SUPREME COURT OF VIRGINIA
FEB 10 1977
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 761204

John Adams, a/k/a
Donald Mooreman Clodfelter
Appellant,

v.

Commonwealth of Virginia
Appellee.

APPENDIX

John H. Herbig
Robert L. Harris
HARRIS, TUCK, FREASIER & JOHNSON
Professional Associates, Inc.
3805 Cutshaw Avenue
Richmond, Virginia 23230

Counsel for Appellant

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COMMONWEALTH OF VIRGINIA,)
) TO-WIT:
CITY OF VIRGINIA BEACH)

In the Circuit Court of the City of
Virginia Beach:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Virginia Beach and now attending the said Court, upon their oaths, present that

JOHN ADAMS AKA DONALD MOOREMAN CLODFELTER

on or about the 16th day of June, in the year 1975, in the said City of Virginia Beach, Virginia, feloniously did manufacture, sell, give or distribute, or possess with intent to manufacture, sell, give or distribute, or possess with intent to manufacture, sell, give or distribute controlled substances, to-wit: Depressants (Schedule III - Amobarbital, Pentobarbital, Secobarbital).

Va. Code §54-524.101:1

Date Found: September 3, 1975

COMMONWEALTH OF VIRGINIA,)
) TO-WIT:
CITY OF VIRGINIA BEACH)

In the Circuit Court of the City of
Virginia Beach:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Virginia Beach and now attending the said Court, upon their oaths, present that

JOHN ADAMS AKA DONALD MOOREMAND CLODFELTER

on or about the 16th day of June, in the year 1975, in the said City of Virginia Beach, Virginia, feloniously and knowingly or intentionally did possess a controlled substance, to-wit: Amphetamine.

Va. Code §54-524.101:2

Date Found: September 3, 1975

MOTION TO SUPPRESS STATEMENTS

Comes Now the defendant, by counsel, and moves this Honorable Court to suppress as evidence all written and oral statements made by him on the grounds that the statements were obtained in violation of the defendant's privilege against self-incrimination and his right to counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Constitution of the State of Virginia.

DONALD M. CLODFELTER

By /s/ Robert L. Harris
Of Counsel

Robert L. Harris, Esquire
John H. Herbig, Esquire
HARRIS, TUCK, FREASIER & JOHNSON
Professional Associates, Inc.
3805 Cutshaw Avenue
Richmond, Virginia 23230

DATE FILED: October 16, 1975

MOTION TO SUPPRESS EVIDENCE

Comes now the defendant, by counsel, and moves this Honorable Court to direct that certain property, a schedule of which is annexed hereto, which was unlawfully seized by Detective Tom Collins, Detective Richard Chrisman and two other police officers of the City of Virginia Beach on June 16, 1975, from the premises known as Room 611 of the Ramada Inn, 7th Street and Ocean Front in the City of Virginia Beach, Virginia, be suppressed as evidence against him in any criminal proceeding on the grounds that the property was unlawfully seized in violation of the Fourth Amendment of the United States Constitution.

DONALD MOOREMAN CLODFELTER

By /s/ Robert L. Harris
Of Counsel

Robert L. Harris, Esquire
John H. Herbig, Esquire
HARRIS, TUCK, FREASIER & JOHNSON
Professional Associates, Inc.
3805 Cutshaw Avenue
Richmond, Virginia 23230

DATE FILED: October 16, 1975

MOTION TO DISMISS

Comes now the defendant, by counsel, and moves this Honorable Court to dismiss the indictments now pending against the defendant based on the doctrine of collateral estoppel as applied in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970).

DONALD M. CLODFELTER

By /s/ Robert L. Harris
Of Counsel

Robert L. Harris, Esquire
John H. Herbig, Esquire
HARRIS, TUCK, FREASIER & JOHNSON
Professional Associates, Inc.
3805 Cutshaw Avenue
Richmond, Virginia 23230

DATE FILED: October 16, 1975

ORDER

THIS DAY came counsel for the defendant and moved for entry of an order to suppress evidence, the basis for said motion being that the affidavit for search warrant was imprudently executed.

An oral argument was heard, written memoranda were submitted, and after due consideration, it was decided by the Court that the foregoing motion should be denied.

Therefore, it is ADJUDGED, ORDERED and DECREED that the motion to suppress be, and the same hereby is, denied, to which the defendant, by counsel, excepts.

Let the Court certify a copy of the foregoing order to counsel for the defendant.

ENTER: 12/31/75

/s/ Philip L. Russo
Judge

Seen:

/s/ Larry B. Slipow
Larry B. Slipow
Assistant Commonwealth's Attorney

Seen and objected to:

/s/ John H. Herbig
Counsel for the defendant

ORDER

THIS DAY came counsel for the defendant and moved the Court for entry of an order to dismiss the indictments presently pending against the defendant, the basis for this motion being that the Commonwealth is collaterally estopped from prosecuting felony matters after the District Court has reached an ultimate determination of fact and acquittal on a misdemeanor arising from the same facts and circumstances.

An oral argument was heard, written memoranda were submitted, and after due consideration, it was decided by the Court that the foregoing motion should be denied.

Therefore, it is ADJUDGED, ORDERED and DECREED that motion to dismiss the indictments be, and the same hereby is, denied, to which counsel for the defendant excepts.

Let the Clerk certify a copy of the foregoing order to counsel for the defendant.

ENTER: 12/31/75

/s/ Philip L. Russo
Judge

Seen:

/s/ Larry B. Slipow
Larry B. Slipow
Assistant Commonwealth's Attorney

Seen and objected to:

/s/ John H. Herbig
Counsel for the defendant

ORDER

THIS DAY came counsel for the defendant and moved the Court for entry of an order to suppress certain statements.

Argument was heard, written memoranda were submitted, and after due consideration, it was decided by the Court that all statements by the defendant are admissible as voluntary statements, except those statements made in answer to questions propounded by Detective Collins about empty pill bottles, which shall be taken under further advisement.

Therefore, it is ADJUDGED, ORDERED and DECREED that the motion to suppress statements be partially denied and partially taken under advisement, to which ruling counsel for the defendant excepts.

Let the Clerk certify a copy of the foregoing order to counsel for the defendant.

ENTER: 12/31/75

/s/ Philip L. Russo
Judge

Seen:

/s/ Larry B. Slipow
Larry B. Slipow
Assistant Commonwealth's Attorney

Seen and objected to:

/s/ John H. Herbig
Counsel for the defendant

AFFIDAVIT FOR SEARCH WARRANT

STATE OF VIRGINIA, CITY OF VIRGINIA BEACH:
Before me, the undersigned, this day came DETECTIVE T. A. COLLINS
(Name of Affiant)
Who, after being duly sworn, made oath that;

(1) He has reason to believe that on the premises known as or located at RAMADA INN ROOM #611 7th STREET AND OCEAN in the City of Virginia Beach, Va. there is now being concealed certain property, namely MARIJUANA

(2) He bases his belief that such property can be found on those premises on the following facts;
OF INFORMATION OBTAINED FROM A RELIABLE INFORMANT

(3) He was advised of the facts set forth in paragraph (2) by an informer. This informer's credibility or the reliability of the information may be adjudged by the following facts; THAT WITHIN THE PAST 48 HOURS THIS INFORMANT HAS BEEN AT THE ABOVE MENTIONED ROOM AND TALKED TO A SUBJECT KNOWN AS DONNIE. AT WHICH TIME THE INFORMANT WAS GIVEN SOME GREEN BROWN PLANT MATERIAL WHICH DONNIE STATED THAT IT WAS GOOD POT "STREET TERM FOR MARIJUANA" TO SMOKE. THE INFORMANT FURTHER STATED THAT HE GOT HIGH "STREET TERM FOR INTOXICATED" AS HE HAS DONE IN THE PAST WHEN HE SMOKED MARIJUANA. ALSO DONNIE FURTHER STATED THAT HE HAD SOME TO SELL FOR $20.00 AN OUNCE. AND THAT ALL HE WOULD HAVE TO DO WAS RETURN TO THE ROOM BECAUSE HE HAD PLENTY. BUT THAT HE WOULD LEAVE AROUND THURSDAY 6-19-75.

(4) (a) The offense in relation to which the search is to be made is:
POSSESSION OF MARIJUANA

(4) (b) The grounds for search and seizure are established by the following facts:
THAT MARIJUANA IS A CONTRABAND SUBSTANCE AND IS ILLEGAL TO POSSESS IN THE STATE OF VIRGINIA.

(5) He was advised of the facts set forth in paragraph (4) by an informer. This informer's credibility or the reliability may be adjudged by the following facts: THAT THIS INFORMANT HAS GIVEN INFORMATION FOUR TIMES WITHIN THE PAST SIX MONTHS THAT HAS LED TO THE ARREST AND CONVICTION OF DRUG VIOLATORS IN THE CITY OF VIRGINIA BEACH, ALSO THIS INFORMANT HAS BEEN INVOLVED IN THE DRUG CULTURE FOR THE PAST TWO YEARS AND HAS SMOKED MARIJUANA MANY TIMES DURING THIS PERIOD.

/s/DETECTIVE T. A. COLLINS
(Signature of Affiant)

SUBSCRIBED AND SWORN TO BEFORE ME ON JUNE 16, 1975,
at 1:05 A.M.

/s/ Alim L. Rogers
Signature of Issuing Officer

Magistrate
(Title)

Date Filed: June 16, 1975

SEARCH WARRANT

COMMONWEALTH OF VIRGINIA:

CITY OF VIRGINIA BEACH,

To Any Police Officer, or Other Authorized Officer:

You are hereby commanded in the name of the Commonwealth forthwith to search

RAMADA INN, ROOM #611, 7th AND OCEAN FRONT.

for certain concealed property, namely

MARIJUANA

and to produce the property, if it be found, before the Municipal Court, Virginia Beach, Virginia.

On the basis of the sworn statement(s) of DETECTIVE T. A. COLLINS the undersigned has found probable cause to believe the search should be made in relation to the offense(s) of POSSESSION OF MARIJUANA

Issued at 1:07 A.M., this the 16th day of JUNE, 1975.

/s/ Alim L. Rodgers

MAGISTRATE

DATED: June 16, 1975

LABORATORY REPORT

July 8, 1975

To: Chief of Police
Virginia Beach Police
Division
Detective Bureau
Municipal Center
Virginia Beach, Va. 23456

Re: Drug Analysis
Date of Recovery:
June 16, 1975

Attention: Mrs. Barbara Sutton

Your Case # 75-140947 (58-336)

FS Lab# 74-27446
74-T-4451
Examiner: Maurice P.
Fortune,Jr.
Laboratory: Central

Suspect(s): CLODFELTER,Donnie
AKA John Adams Jr.

1 North 14th St.
Richmond, Va. 23219
Date Received:
6-26-75

Evidence Submitted By: Det. R.A. Chrisman

DESCRIPTION:
One (1) sealed brown paper bag which contained eighteen (18) sealed plastic bags marked A through Q and S and one (1) sealed brown paper bag marked R and containing the following:

* * *

R-One (1) plastic bag which contained eleven (11) pastic bags each containing a greenish-brown substance.
S-Two (2) burnt hand-rolled cigarette butts.

RESULTS OF EXAMINATION:

* * *

The greenish-brown substance from each of the plastic bags in envelope R and the contents of the burnt hand-rolled cigarette butts in envelope S individually responded positively to the qualitative tests for and were identified as Marijuana, a Schedule I controlled sutstance.

* * *

ORDER

The court doth order for the recording verbatim of the evidence and incidents of the trial of this case by Kathy Cardea, a Court Reporter of Jaime & Browning.

Whereupon, came Larry Slipow, the Assistant Attorney for the Commonwealth, and the accused, John Adams, aka Donald Mooreman Clodfelter who was on the 22nd day of January, 1976, found guilty of Viol. DCA, to-wit: Amobarbital, Pentobarbital, Secobarbital, and his case referred to the Probation Officer of this court for a report, was again led to the bar in the custody of the Sheriff of this court, and also came John H. Herbig and Robert Harris, attorneys for the accused, said attorneys being of the accused own choosing, and also came the Probation Officer and rendered her report in open court, which report was ordered filed as part of the record in this case, and after considering said report, and on motion of the accused by counsel to dismiss based on doctrine of collateral estoppel is overruled by the court.

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 according to law, and nothing being offered or alleged in delay thereof, it is adjudged, ordered and decreed by this court that the said John Adams, aka Donald Mooreman Clodfelter, age 22 years (5-31-53) be and hereby is sentenced to confinement

in the place designated by the Director of the Division of Corrections, for the term of six years.

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 John Adams, aka Donald Mooreman Clodfelter, 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.

And the court deeming it compatible with the public interests, pursuant to the statutes in such cases made and provided, and with the concurrence of the Assistant Attorney for the Commonwealth, doth suspend three years of said sentence, and doth place the said John Adams, aka Donald Mooreman Clodfelter, on probation during his good behavior for a period of three years, which is to start running on his release from confinement, and upon the further conditions that he pay the costs incident to his prosecution and conviction.

The court doth appoint John H. Herbig and Robert Harris, attorneys for the accused to perfect appeal in this matter, and the court doth further order that all transcripts in this matter be prepared including the

proceedings of the General District Court.

And the prisoner is remanded to jail.

ENTER: May 20, 1976

/s/ Philip L. Russo
Judge

ORDER

The court doth order for the recording verbatim of the evidence and incidents of the trial of this case by Kathy Cardea, a Court Reporter of Jaime & Browning.

Whereupon, came Larry Slipow, the Assistant Attorney for the Commonwealth, and the accused, John Adams, aka Donald Mooreman Clodfelter, who was on the 22nd day of January, 1976, found guilty of Controlled Substance, to-wit: Amphetamine, and his case referred to the Probation Officer of this court for a report, was again led to the bar in the custody of the Sheriff of this court, and also came John H. Herbig and Robert Harris, attorneys for the accused, said attorneys being of the accused own choosing, and also came the probation Officer and rendered her report in open Court, which report was ordered filed as part of the record in this case, and after considering said report, and on motion of the accused by counsel to set aside the findings of guilt are overruled except that in the charge of possession of scheduled III drugs (depressants) with intent to sell, is reduced to mere possession (misdemeanor).

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 according to law, and nothing being offered or alleged in delay thereof, it is adjudged, ordered and decreed by this court that the said John Adams, aka Donald Mooreman Clodfelter, age 22 years (5-31-53) be and hereby is sentenced to confinement in

jail for the term of twelve (12) months, said sentence to run concurrently with a previous term of six years in the place designated by the Director of the Division of Corrections, this day rendered against the accused, and mentioned in the preceding judgment of this court.

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 John Adams, aka Donald Mooreman Clodfelter, 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.

The court doth appoint John H. Herbig and Robert Harris, attorneys for the accused to perfect appeal in this matter, and the court doth further order that all transcripts in this matter be prepared including the proceedings of the General District Court.

And the prisoner is remanded to jail.

ENTER: May 20, 1976

/s/ Philip L. Russo
Judge

NOTICE OF APPEAL
AND
ASSIGNMENTS OF ERROR

The defendant, Donald M. Clodfelter, by counsel, gives Notice of Appeal from the final judgment of the Circuit Court of the City of Virginia Beach, Virginia, rendered on May 20, 1976, and assigns the following errors as required by Rule 5:6 of the Supreme Court of Virginia:

1. The Trial Court erred in denying the defendant's Motion to Suppress Evidence unlawfully seized.

2. The Trial Court erred in denying the defendant's Motion to Dismiss, based upon the doctrine of collateral estoppel.

3. The Trial Court erred in denying defendant's Motion to Suppress Statements by permitting certain alleged statements to be admitted into evidence.

4. The Trial Court erred in permitting statements of a person not in Court, Jimmy Rufus Johnson, that the accused was Donald Clodfelter.

5. The Trial Court erred in denying the defendant's Motion to Strike the Evidence of the Commonwealth as being insufficient.

6. The Trial Court erred in convicting the defendant as the evidence was insufficient in law to support a conviction.

7. The Trial Court erred in overruling the defendant's Motion to set aside the verdict.

8. The Trial Court erred in admitting the evidence of the handwriting expert.

No transcript or statement of facts, testimony or other incidents of the case are to be hereafter filed except for the transcript of the hearing in the General District Court of the City of Virginia Beach on August 25, 1975, involving the trial of the defendant on two misdemeanors and the preliminary hearing arising from the single transaction, and the transcripts from the Circuit Court of the City of Virginia Beach, Virginia, including the pre-trial Motions heard on November 18, 1975 and December 16, 1975, the trial of the felony charges in the Circuit Court of the City of Virginia Beach, Virginia, on January 22, 1976, and the post trial Motions and pre-sentence report hearing held on May 20, 1976.

DONALD M. CLODFELTER

By /s/ John H. Herbig
Of Counsel

Robert L. Harris
John H. Herbig
HARRIS, TUCK, FREASIER & JOHNSON
Professional Associates, Inc.
3805 Cutshaw Avenue
Richmond, Virginia 23230

DATE FILED: June 7, 1976

P R O C E E D I N G S [3]

THE CLERK: All parties who are going to testify raise your right hand, please.

(The witnesses were sworn.)

MR. SLIPOW: Call Detective Collins.

THE COURT: Just a moment.

He is charged with two felonies and three misdemeanors. How does he plead to the misdemeanors?

MR. HARRIS: Not guilty.

Your Honor, I move to separate the witnesses.

(The witnesses were excluded.)

MR. SLIPOW: Your Honor, Commonwealth would move to nol-pros the possession of opium with intent to distribute. That report came back negative.

MR. HARRIS: Yes, sir. As I understand it, it was negative. You are going to dismiss it instead of nol-pros?

MR. SLIPOW: Fine.

THE COURT: I will dismiss it.

Is that the only one?

* * *

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SLIPOW:

Q. State your name.

A. Detective T. A. Collins, Virginia Beach Police Department, Narcotics.

Q. Detective Collins, directing your attention to June the 16th of this year, did you have occasion to secure a search warrant and affidavit for the Ramada Inn?

A. Yes, I did.

Q. Is this a copy of the affidavit?

A. This is a copy of the affidavit which I presented to Magistrate Rogers at 1:05 a.m. at the Police Headquarters here in the City of Virginia Beach.

Q. As a result of that affidavit did you secure a search warrant?

A. After swearing to the facts contained in the affidavit, Magistrate Rogers issued the search warrant for the Ramada Inn, Room 611, Seventh and Ocean Front.

Q. What city?

A. That is in the City of Virginia Beach.

* * *

BY MR. HARRIS: Well, did you come to the courthouse complex to get the search warrant?

A. Yes, I did.

Q. What time did you arrive at the courthouse to get the search warrant?

A. I presented the Magistrate with the affidavit for the search warrant at 1:05 a.m. on June 16th, 1975 here at the courthouse complex, -- Magistrate Rogers.

Q. Who typed out the information contained in the affidavit?

A. I did.

Q. Had you typed that out prior to going before the Magistrate?

A. Prior to going before the Magistrate I typed it out personally.

Q. What did you do when you went before the Magistrate?

A. As I testified, after swearing to the facts contained in the affidavit, the Magistrate issued a search warrant for Room 611, Ramada Inn.

Q. Okay.

Who was present with you when you went before the Magistrate?

A. Myself.

Q. Were you alone?

A. And the Magistrate, yes.

* * *

[14-20]

BY MR. SLIPOW:

Q. Officer Collins, after receiving the search warrant and affidavit where did you proceed?

A. We proceeded to the Ramada Inn in the City of Virginia Beach.

Q. Okay.

Upon your arrival what steps did you take?

A. Upon arriving myself, Detective Chrisman and two uniformed police officers entered the room, after obtaining the pass key. Nobody answered the door. We announced ourselves as police officers and then after nobody answered we entered with the pass key. A search of the room revealed two paper bags containing a quantity of plant material and various pill bottles.

Q. Was anybody else present?

A. Myself, Detective Chrisman and the two uniformed officers.

One of the large bags containing the empty pill containers was found under the bed. The other brown paper bag containing pill containers with the pills in it was behind a mirror beside the bed closest to the window on the Ocean Front.

The marijuana was also in that bag that contained the pills.

Prior to our arrival at the Ramada Inn myself observed a white male subject with a ponytail -- long black hair pulled in a ponytail. He was with a female subject as they left the Ramada Inn.

At 3:10 a.m. a subject entered the room, that was identified as Jimmy Rufus Johnson. He had a pass key, and Mr. Johnson was searched for weapons. He had no weapon or drugs about his person. We asked Mr. Johnson if he was a resident there at the room. He stated, no, he wasn't, and he was sent there by a person. We asked him if he knew who occupied the room.

MR. HARRIS: Who did he say was sending him there? I know it was hearsay.

THE WITNESS: He said that Donald Clodfelter sent him there.

MR. HARRIS: What time was that?

THE WITNESS: He didn't give us a time, but we arrived at the room at 1:40 a.m. and it was about 1:38, 37, that I saw a white male subject with the ponytail, the beard, about six foot, leaving with the white female subject, so apparently it was sometime -- I'd have to assume on that it was between the time we were in there and the time he got there, three ten.

He further -- the subject, Johnson, further stated that Mr. Clodfelter had told him to come to the room to pick up the drugs because he saw police officers going into the motel, and that he wanted to pick up the drugs because they were probably going to search this place; get the drugs if the cops had not already gotten them.

BY MR. SLIPOW:

Q. What point in time did you come in contact with Mr. Clodfelter?

A. Mr. Clodfelter was not located until 5:30 a.m. at the arrival at the Cutty Sark Hotel, Room 2, upon being directed there by the subject, Jimmy Johnson.

Q. Okay.

Did you have an opportunity to interview Mr. Clodfelter?

A. Yes, I did.

Q. Was he advised of his Constitutional rights?

A. Mr. Clodfelter was advised of his Constitutional rights at the Second Police Precinct.

MR. SLIPOW: Mr. Harris, do you have any questions regarding the Constitutional rights; what rights were advised, what procedures used?

MR. HARRIS: Yes, I do.

MR. SLIPOW: Go ahead.

RECROSS EXAMINATION

BY MR. HARRIS:

Q. When did you first see Mr. Clodfelter?

A. At 5:30 a.m. at the Cutty Sark Hotel.

Q. Who was present then?

A. It was a male and another female and Mr. Clodfelter. I believe they were the only three that were in the room besides myself, Detective Chrisman, Detective Sergeant Pritchard and Auxiliary Officer Tucker.

Q. Was Auxiliary Officer Tucker, was he one of the individuals that went to the Ramada Inn?

A. No.

Q. Okay.

Now, did you advise Mr. Clodfelter of his rights at the -- what's that? The Cutty Sark?

A. Cutty Sark.

Q. Did you advise him there?

A. No, we didn't.

Q. How long was it after he was arrested before you advised him of his rights?

A. Fifteen minutes.

Q. What did you say to him when he was arrested?

A. When he was arrested I asked him who he was.

Q. Okay.

Now, did you read from a card when you advised him of his rights?

A. No, I didn't.

Q. Exactly what did you tell him?

A. I told him he had a right to remain silent; anything he said would be used against him in a court; he had the right to have an attorney; if he can't afford one, one would be appointed to him; if he had any questions prior to our questioning him he could stop answering at any time until contacting an attorney.

Q. Did you advise him anything else?

A. That if he didn't have -- if he wanted an attorney that the Court would appoint him an attorney prior to questioning, if he wished. He stated he understood all of his rights, and that he had been through this before.

Q. Did you advise him anything else?

A. Not that I can think of.

Q. Take time to think.

A. I don't believe so.

Q. Did you advise him anything else then?

A. I don't believe so.

Q. Who was with you when you advised him of these rights?

DETECTIVE T. A. COLLINS

A. Detective Chrisman.

Q. Where were you when you advised him of his rights?

A. At Police Headquarters at the Second Precinct. We asked him point-blank who he was at the hotel, at the Cutty Sark, where this subject, Jimmy Johnson, came down and looked at Mr. Clodfelter and said that he was the person that had directed him to the motel.

From there we transported Mr. Clodfelter to the Second Precinct where he was advised of his rights.

Q. Now, where were you at the precinct when you advised him?

A. In a large room that's as you go into the precinct you turn right, go into the corridor, you walk through a little swinging door and turn left and there is the muster room.

Q. What time was this?

A. That was at 5:45 a.m. at the Second Police Precinct.

Q. What did he say?

First of all, did he appear to have had any narcotics that night?

A. He didn't seem to be intoxicated. He was coherent. He wasn't staggering on his feet. He seemed to be about his facilities -- his faculties, et cetera.

MR. HARRIS: Okay.

* * *

BY MR. SLIPOW:

Q. What name did he give you when you asked him what his name was?

A. Gave me the name of John Adams.

Q. John Adams?

A. Mm,mm.

Q. How did you ascertain what his name was?

A. I found out what his name was in court at the appointment hearing. Upon finding out I asked him where he got "John Adams" at, and he said that if I had asked him what his first name was instead of what his last name was, then he probably would have told me what his real name was, but he thought of the first name he could think of and "John Adams" was the first one.

Q. Directing your attention back to the night in question, what statements, if any, did Mr. Clodfelter make to you about the drugs in the room?

MR. HARRIS: Let me ask you --

FURTHER RECROSS EXAMINATION

BY MR. HARRIS:

Q. Did you go directly from the Cutty Sark to the Police Headquarters?

A. At the Second Precinct, yes.

Q. Didn't you go from the Cutty Sark to the Ramada Inn?

A. No.

Q. Did you not go to the Ramada Inn?

A. We went from the Cutty Sark to the Police Headquarters at the Second Precinct. At 6:45 a.m. Mr. Clodfelter was taken to the Ramada Inn to see if the Manager could identify him as being the one that registered at 611.

Q. Isn't it a fact that Mr. Clodfelter asked for an attorney?

A. I don't believe he did. He just stated that he knew what his rights was and he didn't want to say anything until he talked to an attorney.

Q. Isn't it a fact, now, Detective Collins, that Mr. Clodfelter said that he wanted to talk with an attorney?

A. I can't say positive if he said point-blank, "I want to talk to any attorney." He said he wouldn't answer any questions until he talked to an attorney; that he had been through this before.

Q. That was before you even advised him of his rights?

A. No; that was after we advised him of his rights at the Second Precinct.

A. So he said he wouldn't asnwer any questions until he talked with an attorney. Did you terminate your questioning at that point?

A. At that point there we transported him to the Ramada Inn, where Detective Chrisman had stayed there waiting for the room to be processed for fingerprints, at which time I then transported Mr. Clodfelter to the Police Headquarters, and at 8:25 a.m. Mr. Clodfelter was readvised of his rights at the Police Headquarters.

Q. Did you offer to get the attorney that you told him earlier that he could have?

A. I told him if he had an attorney he wanted to call, that he could make that call.

Q. You told him that?

A. He could get the attorney if he wanted to make a call; that we had to finish processing him and everything else, and from there he would have to contact the Court for the appointment of the attorney.

Q. Detective Collins, didn't you tell Mr. Clodfelter that you were going to call your secretary so he could make a statement?

A. If he wanted to.

Q. How many times did you tell him that?

A. I believe twice.

Q. Twice?

A. Mm,mm.

Q. Was that after he told you he wasn't going to make a statement until he talked with an attorney?

A. Mm,mm. He said he didn't want to make any other statements then. After just talking with him, sitting there, he made other statements then.

Q. In other words, you continued to interview him after he said he wasn't going to make a statement until he got an attorney?

A. It wasn't an interview where I said, "Did you say this or did you do this", et cetera; it was one of the things where we were talking about he had been in trouble before, in the penitentiary, things like that, that he was from Richmond; where in Richmond? other questions related --

THE COURT: Did he make a statement?

THE WITNESS: Not directly. He made other statements in regard --

THE COURT: A statement --

THE WITNESS: In the room he made statements.

THE COURT: In regard to these drugs?

THE WITNESS: Well, that's what I was going to get into, your Honor.

MR. HARRIS: Your Honor, I submit the man said he wasn't going to make a statement until he got an attorney. At that point they should have stopped talking to him or stopped interrogating him until he had an attorney.

MR. SLIPOW: Your Honor, I believe if we hear the nature of the statement before you rule

on it, the Court will be made aware that he didn't make an incriminating statement in that he said, "These are my drugs," or anything like this. It was just a general conversation of background, the man had had involvement in other types of activities in the past, and about personal possessions of his. And the man volunteered the information. It wasn't a point of an interrogation type thing. It was just a conversation back and forth.

THE COURT: Well, let him go ahead and testify, and then we will rule on it.

FURTHER REDIRECT EXAMINATION

BY MR. SLIPOW:

Q. What was the result of the conversation?

A. After he said he understood his rights and wouldn't say anything because he had been through this before, he wouldn't say what his real name was. I wondered where he got the "John Adams" at. He said he made that up. I was telling him that -- Donnie and I were talking about the girl that left the motel - if he had a girl there and he said he had, and that -- he stated he saw us arrive while he was leaving with the girl.

Q. So he indicated that he had been at the motel?

A. He indicated he saw us go to the Ramada Inn. He didn't say whether he was in the motel or coming from it. He said he saw the police going into the Ramada Inn.

Q. Did he discuss any objects that were found in the room?

A. Yes, he did.

Q. Such as?

A. After that he stated he didn't want to say anything else. So I took him before the Magistrate and swore to the facts contained in the warrant, and while we were sitting there I told him, I said that there were only two things - only one thing - that really bothered me, and that was that there was two bags found within the room, one of them had a large quantity of pill bottles that were empty, and the other was a large quantity of pill bottles that had pills in it, and I was afraid that some kid might overdose on the pills on the street, at which time Donnie said, "You don't have to worry about that," that they are in Richmond. Then he was processed. That was taken from him in the Interview Room just before I took him before the Magistrate.

After taking him before the Magistrate Donnie asked me if I found his knife, and I said, "Yes." He stated that --

Q. Let me interrupt.

Did he ask you or did you say anything about the knife being found in the room?

A. He asked me if I found his knife. I stated, "Yes." I stated it was a good knife. Donnie further stated, "Yeah, it was a buck - a buck knife." He said it cost about

twenty-nine fifty-nine. He further stated -- we were talking about some other things that were found, like a bracelet, a hair brush, et cetera, and Donnie stated - asked - if we had found his rings and his bracelet. I asked him about the bracelet. He said what the bracelet looked like. He stated that the bracelet looked like it was made from a spoon and had some type of inscription on it referring to the penitentiary or prison. I stated that I had recovered that, the bracelet and some rubber bands with some hair on it.

Q. Was there any other conversation?

A. No.

* * *

[27-28]

BY MR. HARRIS:

Q. All right. So you obtained the search warrant at one-oh-seven; is that right, now?

A. I'd have to look at the search warrant. I believe it was one-oh-five. I am not sure. The affidavit was issued at one-oh-five and the search warrant was one-oh-seven.

* * *

[30-35]

Now, when you got to the room the room was empty; is that right?

A. Yes, it was.

Q. And you made the search?

A. Mm,mm.

Q. And you testified who was there?

A. Right.

Q. How long were you in the room?

A. We stayed in --

MR. SLIPOW: Could he have his notes back for a second?

THE WITNESS: Well, we got there at one forty and this boy, Jimmy Johnson, entered at three ten, and we probably didn't leave there until a little after four because Jimmy stated that harm would come to him if he said anything else to us about who sent him there or what he was doing there.

BY MR. HARRIS:

Q. Did you arrest Jimmy Johnson?

A. No, we didn't. Took him into custody and released him to his mother in Richmond.

Q. Okay.

Now, how did you find out where Donnie Clodfelter was?

A. Jimmy Johnson told me.

Q. Okay.

And did you go directly from the Ramada Inn to the Cutty Sark?

A. Yes, we did.

Q. How long did you stay at the Cutty Sark?

A. I don't know. I'd probably have to estimate five, eight, maybe 10 minutes.

Q. Was he asleep when you got there?

A. Yes, he was.

Q. And you took him directly from the Cutty Sark to where?

A. The Second Precinct.

A. How long did you stay at the Second Precinct?

A. Again I'd probably have to estimate.

THE COURT: What difference does it make how long it took on these things? This is a preliminary hearing. We are not on a fishing expedition.

BY MR. HARRIS:

Q. You said that -- you testified earlier you took Donnie Clodfelter back to the Ramada Inn, and who did you talk with at the Ramada Inn when you got back there?

A. The Manager there at the Ramada Inn. He responded, and I asked him if he could make any identification of the person that rented the Room 611.

Q. What was his response?

A. He stated that he thought he might be able to identify somebody, but that after seeing Mr. Clodfelter he stated he couldn't be positive that that was him.

Q. Did you talk with anyone else at the Ramada

Inn about identifying Mr. Clodfelter?

A. Mm,mm.

Q. Who did you talk with?

A. A female that was registered right behind Mr. Clodfelter when he went into the hotel. I believe she registered in Room 610, 612, 613.

Q. Do you have her name?

A. No, I don't. She couldn't identify him, so I couldn't see any reason trying to ascertain who she was.

Q. Did you talk to anyone who could identify Mr. Clodfelter as being the person staying in Room 611 --

A. Yeah. Jimmy Rufus Johnson.

Q. -- at the motel?

A. No, not at the motel. The Manager stated he had seen Mr. Clodfelter before, but he couldn't picture whether it was at the motel or on the street, but he did look familiar.

Q. All right.

One question about time, your Honor.

How long did you stay at the Ramada Inn when you went back?

A. I think we were there probably -- I can't be for sure, because it took awhile for the Manager to respond. We had to wait for the ID Tech to go respond to process the room, so it is possible we could have been there 45 minutes to an hour.

Q. Okay.

Now, as far as the statement, the statements that Mr. Clodfelter made about the knife and so forth, all that came after he said he wasn't going to make any statement until he got an attorney?

A. Mm,mm. Those were -- you know, we were sitting there just talking general conversation. I made the statement about the pill bottles, and I thought somebody might OD, and he made the other statement that I didn't have to worry about them, that they were in Richmond.

Q. When did you offer to let him make a telephone call?

A. When we got to the jail.

Q. But that was after you had been to the Second Precinct?

A. Mm,mm.

Q. And after you had been back to the Ramada Inn?

A. Mm,mm.

Q. And that would have been what? Three hours after he was arrested?

A. You are talking about it was three thirty in the morning he said he'd have to make a long-distance call. He didn't tell us who he wanted to call, I will put it to you that way. He didn't say, "I want to call Mr. John Smith in Richmond, Mr. Steve So-and-So in Virginia Beach."

DETECTIVE T. A. COLLINS

Q. You testified he wanted to make a call.

A. He said he wasn't going to make any statements until -- he wanted to talk to an attorney. He didn't say, "I want to talk to an attorney right now, next week, next month." He didn't say. He didn't give a time limit.

MR. HARRIS: That's all, Judge.

MR. SLIPOW: Thank you.

* * *

DETECTIVE RICHARD CHRISMAN,

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SLIPOW:

Q. State your name, sir.

A. Detective Richard Chrisman.

Q. For whom are you employed?

A. City of Virginia Beach, Virginia Beach Police Department.

Q. Directing your attention to June 16th, 1975, were you with Officer Collins when this search pursuant to a search warrant was made at the Ramada Inn?

A. Yes, sir.

Q. What time were the drugs placed in your custody?

A. Approximately 8:30 a.m.

Q. What did you do with them?

A. Packaged them, sealed them, took them down to the Property Room downstairs, picked them up again on the 26th of June, took them to the Drug Lab in Norfolk, where I picked them up this morning at approximately 10 o'clock.

Q. I show you each of these items and ask you if you recognize them.

A. Yes, sir. These are the bags we picked up.

Q. How do these correspond --

A. This is the only one that has the drugs in it. The others --

THE COURT: You want to open that?

MR. HARRIS: No, sir, your Honor.

THE WITNESS: You don't have the sheet, do you?

THE COURT: Here's the sheet.

Have you seen the report?

MR. HARRIS: Yes, sir.

BY MR. SLIPOW:

Q. Okay. How does the evidence tag correlate with the drug bag?

A. 7427446 on here; 7427446, the same number that went to Richmond.

Q. Okay. Fine.

These drugs have been in your exclusive possession except for when they went to the lab?

A. Yes, and down in the Evidence Room.

Q. What were the results of the drug report?

Has the Court seen the copy?

THE COURT: I just put it up there.

THE WITNESS: It is lengthy. You --

MR. SLIPOW: We will show you a copy of the

report.

MR. HARRIS: I have got a copy.

MR. SLIPOW: There are multiple items that came back positive.

Answer any questions this gentleman has.

* * *

[39-45]

BY MR. HARRIS:

Q. Now, did y'all see anybody come out of the room?

A. Come out? No, sir.

Q. Did you see anybody that later -- did you see anybody leave the Ramada Inn with a young man with a ponytail?

A. I don't recall whether he had a ponytail. We saw a man with black hair leave.

Q. Was he alone?

A. No, sir. He had a girl with him.

Q. Now, did you call the Manager to get into the room?

A. Yes, sir.

Q. You called him?

A. I don't remember if I called him or Detective Collins did. We got the key from the Manager.

Q. Do you know the Manager's name?

A. No, sir, I don't.

Q. Was he there already when you got there?

A. Yes, sir. It's open 24 hours a day.

Q. I understand that. Was the Manager there when you got there?

A. Okay.

Now, we have got a misunderstanding, because we got the key from the desk clerk. The Manager - I don't believe we saw him until the next morning.

Q. You didn't see the Manager until the next morning?

A. Or until that morning.

Q. Who made the inventory of the items?

A. As far as counting the pills and whatever?

Q. Yes, sir.

A. I did.

Q. Were you the custodian of everything in the room all the way through the investigation?

A. After he picked it up and everything he gave it to me.

Q. What did you do with it?

A. I sealed it and put it in these bags and took it down to the Evidence Section in the Evidence Room, and picked it up and hand-carried it to the lab, and picked it up from the lab this morning.

Q. How long did it stay in the Evidence Room before you took it to the lab?

A. What day was this? The 16th? Twenty-sixth

I took it to the lab, when I picked it up and took it in.

Q. On the 26th?

A. Yes, sir, of June.

Q. Was it sealed all during the time it was in the Evidence Room?

A. Yes, sir. It was in these bags just like this.

Q. Who did you leave it with at the lab?

A. Pauline Lowe.

Q. When did you pick it up?

A. This morning about 10 o'clock.

Q. Were you with Mr. Clodfelter and Detective Collins all during the time after he was arrested?

A. No. He was in the Interrogation Room part of the time. When he went down to get the warrant I don't believe I was with him then. When he went to get processed I wasn't with him.

Q. When was the first time he was warned of his rights?

MR. SLIPOW: I have to object.

THE WITNESS: I don't know.

BY MR. HARRIS:

Q. Did you hear whether or not he was warned of his rights at any time? Were you present?

A. Detective Collins told me he had. I wasn't

there when it happened.

Q. You don't know whether he was or not?

A. No, sir.

MR. HARRIS: That's all I have, Judge.

CROSS-EXAMINATION

BY MR. SLIPOW:

Q. Just one question.

Was Detective Collins present when you inventoried the items?

A. Most of the time. Our desks are right next to each other -- part of the time.

MR. SLIPOW: Judge, we ask that this matter be sent to the grand jury.

THE COURT: Do you want to put on any evidence?

MR. HARRIS: No, sir, your Honor. I have got a motion.

(The witness was excused.)

THE COURT: All right, sir.

MR. HARRIS: With respect to trying Mr. Clodfelter with these items, the only evidence they have got, really, is the statement he allegedly made. Now, Detective Collins said that he asked -- said he wasn't going to say

anything until he got an attorney. Now, then, Detective Collins said he made these voluntary statements thereafter. But he, Detective Collins, made certain comments about the pills -- someone else having the pills, your Honor, I submit, with the intent to get Mr. Clodfelter to respond, which he did. And that's the only evidence that the Commonwealth has got to tie Mr. Clodfelter with this room.

Now, he said that nobody at the motel could say that Mr. Clodfelter was the one that was in the room, so what we have is Mr. Clodfelter's statement. I submit, your Honor, that Mr. Clodfelter's statement was after he had been warned of his rights, after he said that he wanted an attorney and that he wasn't going to make any statements until he had an attorney.

THE COURT: All right, sir.

MR. SLIPOW: Your Honor, I would submit to the Court that the detective can't be responsible for sealing and gagging the young man's mouth. As I remember the testimony, they were sitting there and he said, "Hey, did you get my knife?" Then he went into a description of the knife that was found in the room, and he said, "What about my bracelet?"

Now, the detective can't be responsible for what statements were or were not made. These were voluntary statements brought out by the defendant, not by the detective. Each one of them indicated that the man had been in the room.

He did make the statement that he did see

the police officers coming to the room. Although there was no positive identification made, it was indicated that a young man with dark hair was seen leaving the hotel as the police officers came in.

Once again, I would submit there is more than ample probable cause to indicate this man was in the room, to send it to the grand jury. As I stated previously, the officer can't be responsible for any voluntary statements made by the man.

MR. HARRIS: Once he said, your Honor, he didn't want to make a statment --

THE COURT: I agree with the Commonwealth Attorney. It was a voluntary statement. He asked him, "Did you get my knife?" He didn't ask him about the knife.

I overrule the motion, and send it to the grand jury.

Are you going to put on any evidence?

MR. HARRIS: No, sir.

You have got two criteria here. First of all, you have got to prove beyond a reasonable doubt --

THE COURT: No. Probable cause.

MR. HARRIS: -- with respect to the misdemeanors.

THE COURT: With the misdemeanors --

MR. HARRIS: With respect to the felonies, I realize it is just a probable-cause hearing, but with respect to the misdemeanors, as I understand, the burden is on the

Commonwealth to prove beyond a reasonable doubt --

THE COURT: I will go along with you on that. I will dismiss the two misdemeanors.

MR. HARRIS: All right, sir.

MR. SLIPOW: Okay.

THE COURT: The three felonies -- I will refer the three felonies.

MR. HARRIS; I think there will be two felonies.

THE COURT: Three felonies; one, two, three. We dismissed the opium.

MR. HARRIS: There are two felonies, then.

THE COURT: Three. Amphetamines, distribution and depressant drugs. Opium was dismissed. He had four felonies.

* * *

Now, the motion to suppress the evidence. Now, that is based upon the fact that the magistrate issued the search warrant within a short period of time and therefore it was not a valid search warrant. Is there any additional argument on that one?

MR. HERBIG: I think the defense's position was stated in the memorandum as well as on oral argument on November 5th.

THE COURT: All Right. Mr. Slipow?

MR. SLIPOW: The Commonwealth rests on this point as well, your Honor.

THE COURT: All right. Once again, gentlemen, I have given that a lot of thought. I think that the fact that there was a short lapse of time in the writing of the search warrant does not in and of itself necessarily make the search warrant invalid. It appears to me that the affidavit was in proper form; that the search warrant itself was in proper form and that the mere lapse of a short period of time does not invalidate the search warrant, so I am going to overrule that motion, to which counsel for the defendant objects and excepts.

All right. Now, the motion to suppress the statements.

Once again, is there any additional argument on that other than what you have in the memorandum?

MR. HERBIG: I have one question there, your

Honor. I don't know whether the fact in the memorandum -- I would, you know, waive having the defendant testify if the court will accept these facts at face value. I don't believe there has been any real evidence adduced as to what transpired.

THE COURT: Well, the only thing I have before me now is the transcript of the preliminary hearing and what Officer Collins said, and also your oral argument on November the 4th and 5th, whenever it was we were here, and also your written memorandum, so if you have additional testimony that appears necessary, I will hear it. But so far I would have to base my ruling on your argument in regard to what Officer Collins said and did.

MR. HERBIG: Very well, your Honor.

THE COURT: And what he said in the General District Court.

MR. HERBIG: Very well. I think then some of the facts were not brought out in the General District Court and, therefore, I feel like at this time I would like to call the defendant for the limited purpose as to what transpired as to the police's conduct at the time of his arrest.

THE COURT: All right. If you will swear him.

DONALD MOOREMAN CLODFELTER [11-13]

DONALD MOOREMAN CLODFELTER, the defendant, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HERBIG:

Q. Mr. Clodfelter, were you arrested at approximately 5:30 a.m. on --

THE COURT: Well, first of all, for the record your name is Donald Mooreman Clodfelter. Is that correct?

THE ACCUSED: Yes, sir.

THE COURT: All right.

BY MR. HERBIG:

Q. Were you arrested on June 16th at approximately 5:30 a.m.?

A. Yes, sir.

Q. In the city of Virginia Beach?

A. Yes, sir.

Q. At that time would you tell the court where you were.

A. I was at the Cutty Sark Motel.

Q. And would you tell the court what happened at approximately 5:30 a.m. that morning.

A. There was a knock on the door and I was awakened and three or four or five plainsclothesmen, officers, came in and started looking around and asked me what -- woke me up and asked me what my name was. I was asleep on the bed, actually asleep and half-daze, at least half awake.

Q. Did anyone at that time inform you of any constitutional rights?

A. No, sir, not at that time.

Q. Did they ask you any questions at that time?

A. Yes, sir. They asked me my name, what was I doing there, where was I from. Just stuff like that. You know. Three or four of them asking a lot of questions. There was two other people in the room, too. They were asking them questions.

Q. Did you have any indication at that time that you were under arrest?

A. No, sir, I did not.

Q. What happened after you left the Cutty Sark Motel or hotel?

A. Before I left I was shaken down. I was asked to get up against the wall and they patted me down, and at that time I figured I was under arrest. They took me to a police car and as we walked in front of the hotel -- as we walked out to get into one of the detective's cars, three or four of the officers were lined up and one of them had a slapjack or something and hit me on the back of the head

like here (indicating) -- hit me as I was getting into the car. And then is when I sat in the car. I was sitting in the front seat, and he turned around to me and put the black-jack up against my teeth --

* * *

[14-15]

Q. And continuing, Mr. Clodfelter, this was outside of the Cutty Sark Motel?

A. It was in the police car as we were driving away. Mr. Chrisman turned around and put the blackjack right to my teeth and said one thing he hated was a goddamn pusher.

Q. Excuse me.

A. We drove to one of the police headquarters -- I don't know exactly where it was -- at that time I remained in the car and they -- one of the officers stayed with me running back and forth to police headquarters or what-not.

Q. During your ride from the Cutty Sark Hotel to the police station, were you interrogated or asked any questions?

A. I don't believe I was asked any questions. They were just saying something to me. I wasn't directly asked any questions, any more than what is your name, where are you from; nothing more than that.

Q. During this period of time were you informed of any rights?

A. Not yet; not yet.

Q. When were you first informed of any rights?

A. The first time I was informed of my rights is when we stopped the car in front of police headquarters the first time.

Q. And what was your response?

A. I told them I had nothing to say, I want to call my lawyer.

Q. What transpired at that time? What did they do?

A. They just practically ignored me and kept asking questions, so I got tired of it. I wanted for them to either to arrest me or to let me go. They kept saying that I had gone to this motel room, and I told one of the officers, I said, "If you believe I went to the motel room, why don't you take me back up there and see if they could identify me."

So, they took me back up there to one of the hotels --

Q. They took you back up there?

A. Yes.

* * *

[17-19]

Q. Did the police officers, after you had been back to the Cutty Sark, did they indicate one way or another whether you were identified?

A. They didn't positively say yes or no I have

been identified, but they led me to believe I had been identified. I even asked them point blank is there anybody there that could identify me and they wouldn't answer me directly but they led me to believe I was identified by saying we've got you now, you might as well just go ahead and admit to it.

Q. After you left the Ramada Inn with Officer Collins and Chrisman, where were you taken?

A. I was taken back to police headquarters.

Q. Now, from the time that you were first informed of your constitutional rights when you first arrived at police headquarters until the time you arrived back, had you been reinformed of your constitutional rights during any of this time?

A. Not right yet. The second time no. I was informed the first time that we stopped at police headquarters and the second time we went to police headquarters we went into a conference room and four or five detectives was in there and that was when I was informed the second time of my rights.

Q. What was your response at this time?

A. The same: I have no statements; I wish to call my lawyer.

Q. What did the officers inform you? What did they advise you of? Do you remember what they said?

A. They just read me the rights from the card.

Q. And your response again? I mean what was your response again?

A. I have nothing to say, I would like to call my lawyer.

Q. Did they continue to ask you questions?

A. Yes, they did.

Q. What transpired in the questioning room?

A. It was a big long table in there. Three or four detectives were constantly asking me questions and pushing at me, getting up in my face asking me irrelevant questions: What were you doing here, why was you there; just any old thing, really, trying to get me to say something.

Q. And approximately how long were you in this conference room?

A. I guess about fifteen minutes after they found out I wasn't going to say anything.

Q. Did they handcuff you at any time?

A. Yeah, when they left there I don't know what the officer's name was, he seemed to me to be the head man because he did most of the asking of the questions and giving the rest of them --

* * *

[20-24]

A. (Continuing) The head officer there said to one of the other officers, "Handcuff him." And they brought my arms up and to my back and handcuffed me, put

the cuffs on real tight to the point where I was almost crying, and one of them led me out of the room and kept jerking my arm up to my head, like pulling both of my arms up, and when we got out in the corridor there was a uniformed officer --

BY MR. HERBIG:

Q. Before we get to that point, Mr. Clodfelter, did you make any complaints about the handcuffs being tight or by your facial expressions or signs?

A. Yeah, I could say take them off, but I didn't ask that. But I yelled out that they hurt, like that.

Q. Now, when you went out into the corridor or -- go ahead.

A. There was a uniformed officer coming down the hall and just as I seen him I fell to my knees and I asked him as he walked by if he would tell the officer to loosen the handcuffs, and they looked at each other, and the officer behind me smiled and said, you know, just "ha, ha," something like that, and took the cuffs and loosened them up a little bit.

Q. Where were you taken from the conference room after they handcuffed you? What transpired then? What happened?

A. Collins took me to a room to fill out a form. He had a form he wanted me to answer some questions to.

Q. Did Officer Collins ask you at that time questions?

A. Yes, he did.

Q. Did he readvise you of your constitutional rights?

A. No, not at that time.

Q. What was your response to the questions that he asked? Other than answering them directly did you make any statements to him?

A. I wouldn't even answer the questions that was on the form. He would ask me, he would say your name is John Adams.

Q. All right. How long were you in the room? How long were you with Detective Collins approximately?

A. Fifteen or twenty minutes.

Q. All right. After you left the room where you were questioned to fill out a questionnaire where were you taken?

A. In front of the magistrate.

Q. What transpired there?

A. I was sitting in front of the magistrate. Tom Collins was sitting on my left and Chrisman was sitting on my right, and we were sitting down there talking.

I mean I was talking to the magistrate. He was asking me questions like do you know how much your bond is going to be. I said no. He said I am going to set bond at $75,000. Well, the whole time he was sitting there filling out those papers Tom Collins and Chrisman were more or less talking back and forth to each other pointing the questions at me. In one instance Mr. Chrisman said what kind of soap do you use, Mr. Clodfelter?

I said I don't want to answer that.

And he asked me what kind of soap do you use. I told him again I didn't want to answer. He asked me again what kind of soap, just name a soap, just name a brand. I said Irish brand.

Q. Why did you answer the question?

A. Because he kept bugging me about it. I just wanted to be left alone, just to go on with the proceedings.

Q. Up to this point in time had you been able to contact an attorney or did you have an attorney?

A. No, I had not. I had not been able to contact one.

Q. All right. After you were taken before the magistrate where were you taken?

A. Tom Collins took me to what I assumed is his working room or whatever, a little small room, and he told me, he said you go on and sit down here and I am

going to get my secretary and she will just type up a statement for you. I said I don't have any statement I want to make. He said, well, you just go on and sit down here and I will go get my secretary and she will type up a statement for you. I told him I didn't have any statement I wanted to make and he asked me that three or four times pertaining to the same thing. He wanted to bring his secretary to me for her to type up a statement for me. Afterwards I had told him I didn't have any statement I wanted to make.

Q. Had he readvised you of your constitutional rights?

A. No, he had not.

MR. HERBIG: No further questions, your Honor.

THE COURT: Well now, you didn't really -- about the question, as I understand it, the statements that you are concerned about are the one that I just said and the fact that he asked about his knife, his ring and his bracelet. Is that right?

MR. HERBIG: Well, yes, your Honor. That was an oversight on my part. Although I think the thrust of his testimony is certainly that he was advised of his constitutional rights, had no further statements to make, he wanted to

contact an attorney, yet was never given the opportunity nor did interrogation cease; plus there were certain accounts in there which could be interpreted as coercive or (under the - reporter's error) undue influence, plus continued repetition of the same questions over and over even though he said he had no statements.

THE COURT: About what kind of soap he was using.

MR. HERBIG: Plus the statement, "Let me go get my secretary."

THE COURT: All right. Mr. Slipow, do you have any questions?

MR. SLIPOW: Just a couple, your Honor.

* * *

[25-56]

Q. Mr. Clodfelter, the man you make reference to as Mr. Chrisman, is he present in the courtroom today?

A. No, sir, he is not.

Q. How about Tom Collins? Is he present in the courtroom?

A. Yeah, Tom Collins is sitting beside you.

Q. Okay. Now, you indicate you were interrogated once at the Second Precinct; is that correct?

A. I don't know where.

Q. Down town not too far from where you were

arrested?

A. I am not sure where it was. I mean what I am saying, when you say the Second Precinct, I am not sure that is where the place was. I am not going to say that.

Q. Were you interrogated downtown not too far from where you were arrested once in the Cutty Sark Motel at approximately 32nd and Atlantic?

A. Approximately, yeah.

Q. Okay. Were you taken to a building that appeared to be a police compound?

A. Yes, I was.

Q. Was that approximately 18th and Artic?

A. I am not sure.

Q. Was it approximately twenty blocks away?

A. I can't say. The first time they took me to police headquarters we just sat in the car, no questions. I wasn't taken inside. Then I was taken back to a hotel room, another hotel room, then I was taken -- but I am not familiar with the Virginia Beach area.

Q. Then you were taken to a hotel room. How long did you drive to get there?

A. I can't say what the time was for the simple fact while I am sitting in the police car, when you are under abnormal conditions time goes by slow or sometimes it goes by faster. Like when they handcuffed

me I am experiencing pain. While I am experiencing pain minutes might seem like hours.

Q. And while you are experiencing this pain sometimes it fogs your memory, is that correct?

A. No, I am not saying that. You said it.

Q. Okay. You indicate that you were read your rights twice; is that correct?

A. That's right.

Q. Once the first time and once the second time?

A. Right.

Q. Okay. And that subsequent to being read your rights the second time you did not answer any questions, is that correct, in the room with three or four officers?

A. The second time I didn't what?

Q. Did not answer any questions?

A. No, I answered questions. They asked me what my name was. I said John Adams. They asked me where I lived at. I said Richmond.

Q. Did you answer any other questions?

A. There might be some like what color are your eyes. I might have said brown.

Q. Did you answer any incriminating questions at that time?

A. No, I didn't.

Q. Then you were taken to the hall at which

time you asked a uniformed officer if he would ask the officer to loosen your handcuffs. Is that what you testified to a minute ago?

A. Yes, sir.

Q. And then you were taken to the magistrate, is that correct?

A. Right.

Q. Is this the time that you made an alleged statement about the knife?

A. No.

Q. Were you asked about the knife?

A. I was asked about the knife, yes, in front of the magistrate.

Q. Is it your testimony you made no response or is it your testimony that you responded to questions about the knife?

A. It was just like the soap. One of the detectives asked me do you own a knife. I said no, I do not, it is against the law for me to own a knife. He said, well, there was a knife found in the room. I said "so"? So he said what kind of knife do you own? I told him I don't own a knife, and he asked me what kind of knife I owned. I told him I didn't own a knife.

MR. HERBIG: Your Honor, I hate to interrupt, but I have one problem that I would like to ask the court's opinion on this, and

since there is objection I am not so sure whether the context of his statements at this point in the hearing is even relevant. I think what is relevant here is whether or not the police officers had complied with the Miranda. I think what was said and what was not said is a question of evidence to be heard at the trial. That would go to the weight of whether these statements were made or not.

THE COURT: Well, I think this, frankly, when we came in today the only thing that I was concerned about were the knife and the rings and the bracelet, and frankly I was of the opinion that the defendant volunteered that, according to Detective Collins' testimony, after taking him before the magistrate. Detective Collins testified: "Donnie asked me if I found his knife, and I said, yes. He stated that --

"Let me interrupt. Did he ask you or did you say anything about the knife being found in the room? He asked me if I found his knife. I stated yes. I stated it was a good knife. Donnie further stated, yeah, it was a buck -- a buck knife. He said it cost about twenty-fifty-nine. He further stated -- we were talking about some other things that were found, like a

bracelet, a hairbrush, and so forth, and Donnie stated -- asked if we had found his rings and his bracelet. I asked him about the bracelet. He said what the bracelet looked like. He stated that the bracelet looked like it was made from a spoon and had some type of inscription on it referring to the penitentiary or prison. I stated that I had recovered that, the bracelet and some rubber bands with some hair on it."

Insofar as those are concerned, I was of the opinion, and still am, that they were voluntary, that this man opened it up. He asked the questions of the detective about these things. Now the thing that gives me more concern, and we might have to see what the latest Supreme Court decision that I've been reading in the papers about relaxation of the Miranda has to say about that, that being this once again on Page 25: "Did he discuss any objects of his that were found in the room? Yes, he did. Such as what?" This is Detective Collins: "After that he stated he didn't want to say anything else. So, I took him before the magistrate and swore to the facts contained in the warrant, and while we were sitting there I told him, I said that there were only two things -- only one thing that really

bothered me, and that was that there was two bags found within the room. One of them had a large quantity of pill bottles that were empty, and the other was a large quantity of pill bottles that had pills in it, and I was afraid that some kid might overdose on the pills on the street, at which time Donnie said, 'You don't have to worry about that,' that they are in Richmond. Then he was processed."

Now, the detective himself said after that, and going back to the first part of his answer, after that he stated he didn't want to say anything else, but the detective was the one who brought this up but -- and now this gives me some concern about the bracelet and the knife and what-not. Based upon the detective's testimony it does not because I think this man, according to the detective, opened that up himself.

MR. HERBIG: Well, I think the thrust of Mr. Clodfelter's testimony is that he didn't answer or volunteer that. They questioned him about these things. He said I didn't want to answer it about the drugs. He got into that later. But I think unless Miranda has been completely overturned with respect to what is

supposed to transpire once warnings are given and the defendant responds in any manner, he is saying I don't want to speak, I don't want to answer questions or I want an attorney, Miranda required that interrogation cease.

THE COURT: But Miranda does not require that a detective close his ears if the man says, no, I don't want to talk, I want to talk to my lawyer, and then he says "did you find my knife?" He can answer his question. That part does not give me any concern, but what does give me a concern, as I said before, is that the detective is the one who asked him the questions. He opened it up.

There is only one thing that really bothers me and those are the two bags found in the room. One of them had a large amount of plant material and a pill bottle and the other that had pills and he was afraid of overdose on the people on the street, at which time Donnie said, "Well, you don't have to worry about that, they are in Richmond." That gives me concern because the detective opened that up after the man said he didn't want to talk. This gives me concern.

As far as the knife and the bracelet and the rings, according to the detective's testimony, he opened that up. The detective merely answered his question, and I don't think that Miranda goes that far that a detective has to close his ears if anybody asks him any questions.

So, maybe we are going to have to wait and see what that decision is, the new decision says insofar as the things giving me concern. The others don't give me concern.

Now, at the time of trial, if it gets to trial, you can put him on and he can testify about what happened. The detective can testify about what happened and the jury can give what weight that they want to give it or the judge who is trying the case. You all understand what I am saying?

MR. SLIPOW: Yes, you Honor.

THE COURT: But, maybe we might have to see what that latest Supreme Court decision on the latest Miranda has to say. I know, and this is no reflection on the newspapers, I know based on my experience when I was practicing law, I was arguing an appeal one time in a bankruptcy matter and I was representing the

trustee in bankruptcy, and it just so happened the day that I went up for my argument I read in the paper that the Supreme Court had come down with a decision which was on all fours supporting my position and I argued this before Judge Hoffman and he said, well, Phil, let's wait and see what the decision said. Much to my dismay that decision, instead of being for me, it was aginst me. So, you know, the newspapers don't always help lawyers and don't always get it exactly right. So I think we should have the opinion before we decide on that point. But that one situation does give me concern at this point.

Mr. Clodfelter, according to the detective's own testimony, said he didn't want to say anything, then in spite of that Detective Collins told him there is only one thing that bothers me. I'm afraid some kid might overdose on the street. And then he answered the question that was opened up by the detective.

All right. Is there anything else you want to ask?

MR. SLIPOW: No, sir. The court, as I understand it, has made its ruling that it is going to overrule the defendant with regards to

the --

THE COURT: Well, I haven't exactly said that. That is my feeling unless somebody could convince me.

MR. HERBIG: I would like then to ask Mr. Clodfelter as few questions on redirect since this was opened up on cross.

THE COURT: All right. Go ahead.

REDIRECT EXAMINATION

BY MR. HERBIG:

Q. Mr. Clodfelter, at any time did you make any voluntary statements?

A. No, I did not. Anything I said was because they had asked me a question.

Q. You didn't ask them if they had found any itmes in your room?

A. No, they would come to me and ask me do you have a ring, do you wear jewelry, to which I said I do wear jewelry but I didn't have anything on. I said I do wear jewelry at times, and they asked me did you lose a ring. Somehow they knew by the person they were looking for, Donnie Clodfelter, had been in jail before, had been in the penitentiary, so they thought back to me that this bracelet that they had found had been in the penitentiary or had some inscription on it. And they asked

me about this, wasn't it your bracelet, or something like that, to which I said no.

Q. Did they ask you any questions with reference to their concern over children?

A. Yes, one question was asked -- I believe I was sitting in front of the magistrate -- by Tom Collins, asked me there was one thing that puzzles me or something, that one bag had an empty pill bottle and one bag was full of pills and bottles, to which I said, no. He asked me -- he said I'm concerned about it, I don't want it to get in the hands of a little child, and I said you don't have to worry about that, I don't mess with drugs.

Q. So this question was directed to you further?

A. Right.

MR. HERBIG: No further questions.

RECROSS-EXAMINATION

BY MR. SLIPOW:

Q. Mr. Clodfelter, have you ever been convicted of a felony?

A. Yes, I have.

Q. How many?

A. Three.

Q. Have you ever been convicted of a misdemeanor involving moral turpitude, which would mean

lying, cheating, stealing or dishonesty?

A. No, I have not.

Q. You do acknowledge that you made response to Mr. Collins' question about the concern for the empty pill bottle?

A. Right.

MR. SLIPOW: Thank you.

THE COURT: All right. You may step down.

All right, gentlemen, I will hear you.

MR. HERBIG: Your Honor, the defense's position on this point is the fact unless Miranda has been overruled, Miranda at Page 436, 384 US Reports, 436 at Page 473 and 74 stated: "Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion; subtle or otherwise. . . If the individual states that he wants an attorney the interrogations must cease until an attorney is present."

It is the defense's position we think we have shown prima facie that he was given the Miranda warning, that the defendant did not want to speak; the defendant wanted counsel present.

As the Supreme Court states, any statements, whether they be outbursts or whatever, must be the product of compulsion, subtle or otherwise.

I think there has been evidence put on by the defense there were certain acts which would intimidate an individual and could very well be that anything allegedly made by him would be the product of compulsion or under duress.

Furthermore, Miranda requires the burden of proof on the prosecution to prove any statements made after the defendant has made the statement he does not want to speak or wants an attorney present, which places a heavy burden on the prosecution to prove that the statements were not the product of compulsion, subtle or otherwise.

THE COURT: All right.

MR. SLIPOW: Your Honor, as I understand it, the court is accepting Detective Collins' testimony from the preliminary hearing that that would be his testimony today, or do you wish to hear from him again?

THE COURT: No, not if he would say the same thing that he said at the preliminary hearing. Well, gentlemen, insofar as the motion to suppress statements are concerned, I am going to overrule that motion as to the questions by the defendant and the answers by Detective Collins and subsequent answers by the defendant in regard to the knife, the bracelet and the hairbrush and the rings. And I am going to withhold the ruling on the conversation on Page 25 of this transcript in regard to some kind of overdosing on the pills on the street until we get that report of that case to see whether or not that case helped the Commonwealth. I am inclined to agree that that particular statement should be suppressed at this point, so I am going to withhold ruling on that, but I am overruling the motion to suppress in regards to the knife, the bracelet and the hairbrush.

MR. HERBIG: Defense counsel would like to note its exception, please.

THE COURT: All right. The orders on these motions, Mr. Slipow, I have taken notes -- I am going to ask you -- at any rate they are a little bit more complicated, so if you will

prepare the orders.

MR. SLIPOW: Yes, your Honor.

THE COURT: In accordance with the rules.

All right. Now we come to the motion to dismiss based on the doctrine of collateral estoppel. Do either of you gentlemen have anything to add to your respective memoranda? I think, as I said before, both of you did an excellent job, but I will be glad to hear additional argument if you have anything that you did not have in your memoranda.

MR. HERBIG: Your Honor, one point I definitely would like to make is that the case of Petrus v. Robbins which was discussed in an open letter to Mr. Slipow on December 11. I would like briefly to apprise the court (of the) facts of this case to show the similarity as far as the question of jurisdiction.

In that case it was civil, and Mr. Slipow addressed the doctrine of collateral estoppel, or the Virginia Supreme Court has heretofore really called it estoppel rather than estoppel by judgment as pointed out in the section of Michie's Jurisprudence, Section 357. Burks Pleadings and Practice states the same thing, what the Supreme Court calls collateral estoppel

of a necessary element. There is a semantical difference there.

Now, In Petrus v. Robbins there was an automobile accident. Now, there was a question of bailment, but I don't think the question of bailment is really relevant to the issue or the point that I want to make.

Both parties sued each other. One party brought a suit for property damage within the jurisdiction of the District Court. The other party counterclaimed jurisdiction in the General District Court. That court concluded that neither party shall recover from the other as both parties were negligent.

In the Circuit Court, Mrs. Petrus filed a suit alleging personal injuries. Now, the decision was a little confusing to me. At one time she sought recovery of $20,000. They broke it down and said, well, there was $19,700 in personal injuries claimed, but the point there that I would like to make is that clearly exceeded the jurisdictional amount of the General District Court in that case.

In the Circuit Court on appeal the Virginia Supreme Court held that the judgment by the General District Court as to the property dam-

age was a valid and final judgment and that since that was a valid and final judgment the court had jurisdiction of the subject matters, that that adjudication will be operative as to the court of record's decision as to the personal injuries.

The point there is that the collateral estoppel does not look at what you are trying to collaterally estop. It looks at whether or not the prior proceeding had jurisdiction of the parties, of the subject matter, and whether or not that judgment was valid. And finally, and I don't think there can be any question in the case at hand, that Judge White's decision on August 25, 1975 that he had jurisdiction of the parties, had jurisdiction of the subject matter and was a valid and final judgment. As it was the defendant that was appealing the Commonwealth had no right.

Now, in looking to the point brought out by Mr. Slipow as far as the evidentiary question, as far as the motion to suppress, I think I have researched the Virginia law and can find no case directly on point with respect to an evidentiary question, but in researching the Virginia law as far as matters collaterally involved, in Section

42 of Michie's Jurisprudence, I think we will find the logic, find the California case that I cited the logic behind their decision, and that is Michie's Jurisprudence stated a fact which had been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court. It is res judicata. But to make it res judicata it must have been directly and not collaterally in issue in the former suit and there decided, I think, any evidentiary questions are always collateral to the ultimate issues necessary to prove a prima facie case.

Section 45 states in Michie's Jurisprudence the facts necessarily involved in an issue in which there is a judgment is thereby conclusively settled in any suit thereof between the same parties.

I think this here again it shows it is necessary to decide evidentiary questions throughout the proceedings of almost any trial, but it is not an (alternate - transcript error) ultimate issue in this case.

Furthermore, Section 47 of Michie's Jurisprudence states, "Facts found which were not necessary to uphold former judgment does not

necessarily determine the outcome of the result of the case. It might have some bearing, but it is not absolutely necessary."

I think with this background of the civil concept of the collateral estoppel which my understanding of Ashe just carried it over into the criminal law, I believe for the intent we are going to have to look back to the civil law.

I think the reasoning of the California court in the case of People v. Dykes, 243 Cal. App. 2nd, 572, that court recognized the doctrine of collateral estoppel to criminal proceedings.

I think in hearing the case, they go back to the civil case, although not Virginia law, to what Virginia states has got to be an ultimate issue of fact. It has got to be directly in circumstances, not collaterally decided even though it might be very important to the final outcome. And, therefore, I think it is clear that Judge White's decision on August 25th was a valid and final judgment between the Commonwealth of Virginia and Donald Clodfelter.

Furthermore, I think it is clear from the lab report, which it is straining to me, that Mr. Slipow states it is now in evidence before you, although there has been no (transcript - error)

verbal testimony by Officer Collins, yet contends that wasn't before the court, although it was submitted into evidence although there was (no - transcript-error) verbal testimony, and Officer Collins' testimony on Pages 14 and 15 in the transcript, this court must view those proceedings as to what was presented in that court in the practical framework of what was presented in court, which was evidence of marijuana which the lab report confirmed. Defense counsel in his memorandum states the court in reviewing the collateral estoppel question cannot and should not go back and try to say this was a possibility for the court when the matter was uncontested. There was substantial proof to that effect, and I think that as far as the issue of whether or not it was a controlled substance, contraband evidence by the evidence adduced in the General District Court, it was uncontested, and I think that the thrust of Ashe is that the decision says this court must foreclose that situation. The only question that was left unresolved and the only issue on which Judge White could have found the defendant not guilty or acquit the defendant is the question of who had constructive possession of the room.

Here again, I think I would address myself to the Commonwealth's other point as far as his cases involving appeals, and so forth, which I don't believe are in point.

THE COURT: All right. Mr. Slipow, do you have anything to add?

MR. SLIPOW: Judge, just a couple of minutes. I can't make much reference to the California case because unfortunately our library does not have it. I am not really aware what it said.

In regard to the Petrus v. Robbins case, I did get an opportunity to read that, and I feel like there are some distinctions that should be brought to light. One fact is in that case the defendant had both -- or excuse me -- the plaintiff had both suits pending at the same time. They filed a suit in General District Court for, I believe $273. At the same time they had filed suit in the Circuit Court for $20,000, as Mr. Herbig indicated. They also differentiated on a Bill of Particulars in the suit in the Circuit Court. They said that the suit in Circuit Court was for $19,000 odd dollars plus the $273 property damage. The exact same suit that was already pending in the

General District Court. So, in other words, what they had done is that they had sued twice for the same thing.

Also, I think an extremely important decision, and it is something that has been buffed around is the fact that in this civil suit both parties had an absolute right of appeal, a right to a trial de novo. All they had to say is I appeal, and that was the end of it. There is no collateral estoppel. There is no issue involved at all. In this situation the plaintiff neglected to bother to appeal so, in other words, after she had been overruled she in fact found that -- she had already filed the same suit again. In other words she had both suits pending at the same time and rather than choosing to exercise her right of appeal she let her right of appeal lapse and then asked now on my previous suit in the Circuit Court I want to stand on that. I want to be tried on that. The court also went on to say, as Mr. Herbig indicates, there was a bailment issue involved and one reason it was accepting the judgment of the General District Court in regards to the negligence issue was because they had accepted their determination on the facts of

the bailment issue, so they said they used it once so they had to use it twice. This is one reason they grounded their decision on.

Now, Ashe as I understand it, makes no reference to the fact that the doctrine of collateral estoppel is the same in the civil practice as well as in the criminal practice. I think this. Succinctly, there are differences and there are distinctions, but it is applicable under certain circumstances in criminal practice, and this has been the thrust of my entire argument to the court that the present factual situation that we have is not one of these sets of circumstances, and as I indicated to the court in the letter that Mr. Herbig made reference to in one situation where the Legislature has anticipated that there might be a conflict, they have stood up and they have said that the General District Court cannot collaterally estop the Circuit Court in rulings on motions to suppress. And Mr. Herbig's position is if they have reached a final determination then that could collaterally estop the Circuit Court, but to reach a final determination they have to reach evidentiary determinations prior to that. So this would be in conflict with the legislative

intent. The final decision of the General District Court is based on their evidentiary intentions which the Legislature cannot be bound. In other words Mr. Herbig is asking that the final determination be binding. Other than that, I think that everything I have said, and I must reiterate to the court that it is my firm belief that there is no intent either in the statute or in Ashe to raise a jurisdictional question and to expand that jurisdictional question. Everything else is in the brief.

THE COURT: All right. Do you want to respond?

MR. HERBIG: Yes, sir, I have some points I wish to address myself. Number one, I fail to see the relevancy of whether or not the two suits were pending at the same time. I don't see where that has any relevancy whether they were pending at the same time or were filed a day or two afterwards.

As far as the property damage, while it is true that they broke it down in the Bill of Particulars $273 for property damage and $19,700 for personal injuries, the court didn't say we are just going to prevent the readjudication on

the property damage. The court says you cannot bring a personal injury action either because it has already been determined you were contributorily negligent. It has been adjudicated.

They went further than what was heard in the District Court. Mr. Slipow's point about appealing, here again Ashe addresses itself to a final judgment, number one. I think Mr. Slipow is trying to get this court to change criminal justice by giving the Commonwealth a right of (an out on - transcript error) appeal. That is not how the criminal justice system operates. Since the defendant in this case, in Judge White's case, did not appeal that judgment it has now become valid. And, finally as addressed by Ashe v. Swenson, the last page of my letter, "Collateral estoppel is an awkward phrase, but it stands for an important principle in our adversary system of justice." It means simply when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated." That case before Judge White is now a final and valid judgment. I don't think that can be contested and continued. That issue cannot be again relitigated between

the same parties in any further lawsuit.

As far as the bailment issue, the only issue -- the bailment issue had, as I understood Petrus, was the fact that the wife was not entitled and she had instituted suit. Now, there was a question of whether or not she was a bailee from the property damage or not, and of course it said a bailee could; that that was clear law. That was the only relevance of the bailment issue in that case, and I don't feel that it has any particular bearing here. Again reiterating my basic position on an evidentiary question as to the ultimate issue of fact, I think the Virginia law is clear on the question of estoppel by judgment or estoppel for record. Res judicata shows there has got to be an ultimate issue, not one with collateral involved even though necessary to decide in order to determine the ultimate issue. I think if we try to use Mr. Slipow's interpretation, saying there is no difference between evidentiary issue and ultimate question of fact -- whether the Virginia case cited by Mr. Slipow is constitutional -- but I don't think that question needs to be gotten into because I think there is a clear

evidentiary issue of fact and ultimate issue of fact as estoppel judgment of record.

Now, here again, the Supreme Court in Ashe said collateral estoppel again were imposed through the Fifth Amendment prohibition against double jeopardy. It is a constitutional statute applicable to the states through the Fourteenth Amendment. In Rouzie v. Commonwealth, we had a situation where the defendant was convicted of a misdemeanor where at that time there was a preliminary hearing for the felony assault with intent to maim, disfigure, disable and kill. The judge said there is not probable cause on the felony but I am going to try it on the misdemeanor, and he was convicted. The court there said that the General District Court has jurisdiction of the misdemeanor. It was a lesser included offense and double jeopardy precludes the Circuit Court from reopening this question on the felony. And I think since the Supreme Court in Ashe said that collateral is estoppel, I think that case is strong precedence to the position that obviously a decision in General District Court that is valid and final on an ultimate issue which has been adjudicated

can be binding on the Circuit Court.

THE COURT: Well, gentlemen, as you well know, when I heard you arguing these matters on November 5th, I was much impressed with the motion to dismiss based on collateral estoppel. As a matter of fact, a review of that transcript -- I doubt that it has even been reduced to writing -- but a review of the transcript, I would feel certain it would indicate I felt very strongly that the doctrine would apply. Since that time I have done a lot of research, or at least you gentlemen have done a lot of research, and I have checked out your authorities and I have given this matter a lot of thought. I have studied your respective memoranda, and in particular the case of Ashe v. Swenson. It seems to be the case that has finally served the doctrine of collateral estoppel applies to criminal as well as to civil cases.

I have reached the conclusion that when the reference is made to a court of competent jurisdiction, which is referring to a court which has jurisdiction to hear a particular matter on its merits, by particular merits I mean these matters that are before me here now,

these Commonwealth matters, I have concluded that since the General District Court could not hear these felony cases on their merits that it is not a court of competent jurisdiction, and I am going to (sustain - transcript error) overrule the motion to dismiss based on the doctrine of collateral estoppel.

In the Ashe case the same court rules in the case the first time and then they proceeded to hear it again and the Supreme Court said that a court of competent jurisdiction had ruled on that question once and that they were collaterally estopped to try that defendant again. But it is my opinion, and I could be wrong, but it is my opinion that when we talk about a court of competent jurisdiction that the Ashe case is referring to a court which has jurisdiction to hear the particular matter on its merits. While it is true that the misdemeanors were dismissed, it is my opinion that the General District Court was not a court of competent jurisdiction insofar as the felonies are concerned; that they could not hear the felonies on the merits; that they could only hear them at a preliminary hearing case to determine whether or not there was probable

cause, and so I, accordingly, overrule the motion to dismiss based upon the doctrine of collateral estoppel, to which action of the court the defendant objects and excepts.

* * *

[56-57]

THE COURT: I would just like to cite for the record the court is of the opinion since the only marijuana which was introduced in the General District Court is the same marijuana which is the subject of this indictment that this falls within the doctrine laid down in the case of Rouzie v. Commonwealth. The defendant was found not guilty of possession of marijuana in the General District Court which was a lesser included offense of possession of marijuana with intent to distribute. The motion to dismiss this particular indictment should be sustained.

All right, gentlemen, once again I want to compliment both of you on your extensive research, your very able arguments and your very well prepared memoranda.

* * *

STATEMENT OF FACTS

On January 22, 1976, Donald M. Clodfelter stood trial in the Circuit Court of the City of Virginia Beach, on the charges that he did feloniously manufacture, sell, give or distribute or possess with intent to manufacture, sell, give or distribute controlled substances, to-wit: Depressants (Schedule III - Amobarbital, Pentobarbital, and Secobarbital) and that he did feloniously and knowingly or intentionally possess a controlled substance, to-wit: Amphetamines.

At trial the Commonwealth's case consisted of calling the following witnesses: Brian Jantz, manager at the Ramada Inn; Detective Tom A. Collins, an arresting officer; Detective R. A. Chrisman, another arresting officer; Detective W. R. Blevins, who took a handwriting exemplar of the accused; Pauline Lowe, an individual in the chain of custody of the controlled substances; Maurice P. Fortune, Jr., the chemist who conducted a qualitative drug analysis on the controlled substances; June E. Browne, a chemist who conducted a hair sample analysis; and D. B. Davis, a handwriting expert.

During the trial, the following exhibits were introduced into evidence by the Commonwealth:

1. Registration card from the Ramada Inn.
2. Affidavit for search warrant.
3. Search warrant.

4. Hair brush.
5. Bracelet.
6. Buck knife.
7. Handwriting exemplars.
8. Drugs confiscated in Room 611 of the Ramada Inn.
9. Lab report.
10. Hair samples.
11. Hair analysis report.
12. Handwriting analysis.

The following is a narrative statement of the evidence ruled admissible at trial. All evidence which was ruled inadmissible has been omitted, since it cannot be considered in determining the guilt or innocence of the accused.

Brian Jantz was called as the first witness for the Commonwealth. He identified a registration card as the type used by the Ramada Inn, and that the writing at the bottom of this particular card was his. His testimony further disclosed that there were numerous persons who had access to this registration card prior to the time that it was delivered to the police. On the night of June 16, 1975, he was called at home when the police arrived at the Ramada Inn with a search warrant for Room 611. He then went to the motel and went up to Room 611. While in the

room, an individual known as Jimmy Rufus Johnson entered the room with a key shortly after 3:00 A.M. Mr. Jantz testified that only one key was given to the person that had registered in the room. Thereafter, Detective Collins and Chrisman left the Ramada Inn and brought a suspect back for possible identification. Mr. Jantz, while testifying that he had signed the bottom part of the registration card, was unable to identify the accused at that time, and was still unable to identify him at the time of trial, as the one who was staying in Room 611 of the Ramada Inn. His testimony revealed that he had not seen the accused go into the room in question, and had no knowledge of how many people may have been in the room, or had access to the room. Another guest in the Motel who had registered behind the person in Room 611 was unable to identify the accused as the person whom she had registered behind.

The Commonwealth called as its second witness Detective Collins. He testified that pursuant to information obtained from an informant he presented an affidavit for a search warrant to the magistrate at 1:05 A.M. on June 16, 1975. A search warrant for Room 611 of the Ramada Inn was issued at 1:07 A.M. and he conducted a search of the room with Detective Chrisman. As a result of their search, they found two brown paper bags. One brown

paper bag contained what was suspected to be controlled substances and it was found hidden underneath a mirror against the wall. Detective Collins testified that the bags were hidden and were not in plain view.

While in the room, at approximately 3:10 A.M., a suspect known as Jimmy Rufus Johnson entered the room with a key. They released Jimmy Rufus Johnson after apprehending the accused some 30 blocks away from the Ramada Inn at the Cuttysark Motel. When the accused was apprehended, no drugs were found on his person, or in the room at the Cuttysark Motel. He did not appear to be under the influence of drugs, and appeared to have been asleep at the time they arrived. When questioned as to his identity, he gave the name, John Adams. While at the Cuttysark Motel, Detective Collins testified that Jimmy Rufus Johnson stated that this individual was Donnie Clodfelter while in the presence of Mr. Clodfelter. To this testimony counsel for the defendant objected and noted an exception based on the fact that this was hearsay, and not sufficient to constitute an admission by silence. After advising the accused of his Miranda rights, the defendant said that he did not have anything to say and wanted to talk to an attorney.

Detective Collins testified that the accused made certain statements inquiring as to whether they found

certain items such as a bracelet, a hairbrush, and a buck knife. To this testimony, counsel for the defendant objected on the basis that these alleged statements were made in violation of his 5th Amendment rights under Miranda, and also noted an exception. However, Detective Collins testified that the defendant did not ask him if he found them at the Ramada Inn and at no time did the accused ever state that he had been in the Ramada Inn. Detective Collins testified that in Room 611 of the Ramada Inn he found a buck knife, a hair brush, and a bracelet that was shaped like a spoon which had an inscription on it. Apparently, at no time did Detective Collins show the items that he found to the accused to ask him if these were the items that he was talking about. Furthermore, none of the defendant's fingerprints were found on these items, or on the controlled substances or anywhere in Room 611 of the Ramada Inn. Not only did Detective Collins testify that he never saw the accused in Room 611 of the Ramada Inn, he also testified that he had no personal knowledge as to when, how and by whom the controlled substances were put in Room 611.

Detective Collins then took the accused back to the Ramada Inn for identification. The manager, Brian Jantz, was unable to identify him as well as a woman who had registered behind the individual registering in Room 611.

STATEMENT OF FACTS

While Jimmy Rufus Johnson entered the Room at 3:10 A.M that morning, no attempt was made to have him identified by this woman or any of the other guests at the Ramada Inn. They did not take any handwriting exemplars from Jimmy Rufus Johnson, nor did they take a hair sample. When asked if Jimmy Rufus Johnson was in Court to testify today, Detective Collins stated that he was not. When asked if attempts had been made to locate him, Detective Collins stated that they had used dilligent efforts to locate Jimmy Rufus Johnson, through the Richmond Police, who knew of him because he had a previous record, and he had also attempted to locate him through one of the Commonwealth Attorneys in Richmond. Detective Collins testified that after attempting to locate Jimmy Rufus Johnson for six months without avail, it appeared that Jimmy Rufus Johnson had fled underground.

The Commonwealth then called Detective Chrisman. Much of his testimony was merely cumulative to that of Detective Collins. Detective Chrisman did agree that the drugs found in Room 611 were hidden, and not in plain view, and that it was possible that a casual observer could very possibly have been in the room without noticing the drugs. Most of his testimony was focused on the fact that he was custodian of the drugs found in Room 611 of the Ramada Inn. He testified that he took the drugs to his

evidence locker. Several days later he delivered the bags to Pauline Lowe. Detective Chrisman also testified that he found two hair samples in the room and that he delivered them to June Browne. He also testified that he delivered a known hair sample of the defendant to June Browne.

Detective W. R. Blevins was called as the Commonwealth's next witness. He testified that he took some handwriting exemplars of the accused after his arrest.

Pauline Lowe testified next for the Commonwealth. She testified that she received the controlled substances delivered to her by Detective Chrisman. She in turn delivered them to a truck driver, who delivered them to Richmond for chemical analysis.

Maurice P. Fortune testified next that he sampled all the drugs delivered to him by the truck driver, and that it was his opinion that they tested positively to the qualitative test for the respective controlled substances.

June Brown testified next for the Commonwealth that she had conducted a hair analysis. She testified that there was a known hair sample delivered to her from Detective Chrisman, and there were two samples found in the room. She compared the known sample to the two unknown samples. Her conclusion as a result of the testing was that the sample taken from the defendant was similar in

race, sex, color, diameter, and microscopic characteristics with one unknown sample found in the room, however, the second unknown sample found in the room was not consistant with the known sample. On cross-examination, she testified that hair sample anylysis is not an exact science such as fingerprints.

As its last witness, the Commonwealth called D. B. Davis. Mr. Davis stated that he had testified many times before as a handwriting expert, and that it was his opinion that the registration card was signed by the accused, Donald M. Clodfelter, based on the exemplars taken by Detective Blevins after his arrest. While this was his opinion, he was unable to base his conclusion on any one particular card, but based on the totality of all of the cards.

At trial, counsel for the defendant objected to the introduction of the handwriting analysis and to the introduction of the testimony of D. B. Davis, on the basis that the Commonwealth Attorney had a continuing duty under Rule 3A:14 of the Supreme Court of Virginia to provide the results of reports of physical examinations and scientific tests or experiments made in connection in this case. Counsel for the defendant had made a motion for discovery and the Commonwealth had complied. On January 21, 1976, one day before trial, counsel for the defendant requested a

copy of the results of the handwriting analysis to which the Commonwealth replied by saying they had not received it. Previous testimony by Detective Blevins substantiated the fact that the results were received by him several days earlier, but he had not informed the Commonwealth's Attorney's office or delivered it to them. The Commonwealth Attorney offered to grant the defendant a continuance at this time in order to inspect the report. Counsel for defendant noted an exception to the Court's ruling

This concluded the Commonwealth's evidence at which time a Motion to Strike based on the insufficiency of the evidence was denied. To this action counsel for the defendant objected and noted an exception. The Defense called no witnesses and rested its case and closing arguments were presented. After closing arguments, counsel for the defendant renewed its Motion to Strike based on the insufficiency and it was again overruled. To this ruling counsel for the defendant objected and noted their exception. The Honorable Philip L. Russo, found the defendant guilty of the charges pending against him, taking under advisement the question of whether or not one charge should be simple possession instead of the possession with intent to distribute. The Commonwealth requested a pre-sentence report at the conclusion of the case and sentencing was postponed until an appropriate time.

THE COURT: If I remember correctly, I dismissed the possession of marijuana with intent to sell because of the fact that the District Court had dismissed the charge of possession of marijuana.

MR. SLIPOW: Exactly.

THE COURT: Therefore, Rouzie -- that being a lesser included offense, I dismissed it. Isn't that correct?

MR. SLIPOW: Yes, sir. That's correct, but what I'm suggesting to the Court is that, essentially, Waller speaks from the same point that the Rouzie case does. If the Court wishes to recess and read it?

THE COURT: Let's do this: Let's hold that in abeyance for the time being. Let's argue the -- the motion to set aside the findings of guilt because of the insufficiency of the evidence.

Incidentally, gentlemen, if any of you would be more comfortable seated while arguing, that's perfectly fine.

Then, if we get by that, we'll go ahead and adjourn and get Waller v. Florida.

Let's see. I have the brief, which was submitted by Mr. Herbig -- a fourteen-page brief -- and I know he sent a copy to Mr. Slipow.

MR. SLIPOW: I have it.

THE COURT: And I'm sure Mr. Slipow has had an opportunity to study it.

I have carefully read -- I read the brief when it came in and just yesterday I studied it again. So, unless you have something to argue that's in addition to your brief, suppose I go and hear from Mr. Slipow and see what he says in opposition to the brief. Then I'll hear from you gentlemen.

* * *

[16-17]

All right, Mr. Slipow. It would appear that the three crucial elements that we have to link the defendant with these drugs, and upon which I convicted him -- and I'll say this and you can correct me if I'm wrong. It seems to me that the three crucial bits of evidence we had were the fact that the handwriting expert said it was his signature on the registration; the fact that the hair analyst said that -- well, she didn't -- she could say that it was like the defendant's or whatever the terminology was that she used, thereby putting him in the room at one time; and, also, the fact that I allowed the evidence about his asking about the knife

and the other articles.

* * *

[17-24]

MR. SLIPOW: One point I wish to bring to the Court's attention is that the room clerk, Mr. Jantz, "J-a-n-t-z", indicated in his testimony that only one key was dispatched, that being to the person that registered at the hotel.

Another point, which I think is critical, which I will bring to the Court's attention and hope to properly tie in, is the fact that when the defendant was questioned by the police that he gave an alias. I found that to be a very important point, and I will tie that in.

THE COURT: All right. Well, suppose you go ahead and give your argument now.

MR. SLIPOW: Okay. Your Honor, the Court has already indicated a number of the points that should be considered, but I would like to rehash and go over the same ground one more time, since it's not quite as fresh in our memory as it was at one time.

Throughout Mr. Herbig's memorandum he has implied that there was no evidence to link the defendant to the room, and I beg to differ

on this particular point. The handwriting analysis is an exact science. Mr. Davis, who testified, was a former F.B.I. employee who has been doing this type of thing for a number of years. From conversations, I think, it may be well on to thirty years. I'm not certain, but he indicated that in his mind there was no question that the defendant is the one who registered at the hotel. No question. Nobody could identify him, but it was his handwriting on the card.

Mr. Jantz testified that he gave the key to the man that registered at the hotel, so that puts the key in Clodfelter's hand.

Then, to go one step further and go to the room, the items that were found in the room Detective Collins testified to. I'm not talking about the drugs, now. I'm talking about the -- the knife and the various personal items that the defendant questioned Detective Collins about. They were not everyday items. And the defendant asked about these items and Collins acknowledged finding them in the room, which leaves no question that the defendant was in the room.

This fact is also corroborated by Miss

Brown's hair analysis. So, I believe, we can put the defendant in sole custody of the key, initially, and we can put the defendant in the room where the drugs were placed.

Another very, very, important factor for the Court to consider is that this was a single registration. Only one occupant was registered into the room.

Now, throughout Mr. Herbig's memorandum he asks the Court to speculate and go outside the evidence and guess. Well, we don't know that there might have been one, twelve, fourteen or twenty people in the room, but the evidence was it was registered in Mr. Clodfelter's name, and Mr. Clodfelter is the only occupant of the room.

Now, we come to the night of the search -- the search warrant and Mr. Jimmy Rufus Johnson being -- coming into the room or letting himself in the room with the key.

The drugs, admittedly, were not in plain view. Now, Mr. Johnson opened the door, as the evidence indicated. We already know that the key had to have come from Clodfelter because we know the key was dispatched to the man who registered at the room, and the evidence is

that Johnson had the key, so he had to get it from Clodfelter or he had to get it from another party who gave it to Clodfelter.

The evidence was that upon entering the room, finding what the police were there for, that this person, Johnson, took the police directly to the defendant. So I would suggest to the Court that it would be much, much more than idle speculation to say that that man, Johnson, got the key from Clodfelter.

Here we know that the key went to the man who registered at the room, Clodfelter, and that when he went into the room he immediately took them back to Clodfelter. So, there is no question that there was dominion and control. If he had the key, he had access to the room. So the only question becomes the imputed knowledge to the defendant.

The thing that gives me considerable concern -- more concern than anything else in this entire case -- is that the police came to this man with Jimmy Rufus Johnson and, upon introducing themselves as police officers, what did Donald Clodfelter say? He didn't give his name. He gave an alias.

Now, Your Honor, I argue to the Court --

and there is no question in my mind that the Court can draw the inference that if a man gives an alias to the police, predicated on these facts and this situation, that there is a reason. That reason is that he's got something to hide, that the drugs were in his room.

So here we have a room that he was the sole occupant of, according to the best evidence, or according to all the evidence. There is no evidence to dispute the fact that he had been in the room. There is no evidence to dispute that he had registered at the hotel. There is no evidence to dispute that somebody entered the room with a key they obtained from Clodfelter.

THE COURT: There is at least one other occupant, Rufus Johnson.

MR. SLIPOW: There is no evidence he was an occupant in the room. He came into the room.

THE COURT: He was in the room?

MR. SLIPOW: He entered the room while the police were there.

THE COURT: While the room --

MR. SLIPOW: Was being searched.

THE COURT: These gentlemen even dispute that the defendant registered. If we say that

he did, as a matter of fact -- that he was the one that registered and was given the key based upon the handwriting expert, the evidence is that at least one other person entered that room, Jimmy Rufus Johnson; isn't that right?

MR. SLIPOW: No question about that because he entered it while the police were there.

THE COURT: I didn't mean to interrupt your train of thought.

MR. SLIPOW: I don't mean to argue that that man didn't enter the room. I would argue that there is no evidence to show that that man was an occupant of the room. The only evidence we have is that he entered the room that night.

THE COURT: Well, what's the difference? In other words, you're saying that he slept there overnight. Is that what you're talking about?

MR. SLIPOW: No. The only thing I'm saying is he walked into the room with the key while they were searching it. We don't know whether he was sent on an errand, if somebody told him he could come to the room for a while or what. But the thing that gives me considerable concern is that the Commonwealth had this

man, Jimmy Rufus Johnson, subpoenaed as a witness and begged the Court in front of Judge Owen, literally, to continue this matter when we could not get service on Jimmy Rufus Johnson.

The defendant opposed the continuance -- opposed it vigorously, and then they turn around and submit to the Court, "We want to throw the blame on somebody that we wouldn't give you a continuance to find." That causes me considerable concern.

So the thrust of that memorandum is to shift the blame from the defendant to Jimmy Rufus Johnson. The only evidence that we have -- and we can't speculate or go outside of the evidence -- is that the key went to Clodfelter or whoever signed the card. It was registered as a single room with one occupant. Jimmy Rufus Johnson entered the room during the course of the search at three o'clock in the morning, so we have no evidence that he had slept there, that he had been there. The only evidence that we have is when he entered that room with the key that he had to obtain from Clodfelter, he took them directly to Clodfelter and Clodfelter gave an alias. And the man would not give an alias, if he didn't have something to

hide.

* * *

[31-33]

Also, it gives me considerable concern, as I have mentioned previously, that the -- Mr. Herbig and Mr. Harris tried to shift the blame on someone who they wouldn't give us a continuance to find. If we're seeking the truth, why would there be any reason to oppose a continuance?

THE COURT: Well, of course, not throwing this off on somebody else -- I had nothing to do with that, but the Court did. The Court was the one that refused the continuance, so, I mean, for whatever reason Judge Owen had, he felt that the Commonwealth should not have a continuance.

Now, can I infer something sinister about that in regard to the defendant because of the fact that the Court refused the Commonwealth a continuance to get Jimmy Rufus -- or attempt to get Jimmy Rufus Johnson here? I don't know that I can.

MR. SLIPOW: I don't mean to -- let me see if I can phrase this properly.

What I mean to say is that the reason why the Court refused the continuance is because it

was opposed by the defense counsel. I think, that much we can safely say, that the defendant and his counsel opposed the continuance.

Now, if Jimmy Johnson had been -- or there was evidence to indicate on the part of the defendant that Jimmy Johnson may have been in possession of those drugs, I only suggest to the Court that we seek the truth. They were perfectly within their rights, but they opposed the continuance. So, for some reason, they don't want Johnson here and I don't know what it is.

* * *

[36-37]

THE COURT: All right, gentlemen

MR. HERBIG: All right. Your Honor, the first thing I'd like to clear up to some extent -- perhaps the inferences attempted to be raised by Mr. Slipow in reference to Jimmy Rufus Johnson -- I think, the Commonwealth is trying to slip a tremendous red herring into this case. I think there was testimony -- I know there was testimony introduced at trial by Detective Collins that they attempted to locate Jimmy Rufus Johnson for six months. They had assistance from the Richmond Police Department. I think -- you know, you've got

a question where the defense counsel -- they can't wait forever for the trial just because the Commonwealth has attempted to locate someone. I think that defense counsel has a responsibility to his client to see that the case is prosecuted.

In addition, Detective Collins clearly stated that Jimmy Rufus Johnson had fled underground and, I think, this goes back to one of the major points of Mr. Slipow, and that's the fact that maybe Jimmy Rufus Johnson did lead Detectives Collins and Chrisman to Donnie Clodfelter, and he's arguing that the giving of an alias inculpates the defendant somehow. His whole point is that the logical thing for a guilty party to do is try to exculpate himself and inculpate someone else.

I know the facts and circumstances that were presented into evidence show that he had fled the jurisdiction. Also, the evidence established through Detective Collins that he was well known to the Richmond police and that Jimmy Rufus Johnson did have a previous record.

* * *

[38-39]

I think, the real crux of this case is it's clear that there is a reasonable hypothesis of innocence. We know that Jimmmy Rufus Johnson

entered the room shortly after the police officers arrived there. Even assuming what the Commonwealth is stating about the defendant registering in the room, they did not establish when those drugs were placed there. They did not establish when the key was given to Jimmy Rufus Johnson or whether, in fact, it was obtained from the defendant. Even if he was the registrant, it could have gone through five or six people's hands and, I think, the Commonwealth's own case presented the reasonable hypothesis of innnocence -- the facts of its own case.

* * *

[39-40]

I think, Chrisman is very appropriate here because, I think, the language in the Supreme Court in Chrisman -- the Supreme Court wasn't speculating. There were five men in the automobile. Any one of them could have dropped the heroin on the floor or it could have been placed there by some unknown party. There is no proof of ownership of the powder or who placed it on the floor of the car.

In Chrisman, the evidence was very meticulous as to the owner of the car. He washed the automobile, number one. The floor was wet.

There was nothing in the car. He was the owner of the car. To his knowledge, there was no one in the backseat besides these two occupants prior to the time that this heroin was found in the car.

The Commonwealth has completely failed to put this in perspective in this case. There is over a day's lapse from the time the registration occurred until the contraband was seized in this case, and we don't know whether Jimmy Rufus Johnson had the key ten minutes prior to the search. We don't know whether he had it ten minutes after.

As the Commonwealth contends, the defendant may have registered. We just don't know when he obtained the key. We, also, don't know when the drugs were placed there.

I submit to the Court that there is clearly a reasonable hypothessis of innoccence in this case.

* * *

[40-42]

Furthermore, even assuming what points the Commonwealth wants to establish, all they can really establish in any stretch of the imagination is that the defendant may have been in the room at some time, but we don't know when. I think, the Virginia statute itself under which he is charged addresses itself to that point when it says, "Upon

the prosecution of a person for a violation of this section, ownership or occupancy of the premises or vehicle upon or in which a controlled substance was found shall not create a presumption that such person either knowingly or intentionally possessed such control of substance."

And I submit to the Court that knowing and intentional possession is one of the necessary elements for conviction in this case, and that the Commonwealth has the burden to prove beyond a reasonable doubt knowing and intentional possession. Therefore, the most they've shown -- our own statute says it's not enough for a presumption -- that's on page eight of my memorandum, that section from the code.

THE COURT: Let's see. Youu're citing Section 54-524.101:2?

MR. HERBIG: Yes, sir. And I submit that has to carry over, since knwowing and intentional possession is a --

THE COURT: "It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or ex-

cept as other wise authorized by this chapter.

Upon the prosecution of a person for a violation of this section, ownership or occupancy of premises or vehicle upon or in which a controlled substance was found shall not create a presumption that such person either knowingly or intentionally possessed such controlled substance."

MR. HERBIG: The most the Commonwealth has shown is the possibility that the defendant was there at some point in time totally unrelated to what point in time these drugs may have been placed there, but that's all they've shown. If that's not sufficient under the statutory law to create a presumption, it certainly wouldn't prove the Commonwealth's case beyond a reasonable doubt.

* * *

[44-46]

BY MR. SLIPOW:

So what facts do we have? We've got the defendant registered in the room, the drugs in the room and a man representing himself as a narcotics officer to the defendant, and what does he say? He says, "My name is John Adams."

I certainly think that that goes beyond the statute and is most definitely inculpatory. Why lie? There is no other explanation. That

is all of the evidence that we have, that the man lied when he was confronted by it.

Judge, also, Mr. Herbig had indicated to the Court that we can't show when the defendant was in the room and that is correct, and we can't show for what length of time the defendant was in the room, but we can show that he must have been there for some span of time, long enough for him to shed hair on the bed. I don't think it would be an unreasonable inference to make that the defendant slept in that bed, if his hair was on the bed.

Not only that, but he was there long enough to unpack certain of his personal effects. These are not casual items. One of them was something that he had made in jail which, apparently, was very near and dear to him, and he indicated to Detective Collins that it was special, that you don't find too many of them like it, and he had managed to leave these personal effects. So I would indicate to the Court that the Court could, logically, draw the inference that the man that was registered in the room, having left his personal effects in the room, intended to return to the room, and I don't think that's going beyond the scope of

the evidence.

Unquestionably, I believe that we have shown more than the statute requires or more than the statute denies when it says that mere occupancy or ownership is not sufficient because we've showed a locked room and we've limited who had access to it. We've put the personal effects in there. We put him on the bed, if not sleeping in the bed, as well as an inculpatory lie when confronted by the narcotics officers.

* * *

[46-48]

MR. HERBIG: Okay. First point I'd like to bring out is that all of the points that the Commonwealth has brought out may well place him in the room. That's occupancy, but the critical question is there is nothing to tie it in time -- in a time span with the drugs -- with the drugs there, when he had the key or when they went in.

I mean this: Assuming the Commonwealth's theory of the case is devoid of any evidence to this point, I think, Chrisman was very meticulous on that point. I believe the case of Gordon -- Gordon was the case. It was so meticulous to the time he had this envelope that

was positively identified by the police officer. He saw him running around the corner at 206 East Gray Street, and another police officer found an envelope shortly thereafter and identified it positively, but that's not sufficient.

The point is there is a lot of inferences that the Commonwealth has drawn, but inferences are not proving the case beyond a reasonable doubt.

He has constantly attempted to shift burdens to us, which, I think, Mullaney strongly says he cannot do. He has to prove his case and he, alone. He cannot look to the defense to prove it. There are at least two people, according to his theory, perhaps there is a third. At least, clearly, from the eviidence of the hair expert, there are two samples of different people -- according to the hair expert. We don't know whether that was Jimmy Rufus Johnson. That adds another.

And, I think, the Supreme Court wasn't speculating in Chrisman when they said, "Or some unknown party could have placed it there."

The point is there is too big a break in the chain of circumstances here and that the Commonwealth's case is premised on nothing but circumstantial evidence and inferences, and that

does not prove a case -- each and every element of the case beyond a reasonable doubt and to a moral certainty, as cited in the instructions usually given by the Court.

* * *

[51-52]

Jimmy Rufus Johnson had the key. I think, the reasonable hypothesis that Jimmy Rufus Johnson was the one who placed the drugs there is so strong in this case. The testimony is that he fled unnderground. They couldn't locate him for six months.

The obvious thing -- the whole thrust of Mr. Slipow's argument -- I think, he missed the point when I was talking about saying that the defendant gave them an alias -- that was his whole point. It flies right in the face of what Jimmy Rufus Johnson did. The natural thing might well be to exculpate himself and he has fled underground. We know that that person had dominion and control over that room and we know the drugs were there when he had dominion and control over that room.

We don't know -- the Commonwealth has not proved whether that is, in fact, the case against the defendant; therefore, I submit to the Court

that the reasonable hypothesis of innocence is so strong and was brought out in the Commonwealth's own evidence that they haven't met the threshold constitutional burden in this case. They have nothing but inferences.

* * *

[56]

This is a constructive possession question, as opposed to actual, and, I think, the whole history of Virginia law, with the exception of Ritter where there was that statement saying "It must have been mine", requires that the Commonwealth have a stronger case.

And there are these two critical breaks in the Commonwealth's circumstantial evidence chain. When were the drugs placed there and who was in possession at that time?

We know that Jimmy Rufus Johnson had actual possession at the time he entered the room and had dominion and control prior to that time. I think, it's incumbent on the Commonwealth to show when he acquired possession and control of that room -- dominion and control of that room and when the drugs were placed there in order to eliminate every reasonable hypothesis of innocence.

* * *

[63-64]

MR. HANSON: I think, Mr. Herbig has really brought out a good point in showing the statute -- the presumption -- that there is no presumption created by use or occupancy. So, I think, we can safely assume, of course, Mr. Clodfelter rented the room and that at one time or another he was in the room. He got the key. We didn't have him in the room at the time the drugs were found.

Again, we get back to this alias question. Now, Mr. Clodfelter, who used the name Clodfelter when he registered, entered the room that had no drugs in it, and he knew it had no drugs in it.

If he then left the room that had no drugs in it and he figured it would have no drugs in it, why, if he is confronted by the narcotics officers and Jimmy Rufus Johnson who had the key, if he believed that this was a room like any other room with no controlled substances, no unlawful substances, then why would he not admit freely and simply that he was Donnie Clodfelter, the one who rented that room?

The fact that he used another name at this time imputes knowledge, as Mr. Slipow has said

time and time again -- imputes knowledge that he knew there was something in that room that he had rented under his right name that should not be discovered by the law enforcement authorities.

Now, if it was just the narcotics officers, maybe he could think that it was something that he hadn't known about, but the fact that it's Jimmy Rufus Johnson with them -- Jimmy Rufus Johnson, to whom we have to assume he had given the only key that had been let to that premises -- then there is no other explanation, or at least none that has been raised.

Your Honor, when you -- when you defend (sic.) a case, it's our job to prove the guilt beyond a reasonable doubt. It's not the defendant's job or the defense counsel's job to prove innocence. It is just their job to rebut that proof beyond a reasonable doubt. They can do that two ways, or a combination of two ways.

Number one, they can cross-examine, and raise as many holes in our case as possible. Number two, they can present their own evidence.

* * *

[76-79]

THE COURT: Gentlemen, it appears to me from reading Waller that for our purposes in

this case it's really an enunciation of what our Supreme Court has said in Rouzie.

To me, unless I overlooked it, it looks like the standard for the proposition -- I guess, the big question in Waller is whether or not the municipal court was an agency of the state and, therefore -- so on and so forth. But for our purposes, it appears to me that it enunciates the principle that Rouzie did, namely, that if a -- and I will use general district court because that's what we have -- that if the general district court convicts on a lesser included offense, then this will bar prosecution on the greater offense, and I use that principle in this case in dismissing the indictment of possession of marijuana with intent to manufacture, sell, give or distribute.

I don't think that -- that Waller gives me that -- any help or gives me any more knowledge than I had before with the other cases that were cited, so motion to dismiss based on the doctrine of collateral estoppel is overruled.

MR. HERBIG: Your Honor, for the record, I note my exception again.

THE COURT: Yes, sir.

Before I announce my other rulings, I'd

like to say, for the record, that all of you gentlemen -- Mr. Herbig, Mr. Harris, Mr. Slipow, Mr. Hanson -- have all done an excellent job and, I think, all of you have explored this thing as carefully and extensively and kept the plow to the ground as well as anybody could have done it. I say this in all sincerity. I feel that all of you gentlemen should be commended.

In regard to the motion to set aside the findings of guilt, which were made at the time of trial, after listening to all the argument today carefully, studying Mr. Herbig's written motion to set aside the verdict, which he entitled it, and having checked all of the cases that he cited in there, I still feel that I was correct in my rulings at the time of trial with one exception. I feel that the motion to set aside the findings of guilt should be, and they are, overruled, except that in the charge of possession of a Schedule III drug, namely, depressants, with intent to sell, I'm going to find the defendant guilty of mere possession of those drugs.

That is a misdemeanor; is that correct?

MR. SLIPOW: Yes, sir.

THE COURT: And, please, note the defendant's

exception to the Court's ruling of finding the defendant guilty of anything at all, unless y'all want to word it differently.

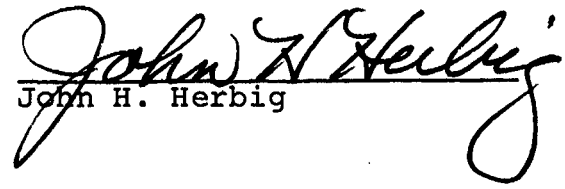
* * *

CERTIFICATE

I hereby certify that I have fully complied with 5:49 of the Rules of Court of the Supreme Court of Virginia by

(a) Filing twenty-five copies of this Appendix in the Office of the Clerk of the Supreme Court of Virginia at Richmond; and

(b) Delivering 3 copies of this Appendix to K. Marshall Cook, Esquire, Assistant Attorney General, 830 East Main Street, Richmond, Virginia 23219, prior to the filing of this brief with the Clerk of the Court on the 10th day of February, 1977.



John H. Herbig