1 wound number one or the one in the left back was actually
2 the second wound inflicted. What we have called gunshot
3 wound number two, the one in the right back, the nonfatal
4 wound, was the first shot to hit this man's body.
5 Q What is the tendency, if any, doctor, of a
6 bullet to pick up matter as it travels through an object
7 such as a body?
8 A To pick up blood material, for instance?
9 Q Yes.
10 A Of course the bullets will do this,
11 will pick up blood, maybe a piece of cartilage, piece
12 of bone, or piece of tissue.
13 Q And what would be the effect, if any,
14 doctor, on that bullet had it picked up such an object
15 if it goes through clothing leaving the body?
16 A It will very frequently wipe the bullet
17 quite clean. I am sure if we had real, real -- if
18 medical technology were far enough advanced, we could
19 pick up blood on a bullet like that, or even tissue.
20 But quite often when the bullet goes through the skin and
21 then through subsequent clothing it will be wiped quite
22 clean, so when you look at a bullet -- if I find a bullet
23 on the floor, for instance, at the scene of a shooting,
24 even with a magnifying glass -- I am sure there is blood
25 there, but you can't see it, and many times we can't

1 detect it.

2 Q You say you can't see it. Do you mean

3 with the naked eye or with the microscope?

4 A I can't see it with these or with a

5 hand lens or under a microscope.

6 Q Were any bullets found in the body of

7 Captain Monte, doctor?

8 A No, sir.

9 Q Did you have occasion, sir, to prepare

10 diagrams based on your findings?

11 A Yes, I did.

12 Q Doctor, I'll ask you to look at these

13 and tell me whether or not you prepared those, sir?

14 A All right. Those are -- one is

15 labeled Commonwealth's Exhibit Number 12, and that is

16 a copy -- one labeled Commonwealth's Exhibit Number 12

17 is a copy of a diagram I prepared.

18 Q Doctor, the numbers may differ. Tell me

19 first whether you prepared those.

20 A All right. They are copies -- yes, they

21 are copies of a diagram I did make.

22 MR. DULING: Let me have those marked and

23 I will return them to you.

24 I would introduce these as a group as

25 Commonwealth's Exhibit Number 12, sir -- 13,

excuse me.

(So marked by the court.)

BY MR. DULING:

Q Doctor, I'll hand you again what appears to be the Commonwealth Exhibit Number 13 and the diagram. Relate to the members of the jury what is shown on those diagrams?

A All right. On -- show the jury?

Q If that's easier for you. Whichever is easier for you.

THE COURT: What is that?

A I will show the jury this if I am able as I describe it.

THE COURT: All right.

BY MR. DULING:

Q Refer to it as page 1, 2, 3, 4, 5.

A Page 1 shows the exit wound of gunshot wound number one.

THE COURT: Gentlemen, haven't we been over this thoroughly, haven't we?

MR. DULING: I just asked him briefly, judge, to point them out where they are on these diagrams.

THE COURT: All right.

MR. JANUS: I think it is written right on the diagram. Says entrance gunshot wound number one, exit gunshot wound number two.

THE COURT: Yes, I think the exhibit will speak for itself.

BY MR. D ULING:

Q That's fine, doctor.

What effect, if any, Dr. Jordan, does the passage of bullets through a body such as the two you have described in this case have on the speed of the projectile?

A It will slow it considerably depending on what it hits.

Q And what is the reason for that?

A Just simply extracts energy from the bullet as it passes through. When a bullet hits -- for instance, if a bullet hits a fluid-filled organ such as the heart it will slow it considerably more than if it just went through a kidney, say. The fluid itself will slow the bullet, make it tumble, make it lose energy faster.

Q What about the skin?

A The skin will slow the bullet, and it is interesting that in many cases -- not in this case, but many times the bullet will just go through the skin or will not quite get through the skin. Enter one side of the body travel all the way through and then be stopped simply by the outer layers of the skin or just go through the skin and be stopped. This is not all cases. Depends on the type of gun, type of ammunition, what it hits in the body.

Q What about bone and cartilage?

A Bone and cartilage will certainly slow a bullet down as well as potentially changing its course.

Q Describe the relationship it will have to bone to cartilage or cartilage to skin as far as slowing the bullet down?

A Of course we all know bone is very hard and it is like this bench. If we get a direct hit, if the bullet directly hits bone obviously it is going to slow it down and/or stop it and/or change its course. Cartilage is a little bit softer than bone, or considerably softer than bone. Your ear and the part of your nose that sticks out from your face is made of cartilage or is cartilage covered with skin, so it is an elastic, rubbery-type of thing, so it would be more resistant than skin, but it wouldn't be as resistant certainly or

1 near as resistant as bone. Of course skin is kind of
2 elastic. Doesn't really take much to puncture the
3 skin as you know. You can cut yourself on a piece of
4 paper or blade of grass or something. So cartilage
5 is closer -- in hardness cartilage is closer to skin.
6 In other words, it is much softer than bone.
7 Q What were your observations, doctor, in
8 regard to this particular body whether there was fresh bone
9 damage, cartilage damage, or fluid in areas you mentioned
10 of the body the bullet passed through?
11 A In gunshot wound number one, the wound
12 to the left back, the fatal wound, after it went through
13 the skin it went into the left chest cavity. Captain Monte
14 at one time had had apparently pneumonia or some kind of
15 infection in his left chest and he was left with adhesions
16 or what we call pleurisy or pleuritis so that lung was
17 somewhat scared and the tissue around the lung was fibrous
18 or heavier, thicker than it should have been. So it
19 first struck this fibrous tissue, then the lung, then
20 the fluid-filled heart, and went through the cartilage
21 at the front of the chest before it exited the skin. And
22 it also when it entered, gunshot wound number one
23 entered -- it entered between the seventh and eighth ribs,
24 between rib number seven and rib number eight -- it
25 chipped a little bit off rib number seven, chipped a little

1 bit off rib number eight, and went on through all these
2 various organs. Before it exited the body it went through
3 a solid piece of cartilage here in the anterior breastbone.
4 Q Doctor, in your capacity as a chief medical
5 examiner or the medical examiner in that case what did you
6 determine, sir, as the cause of the death?
7 A Gunshot wound of the chest.
8 MR. DULING: Excuse me just a minute,
9 please.
10 THE COURT: All right.
11
12 BY MR. DULING:
13 Q Dr. Jordan, from your examination of
14 this particular body and the entry and exit wounds that
15 you have described and particularly in regard to the
16 chipped fractures that you mentioned, what effect, if
17 any, would that have on the bullets involved, sir? What
18 was the extent of the damage to the bone and what effect
19 would it have, if any, on the bullets?
20 A Damage to the bone was minimal. Chip
21 factures are just that, they are tiny little fragments
22 probably the size of the head of a pin. Not as big as
23 the size of a head of a common pin. So they would have
24 potentially marked the bullets, scratched them in some
25 way, but they would not -- the bone in itself would not

have caused extensive damage to the bullet.

MR. DULING: Answer counsel's questions, please, sir.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. BARNES:

Q Dr. Jordan, it is true you can't say what calibre bullet caused the entrance and exit wounds Captain Monte had?

A Is it true I cannot?

Q Yes.

A That is true, yes.

Q Can you say whether both wounds were caused by the same weapon?

A No, sir, I cannot.

Q Can you say both wounds were caused by the same calibre bullets?

A No, sir.

Q You stated that the wound in the right lower quadrant of the back was the first wound. Can you state what the time interval was between the two shots?

A No, sir.

Q Without knowing the type of gun,

ammunition, or any other thing about the weapon used, can you really state the distance of the shot accurately?

A I have stated the distance as I believe it. In other words, I have stated that in gunshot wound number one and in gunshot wound number two, because I found powder on the garments, that I think both were within the eighteen to twenty-four inches or closer, and I have already stated I believe that they were both close shots and that gunshot wound number one, the fatal wound, was a very close shot.

Q You stated that the seventh and eighth ribs were both struck. Is that right?

A The bullet passed between the seventh and the eighth ribs. Below the seventh and above the eighth.

Q What is the distance between those two ribs?

A Oh, perhaps a quarter to a half an inch. Probably closer to a half an inch. It all depends on whether the person is breathing in or out at time. The chest cage changes.

Q From your measurements as far as the distance from the top of the head to the entrance wound number one, that is the left wound, and the exit wound on the right front from wound one, was it a downward shot

from the back?

A Yes, sir, it traveled downward at I would estimate round twenty-five degrees from the time it hit the back until the time it exited the front of the chest.

Q So far as indicating on myself, if I were the body that was struck, the gunshot would be going in this direction. Is that correct?

A That's correct.

THE COURT: You indicated starting forward,but of course --

BY MR. BARNES:

Q I am sorry, I meant to indicate downward.

A The inclination is correct. Of course the bullet traveled from the left to the right.

Q You made mention of powder burns, et cetera. Was any chemical analysis made?

A Not by me. Well, excuse me. Before I shut myself off here. No chemical analysis was made by me. An analysis was made by me as a pathologist, however, of the wound.

Q I just want to know about the chemical analysis made, and there were none?

A Not by me, sir.

Q You stated that sometimes when a bullet

1 passes completely through a body that it might be
2 wiped clean, or rather than really being wiped clean,
3 that so much would be wiped off that it could not be
4 detected with the unaided eye or with just a microscope?
5 A That's correct.
6 Q Is there a technology for finding such
7 things as blood, skin, fiber, and so forth on bullets,
8 even though a microscope can't detect it?
9 A Yes, there is such technology.
10 Q All right, good.
11 You stated earlier that a bullet sometimes
12 can go all the way through a body and stop just short of
13 coming out?
14 A Yes, sir, that does happen.
15 Q That is a possibility. Is it also
16 possible that a bullet could go straight through a body,
17 completely traversing the width of the body or depth
18 of the body, and then go through another object?
19 A Oh, yes, same calibre bullet. I have
20 seen it happen in both cases either way.
21 Q So call it the shorter example or even
22 the farther much more powerful example are equally
23 possible?
24 A Yes, sir.
25 MR. BARNES: Thank you, doctor. No

1 Who is your next witness?
2 MR. DAVIS: Investigator Lloyd.
3
4 ------oOo------
5
6 E. M. LLOYD, called as a witness on behalf of
7 the Commonwealth, having been first duly sworn, was
8 examined and testified as follows:
9
10 DIRECT EXAMINATION
11
12 BY MR. DAVIS:
13 Q Sergeant Lloyd, would you state your name
14 and your occupation, please?
15 A E. M. Lloyd, Sergeant, Division of
16 Investigation, Department of State Police, Richmond,
17 Virginia.
18 Q How long have you been so employed,
19 Sergeant Lloyd?
20 A Since 1941.
21 Q Sergeant Lloyd, calling your attention
22 to the 11th day of November 1971, did you have occasion,
23 sir, in your capacity as a state police investigator to
24 respond to the Powhatan County Circuit Court?
25 A Yes, sir.

1 Q What was your purpose in responding there,
2 sir?
3 A The results of a shooting that had
4 occurred in the courthouse approximately one hour before
5 my arrival.
6 Q Now, when you responded to the courthouse,
7 sir, what, if anything, did you do?
8 A I assisted Investigator Hillman in the
9 location of evidence and I interviewed potential witnesses
10 who had been present in the courthouse.
11 Q Now, subsequent to you arrival, sir, did
12 you have occasion to search for physical evidence?
13 A Yes, sir.
14 Q Did you in fact recover some things while
15 you were there, sir?
16 A Yes, sir.
17 Q Sergeant, I'm going to hand you what
18 purports to be marked Q-1 and ask you if you can identify
19 that, sir?
20 A Yes, sir. This is the projectile that
21 was recovered from the ceiling in the middle of the
22 courtroom.
23 Q Did you recover that yourself, sir?
24 A Yes, sir.
25 Q After you recovered it, sir, what, if

anything, did you do with it?

A I gave it to Investigator Hillman on the 23rd day of November 1971.

Q All right, sir. Did you keep custody of it until that time?

A Yes, sir.

Q Now I hand you, sir, what purports to be marked Q-2 and ask if you can identify that, sir?

A Yes, sir. This is the fragments that I recovered from a rafter in the left-hand side of the courthouse in the ceiling after it had passed through the ceiling.

Q What, if anything, did you do with that after you recovered it?

A I also kept this in my possession and I gave this to Investigator Hillman on the 23rd day of November 1971.

Q What type of projectile is that?

A This is fragments of lead, small particles.

Q Referring back to Q-1, what type of projectile is that?

A This is a lead projectile.

Q Now, sir, I hand you what purports to be -- what is marked Q-7 and ask if you can identify that, sir?

A Yes, sir. This is the lead projectile that was recovered on the ground beneath the floor in the room which was marked "Private," where the toilet was, after it had hit the wall.

Q What, sir, if anything, did you do with that projectile?

A I also kept that and I gave it to Investigator Hillman on the 23rd day of November, 1971.

Q Sergeant, I'm going to hand you these two photographs, sir, and ask you if you can identify those photographs?

MR. JANUS: May I see them first?

MR. DAVIS: Sure. Excuse me, Mr. Janus.

A Yes, sir, this is the photograph of the bullet hole in the ceiling in the center of the courtroom.

BY MR. DAVIS:

Q Would you point out to the ladies and gentlemen of the jury what you are referring to, sir?

A Referring to this dot here as being the bullet hole in the ceiling in the center of the courtroom.

Q All right, sir. Now, the second -- what is the second photograph?

A This is also a bullet -- photograph of a bullet hole in the ceiling but to the left-hand rear

of the courthouse.

Q When were these photographs taken, Mr. Lloyd?

A May 12, 1972.

Q All right, sir. Did you take the photographs, yourself, sir?

A Yes, sir.

Q Were they the same holes as the holes that you recovered the projectiles you have testified to on the day in question?

A Same holes at the same location I had observed November 1971.

Q What date were they taken on, sir?

A May 12.

Q I hand you two other photographs and ask you if you can identify those?

MR. DAVIS: Judge, I'm going to try to introduce them all in bulk if the court doesn't mind.

THE COURT: All right, sir.

BY MR. DAVIS:

Q All right, sir. Sir, could you identify those two, please?

A Yes, sir. This is a photograph of the

1 toilet section in the room marked "Private," and this is
2 the bullet hole in the middle of the door.
3 Q All right, sir. Would you remove your
4 finger so the jury can see?
5 Now, what's the other photograph depict?
6 A This is the photograph after the door
7 was open showing the hole in the wall inside the toilet
8 below the switch box.
9 Q Would you show the hole to the ladies and
10 gentlemen of the jury?
11 A This hole.
12 Q Relating to that hole where did you
13 finally locate the projectile itself?
14 A Immediately under the floor on the ground
15 after it had gone through the wall section.
16 Q Sergeant Lloyd, did you have occasion to
17 take that photograph, sir?
18 A Yes, sir, I did.
19 Q Would you explain to the ladies and
20 gentlemen of the jury what that photograph depicts, please?
21 A This photograph reflects the scene or
22 the area from inside the front door looking in the northern
23 direction.
24 Q Did you have occasion also to take this
25 photograph, sir?

A Yes, sir, I did.

Q All right, sir. What does that photograph depict?

A This is a photograph of the door that's marked "Private," behind the clerk's desk.

Q Did you have occasion, sir, to take that photograph?

A Yes, sir, I did.

Q All right, sir. What does that photograph depict?

A This is a photograph of the door leading from the courtroom into the jury room.

Q For what purpose was that photograph taken, Sergeant Lloyd?

A That also had a bullet hole in the door and also where a bullet ricocheted off of the molding at the door.

Q All right, sir, would you point out to the ladies and gentlemen of the jury where that bullet hole is?

A That bullet hole is three and four -- three feet four and one half quarter inches from the floor approximately three inches from the door -- edge of the door on the left-hand side.

Q All right, sir. Was there another

1 indentation in the door, sir?

2 A It was up at the top. I don't think it

3 reflects in this photograph.

4 Q All right, sir. Did you have occasion to

5 take that photograph?

6 A Yes, sir, I did.

7 Q All right, sir. What does it reflect?

8 A It also reflects a bullet hole in a chair

9 and where the bullet ricocheted off the counsel's table.

10 Q Will you point out those areas to the

11 ladies and gentlemen of the jury, please?

12 A This is the chair with the hole and this

13 is the spot where it ricocheted off the counsel table.

14 MR. JANUS: Are you offering all of these

15 in evidence at this time?

16 MR. DAVIS: As soon as I get through. I

17 am offering them in bulk.

18 MR. JANUS: I may have specific objections

19 to individual pictures, your honor, for different

20 reasons as they come in.

21 THE COURT: All right.

22

23 BY MR. DAVIS:

24 Q All right, sir, did you have occasion to

25 take this photograph?

A Yes, sir.

Q What does it depict?

A It reflects a hole -- bullet hole in the floor in the cabinet section in the jury room, which is this hole right here.

Q All right, sir. Did you have occasion to take this photograph?

A Yes, sir, I did.

Q What does it depict?

A It reflects a bullet hole in the door that's marked "Private," behind the clerk's section in the courtroom.

Q Would you point out where the bullet hole is?

A This bullet hole is fifty-two and one-eighth inches from the floor level, and it is four and one-eighth inches from the right-hand side of the door.

Q And lastly, sir, did you have occasion to take that photograph?

A Yes, sir, I did.

Q What does that show, sir?

A This shows the interior of the courtroom looking from the counsel's table to the front door as we look out.

This also reflects the arrangement of the seating.

1 Q While you are at this photograph,
2 Sergeant Lloyd, there appears to be some type of --
3 A Yes, sir.
4 Q -- stuff on one of those benches. Can
5 you explain what that is, please?
6 A Yes, sir. That is a varnish type stain
7 that had been on that bench some two or three years prior
8 to this when they renovated the courthouse.
9 Q Would you show the jury what you are
10 talking about?
11 A That is the stain on this bench here.
12 MR. DAVIS: Judge, please the court, I
13 move to introduce them in bulk as Commonwealth
14 No. 13 or 14.
15 THE COURT: Mr. Janus, you see which one
16 you want to object to?
17 MR. JANUS: Mr. Davis hasn't numbered
18 them for identification, so it is a little
19 difficult to object.
20 This one is immaterial, it has no
21 probatative value to the jury, because the
22 defendant has already offered pictures of the
23 same thing. It is just cumulative.
24 THE COURT: Let me see it.
25 MR. JANUS: I would submit it has no

1 probative value. I don't object to it strenuously
2 except that it is cumulative.
3 MR. DAVIS: Talking about not objecting
4 to it, I see no reason why the photograph can't
5 go in. It depicts the courthouse as it was on
6 that day in question.
7 MR. JANUS: This is the defendant's
8 exhibit that we already introduced.
9 THE COURT: Well, I don't think it will
10 hurt if it goes in. I will overrule your objection
11 on that.
12 MR. DAVIS: Just keep the photographs
13 in sequence, judge, that's all.
14 MR. JANUS: With regards to the picture
15 of the chair, your honor, I am sure it will be
16 elicited on cross-examination, but it can certainly
17 give the impression to the jury that the chair
18 was in that exact position, whereas this picture
19 was taken on May 12, 1972, and we don't know
20 whether the chair was in that position or not.
21 The chair itself has been introduced in evidence,
22 and obviously you can see a hole of some kind in
23 it.
24 MR. DAVIS: Judge, the picture is
25 introduced for the purpose of the ricochet that's

1 shown there, and Mr. Lloyd has testified the
2 pictures were taken May 12, 1972, and it is quite
3 obvious to anybody of knowledge the chair's
4 probably not back in the exact spot it was in.
5 The table itself is not movable, and therefore
6 the picture is offered for that purpose.
7 THE COURT: I will sustain the objection
8 as to this one.
9 MR. JANUS: With respect to the picture
10 of the door, your honor, this particular one the
11 door seems to be cracked. This likewise was
12 taken on May 12, 1972. There would be no way
13 the jury would know that the bullet came in at
14 a certain direction on November 22, 1971. If
15 the door was cracked -- Mr. Lloyd of course wasn't
16 there, and if the door was opened or shut of
17 course it would affect the angle of --
18 THE COURT: All right, I sustain the
19 objection to that.
20 MR. JANUS: His honor going to lable
21 those?
22 THE COURT: I'll lable them as Exhibit
23 A, B, C, and D. I will make it 14 and then I'll
24 make them A, B, and C.
25 (So marked by the court.)

MR. JANUS: I have no further objections to the admission.

MR. DAVIS: Judge, for identification purposes I will ask the court could Q-1, 2, and 7 be marked and accepted as Commonwealth exhibits?

THE COURT: All right, sir. Bring them up. How many is there, Mr. Davis? Three?

MR. DAVIS: Three. I would like to separate them if possible.

THE COURT: All right, sir. This will be 15.

MR. DULING: Is that Q-1, Mr. Davis?

MR. DAVIS: That's Q-1, yes, sir.

No. 15?

THE COURT: Um-hum. All right, that's 16. Q-7 will be 17.

(So marked by the court.)

BY MR. DAVIS:

Q Now, Sergeant Lloyd, did you have occasion at the request of our office on May 12th of 1972 to go to the Powhatan County Circuit Court with Captain Netherland, Investigator Hillman, and then-Commonwealth's attorney Mr. Davila --

A Yes, sir.

Q -- to take certain measurements?

A Yes,sir.

Q All right, sir. Would you relate to the court what transpired while you were there, sir?

A At that time measurements was taken of Captain Netherland as he stood in the -- near the front entrance of the courthouse in a position as if he was firing a weapon towards a door marked "Private." At that time his hand was five feet eight inches --

MR. JANUS: Your honor, I would have a motion outside the presence of the jury.

THE COURT: All right, ladies and gentlemen of the jury, will you retire to your room a moment, please?

(The jury withdrew from the courtroom.)

MR. JANUS: Your honor, I object to Mr. Lloyd's testifying as to measurements that he took on Netherland's body from the end of a projected weapon that would be extended. I have no objection to him testifying that he measured the bullet holes, their height from the floor or ceiling or what have you. I would object -- the court has previously ruled in the Jefferson trial on a similar objection I believe and allowed Mr. Lloyd at that time to testify to the

1 measurements from the floor or ceiling physically,
2 but from any experiment from where Mr. Netherland
3 may have been and his approximate position, then
4 we would object to it.
5 THE COURT: All right, Mr. Davis?
6 MR. DAVIS: Judge, please the court,
7 Mr. Netherland's already testified in this trial,
8 and there wasn't any objection to his testimony
9 that he was standing in the position he was
10 standing on the date in question, November 22,
11 1971, and that the measurements were taken by
12 Mr. Lloyd and that he was basically in the same
13 position. I submit to the court it is a matter
14 for the jury to determine its weight and value,
15 and it's been permitted before in the Jefferson
16 case. I correct Mr. Janus a little bit. The
17 court did allow it in the Jefferson case, if we
18 are going back to that. Didn't allow the
19 photograph; however, that's the only thing wasn't
20 allowed. And we are not offering the photograph
21 in this particular case.
22 THE COURT: I'll let Sergeant Lloyd
23 testify how high his hand was off the ground and
24 where the bullet went through and how far he was
25 away from the door. I think he can measure how

1 far he was away from the door, but no drawing
2 the tape measure to show the line of the
3 projectile.
4 MR. DAVIS: I am not going to offer that.
5 THE COURT: All right. I think that does
6 away with your objection, doesn't it, Mr. Janus?
7 MR. JANUS: Yes, sir.
8 THE COURT: All right, sir.
9 Return the jury, sheriff.
10 (The jury returned to the courtroom.)
11 THE COURT: All right, sir, Mr. Davis.
12
13 BY MR. DAVIS:
14 Q Sergeant Lloyd, returning to your testimony,
15 sir, did you have occasion to measure the distance from
16 the floor where Captain Netherland was standing to his
17 hand as it was extended?
18 A Yes, sir.
19 Q And what was that distance?
20 A Five feet eight inches.
21 Q Did you likewise have occasion to measure
22 the distance from the floor to the bullet hole that was
23 in the door marked "Private"?
24 A Yes, sir.
25 Q All right, sir. What was that measurement?

A It was fifty-two and one-eighth inches. It has, however, a sixteen-foot rise -- sixteen-inch rise between the courthouse floor and the floor where the door was measured.

Q Why is that, Sergeant Lloyd?

A Because it is a rise area as it is here. You come up two steps to get up into the clerk's office and the judge's chambers.

Q Now, did that fifty-two inches -- fifty-two and one eighth inches --

A Yes, sir.

Q Did that include the sixteen-inch raise?

A No, sir.

Q That was in addition to it?

A That's correct.

Q Sergeant Lloyd, would you take Defense Exhibit No. 1 and relate to the ladies and gentlemen of the jury what you are talking about when you say "rise"?

A It reflects the two steps here in the corner of the right-hand side, which are eight-inch steps. It is a sixteen-inch rise from the courthouse floor level to the area of the door marked "Private," the bottom of the door.

Q Sergeant, did you also have occasion to make measurements of the bullet hole that traversed the

door to the rest room in the rear of the private door?

A Yes, sir, I did.

Q All right, sir. What were your measurements as to that?

A That bullet hole is fifty-five and three-quarter inches from the bottom of the door, and it is eleven and one-quarter inches from the left-hand side of the door.

Q Is that the door marked "Private" or the other door, sir?

A That's the toilet door itself.

Q Now, sir, during the investigation did you have occasion to -- as relates to the projectile hole on the door marked "Private," to place an instrument through that door, sir?

A Yes, sir, I did.

Q What type of instrument did you place through it?

A A lead pencil.

Q All right. What was your purpose in doing that?

A To determine the direction of travel.

Q What were the results of your test?

A It came out of the back side of the door on a slight angle.

Q In which direction, up or down, sir?

A Up.

Q Sergeant Lloyd, do you know what effect the grain of the wood would have on a projectile, sir?

MR. JANUS: Your honor, I don't think the sergeant is qualified as a ballistics expert.

THE COURT: I think that would be purely speculative. Objection sustained.

BY MR. DAVIS:

Q Sergeant, when you were present on May 12, 1972, with Captain Netherland, did you have occasion to observe the distance from where he was standing to the back of the courthouse?

A To the back of the courtroom or the back of the courthouse?

Q Excuse me, the back -- to the door marked "Private" is what I am getting at.

A Yes, sir, I did.

Q How far was that?

A From where he was standing to that door?

Q Yes, sir.

A Thirty-six feet two inches.

MR. DAVIS: Sergeant, would you answer Mr. Janus's questions, please?

THE WITNESS: Yes, sir.

CROSS-EXAMINATION

BY MR. JANUS:

Q Sergeant Lloyd, on May 12th when you went there, you just -- Netherland put himself in the approximate position of where he recalled being some six months before. Is that correct?

A That is correct.

MR. DAVIS: I object to that, judge. That's not the testimony.

THE COURT: He asked him the question and he answered and he said that's correct. Objection is overruled.

BY MR. JANUS:

Q If the gun was fired from a five foot eight inch height , approximately, and it hit something four foot six inches off the ground on the same plane, then the path of course would be downward slightly. Isn't that correct?

A Yes, sir.

Q And with respect to the doors marked "Private" and the door to the jury room, you weren't

1 present in the court on November 22, 1971, when the
2 incident actually took place, were you, sir?
3 A No, sir.
4 Q So you don't know of your own knowledge
5 whether those doors were closed, slightly ajar, or wide
6 open?
7 A I do not.
8 MR. JANUS: Are these the pictures,
9 Mr. Davis?
10 THE COURT: No, here they are, Mr. Janus.
11 MR. JANUS: I don't have any further
12 questions of Sergeant Lloyd.
13 THE COURT: Any further questions on
14 redirect?
15 MR. DAVIS: No, sir, I have no more.
16 THE COURT: All right, sir, may Sergeant
17 Lloyd be excused?
18 MR. DAVIS: No, sir.
19 THE COURT: All right, next witness.
20 MR. DAVIS: Mr. Hillman, please.
21 This testimony would be a little lengthy.
22 Could we have a five-minute recess before we
23 start?
24 THE COURT: We have only been going less
25 than an hour. If you need a recess we will take

A I believe that is correct.

Q And the investigation further revealed that the defendant James Washington had no such lacerations about his wrist or person, did he?

A That's correct.

MR. JANUS: Thank you, sir.

THE COURT: Any further questions?

MR. DAVIS: I have none, your honor.

THE COURT: All right, Mr. Hillman.

MR. DAVIS: Special Agent Poppleton, please.

------oOo------

RICHARD J. POPPLETON, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DULING:

Q Please state your name?

A Richard J. Poppleton, P-O-P-P-L-E-T-O-N.

Q What is your occupation or profession, Mr. Poppleton?

1 A I am a special agent of the Federal
2 Bureau of Investigation assigned to the FBI laboratory
3 in Washington, D.C.
4 Q How long have you been employed as an
5 FBI agent, sir?
6 A Little bit more than twenty-seven years,
7 sir.
8 Q What are your present duties with the
9 Federal Bureau of Investigation?
10 A I am assigned to the firearms
11 identification section of the FBI laboratory, and in that
12 section I conduct microscopic examinations and comparisons
13 of markings on bullets and cartridge cases to determine
14 whether or not a particular ammunition specimen was fired
15 from a particular gun.
16 I also conduct what are known as gun powder tests
17 in the field of firearms identification. And these are
18 microscopic and chemical examinations upon articles of
19 clothing worn by victims in shooting cases to determine
20 from a microscopic and chemical examination of these
21 garments the approximate muzzle-to-garment distance at
22 the time a particular shot was fired.
23 In the field of firearms identification I also
24 conduct what are known as functional tests, and these
25 are mechanical tests performed on guns to determine,

number one, whether a weapon is in proper operating condition, whether or not a gun will fire accidently without pulling the trigger, tests to determine trigger pull, that is --

MR. JANUS: Your honor -- excuse me, Mr. Poppleton.

Your honor, if the purpose of this is to establish his qualifications as a firearm identification specialist I would stipulate he is qualified in that area.

BY MR. DULING:

Q Agent Poppleton, were your duties similar in 1971, '72, and '73, sir?

A Yes,sir, they were the same duties then as they are now.

Q I take it, sir, you have had occasion to testify as an expert before. Is that correct, sir?

A Yes, sir, I have.

Q On roughly how many occasions?

A Slightly more than four hundred cases, sir.

Q What do you mean by the term firearms identification?

A Firearms identification I believe as previously described is a microscopic examination and study of markings on bullets and cartridge cases to

determine from an examination of those microscopic marks and a comparison of same whether or not a particular bullet or cartridge case was fired by a particular gun.

Q Agent Poppleton, did you have occasion to receive some items from Investigator Hillman sitting on my right, sir?

A Yes, I did. On November 26th of 1971 Investigator Hillman delivered certain items of evidence to me.

MR. DULING: If your honor please, with the court's permission I would like to take this table that's empty here and move it over in front of the jury so that I might continue my examination of Mr. Poppleton.

THE COURT: All right, sir.

MR. DULING: Sir, if you would step down here I think it might facilitate matters.

I need Exhibits 7, 9, and 11, sir, the three weapons. And 15, 16, and 17.

THE COURT: They have been marked for identification, but they have never been introduced.

BY MR. DULING

Q Agent Poppleton, I'm going to ask that

you first look at Commonwealth's Exhibit No. 9 and tell me whether or not you have ever seen it before?

A Yes, sir, I have seen this revolver before, Commonwealth's Exhibit 9.

Q What were the circumstances under which it came into your possession?

A I received this from Investigator Hillman in the FBI laboratory on November 26, 1971.

Q I'll ask you, sir, to look at what has a marking at this time of Commonwealth's Exhibit No. 27 and ask you whether or not you have ever seen it before? Have you ever seen those before?

A Yes, sir. Commonwealth's Exhibit 27 was also received by me from Investigator Hillman on November 26, '71, in the FBI laboratory.

Q And where were they when you received them, sir? Were they loose?

A These items contained in Exhibit 27 were loaded into the Exhibit 9 revolver when Investigator Hillman delivered this evidence to me in the laboratory.

Q Now, for the purposes of your examination, sir, what identification marking, if any, did you put on the Commonwealth's Exhibit No. 9?

A On the crane, which is the vertical portion of the gun bearing the serial number, which is

hidden by the cylinder when the action is closed, I placed a specimen number and my initials at the time I received the gun from Investigator Hillman.

Q And what is the specimen number you put on that exhibit?

A I referred to that as specimen 23.

Q Would you mark that on that card, sir, so that I might keep these weapons straight?

A (Did so.)

MR. DULING: Do you object, Mr. Janus?

MR. JANUS: No, sir.

MR. DULING: If your honor please, with the court's permission, for the purposes of his testimony I am going to attach that to this weapon.

THE COURT: All right, sir.

BY MR. DULING:

Q I believe you testified that those cartridges were in this weapon. Is that correct?

A Exhibit 27 contains four cartridges and a cartridge case, all of which were in Exhibit 9.

Q Describe those, if you will, please?

A The four cartridges and the cartridge case, or the pall or the empty cartridge case, if you

will, which were contained in Exhibit 9 are caliber .32-20 Winchester cartridges and one cartridge case. They are of western manufacture.

Q I show you now what is marked as Commonwealth's Exhibit No. 11 and ask you if you have seen it before?

A Yes, sir. Commonwealth's Exhibit 11 was received by me from Investigator Hillman on November 26, 1971, in the laboratory.

Q And what type marking, if any, did you put on it, sir?

A On the crane of this gun in the same location as the markings I placed on Exhibit 9 revolver I placed a symbol number K-2 and my initials.

Q Would you place that, sir, on that card and attach it to that weapon, please, sir?

A (Did so.)

Q I show you, sir, what has a tentative marking of Q-13 and ask you if you have ever seen those items?

A The item which you refer to as tentatively marked Q-13 contains two cartridges and three cartridge cases which were received by me from Investigator Hillman on November 26, 1971.

Q And where were they when you received

1 those?

2 A These items, the two cartridges and the
3 three cartridge cases, were loaded into the Commonwealth's
4 Exhibit No. 11 revolver, which I referred to as specimen
5 K-2, the two cartridges and three cartridge cases.

6 Q I show you now, sir, what appears to be
7 Commonwealth Exhibit No. 7 and ask you if you have ever
8 seen it before?

9 A Commonwealth Exhibit No. 7 was received
10 by me from Investigator Hillman and on the same date as
11 the other guns were referred to, in the FBI laboratory.

12 Q What marking, if any, did you place on
13 it?

14 A On the crane of Commonwealth Exhibit No. 7
15 I placed a symbol K-1 and my initials at the time I
16 received this item.

17 Q Would you mark that, please, sir, on that
18 card and attach it to that gun?

19 A (Did so.)

20 Q I show you now, Agent Poppleton, the
21 object of this envelope indicated Commonwealth Exhibit
22 No. 26 or a Q-9 marking. Have you ever seen those before?

23 Incidentally, are the markings that I refer to
24 as Q markings, were they made by you, sir?

25 A Yes, sir, they were. The item which is

1 tentatively marked Q-9 contains four cartridge cases and
2 one cartridge, which all of the items in this envelope
3 were received by me from Investigator Hillman on November
4 26th of 1971, and all of these items, namely, the four
5 cartridge cases and the cartridge, were at the time
6 received by me loaded into the Exhibit 7 revolver which
7 I referred to as K-1.
8 Q Now, before we go further, Agent
9 Poppleton, will you explain to the members of the jury
10 the significance, if any, of the K prefix or the Q prefix
11 on any of these envelopes or weapons?
12 A Normally, the use of a K item or a Q
13 item in our means of marking evidence in the FBI laboratory
14 is strictly a selection made by the examiner. Normally,
15 a K item would refer to an object whose source is known
16 and a Q item is normally referred to as an item whose
17 source is questioned at the time it is received in the
18 laboratory. The fact that an item is marked K or an item
19 is marked Q for my purposes in my examination they were
20 labeled as such in order that I would know that I am
21 comparing a Q versus a K. I normally would not compare
22 two Ks with each other. But for the purposes of marking
23 evidence any -- they could be called X, Y, and Z or A, B,
24 and C as far as meaningful examination is concerned.
25 Q Agent Poppleton, I'll hand you now what's

1 marked as Commonwealth Exhibit No. 22 -- it has a reference
2 Q-8 -- and ask you to open the envelope and tell me whether
3 or not you have seen that item?
4 A The item marked Q-8 is a bullet which was
5 received by me in the FBI laboratory from Investigator
6 Hillman on November 26th of 1971.
7 Q And was it received in that envelope,
8 sir?
9 A It was, yes, sir.
10 Q What is the notation on the top of that
11 envelope?
12 A The notation is "Recovered from under rug
13 in front of clerk's bench."
14 Q Now, what, if anything, did you do with
15 that particular object when you received it from
16 Investigator Hillman during the time of your tests?
17 A Well, after marking this item, which I
18 marked Q-8 and my initials, I then examined this bullet
19 to determine, number one, its caliber, and to determine
20 whether or not this bullet was fired by any of the guns
21 submitted to me by Investigator Hillman.
22 I examined the bullet Q-8 -- Commonwealth Exhibit
23 for identification No. 22 is the bullet I refer to. I
24 found it to be a caliber thirty-two -- that's point
25 thirty-two dash twenty Winchester bullet of Winchester

1 dash Western manufacture. I examined the rifling
2 impressions on Commonwealth's Exhibit for identification
3 22 and I compared the rifling impressions on this bullet
4 with test bullets which I fired from the three revolvers,
5 Commonwealth's Exhibits 9, 11, and 7. I found this
6 bullet to be the same caliber and caliber type, that is,
7 caliber .32, caliber type .32-20, as the Exhibit 9 caliber
8 .32-20 Winchester Colt police positive revolver.
9 Q Would you hold that weapon up?
10 A Commonwealth's Exhibit 9 bears serial
11 No. 337102. This gun was designed to chamber and fire
12 caliber .32-20 Winchester cartridges.
13 MR. DULING: If your honor please, I ask
14 that the record show that's been identified as
15 Captain Monte's pistol.
16 THE COURT: All right, sir, the record
17 will so show.
18 A I found that the barrel of Exhibit 9
19 revolver was rifled with six grooves and that those grooves
20 twisted to the left or in a counterclockwise direction.
21 I measured the lined and grooving impression or the groove
22 impressions on the surface of Exhibit 22 for identification
23 bullet and I found that the rifling impressions on
24 Exhibit 22 for identification bullet were the same as
25 those produced by the Exhibit 9 revolver.

1 Q What comparisons, if any, did you make
2 with that bullet in regard to the other two weapons you
3 had in your possession?
4 A In my comparisons between the Exhibit 22
5 for identification bullet and the other two revolvers,
6 Exhibits 11 and 7, I found that this bullet, Exhibit 22
7 for identification, could not have been fired from either
8 of those two guns, 11 or 7, on the basis that the rifling
9 characteristics on the Exhibit 22 for identification
10 bullet are different from those produced by the barrels
11 of Exhibit 7 and 11.
12 In addition, the Exhibit 7 and 11 guns are of an
13 entirely different caliber, namely, .38 special, whereas
14 Exhibit 22 for identification is a .32 caliber bullet.
15 Q Did you have occasion, sir, to compare
16 that bullet, Commonwealth's Exhibit No. 22 that you have
17 been talking about, with the bullets or casings that were
18 found in each of those weapons when you received them?
19 A Yes, I did.
20 Q Would you relate what you did and what
21 you concluded on that?
22 A I found that the Commonwealth's Exhibit
23 22 bullet is the same caliber and the caliber type and
24 manufacture, that is, .32-20 Winchester bullet, of
25 Winchester-Western manufacture, as the bullets contained

in the four cartridges of Exhibit 27, which cartridges were removed by me from Exhibit 9 in the laboratory.

Q I will show you now, Agent Poppleton, Commonwealth's Exhibit No. 20, previously marked Q-5, and ask you to open that envelope and tell me whether or not you have seen it before?

A Commonwealth's Exhibit 20 is a lead bullet which I received from Investigator Hillman on November 26, 1971.

Q Did you receive it in that envelope?

A Yes, sir, I did.

Q What is the notation at the top of that envelope?

A The top of the envelope is noted "Recovered from floor at door to jury room."

Q And what examination, if any, did you make of that fragment or that bullet?

A Commonwealth's Exhibit 5 -- or Commonwealth's Exhibit 20, correction, which I labeled Q-5 in my examination, I found to be a caliber .38 special lead bullet of Remington-Peters manufacture. I found that it was fired from a barrel which was rifled with six grooves which twisted to the left or in a counterclockwise direction. I found that Exhibit 20 is badly mutilated and deformed. There were not enough

microscopic -- that is, individual microscopic characteristics on its surface for me to identify it with a particular gun; however, I found that the rifling characteristics on the surface of this bullet were like those produced by the .38 special Colt revolver Commonwealth's Exhibit No. 11.

MR. DULING: If your honor please, I'd ask that the record show that that's been identified as Captain Netherland's pistol.

THE COURT: All right, it will so show.

BY MR. DULING:

Q Go ahead, sir.

A By the same token, I found that the rifling impressions on the surface of Commonwealth's Exhibit 20, again which is a .38 special bullet, are different from those produced by the barrel of Exhibit 7 revolver, which I labeled K-1 in the laboratory, and therefore Commonwealth's Exhibit No. 20 could not have been fired by Exhibit 7. On the basis of caliber -- Exhibit 20 I found to be a .38 special bullet, Exhibit 9 revolver is a .32-20 Winchester revolver. On the basis of caliber alone the Exhibit 20 bullet could not have been fired by the Exhibit 9 revolver.

Q What comparison, if any, sir, did you

make in regard to the casings or bullets that you found in each of the weapons when you received it?

A I found that the Exhibit 20 bullet is the same caliber .38, caliber type .38 special, and manufacture, Remington-Peters, as the bullets of the two cartridges which I removed from the cylinder chambers of the Exhibit 11 revolver.

In addition, the cartridge case contained in Exhibit 28 is a .38 special cartridge case of Remington-Peters manufacture. The Exhibit 20 bullet is the type of bullet originally loaded into that cartridge case.

The bullet Exhibit 20 is a solid lead bullet. It does not have any coating on it such as copper, as do other bullets, or maybe brass, which other bullets commerically manufactured have on the surfaces.

Q Agent Poppleton, I would show you now what's marked Commonwealth's Exhibit 21 or Q-6 and ask you, sir, whether or not you received it on the same day in question from Mr. Hillman?

A Yes, sir, I received Commonwealth's Exhibit 21 on the same day from Investigator Hillman.

Q Did you receive it in that envelope, sir?

A I did.

Q What is the marking on that envelope?

A "Recovered from memorandum book dated

3/18/40 to 3/18/62 in jury room by Sheriff Simpson."

Q Would you take that bullet out, sir, and describe to the members of the jury your observation of it and comparisons you made?

A The Exhibit 21 bullet I labeled specimen Q-6 in my examination in the laboratory. This specimen is a caliber .38 special lead uncoated bullet of Remington-Peters manufacture. It, like the Exhibit 20 bullet, was fired from a barrel rifled with six grooves twisting to the left or in a counterclockwise direction. I found that the rifling impressions on the Exhibit 21 bullet were like those produced by the barrel of the Exhibit 11 revolver which I labeled K-2 in the laboratory.

Q And what is the marking here, sir?

MR. DULING: If your honor please, let the record show it is Captain Netherland's pistol.

THE COURT: All right, sir, it will so show.

BY MR. DULING:

Q Go ahead, sir.

A By the same token, I found that the rifling impressions on the Exhibit 21 bullet are different from those produced by the Exhibit 7 revolver, which I labeled K-1 and which has the tag "Guard Snyder's pistol."

The rifling impressions produced by the barrel of Exhibit 7 are different from those on Exhibit 21, and therefore Exhibit 21 could not have been fired by the Exhibit 7. Exhibit 21 could also not have been fired by Exhibit 9 revolver, which bears the label "Captain Monte's pistol." This is because Exhibit 9 is a caliber .32-20 revolver and could not fire a .38 special bullet.

Q Did you compare, sir, with the bullets and casings that were in the gun when you received it?

A I did, yes, sir.

Q What were your conclusions, if any?

A I found that the Exhibit 21 bullet is the same caliber, caliber type, and manufacture as the bullets contained in the two cartridges which I removed from the cylinder chambers of the Exhibit 11 revolver in the laboratory. I found that the Exhibit 21 bullet is the type of bullet, that is, caliber, caliber type, and manufacture, as that originally loaded into the cartridge case of Exhibit 28, which was also removed by me from one of the cylinder chambers of Exhibit 11.

Q What is the condition of that bullet?

A The Exhibit 21 bullet is considerably mutilated and deformed.

Q I'll show you now, sir, what is marked as the Commonwealth Exhibit No. 17 or your Q-7. Have you

ever seen it before?

A Commonwealth's Exhibit 17 was received by me from Investigator Hillman along with other items described. The envelope bears the label "Recovered from ground under toilet area at rear of courthouse by Investigator Lloyd."

MR. DULING: Excuse me just a moment, sir.

I believe this is one, sir, that has not been introduced. I move to introduce it as Commonwealth's Exhibit No. 17.

THE COURT: All right, sir. Its been marked.

BY MR. DULING:

Q What comparisons, if any, did you make of that, sir, with the guns and bullets in your possession at that time?

A I examined Commonwealth's Exhibit 17 and found it to be a .38 special bullet of Remington-Peters manufacture. I found this bullet to be badly mutilated and deformed, and therefore there were not sufficient rifling impressions or microscopic marks remaining on its surface to determine whether this bullet was fired by any of the guns submitted to me by Investigator Hillman.

The Exhibit 17 bullet, which I labeled Q-7 in the laboratory, is, however, caliber .38 special. It is of Remington-Peters manufacture. It is a lead uncoated bullet, and it is like the bullets of the cartridges of Exhibit 28 in both caliber -- caliber and caliber type and manufacture. It is also like the bullets of -- the bullet Exhibit 20 and the bullet Exhibit 21, the same caliber, caliber type, and manufacture.

Q What is its comparison, if any, with the bullets out of what's been labeled Guard Snyder's gun?

A The bullet Exhibit 17 is a solid lead bullet. The bullet of cartridge of Exhibit 26, which I removed from the revolver Exhibit 7, Guard Snyder's pistol, is a copper-coated lead bullet. It is different from that bullet in the fact that it has a different coating. It is the same caliber, caliber type, but of a different manufacture.

Q All right, sir. I'll hand you now, sir, what's been marked as Commonwealth's Exhibit No. 19 or your Q-4 and ask you whether or not you have seen it, sir?

A Yes, sir. Exhibit 19 was received by me from Investigator Hillman on November 26, 1971. The envelope in which it was received by me was labled "Recovered from heat vent by step at clerk's desk." This specimen, Exhibit 19, was marked Q-4 by me in the

1 laboratory.

2 Q And what were your examinations and

3 conclusions in regard to that bullet, please, sir?

4 A I found that Exhibit 19 is a caliber

5 .38 special, copper-coated lead bullet of Winchester-

6 Western manufacture. I found that this bullet was fired

7 from a barrel rifled with five grooves, a different

8 rifling characteristics from the bullets of those

9 previously described. From test firing the Exhibit 7

10 revolver, which is labeled Guard Snyder's pistol, I

11 obtained test bullets and I found that the rifling

12 impressions on those test bullets were the same as those

13 on the Exhibit 19 bullet. I found that the rifling

14 impressions on Exhibit 19 were different from those

15 produced by the Colt revolver, Exhibit 11, which barrel

16 is rifled with six grooves and they twist to the left in

17 a counterclockwise direction. I found that the rifling

18 impressions and the caliber on Exhibit 19 were different

19 from those produced by the barrel of the Exhibit 9

20 revolver, which is labeled Captain Monte's pistol, in that

21 the Exhibit 9 revolver is a .32 caliber revolver, Exhibit

22 19 is a .38 special bullet. It could not have been fired

23 from Exhibit 9. It also, based upon the differences in

24 rifling characteristics previously described, could not

25 have been fired by the Exhibit 11 revolver.

It could, based upon the comparable rifling characteristics, have been fired by the Exhibit 7 revolver.

Q Did you --

A This --

Q Excuse me. Go ahead.

A The bullet of Exhibit 19 is of a different manufacture then the bullets Exhibit 17, Exhibit 21, and Exhibit 20, and the bullets contained in the two cartridges Exhibit 28 removed from the cylinder chambers of Exhibit 11, Captain Netherland's pistol.

The Exhibit 19 bullet is also different in caliber, caliber type, and manufacture from the bullet Exhibit 22, and the bullets of the four cartridges, Exhibit 27, removed from the Exhibit 9 Captain Monte pistol. The Exhibit 19 bullet is the same caliber, caliber type, and manufacture as the bullet contained in the cartridge of Exhibit 26, which was removed by me from the Exhibit 7 revolver, which I referred to as K-1 and it is described as Guard Snyder's pistol.

The Exhibit 19 bullet is the type of bullet which was originally loaded into any one of the four cartridge cases of Exhibit 26, which cartridge cases I removed from Exhibit 7 in the laboratory.

Q What is the condition of that bullet?

A The Exhibit 19 bullet is in very good

shape. There is a small amount of deformation at the base area, but the nose of this bullet and the sides or barrel-contacting surface is in good condition, unmutilated.

Q I show you now, sir, what has been marked as the Commonwealth's Exhibit No. 18 or your Q-3, sir, and ask you whether or not you received that from Investigator Hillman on the same day in question?

A Exhibit 18 was received by me in the laboratory on November 26,1971, from Investigator Hillman. The envelope in which it was received was labeled "Recovered from floor at steps by clerk's desk." This bullet was marked by me Q-3 in the laboratory.

Q What were your observations and comparisons, sir, in regard to that particular bullet?

A I examined Exhibit 18 and found it to be a .38 special, copper-coated lead bullet of Winchester-Western manufacture. I found this bullet, like the Exhibit 19 bullet, to have been fired from a barrel rifled with five grooves which twist to the right or in a clockwise direction. I compared the rifling impressions on specimen or Exhibit 18 with those produced by the barrel of Exhibit 7, Guard Snyder's pistol, which I labeled K-1. I found that the rifling impressions on Exhibit 18 were the same as those produced by the barrel of Exhibit 7, and I found the same rifling impressions to be different

1 from those produced by the barrel of Exhibit 11, the
2 Captain Netherland's pistol. And therefore Exhibit 18
3 could not have been fired by Exhibit 11.
4 I found that the rifling impressions on Exhibit 18
5 and the caliber -- and its caliber were different from
6 those of Exhibit 9 or Captain Monte's pistol. Again, the
7 Exhibit 9 pistol is a .32-20 revolver. The bullet
8 Exhibit 18 is a .38 special bullet. Could not have been
9 fired from a .32 caliber revolver.
10 I found that the bullet, Exhibit 18, is like,
11 that is, the same caliber, caliber type, and manufacture,
12 a copper-coated lead bullet, as that contained in the
13 one cartridge of Exhibit 26. The bullet Exhibit 18,
14 although the same caliber, .38, and caliber type, .38
15 special, it is of a different manufacture than the bullets
16 of Exhibit 17, 21, 20, and the bullets contained in the
17 cartridges of Exhibit 28. Exhibit 18 is a copper-coated
18 lead bullet. The bullets of Exhibit 17, 21, 20, and 28,
19 are plain solid lead bullets uncoated. The bullet Exhibit
20 18 is the type of bullet which was originally loaded into
21 any one of the four cartridge cases of Exhibit 26.
22 Q What is its condition, sir?
23 A Exhibit 18? Fairly good condition. The
24 base of the bullet has some degree of mutilation or
25 deformation, but the barrel-contacting surface and the

1 nose of this bullet are in good condition. From a
2 microscopic examination of the individual microscopic
3 characteristics remaining on the Exhibit 18 bullet and
4 the Exhibit 19 bullet, I found that both bullets, Exhibit
5 18 and 19, were fired by the same gun.
6 It was not possible for me, however, because of
7 the fact that the markings on consecutive bullets --
8 when I say markings I mean microscopic markings -- on
9 consecutive test bullets fired from Exhibit 7 were
10 changing in my testing in the laboratory -- because those
11 microscopic markings were changing -- not the rifling
12 impressions; they were not changing -- but because the
13 microscopic marks were changing it was not possible for
14 me to determine whether Q-3 -- correction, whether 18
15 and 19, which I identified as having been fired by one
16 gun, were in fact fired by Exhibit 7. Exhibits 18 and 19,
17 of all the bullets received by me from Investigator
18 Hillman, were the only bullets which were sufficiently
19 unmutilated or deformed and would permit me to make a --
20 to determine whether or not they were fired by one gun.
21 Or, in other words, they were the only two bullets which
22 had sufficient microscopic characteristics on their
23 surfaces to permit me to make an identification between
24 them.
25 Q Of these three guns, sir, is that gun,

1 the one you mentioned, No. 7, Guard Snyder's pistol, is
2 that the only gun that could have fired them or not, sir?
3 A Yes, Guard Snyder's gun is the only gun
4 which could have fired 18 and 19.
5 MR. JANUS: Your honor, that wasn't his
6 testimony. His testimony was the only one of
7 these three guns that could have fired it.
8 MR. DULING: That's correct. That was
9 my question.
10 A Let me correct that, your honor.
11 MR. JANUS: Thank you.
12 THE COURT: All right, sir.
13 A Of the guns Exhibits 9, 11, and 7,
14 Exhibit 7 is the only gun which could have fired Exhibits
15 18 and 19. That's correct, sir.
16
17 BY MR. DULING:
18 Q I'll show you now what appears to be
19 marked Commonwealth's Exhibit No. 15 or Q-1, and ask you
20 if you received that from Mr. Hillman on day in question
21 and in that envelope?
22 A The Exhibit 15 or my specimen Q-1, was
23 received by me from Investigator Hillman on November 26th
24 of 1971.
25 MR. DULING: Excuse me. I want to move

to introduce it as Commonwealth's Exhibit No. 15, if your honor please.

THE COURT: All right, sir.

BY MR. DULING:

Q Go ahead.

A The envelope in which it was contained bears the markings "Recovered from floor of attic near center of courtroom by Investigator Lloyd."

Q Would you state the results of your examination of that bullet compared to these other bullets and other pistols, please, sir?

A The Exhibit 15 bullet I found to be a caliber .38 special copper-coated lead bullet of Winchester-Western manufacture. I found that this bullet was fired from a barrel rifled with five grooves which twisted to the right. I found the rifling impressions on this bullet, Exhibit 15, to be the same as those produced by the barrel of Exhibit 7 revolver, Guard Snyder's pistol, and different from those produced by the barrel of Captain Netherland's pistol, Exhibit 11; to be a different caliber type and caliber and bear different rifling characteristics from those produced by the barrel of Exhibit 9, .32 caliber revolver, Captain Monte's pistol.

I found that the Exhibit 15 bullet is the same

1 caliber, caliber type, and manufacture as the bullets
2 Exhibit 18, Exhibit 19, and the bullet contained in the
3 cartridge Exhibit 26 or the cartridge of Exhibit 26.
4 The bullet Exhibit 15 is a different manufacture,
5 being a copper-coated lead bullet, from the bullets of
6 Exhibit 17, 20, 21, and the bullets of the cartridges
7 of Exhibit 28. The Exhibit 15 bullet could originally
8 have been loaded into any one of the cartridge cases of
9 Exhibit 26, which cartridge cases I removed from Exhibit 7
10 in the laboratory. Specimen Exhibit 15 is badly mutilated
11 and deformed and although it bore or it does bear rifling
12 impressions of value for comparison, there are not enough
13 microscopic or individual microscopic comparisons for
14 identification purposes. But this bullet, Exhibit 15,
15 of the guns in front of me, namely, Exhibits 9, 11, and
16 7, could only have been fired by Exhibit 7.
17 Q I will show you now, sir, Commonwealth's
18 Exhibit 16 with the marking Q-2 and ask you whether or
19 not you received it on the day in question from
20 Mr. Hillman?
21 A Commonwealth Exhibit No. 16 was received
22 by me from Investigator Hillman on the 26th day of
23 November 1971 and the envelope in which it was contained
24 and received by me was marked "Recovered from floor of
25 attic near hole 8, parenthesis, fragments of lead, end

of parenthesis, by Investigator Lloyd."

MR. DULING: Your honor please, I'd move to introduce it as Commonwealth's Exhibit No. 16.

THE COURT: All right, it will be so admitted -- marked.

BY MR. DULING:

Q Go ahead, sir.

A Commonwealth's Exhibit No. 16, when I received this specimen in the laboratory, contained three fragments. One, the largest of the three fragments, I microscopically examined and it did not appear to be from a bullet. It appeared to be solder, and subsequent spectrographic examination verified this, that it was not a bullet fragment, but a piece of solder.

The other two fragments contained in Exhibit 16 from my microscopic examination appeared to be pieces of copper-coated lead bullet. They were minute fragments of lead bearing a copper coating, which because of their minuteness did not bear any rifling impressions or microscopic marks for comparison.

The fragments of Exhibit 16, being pieces of copper-coated lead, could not have originated from any of the lead bullets, Exhibits 17, 20, 21, or the bullets of the cartridges of Exhibit 28. The copper-coated lead

1 physical condition of the copper fragments of Exhibit 16
2 was like that of the bullets of Exhibit 15, 18, 19, and
3 the bullet contained in the cartridge of Exhibit 16.
4 It was not possible for me to associate the fragments
5 within Exhibit 16, which appeared to me to be fragments
6 of one or more copper-coated lead bullets, to determine
7 whether or not they originated from any of the bullets
8 of the copper-coated lead bullets that I have identified
9 here today.
10 Q Would you state whether or not, sir,
11 that was the extent of your examination in regard to the
12 items on the table before us now, sir?
13 A No, sir, it was not.
14 Q All right, sir.
15 A The cartridge case of Exhibit 27, which
16 is the only unfired specimen of Exhibit 27, all of
17 which I removed from Exhibit 9, I compared that cartridge
18 case microscopically with the test cartridge cases which
19 I fired in the laboratory.
20 Q Excuse me, sir. You used the expression
21 "unfired"?
22 A Let me stand corrected. The cartridge
23 case of Exhibit 27 is the only fired specimen of all
24 the items contained in the Exhibit 27. 27 contains four
25 cartridges and a cartridge case. The cartridge case of

1 Exhibit 27 I compared microscopically with test cartridge
2 cases which I fired in Exhibit 9, Captain Monte's revolver,
3 in the laboratory. And I found that the cartridge case
4 of Exhibit 27 was fired or had been fired, rather, by
5 Exhibit 27. The cartridge case contained or -- correction,
6 the three cartridge cases contained in Exhibit 28, which
7 items I removed from the cylinder chambers of Exhibit 11
8 in the laboratory, I compared with test cartridge cases
9 which I fired in Exhibit 11, and I found that the cartridge
10 case of Exhibit 28 had been fired by the Exhibit 11
11 revolver. Let me correct that. There were three cartridge
12 cases in the Exhibit 28. All three cartridge cases I
13 found to have been fired by the Exhibit 11 revolver.
14 In specimen or Exhibit No. 26 there are four
15 cartridge cases and one cartridge, all of which I removed
16 from the cylinder chambers of Exhibit 7. Those four
17 cartridge cases I compared microscopically with test
18 cartridge cases which I fired in Exhibit 7 in the
19 laboratory and found that all four cartridge cases of
20 Exhibit 26 had been fired by the Exhibit 7 or Guard
21 Snyder's pistol. None of those cartridge cases which I
22 described, that is, the four in Exhibit 26, the three in
23 Exhibit 28, and the one in Exhibit 27, could have been
24 fired from any gun other than those that I mentioned.
25 Q I take it, sir --

A Any gun in the world. I am not just limiting it to these three guns here. Of all the guns ever made those cartridge cases which I identified could only have been fired by those guns which I described.

Q I take it, sir, you found all three of those pistols capable of being fired without any repairs or alterations on your part. Is that correct?

A Yes, sir.

Q Would you like to have your seat back up there, sir?

A (Resumed the stand.)

Q Agent Poppleton, can you tell me whether or not the various bullets and fragments that you have testified about today, whether or not they were checked for blood?

A Yes, sir, they were.

Q Was any blood found?

A No, sir. The bullets and bullet fragments were examined for blood. No one -- no blood was found on these bullets or bullet fragments, but the fact that no blood was found is in my experience a very common occurrence. I have examined several thousand bullets in my experience in firearms identification. Of those several thousand bullets possibly several hundred bullets were reported by me --

1 MR. JANUS: Your honor, I am not sure
2 this is material as to several hundred of several
3 thousand other bullets. He testified he didn't
4 find blood on those two bullets. I object.
5 MR. DULING: My question to Agent
6 Poppleton, had he not gone forward, is what is
7 the significance of not having found blood, and
8 I think it is a proper explanation on his part.
9 THE COURT: I think he's said through
10 his experience it is not uncommon not to find
11 blood on there.
12
13 BY MR. DULING:
14 Q All right, go ahead.
15 A Of those several hundred bullets, bullets
16 which in the minds of the investigators were believed or
17 suspected of having passed through a body member, in my
18 dealings with -- in my direct dealings with the serology
19 section of the FBI laboratory, namely the blood examiners,
20 with very few exceptions --
21 MR. JANUS: Your honor, I renew the
22 objection. I think we are going outside the
23 scope of his expertise. If there's blood on a
24 bullet they turn it over to the serology
25 department and they make their own microscopic

examinations.

THE COURT: I think he's already answered the question. He's said in his experience it is not unusual for a bullet not to have blood on it.

BY MR. DULING:

Q Now, Agent Poppleton, would you say whether or not you had occasion to receive any type clothing from Investigator Hillman on the day he visited your office?

A Yes, sir, I did. I received several articles -- numerous articles of clothing from Investigator Hillman on November 26, 1971.

Q Could you describe generally the type of clothing you received? Not its condition at this time, but merely the type of clothing.

A I received from -- I received socks, trousers, with belt, jacket, shirt, undershirt, shorts, tie, from one individual. Reportedly from another individual there was a shirt, trousers, coat, and from a third individual, shirt, trousers, coat.

Q In regard to the first items you described will you tell me whether or not you made some formal analysis of those pieces of clothing?

A The first items described, namely, the socks, trousers, with belt, jacket, shirt, undershirt,

shorts, and tie, I did conduct examinations of in the laboratory.

Q What was the purpose of that examination?

A My examination was conducted to determine whether there were any bullet holes and/or gun powder particles or gun powder residue on any of those garments.

Q Now, in relation to the jacket, sir, I will ask you to look at Commonwealth's Exhibit No. 4 and tell me whether or not that's a similar type or piece of clothing?

A Yes, sir, it appears to be the same type of clothing that I examined in the laboratory.

Q Would it aid you in your testimony, sir, to have that available to you or not?

A I would, yes, sir.

Q Describe to the ladies and gentlemen of the jury, please, Agent Poppleton, your observation of that clothing, the type of analysis that you made, and the result of that analysis, please, sir?

A The jacket which I received in the laboratory, which I referred to as Exhibit Q-20, in the back waist area approximately five inches to the right of the center line in the back of the jacket I found an elongated hole surrounded by gun powder particles and gun powder residues, and that hole was located approximately

1 five inches to the right and in the waist area of this
2 jacket. The gun powder residues and gun powder particles
3 were on the outside of the jacket.
4 Approximately five inches above that elongated
5 hole I found two smudged or sooty areas containing gun
6 powder in the form of cylinder blast, B-L-A-S-T. The
7 two smudged areas and the elongated slit appeared to me
8 to have been produced as a result of one firing of a gun.
9 In order to have produced the elongated slit with the
10 muzzle of the gun in contact or near contact with that
11 area of the garment and the cylinder and top strap, the
12 area above the cylinder of the gun, in contact with the
13 jacket the weapon would have had to have been held against
14 the back of the jacket in both areas. The hole -- elongated
15 hole in my opinion was produced with the muzzle of the gun
16 in contact or near contact at the time of firing. The
17 area five inches above appeared to me to have been produced
18 when the top strap of the gun used was held in contact
19 or near contact with that area of the jacket at the time
20 the same shot was fired. The elongated slit referred to
21 suggests that the bullet which produced that hole would
22 have had to have been fired downward at an angle into
23 the back of the jacket.
24 On the inside of the waistband of the same jacket,
25 approximately six inches to the left of the centerline --

on the inside of that area approximately six inches to the left of the centerline of the jacket I found a smudged area which appeared to be either from cylinder blast, that is, gun powder residues leaking from the cylinder area at the time a gun is fired, or residues produced from the muzzle of the gun at the time of firing. Again, they were not inside of the jacket in that general area. It was not possible for me to identify them from a chemical examination as gun powder residues, but they had the appearance of such. That small smudged area, which measured approximately one-half inch by one inch elliptical in shape, as a result of my chemical processing of this garment disappeared during the chemical processing.

Q What do you mean, sir, by the expression "contact" or "near contact"? Specifically the "near contact"?

A A near contact shot in my opinion is a shot fired with the muzzle less than one-inch from the garment.

Q What other examination, if any, did you make in regard to the clothing presented to you with that clothing or with clothing similar to that jacket?

A I also examined a shirt -- a gray shirt, which I labeled specimen Q-21 in the laboratory. Using the model jacket as a guide, I found holes or certain

1 holes in the front and back of the shirt referred to.
2 It was reported to me that the shirt was a garment worn
3 underneath the jacket previously described. In the back
4 of the shirt approximately midway between the left armpit
5 area and the centerline of the back of the jacket at
6 approximately five to six inches below the armpit I found
7 a gapping entrance hole which in my opinion was produced
8 by the muzzle of a gun held in contact with that area of
9 the shirt. At the same elevation on the back of the
10 shirt but on the right half in the back and approximately
11 midway between the centerline and the right armpit I
12 found a second hole.
13 I found -- I examined this hole microscopically
14 for the presence of gun powder particles and gun powder
15 residues. I found no gun powder particles or gun powder
16 residues on it. I could not identify this hole referred
17 to as a bullet entrance hole. However, if that hole --
18 if that garment were beneath another garment and the shot
19 were fired through both garments gun powder residues would
20 not normally be deposited on the undergarment, that is,
21 the shirt in this case.
22 In the front of the shirt approximately four
23 inches below the right chest pocket of the shirt I found
24 a hole which had more the appearance of an exit hole --
25 as a bullet exit hole than a bullet entrance hole, but

which I could not identify as a bullet hole. No gun powder particles or gun powder residues were found around that hole.

A fourth hole in the shirt was located below the third hole referred to, which is four inches below the right chest pocket. That hole is located down near the shirttail area in the front of the shirt. Although the hole referred to, the fourth hole, could be a bullet exit hole, it could not be identified as a bullet hole either exit or entrance, and there were no gun powder particles or gun powder residues around that hole.

I also examined an undershirt which was reported to me to have been worn beneath the shirt previously described. In the undershirt I found holes which corresponded in general position to those described in the shirt, namely, one in the left back area about midway between the centerline and the left armpit and another hole corresponding to the second hole described on the shirt in the right back area. On -- in the area around the hole in the undershirt I found smoke residue from the discharge of a gun. The other two holes in the undershirt corresponded to those in the front of the shirt, and it was not possible for me other than to say they corresponded in position to the two holes in the shirt, to say that they were or were not bullet holes, entrance

1 or exit.

2 I also examined a pair trousers reported to me
3 to have been worn by the same individual wearing the
4 jacket, the shirt, and the undershirt. In the left hip
5 pocket area approximately one and a half inches down from
6 the pocket opening, from the left corner of the pocket
7 opening, I found a bullet entrance hole surrounded by
8 gun powder particles and gun powder residues, which in
9 my opinion were produced with the muzzle of a gun held
10 in contact or near contact with that area of the trousers.
11 A second hole in the trousers in the left hip pocket area
12 was located approximately two inches below and two inches
13 to the right. These directions are those of the wearer
14 of the garments. Two inches below and two inches to the
15 right I found the second hole. This hole had the
16 appearance -- if it is a bullet hole, had the appearance
17 of an exit hole rather than a bullet entrance hole. I
18 found no gun powder particles or gun powder residues
19 around the second hold referred to.

20 On the other articles of clothing which I received
21 and reported to have been worn by the same individual as
22 the four articles just described, namely, socks, shorts,
23 and a tie -- a necktie, I found no bullet holes or gun
24 powder particles or gun powder residues. On any of the
25 other articles of clothing I examined in this case I found

no bullet holes or gun powder particles or gun powder residues.

Q Would you tell me, sir, whether or not the pants that you examined were like or similar in color to that jacket?

A Yes, sir, they appeared to be the same composition as the material of the jacket.

Q As an expert in your field, Agent Poppleton, I would like to ask you one further question, sir, and that is if a pistol identical to the Commonwealth Exhibit No. 11 or your K-2, marked Captain Netherland's pistol, were fired with ammunition such as the Commonwealth's Exhibit 28, your Q-13 through -15, at a distance of twenty-five to thirty or thirty-five feet from a person wearing a jacket such as the one you examined, would you state, sir, whether or not it would produce powder particles or powder residues such as you found on those garments?

A No, sir, it could not. No gun powder particles or gun powder residues of any type could be projected that distance described.

MR. DULING: Thank you, sir.

May Mr. Janus and I approach the bench?

THE COURT: Not about this case.

MR. DULING: There is one thing I would like to take up.

1 THE COURT: Ladies and gentlemen of the
2 jury, will you retire, please?
3 (The jury withdrew from the courtroom.)
4 THE COURT: All right, the jury's retired.
5 Mr. Duling.
6 MR. DULING: Your honor please, before I
7 release the witness to Mr. Janus -- there was a
8 motion as you know about the clothing -- I would
9 like for the record to either specify a stipulation
10 by Mr. Janus that the clothing examined by
11 Agent Poppleton and testified by him today was
12 in fact the clothing of Captain Monte delivered
13 by Mr. Hillman to Agent Poppleton; otherwise, I
14 will move for introduction of that so there will
15 be no question that it was the same clothing.
16 THE COURT: Mr. Janus?
17 MR. JANUS: That's been the testimony,
18 your honor. Hillman said he gave it to him.
19 Agent Poppleton said he examined the clothing.
20 THE COURT: I didn't have any question
21 in my mind.
22 MR. DULING: I just wanted to clear it up.
23 THE COURT: How long is your cross-
24 examination going to take?
25 MR. JANUS: I would think I could clear

it up very briefly. I'd just as soon do it now before lunch. I would think we can do it in five or ten minutes.

THE COURT: Bring in the jury.

(The jury returned to the courtroom.)

THE COURT: All right, gentlemen, the jury's returned.

MR. DULING: Thank you, Mr. Poppleton. That's all the questions I have.

THE COURT: All right, Mr. Janus.

CROSS-EXAMINATION

BY MR. JANUS:

Q Mr. Poppleton, your examination was based on what other people submitted to you and what other people told you and other people requested. Is that correct?

A If you are asking me if I have any personal knowledge in this case I don't, no, sir.

Q And because of that fact you in your expertise you can't tell the ladies and gentelemen of this jury that this defendant James Edward Washington held the gun that killed Guard Monte of course, can you?

A I can't, no.

Q Would you come down and review some of this evidence with me.

I believe it was your testimony that this bullet labeled Q-8 could not have been fired from either of these two guns, but could have possibly been fired from this gun. Is that correct?

A You are saying that Exhibit 22 could not have been fired by 11 or 7 and could have been fired by Exhibit 9. Yes, sir.

Q But that's not to the exclusion of all other guns in the world; just that it could have been?

A That's correct. I cannot say that Exhibit 22 was fired by Exhibit 9 to the exclusion of all the .32-20 Winchester revolvers made, but of the guns that were submitted to me by Mr. Hillman, it is the only gun which could have fired the Exhibit 22.

Q And you are saying that Q-5, Q-6, Q-7, which are Commonwealth's Exhibits 20, 21, and 17, could have been fired by Captain Netherland's gun, this gun in the middle, as opposed -- but it could not have been fired by the other guns that you examined. Is that correct?

A That's correct, with the exception of the Exhibit 17 bullet, which I labeled Q-7, that bullet of the same make and caliber as the other bullets, it does

not bear enough rifling impressions for me to tell whether it was fired by Exhibit 7 or Exhibit 11. It is the same kind of bullet as that which was originally loaded into Captain Netherland's pistol.

Q This .38 caliber ammunition that we have talked about is standard type ammunition issued to law enforcement people all over the country, is it not?

A It is a very common type of ammunition, yes.

Q And with respect to Q-4, Q-3, Q-1, which are Commonwealth's Exhibits 19, 18, and 15, you can testify that they could not have been fired by either of these two weapons and they could possibly have been fired by this weapon. Is this correct?

A They could not have been fired by Exhibit 9 or 11, and they could have been fired by Exhibit 7.

Q But that's not to the exclusion of all other similar type weapons in the world, is it?

A That's correct, only of the guns that we have in front of us, Exhibits 7, 9, and 11, Exhibits 15, 18, and 19 could only have been fired from Exhibit 7.

Q Q-4 and Q-3, you can testify to were fired from the same gun?

A That's right.

Q And it could have been this gun, but

1 you don't know to the exclusion of all other guns that
2 they were fired -- possibility they could have been fired
3 from some other similar type weapon?
4 A Exhibits 18 and 19, which I identified
5 as having been fired by one gun, have rifling characteristics
6 like Exhibit 7, but there are many other Smith and Wesson
7 revolvers which have the same rifling characteristics.
8 But the rifling characteristics of 9 and 11 are completely
9 different.
10 Q But you do know Q-3 and Q-4 were fired
11 from the same weapon, whether it was this weapon or some
12 other weapon?
13 A Yes.
14 Q But with respect to Q-5, Q-6, Q-7,
15 Commonwealth's Exhibits 20, 21, and 17 respectively, you
16 can't even tell the ladies and gentlemen of the jury that
17 these three bullets were fired from the same weapon, can
18 you, sir?
19 A No, sir, I can't. The only thing I can
20 say is that the rifling impressions on Exhibits 20, 21,
21 and those produced by the barrel of Exhibit 11 are the
22 same.
23 Q With respect to Q-2, which is
24 Commonwealth's Exhibit No. 16, you testified you examined
25 three fragments. Is that correct?

1 A Yes.
2 Q Would you tell us why there are only two
3 fragments in this box?
4 A I don't know, sir.
5 Q You testified that one of the larger
6 fragments was solder. Was that the larger of the two
7 here, or was that the third that is not even here?
8 A The large piece you have in your hand
9 is the piece of solder.
10 Q You may take your seat.
11 A (Did so.)
12 Q Agent Poppleton, your office is in
13 Washington. Is that correct?
14 A Yes, sir.
15 Q There is an FBI field office in Richmond?
16 A Yes, sir, there is.
17 Q If a bullet hit a bone it would do damage
18 to the bullet, would it not?
19 A I would say it would do a certain amount
20 of damage, yes, sir.
21 Q Did your FBI lab do any fingerprint
22 analyses of any of the guns for Investigator Hillman?
23 A No fingerprint examination was requested
24 or conducted upon the items which I received from
25 Investigator Hillman.

1 Q Investigator Hillman did request for you
2 to test for any fabric or hair markings on any of the
3 bullets. Is that correct?
4 A That was conducted, yes, sir.
5 Q And that was by another agent?
6 A I conducted it myself, and it was also
7 conducted by a member of the serological unit, who didn't
8 know I had already done that examination.
9 Q And that was turned back to Investigator
10 Hillman along with all the other evidence?
11 A What was turned back, sir?
12 Q Any hair or fabric samples that might
13 have been extracted?
14 A It would have been the normal procedure
15 for the hair and fiber examiner in the laboratory to
16 include any hairs and fibers which he removed from any
17 items of evidence, yes.
18 Q You examined the defendant Washington's
19 coat, the brown coat that was tendered to you, as well
20 as his shirt and pants for gun powder, gun blast, didn't
21 you?
22 A Yes, sir, I did.
23 Q And no gun powder was found on any of
24 the defendant Washington's clothing, was it?
25 A That's correct, sir.

1 Q You were not submitted Guard Snyder's
2 jacket, this uniform, were you, sir, for examination for
3 gun powder wounds?
4 A Sir, I don't know really the wearer of
5 the articles of clothing that I examined. I know that
6 I received clothing from one victim.
7 Q That was the victim. That was Captain
8 Monte, that was told to you?
9 A And there was clothing from two other
10 individuals.
11 MR. DAVIS: I object to counsel testifying.
12 He's already said he didn't know whose clothing
13 it was.
14 THE COURT: He's just helping him. He
15 just said it was Captain Monte's, and that's
16 what the evidence has been.
17
18 BY MR. JANUS:
19 Q That was brown type clothing; it wasn't
20 this type clothing, was it?
21 A I believe it was brown, yes, sir.
22 Q You of course did not examine the body
23 of Captain Monte in the autopsy yourself, did you, sir?
24 A That's correct.
25 MR. JANUS: I have no further questions.

THE COURT: Any further questions of the agent?

MR. DULING: I have one.

THE COURT: All right, sir.

REDIRECT EXAMINATION

BY MR. DULING:

Q Agent Poppleton, in regards to the gun powder test, just what test was run?

A Would you repeat your question?

Q He asked about the gun powder on the clothing.

A Yes, sir.

Q What type of test was run?

A The first examination was a microscopic examination of the area around the hole for singeing, unburned pieces of gun powder, and partially burned pieces of gun powder.

In addition examinational examination a chemical examination was conducted on those areas which did not bear any visible gun powder, and that being a chemical examination was a determination of an examination for nitrates.

Q What has been your experience with that type of test?

1 A It is the test used by me in examining
2 gun powder particles and gun powder residues, and accepted
3 by the National Association -- Association of Firearms
4 and Tool Mark Examiners, by the American Academy of
5 Forensic Science, and by all recognized law enforcement
6 police laboratories today.
7 Q What conclusions can you reach in this
8 particular case?
9 A You can reach a positive conclusion from
10 a gun powder examination, that is, establishing the muzzle-
11 to-garment distance at the time a shot was fired, based
12 upon the pattern of gun powder particles and gun powder
13 residues around a bullet hole.
14 MR. DULING: All right, sir. That's all
15 I have.
16 THE COURT: Any further questions?
17 MR. JANUS: I have no further questions.
18 THE COURT: All right, may the agent be
19 excused?
20 MR. JANUS: Yes, sir.
21 MR. DULING: No, sir, we don't want him
22 to leave.
23 THE COURT: You are not excused,
24 Mr. Poppleton, but you will have to retire.
25 MR. DULING: If your honor please, I would

1 On behalf of the defendant James Edward
2 Washington we respectfully move the court to
3 strike the Commonwealth's evidence completely
4 on all of the constitutional issues that have
5 been previously made with specific regard to
6 the fact that the statute is overbroad in its
7 present status and does not conform to the
8 specific requirement of the Constitution. It
9 is guilty of being overbroad, and furthermore,
10 doesn't comply to the language of Furman versus
11 Georgia.
12 Statute is unconstitutional on its face
13 as it is violative of the Fifth, Eighth, Nineth,
14 and Fourteenth Amendments.
15 Furthermore, make a motion to strike the
16 evidence on the grounds that the statute is
17 unconstitutional as it is violative of the
18 Eighth, Fifth, Fourteenth Amendments in that it
19 is cruel and unusual punishment and provides
20 penalty of only death.
21 Furthermore, move the court to strike
22 the evidence on the basis of due process,
23 complaining of the Fifth and Fourteenth Amendments.
24 Additional ground would be equal
25 protection clause under the statute, as it applies

1 only to inmates in the Virginia penitentiary.
2 Further make the motion to strike on the
3 grounds Virginia Constitution Article 4-12.
4 Further we make the motion as to double
5 jeopardy on the basis of the testimony that was
6 put forth on the grounds previously stated.
7 Further move the court to dismiss and
8 strike the evidence on the ground of a lack of
9 speedy trial.
10 Finally move the court to strike the
11 evidence on the basis there is no evidence to
12 indicate the defendant killed the guard and there
13 is no evidence under -- no statutory requirement
14 of being a principle in the second degree.
15 For all those reasons we would move the
16 court to strike the evidence and enter a verdict
17 of not guilty.
18 THE COURT: Well, I think under the
19 Jefferson versus the Commonwealth the court will
20 overrule your motion, feeling it is purely a
21 jury question.
22 All right, can we return the jury now
23 and I'll make a stipulation.
24 Mr. Janus, do you have some evidence?
25 MR. JANUS: Yes, sir, your honor. I

THE COURT: All right, the sheriff will take charge of the defendant.

(Counsel for the defendant and the defendant conferred out of the hearing of the court.)

THE COURT: Before I bring the jury back, Mr. Janus, did you make your decision?

MR. JANUS: The defense will rest, your honor.

THE COURT: All right, let me bring the jury back in.

Sheriff, bring the jury back in.

(The jury returned to the courtroom.)

MR. JANUS: Your honor, the defense rests.

THE COURT: All right, the defense rests.

Ladies and gentlemen of the jury, so you can have some idea of what is going on -- it seems you have been going in and out -- at this time the court will take up instructions with the attorneys, after which the court will instruct you as to the law in this case, then each attorney will have an opportunity to summarize their case commencing with the Commonwealth, the defense, and then the Commonwealth in rebuttal, after which the case will go to you for your deliberations.

1 I trust it will not take us long for
2 the instructions, and as soon as they are complete
3 we will call you back and the attorneys may
4 start their summations. But at this time I'm
5 going to excuse you again to go back to your
6 jury room, but you had to be brought in for every
7 aspect of the trial. We will be with you as
8 quickly as possible.
9 Sheriff, you can let the jury retire.
10 (The jury withdrew from the courtroom.)
11 THE COURT: All right, gentlemen, do you
12 have your instructions? Have you-all exchanged
13 them or been over them at all?
14 MR. JANUS: No, sir.
15 Your honor, on behalf of the defendant
16 we would renew the motion to strike for the
17 grounds previously stated.
18 THE COURT: All right, sir, the court
19 will overrule your motion. You have your
20 exceptions.
21 MR. JANUS: Yes, sir, I would -- I assume
22 the Commonwealth has rested its case and has no
23 rebuttal.
24 MR. DAVIS: We can't rebut anything,
25 because nothing's been testified. We have no

THE COURT: All right, sir.

MR. JANUS: Your honor, I would like to elaborate on one particular point. There is of course no evidence that this defendant killed the guard Monte, killed anyone. There is no evidence that this defendant ever had a gun in his hand. Certainly, if he never had a gun there is no evidence that he shot any of the guns. I think the Commonwealth will concede this as it has conceded in its bill of particulars, for it has conceded that they cannot prove this defendant shot the gun, that this defendant killed Captain Monte.

On the other hand, the Commonwealth would come back, we anticipate, and say he was a principal in the second degree. Your honor, of course, as a general rule of criminal law we have principals in the second degree; however, we are not talking about general rules of criminal law. We are talking about specific statutes, 53-291, and this section is not in Title 18.1 of the Virginia Code. It is a felony separate and apart, and a careful reading of that statute, if your honor please, would indicate that in the statute

1 it incorporates elements of principals in the
2 second degree in specific instances. For
3 example, Section 3 -- Section 3 of 53-291
4 states that any person aiding -- using the
5 very language of the principal in the second
6 degree language and case law thereunder -- is
7 guilty as a principal in the first degree.
8 However, the very inclusion of the word "aiding,"
9 in that aspect of the statute would under a
10 strict interpretation of the statute, as every
11 penal statute must be construed, would indicate
12 that the normal law of aiding and abetting
13 and inciting and encouraging, et cetera, would
14 not be applicable. The inclusion therein has
15 to be for a specific purpose. If it is
16 included it is there for a purpose. Had the
17 principal in the second degree statute from
18 Title 18.21 been applicable, then you wouldn't
19 have had necessity in our legislature of
20 putting in the word "aiding in an escape."
21 Your honor, this statute is not only
22 a penal statute, it is not only a statute that
23 is separate and apart from our normal criminal
24 statutes, but under Title 53 instead of 18.1,
25 but it is an extraordinary statute for two

1 reasons: In light of the Furman versus Georgia
2 and in light of the mandatory death aspects
3 of it. And these place it even above and
4 beyond the normal penal construction that our
5 case law says we must give every statute. This
6 is Horn Book law, sir. For that reason, your
7 honor, there is no reason to go to this jury
8 on any applicable principal of law involving
9 the defendant.
10 A man was killed. The defendant was
11 an inmate. But that alone is not necessary,
12 your honor. The Commonwealth has conceded itself
13 out of court by conceding it can't prove that
14 this man killed Guard Monte. That is the only
15 aspect of the statute that they are relying
16 on, 53-291, parenthesis, one, end of parenthesis.
17 This is what the indictment says. This is what
18 the bill of particulars says. That Section 1
19 does not incorporate the words "aiding, abetting,"
20 or any language that would be comparable to
21 being a principal in the second degree.
22 For those reasons we renew especially
23 with especial concentration that aspect of the
24 motion to strike that we made at the conclusion
25 of the Commonwealth's evidence.

1 Your honor, I would urge the court to
2 reread the statute. I know the court's read
3 it literally dozens of times, but if you reread
4 it and see Section 3, which uses that word
5 "aiding in an escape" and see Section (c), the
6 constructive language of that language in
7 Section 1 I am sure it will be apparent to
8 his honor.
9 THE COURT: All right, Mr. Davis.
10 MR. DULING: If your honor please, the
11 court well knows the same code section was
12 applicable in the case of Commonwealth versus
13 Jefferson, which has gone to the Virginia
14 Supreme Court of Appeals and has been upheld.
15 The action involves in this particular case
16 evidence before the jury in spite of the
17 comments by Mr. Janus that the members of this
18 jury could believe that the party described
19 by the witness face up on the floor with the
20 gun in their hand and the shots going off in
21 the ceiling could well be this defendant
22 Mr. Washington.
23 The court has held in effect in
24 previous hearings in regard to the same
25 positions on the statute. The Commonwealth is

1 entitled to an instruction along the line of
2 concert of action and common design, and the
3 Commonwealth does not have a burden of proving
4 which of the two parties involved fired the
5 shots.
6 I would submit to the court the court
7 might even consider under the evidence and
8 under the instruction given in previous cases
9 involving this particular crime that the
10 Commonwealth might well not have the burden of
11 proving that either of the defendants involved,
12 Mr. Jefferson or Mr. Washington, fired the
13 shot. It is the act of the felony, the escape
14 involved, the concert of action between the
15 parties. I submit to the court that the
16 Commonwealth will be entitled to instructions
17 along those lines, that they do fall within
18 the wording of the statute.
19 MR. JANUS: Your honor, Mr. Duling has
20 stated that due to the fact an escape is
21 involved it would be analogous under the statute
22 under another section of the statute to a
23 felony murder type doctrine. The Commonwealth
24 in its indictment has told this defendant that
25 it is relying on 53-291, parenthesis, one, and

1 parenthesis, and in its bill of particulars
2 what subsection of the statute are you relying
3 on, he says 53-291, parenthesis, number one,
4 end of parenthesis. Escape has nothing to do
5 with this case, sir. That is a separate section
6 of that code, and the Commonwealth by furnishing
7 the bill of particulars as ordered by this court
8 as requested by our motion, had precluded itself
9 from arguing anything about an escape or any
10 other type doctrine. The only theory it can
11 go on is that this defendant killed Captain
12 Monte, and there is no evidence, not -- we don't
13 even talk about credible evidence. There is
14 not one scintilla of evidence, not one iota of
15 evidence to show that this man killed Captain
16 Monte or even had the gun in his hand. No one
17 places the gun in his hand. The closest anyone
18 comes to it is Mr. G. E. Hamilton, who says
19 that an arm came up out of the crowd. And he
20 doesn't identify this man. The other witnesses
21 never even saw a gun. Captain Snyder, who was
22 there and involved, cannot say in answer on
23 cross-examination that this man ever had his
24 gun, and he cannot say that this man killed
25 Captain Monte.

1 Whether or not this point was raised
2 by the counsel in the Jefferson case I do not
3 know. To my knowledge this point of being a
4 principal in the second degree was not raised.
5 To my knowledge there was no bill of
6 particulars filed in the Jefferson case as
7 ordered in this case. It was never requested
8 in the Jefferson case. Mr. Barnes and I have
9 inspected the court records in Powhatan
10 concerning that entire file.
11 I would ask the court again, without
12 belaboring the point, to look at the statute.
13 THE COURT: Anybody got the statute?
14 MR. McKENRY: I believe there's a code,
15 if your honor please, in your chambers.
16 MR. JANUS: It is in the original
17 supplement, Mr. Clerk, Number 7.
18 MR. McKENRY: The law library is right
19 behind here.
20 MR. JANUS: Your honor, could we waive
21 the presence of the defendant -- he is not
22 feeling well -- for the purpose of arguing
23 the legal arguments? We would waive it. The
24 defendant --
25 THE COURT: You mean instructions?

1 MR. JANUS: Yes, sir.

2 THE COURT: He doesn't have to be
3 present for instructions. I will be through
4 here very shortly.

5 MR. JANUS: We would waive his presence
6 for any further legal arguments at this time.
7 He is not feeling well. He would so waive if
8 the court would.

9 THE COURT: Well, I tell you, I am not
10 going to rule on this out of his presence.
11 What I will do, I will read the statute and
12 let him rest, and then I will rule back on the
13 point after the instructions, if necessary.

14 (At this point the defendant withdrew
15 from the courtroom.)

16 THE COURT: Let the record show I am
17 not ruling on anything.

18 (The court and counsel for both sides
19 retired to chambers.)

20 MR. JANUS: Your honor, this is out of
21 context, but while I am thinking about it,
22 I realize there may be problems. I have to
23 look at the statute, but will the court formally
24 appoint Mr. James R. McKenry as cocounsel?
25 He's been with us two days and it is possible --

that he saw an arm come out of the crowd, the arm was black, the arm had a gun and it fired one time in -- he saw it fired one time into the ceiling, and he said it had inmate garb. He said he couldn't see the top jacket, but he could see the shirt on the sleeve, inmate garb underneath. He said it was at that point after the shot was fired -- the first shot was fired that Captain Monte got up out of his chair or the area where he was seated and ran around to the right side, stumbled and fell to his knees; that at that time he turned, referring to himself, and he heard more shots fired. This is while he was in the courtroom. And then he went outside and he heard some more shots fired. And while he was outside he saw two guards going into the courthouse and he heard some more shots fired subsequent to the guards going in the courthouse.

Now, these are uncontradicted facts, ladies and gentlemen of the jury. These are uncontradicted facts by the people that were there. And not one bit of evidence before you to show that they have any interest in the outcome of this case; that they had any bias or

prejudice against the outcome of this case or anything of that nature. They are the uncontradicted facts in this court, and all through this trial they are uncontradicted facts.

MR. JANUS: Your honor, may I make a brief comment to the court out of the presence of the jury -- a motion?

THE COURT: All right, sir.

Will the ladies and gentlemen of the jury please retire, please.

(The jury withdrew from the courtroom.)

THE COURT: All right, sir, the jury's retired.

MR. JANUS: If your honor please, on behalf of the defendant James Edward Washington we move the court for a mistrial at this point on grounds that the comments of the Commonwealth attorney Mr. Davis are clearly prejudicial and are unconstitutional, the comment on the failure of the defendant to testify. He has just finished arguing not once but twice that evidence was uncontradicted by the people that were there, the imuendo being that this man has not testified is not contradicted. It is

1 clearly improper argument for a Commonwealth
2 attorney to make. It is a constitutional
3 right that this man has and its just been
4 violated.
5 THE COURT: No question that he can't
6 comment on the defendant's refusal to take the
7 stand. I do think he can say it is uncontradicted
8 evidence, but I think --
9 MR. JANUS: But he adds the words "by
10 those people that were there." Your honor, it
11 becomes just more than just a statement of fact.
12 THE COURT: They can believe he wasn't
13 there. The jury doesn't have to believe the
14 Commonwealth's witnesses. They could believe
15 that the defendant was not even present.
16 MR. JANUS: Your honor, it is not the
17 defendant's theory of the case, as the court
18 well knows, that he wasn't present that day.
19 THE COURT: I know it isn't.
20 MR. JANUS: Of course he was present
21 that day in the courthouse.
22 THE COURT: Yes, by the evidence he was
23 present.
24 MR. JANUS: Yes, sir.
25 THE COURT: I will overrule your

1 objection and note your exception.

2 I think, Mr. Davis, that you have had

3 enough to say about that.

4 All right, return the jury, sergeant.

5 (The jury returned to the courtroom.)

6 THE COURT: All right, gentlemen, the

7 jury's returned. You may continue, Mr. Davis.

8 MR. DAVIS: Ladies and gentlemen of the

9 jury, the next witness to testify on behalf of

10 the Commonwealth is Captain John B. Netherland

11 who testified he has now been promoted to

12 superintendent to the Dinwiddie correctional

13 farm and at that time he was Captain of the

14 guard at the Virginia state farm located in

15 Powhatan County, Virginia. That he and Captain

16 Monte were equal rank and therefore neither one

17 of the two of them were in charge, but when he

18 arrived at the scene he posted the guards for

19 the purpose of protecting the courthouse and

20 protecting the outside of the courthouse. That

21 after that he went into the courthouse with the

22 two inmates who he identified as Jefferson and

23 Washington, James Edward Washington, the defendant

24 in this case, being one of them, and that he

25 left the courthouse and at that time he went in

1 Instruction number 11, and
2 the Commonwealth relies upon circumstantial
3 evidence. If they had circumstantial
4 evidence sufficient they'd be in a lot
5 better position. They don't even have
6 that. They have surmise, conjecture,
7 speculation. But even taking their
8 evidence, as Mr. Davis would have you
9 do, and Mr. Duling I am sure is going to
10 do in his rebuttal, where they present
11 circumstantial evidence to you and you
12 are talking about a death case, the
13 extreme penalty that man can impose
14 upon fellow man, in order to secure a
15 conviction it is the duty of the jury
16 to scan such evidence with great care
17 and caution and unless the circumstances
18 proven are of such a character and
19 tendency to produce in the mind of the
20 jury a moral conviction of the guilt
21 of defendant beyond a reasonable doubt
22 then you must find the defendant not
23 guilty.
24 Thirteen, the one I mentioned
25 earlier, the mere presence of a person at

1 the scene of the commission of a crime is
2 not sufficient to convict. Beyond a
3 reasonable doubt, and the death penalty
4 is involved. I would put it to you
5 isn't any doubt a reasonable doubt in a
6 case of this magnitude, in the case of
7 this penalty involved. Beyond a
8 reasonable doubt Monte has been killed.
9 Mr. Jefferson has been convicted of it.
10 We weren't present at his trial, we
11 don't know what the evidence was, but
12 all we know is the evidence in Washington's
13 trial. The Bible's told us an eye for an
14 eye, tooth for a tooth. Most Western
15 philosophies don't accept that anymore.
16 But nowhere in the Bible is written two
17 eyes for an eye, two teeth for a tooth.
18 He has been convicted.
19 I would like to read you something
20 if I may, I am going to wind up in a few
21 minutes; it is not going to take too long.
22 This is a passage that I think is pertinent.
23 "Their gruesome preparations for
24 execution began in the morning. All of Julius's
25 possessions were removed from his cell --

1 MR. DAVIS: Judge, I object to that.
2 This has no relevancy to this and has nothing
3 to do with the evidence, and Mr. Janus is
4 summarizing the evidence. He is now going
5 to the sympathy of the jury, and I don't
6 think --
7 THE COURT: I don't think that
8 would be proper, Mr. Janus, to read that.
9 MR. JANUS: Sir?
10 THE COURT: I don't think it would
11 be proper to read that.
12 MR. DAVIS: Your honor, the jury is
13 asked, if they find the man guilty, to
14 impose the punishment, which is death. If
15 they had the latitude to impose a punishment
16 of twelve months in jail or twenty years in
17 the penitentiary, people would know what this
18 is, but I don't think the ladies and
19 gentlemen of the jury have any way of knowing
20 what death by electrocution is, and I am
21 going to read a passage that would ask --
22 THE COURT: I don't think it is any
23 evidence before the court. I will sustain
24 the objection.
25 MR. JANUS: The Commonwealth in its

1 theory of the case, his honor has told you that
2 if you convict there is but one punishment and
3 that is death on this evidence, and we submit
4 to you that it would be incredible for you as
5 jurors or any jury to convict a man and take
6 his life on this evidence that you have
7 heard today. To take his life. The legislature
8 says juries must affix punishment in
9 Virginia. They have said that in their
10 wisdom and they make the laws. That death
11 by electrocution, and that would be your
12 decision, the decision that may very well
13 be as important as any you could possibly
14 make in your life, the decision to take a
15 man's life. You have seen my client sit by
16 me throughout a day of testimony, yesterday,
17 today, and there he sits before you and yet
18 by speculation, by surmise, guesswork, educated
19 guesswork, someone is saying on this evidence
20 electrocute him. Take his life. One
21 man has already been convicted of killing
22 Guard Monte. It is not the defendant's
23 theory that Jefferson shot him. Another
24 court, another jury has tried his case
25 and we are not concerned

1 to you the only reasonable verdict in this
2 case is guilty, and that being the case the
3 laws of the Commonwealth direct you as to
4 punishment. You have taken an oath to follow
5 the law. I submit to you under the laws of
6 the Commonwealth James Edward Washington
7 should be sentenced to death.
8 (At 12:30 A.M., August 15, 1974,
9 the jury returned to the courtroom.)
10 THE COURT: All right, sheriff,
11 I understand the jury's reached a verdict.
12 Ladies and gentlemen, give me your
13 jury list, please.
14 All right, gentlemen, the twelve
15 jurors have returned.
16 Ladies and gentlemen of the jury,
17 have you reached a verdict?
18 FOREMAN: Yes, we have.
19 THE COURT: Mr. Clerk, you have the
20 verdict?
21 THE CLERK: We the jury find the
22 accused guilty as charged in the indictment
23 and fix his punishment at death.
24 So say you-all?
25 (All jurors replied in the affirmative.)

(The jury withdrew from the courtroom.)

THE COURT: Sheriff, could they leave through that way? They have to come out. They may leave. They need transportation. All right, Mr. Janus, you have some motions.

MR. JANUS: If your honor please, on behalf of the defendant we move to set aside the verdict as being contrary to the law and evidence. There was no evidence whatsoever that this defendant killed Guard Raul M. Monte. There was no evidence whatsoever to go to the jury that he was a party to any planned escape or any concert of action whatsoever. In addition to that we renew the motions we made previously on the grounds the court submitted the case to the jury on the basis of the defendant possibly being guilty of being a principal in the second degree as opposed to the bill of particulars which was filed by the Commonwealth attorney which specifically stated that the trial was being based on 53-291 parenthesis 1, end parenthesis, states that he killed Guard Monte. That specific statute makes no reference to principals in the second degree. The court allowed the case to go to the jury on principals in the second degree and a theory

1 of escape. That was not the Commonwealth's
2 theory for the indictment or the bill of
3 particulars.
4 And we further assign all of the
5 grounds previously cited, previously stated,
6 motions to strike the evidence and motions
7 at the conclusion of the evidence.
8 THE COURT: Well, the court's of the
9 opinion that it was purely a jury question
10 which was submitted to them under proper
11 instruction and they have reached their
12 verdict, so the court will overrule your
13 motion and note your exceptions.
14 Do you have anything further before
15 the court enters judgment?
16 MR. JANUS: We would further move the
17 court to -- not to sentence the defendant on the
18 grounds that any sentence under Virginia statute
19 would be unconstitutional under Furman versus
20 State of Georgia, which has been decided by the
21 Supreme Court of the United States.
22 THE COURT: Well, the court is going
23 to enter judgment on the verdict, but suspend
24 execution of it for a good length of time so the
25 case may be appealed.

1 MR. JANUS: We respectfully would
2 note our appeal and would expect to file all
3 our appropriate papers to the Supreme Court
4 of the United States and Supreme Court of
5 Virginia, of course, and any other appeal.
6 THE COURT: All right, in accordance
7 with the verdict of the jury the court now
8 finds you guilty as charged in the indictment
9 and fixes your punishment at death.
10 The execution date, gentlemen, will
11 be November 15th, which will give you time.
12 I caution you when you file your petition with
13 Virginia Supreme Court you should ask that court
14 for a stay of execution until they have an
15 opportunity, but that will give you plenty of
16 opportunity to get the papers filed. Also
17 the record in this case will be filed in the
18 clerk's office and become a part of the record
19 in the case. The notice of appeal and assignment
20 of the errors will be filed within thirty days
21 from today. And the defendant will be kept
22 advised of every stage of the proceedings of his
23 appeal, when the notice of appeal is filed, when
24 the Supreme Court of Virginia acts on it, and
25 such other action it might have.

OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS

MR. JANUS: On behalf of the defendant James Edward Washington we respectfully except to the court's ruling in overruling the motion to strike at the conclusion of the Commonwealth's evidence and at the conclusion of all of the evidence, both on the constitutional grounds and all of the other grounds that were set forth.

We would especially except to the overruling of the motion of submitting anything to the jury except the theory that this defendant killed Guard Monte on the grounds that the bill of particulars filed herein stated that the Commonwealth was relying upon 53-291(1), which does not comprehend escape, and on the further ground that there was no evidence that this defendant killed the guard, and there is no principal in the second degree under this subsection of the code for the reasons set forth more specifically previously.

We would further except to the refusal of the court to grant defendant's instruction A, which was a murder in the first degree instruction, murder in the second degree instruction number B,

1 and instruction number C, manslaughter, on the
2 ground that the indictment charged the defendant
3 with common law murder, that he did willfully,
4 premeditatedly, and maliciously kill Guard
5 Monte. It did not charge him with a specific
6 statutory violation such 53-291(1). Although
7 we concede that that statute and subsection
8 was set forth on the indictment, that is not
9 sufficient to cure or correct or amend the
10 indictment itself. He was charged with
11 common law murder and the jury was not so
12 instructed.
13 In addition to that, we except to
14 the court's refusal to grant instruction number
15 D, which comprehended the defendant's theory
16 of the case in that the gun could have gone off
17 accidentally, and further the refusal of the
18 court to grant instruction number E, which is a
19 different finding form, on the grounds that
20 it is an accurate statement of the law.
21 We would object and except to the
22 Commonwealth getting any instructions for the
23 grounds previously set forth, specifically
24 instruction number 6, which sets forth a
25 plan to escape, as this was not the subsection

that the Commonwealth relied upon.

We object to instruction number 8, which is a principal in the second degree, since that would not be applicable because the statute does not set forth principals in the second degree with regard to subsection, parenthesis, one, end parenthesis.

We'd object to instruction -- and except to instruction number 9 -- and with all of these objections we of course note our exception -- on the grounds that there is no evidence to go to the jury that James Edward Washington did in fact do the actual killing.

And further object and except to giving instruction number 13, which likewise encompasses someone being a principal in the second degree.

Insutrction number 7 likewise would include the rationaleof law concerning principals in the second degree, and they likewise would be inapplicable.

For all of those reasons we set forth our objections and exceptions.

On behalf of the defendant James Edward Washington we would object and except to the

court's ruling refusing to allow us in closing argument to read a passage from a book which was descriptive of an electrocution. We submit that since that was the only punishment the jury could have imposed they could have and should have been told something about the electrocution, and this was certainly within the latitude of closing argument. The argument would have been a passage of approximately four pages in length from the book "The Implosion Conspiracy" by Lewis Neiser.

1 May 23, 1974
2 SECOND DAY OF TRIAL
3
4 NOTE: Court reconvenes in the Judge's
5 Chambers, out of the presence of the defendant, James
6 Edward Washington, and the jury, viz:
7
8 IN CHAMBERS
9 MR. RYDER: Judge, as a matter of record, I
10 would like to make a motion at this time to allow
11 me to withdraw as counsel in this case because there
12 are irreconcilable differences that have arisen
13 between my client and myself that have put me in a
14 position that I cannot represent this man, that I
15 cannot go forward with this trial.
16 I spoke to Your Honor on the telephone last
17 night and gave you some ideas. I didn't tell you
18 everything. That's the reason for it, but I cannot
19 go forward with this case.
20 MR. DAVIS: Judge, somebody has got to try
21 this case. Now, if it's going to be based on the
22 accused's conduct over a period of time, this case
23 is going to have to be tried. He is going to have
24 to be reconciled with the defendant, between himself
25 and some attorney. There is the cost of this trial

IN CHAMBERS

to consider. I don't know of anyone more qualified to represent him than Mr. Ryder, and I understand the position he has probably been put in without knowing exactly what has transpired, just by the individual's conduct. But I think even the defendant is entitled to the best kind of representation, and I don't know who is more qualified to handle it than Mr. Ryder. I don't know what transpired last night --

MR. RYDER: Judge, when a situation arises that presents a conflict between an attorney's duty to the Court and to his client that cannot be resolved, then I don't think the Court should make an attorney go forward with the trial.

THE COURT: Well, does anyone have any authority on this? It's a right serious case. It's a serious point, and I just don't know.

MR. RYDER: The only thing I can recall having been there once or twice before, there are certain opinions from legal ethics that I think require the Court to relieve an attorney under certain circumstances.

THE COURT: Of course, we are going to get this from the defendant in every case on every point.

MR. RYDER: You might not in another

IN CHAMBERS

situation. It might be that the defendant won't trust another attorney as much as he trusts me.

THE COURT: Do what?

MR. RYDER: I said it might not be that way. I don't think the defendant -- well, the defendant trusts me quite a bit, and there are certain things that he tells me that he might not tell another attorney. Another attorney might not get into this position.

MR. DAVIS: Is that the problem, something he has confided about to you that creates the conflict?

MR. RYDER: That's right.

MR. DAVIS: Well, I wouldn't want to be in Mr. Ryder's position, but I still say we have that problem.

THE COURT: I think before I am in a position to rule on this, I have to have certain authorities from somewhere. I don't know if we have any law books available.

MR. DAVIS: I have a man up here, Judge. I have an intern up here if you want to use him.

THE COURT: I would like to know if there is a library.

IN CHAMBERS

MR. RYDER: We have the Virginia Reports here. I don't know if you will find anything in them.

THE COURT: Well, there ought to be something in the ethical conduct of lawyers.

MR. RYDER: I may be able to call someone out of law school.

THE COURT: Well, I just --

MR. RYDER: Doubles teaches out there.

THE COURT: I believe there ought to be some case law.

MR. RYDER: He might have some case law.

MR. DAVIS: Let me call my office.

THE COURT: You will have to call long distance.

MR. DAVIS: Do you go off record when I call the office?

THE COURT: You can put this in the record. I think we are at the point now that any mistrial would have to be on the part of the defendant, and I really don't know if his attorney can make a motion on that basis. He might want Mr. Ryder --

MR. RYDER: He won't want me if he finds out. I can tell you that. In fact, I don't want to

IN CHAMBERS

be in the courtroom if he does find out.

THE COURT: Well, that's it, gentlemen. This is a well-recognized and serious case, and we can't go about playing secrets on the aspects of it. I am not going to do anything until we find some authority on the ethical responsibility. Mr. Ryder says it is an ethical point. This doesn't come up often enough to keep a catalogue of cases on it. At this point, we are trying to find out whether or not an attorney who has received something of a confidential nature from his client, and apparently the client does not want it disclosed or the attorney has to keep himself from disclosing it because of the confidential relationship between them and this requires him to withdraw from the case.

MR. DAVIS: Is that the point we are talking about?

MR. RYDER: Yes, sir.

MR. DAVIS: I will call my office. I have two interns. I don't know how long it will take.

THE COURT: Quite frankly, I'm not going to rely on interns.

MR. DAVIS: But Judge --

MR. RYDER: The reason I was thinking about

IN CHAMBERS

calling someone like him, they handle these problems from a teaching standpoint. I would assume he might have some authority he can give to us. I think he could give us some authority though right quick. That's what he told us last night.

THE COURT: Well, do you have the United States Supreme Court Reports anywhere up here along with the --

MR. RYDER: Unless Mason might have them.

THE COURT: He might have them as a County Judge. He has Allen versus Illinois.

MR. RYDER: What do you want to do?

THE COURT: I want some authority from the attorneys. I will just tell the Sheriff we are going to be a little bit late.

NOTE: At this time a recess is taken, after which the hearing resumes in Chambers, out of the presence of the defendant and jury, as follows, viz:

THE COURT: All right, gentlemen. Certain matters have been brought to the attention of the

IN CHAMBERS

Court. I understand from Mr. Ryder and Mr. Lewis that a conflict has arisen between them and the defendant, Mr. Washington. The Court will take this matter up in Court, reserving any decision on it until he hears from all parties. This case has been quite lengthy, and in a mistrial at another time, through the actions of the defendant on that particular morning, and I believe he was mentally ill, we had to continue the case. We have had a lengthy day yesterday in getting a jury. We have finally selected the jury. I have tried to exercise the greatest patience as humanly possible for me. Perhaps others have more patience, but I have endeavored to exercise patience. But in this particular case, I feel that justice for the Commonwealth and for the defendant, in an effort to have a speedy trial, are somewhat in question. All motions for continuances have been made on behalf of the defendant through Mr. Ryder. Is that correct, Mr. Ryder?

MR. RYDER: Yes, Your Honor.

THE COURT: Mr. Ryder, I assume has some law that he would present to the Court.

MR. RYDER: Yes, Your Honor.

1 IN CHAMBERS

2 THE COURT: From everything that has been
3 said, the Court is not in a position to really rule
4 on the point, but in order to, I might go on to say
5 that if it is a matter of cause that falls within
6 one of the rules of Court, I think I am bound by it.
7 If it doesn't fall within one of the rules of Court,
8 than I think that we will have to proceed with the
9 case. However, I am not ruling on it. I am just
10 setting forth the disposal. We will convene Court,
11 in the presence of the defendant and discuss it.
12 MR. DAVIS: Will the record show that the
13 Court was delayed for a period of two hours as a
14 result of this?
15 THE COURT: Yes. I want the record to
16 show also that the Court has ruled on no point of
17 law. The reason for the delay was counsel wanted to
18 give the Court some authority.
19 MR. DAVIS: That's correct. I wanted
20 that in.
21 THE COURT: I understand any conflict
22 between Mr. Ryder and his client, whatever it may
23 be, arose last evening. Is that correct, Mr. Ryder?
24 MR. RYDER: This is correct.
25 THE COURT: All right, sir.

1 OPEN COURT

2 NOTE: At this time a recess is taken,
3 after which the hearing resumes in the courtroom,
4 in the presence of the defendant, as follows, viz:
5
6 THE COURT: Let the record show the
7 defendant is present in Court.
8 Mr. Ryder, I understand you have a motion
9 you want to make to the Court.
10 MR. RYDER: Your Honor, I would move the
11 Court at this time to permit me to withdraw as
12 counsel for the defendant. I would cite to the
13 Court the Rules of Court, DR2:110, headed Withdrawal
14 From Employment, (B) Mandatory Withdrawal.
15 There have arisen certain irreconciliable
16 differences between my client and myself. I have no
17 control over them, and as a result, I am not mentally
18 or physically capable of effectively representing
19 Mr. Washington in this trial, sir. I state that to
20 the Court as an officer of this Court, and for those
21 reasons, I would ask the Court to permit me to
22 withdraw and to declare a mistrial.
23 THE COURT: What is the position of the
24 defendant in his proper person?
25 MR. RYDER: The defendant, as I understand,

it, has no objection to the motion that I have made, sir.

THE COURT: Mr. Washington, what is your position on Mr. Ryder withdrawing as counsel?

DEFENDANT WASHINGTON: I have no objection.

THE COURT: Are you asking the Court to relieve him as counsel?

DEFENDANT WASHINGTON: Right.

THE COURT: Pardon me?

DEFENDANT WASHINGTON: Right.

THE COURT: You are asking the Court to relieve Mr. Ryder. Do you all have a conflict between you that you don't feel Mr. Ryder can adequately represent you?

DEFENDANT WASHINGTON: We have a difference of opinion about the case in general.

THE COURT: Sheriff, hand me the book, please. You are looking under Mandatory Withdrawal, Mr. Ryder?

MR. RYDER: Yes, sir, B.

THE COURT: That is permissive.

MR. RYDER: I am sorry.

THE COURT: As a result of B, you are telling the Court, as an officer of this Court, that you are not mentally or physically in any condition to

effectively represent the defendant in this case?

MR. RYDER: That's correct, Your Honor.

THE COURT: And the defendant is asking the Court to relieve you from representing him?

MR. RYDER: That's correct, sir.

THE COURT: Is that right, Mr. Washington?

DEFENDANT WASHINGTON: That's right.

THE COURT: And you are asking the Court to grant a mistrial?

DEFENDANT WASHINGTON: Right.

THE COURT: Pardon me?

DEFENDANT WASHINGTON: Right.

THE COURT: And are you, Mr. Ryder?

MR. RYDER: Yes, sir, Your Honor.

THE COURT: You feel the mental and physical strain would make it unreasonably difficult for you to carry it out?

MR. RYDER: I don't think I could carry it out effectively. It will be impossible.

THE COURT: Mr. Davis, do you have anything to add to the Court?

MR. DAVIS: Judge, I recognize the position of the particular statute and the particular ruling, having read it. It is a permissive rule. I feel like I am in a position where I find it

1 difficult to look into Mr. Ryder's mind to determine
2 what physical and mental strains are taking place.
3 I have worked in many cases with Mr. Ryder, and I
4 have never known him to represent anything wrong-
5 fully. This case has been pending for a long time.
6 Each continuous or each mistrial, except for the
7 hung jury, each has been a result of the accused.
8 The Commonwealth finds itself in somewhat of a
9 dilemna. We do not want him placed in jeopardy.
10 We will have to try the case sooner or later,
11 THE COURT: I have considered asking the
12 accused this particular question, but the Court is
13 more interested in the officer of the Court, Mr.
14 Ryder, who has represented he is in a particular
15 physical and mental condition.
16 MR. DAVIS: Judge, I can't argue against
17 that point. I don't find myself qualified to say
18 what kind of physical and mental condition he is
19 in. I didn't anticipate that he would come to
20 Court and represent to the Court he didn't feel he
21 was adequate; so therefore, I can only submit it
22 to the Court under those circumstances.
23 I want the record to show the Commonwealth
24 objects to the continuance, to the mistrial, because
25 of the fact the case has been kept in jeopardy. He

has represented he doesn't want Mr. Ryder as a client or as his attorney, excuse me. If Mr. Ryder withdraws from the case, it would become a mess to appoint another counsel and have the matter set down for trial and to try it as soon as possible, perhaps in the month of July.

THE COURT: Gentlemen, the Court is going to take this motion under advisement. Return the prisoner and Court will recess. Everyone remain seated until the prisoner is returned.

NOTE: At this time a recess is taken, after which the hearing resumes, out of the presence of the jury and the defendant, as follows, viz:

JURY OUT

THE COURT: Gentlemen, I am not going to bring the defendant back in. I am not going to rule on anything. I want to tell the attorneys that I would like some citations on a mistrial. You will have some time to get that for me.

MR. DAVIS: Judge, as I see it, the only way is to go back to Richmond.

THE COURT: I have set aside five days to try this case. If you have to go back to Richmond,

1 JURY OUT

2 go back to Richmond. I guess we can do that.
3 I want some authority about a mistrial. I want some
4 good, solid law on this.
5 MR. RYDER: Judge, do you have any idea
6 when you will want to reconvene?
7 THE COURT: As soon as all of you are ready.
8 The Court is still in recess. I haven't ruled on
9 any points of law.
10
11 NOTE: At this time a recess is taken,
12 after which the hearing resumes, in the presence of
13 the defendant, as follows, viz:
14
15 THE COURT: Let the record show the defen-
16 dant is present in Court. Sometime having elapsed
17 since we commenced this morning at 9:00 o'clock, it
18 is now 3:00 o'clock or two minutes after three.
19 Mr. Ryder, is your motion still the same
20 as it was this morning?
21 MR. RYDER: Yes, sir.
22 THE COURT: I would like to ask you these
23 questions. Does your mental or physical condition,
24 such as you mentioned, make it unreasonably difficult
25 for you to carry out the appointment of employment

JURY OUT

effectively in the case of the Commonwealth of Virginia versus James Edward Washington?

MR. RYDER: Yes, sir.

THE COURT: When did the conflict arise between you and your client?

MR. RYDER: Primarily last evening.

THE COURT: It was the same at that hour as it is this day?

MR. RYDER: Yes, sir.

THE COURT: You have represented to the Court, that as an attorney, you do not feel you can effectively represent the defendant because of certain conflicts which have arisen between you and James Edward Washington?

MR. RYDER: Yes, sir.

THE COURT: Mr. Lewis, you are appointed co-counsel in this matter. What is your position?

MR. LEWIS: The same as Mr. Ryder's, Your Honor.

THE COURT: All right. Mr. Washington, you have heard the questions that I have asked Mr. Ryder.

DEFENDANT WASHINGTON: Yes.

THE COURT: Do you understand these

1 JURY OUT

2 questions that I have asked him?

3 DEFENDANT WASHINGTON: I do.

4 THE COURT: Do you agree and ask the Court

5 for a mistrial?

6 DEFENDANT WASHINGTON: I do.

7 THE COURT: Gentlemen, under these circum-

8 stances the Court or the Commonwealth, although

9 ready, willing and able to try this case, has no

10 alternative but to grant the defense's motion under

11 the Rules of Court cited, 211 Virginia, Page 295,

12 the Ruling DR-2:110,(B) Mandatory Withdrawal, under

13 Subsection 3. The Court would like to state to the

14 witnesses that Mr. Ryder has been employed in many

15 serious criminal cases, and to my knowledge he has

16 never made a motion of this nature before. Is that

17 correct, Mr. Ryder?

18 MR. RYDER: That's correct, sir.

19 THE COURT: I think this puts some credence

20 in the idea there must be some serious conflict

21 between you and your client, which would make it

22 impossible for you not to effectively represent him.

23 This helps me to come to that conclusion in the

24 representation of Mr. Ryder, that he could not

25 physically, adequately, effectively represent the

JURY OUT

defendant, and also Mr. Lewis, who made the same representation to the Court.

All right. Sheriff, return the jury.

NOTE: At this time the jury is seated in the jury box, and the hearing resumes as follows, viz:

JURY PRESENT

THE COURT: Gentlemen of the jury, I know it has been a most difficult evening and morning for you, but it also has been for the Court. I wish to apologize for detaining you, but something arose last evening and was brought to the Court's attention this morning. We have been working on it since this morning. The conflict, having arisen between Mr. Ryder and his client, Mr. Ryder being the attorney and Mr. Lewis. They have represented to the Court that they cannot adequately and effectively represent the defendant, James Edward Washington. Under the rules of our court, the Supreme Court of Virginia, it is encumbent upon the Court to declare a mistrial which means you will be discharged from further consideration of the case. The Court will have to set another day and pick

1 JURY PRESENT

2 another jury. I apologize for the inconvenience to
3 you at this time and last night, gentlemen. I trust
4 that you will understand the situation. It was
5 beyond my control.
6 You may now be excused from further service.
7 I appreciate your service thus far, and we regret
8 the delay. You may now leave.
9
10 NOTE: At this time the jury is discharged
11 and leaves the courtroom, after which the hearing
12 resumes as follows, viz:
13
14 JURY OUT
15 THE COURT: I assume under this and under
16 the Rules of Court, the representations made to the
17 Court, the Court will now have to appoint new coun-
18 sel to represent the defendant. Do you have any
19 funds to employ your own counsel?
20 DEFENDANT WASHINGTON: Your Honor, I feel
21 like, you know, I don't need to answer that.
22 THE COURT: I beg your pardon?
23 DEFENDANT WASHINGTON: I don't feel I need
24 to answer that, Your Honor.
25 THE COURT: We have to have an attorney for