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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 77-1488

CHARLES LEWIS ELLISON,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

JOINT APPENDIX

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COMMONWEALTH OF VIRGINIA)
) To-Wit:
CITY OF PORTSMOUTH)

MURDER, ROBBERY, USE OF A FIREARM
MARCH 3, 1977

28311

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH:

The Grand Jury charges that: on or about September 10, 19 76, in the City of Portsmouth Charles Lewis Ellison did feloniously kill and murder Earnest P. Marks,

SECOND COUNT: on or about September 10, 1976, in the City of Portsmouth Charles Lewis Ellison did rob Earnest P. Marks of U.S. Currency in the amount of $100.00 and one Panasonic Radio and Tape Deck, valued at $60.00 and one Wallet, valued at $5.00, having a total value of $165.00,

THIRD COUNT: on or about September 10, 1976, in the City of Portsmouth Charles Lewis Ellison did use and attempt to use and display a firearm in a threatening manner while committing robbery,

against the peace and dignity of the Commonwealth of Virginia.

Va. Code § 18.2-32, 18.2-58, 18.2-53.1

PROCEEDINGS

VERDICT

We, the jury, find the defendant .....

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.....

.....

.....

.....

Foreman.

2

THE CIRCUIT COURT

Docket ..... File .....

COMMONWEALTH OF VIRGINIA

v.

CHARLES LEWIS ELLISON

.....

INDICTMENT

MARCH Term, 19 77

MURDER, ROBBERY, USE OF A FIREARM A TRUE BILL

Angelina E. Capezzo
Foreman.

Witnesses:

Sgt. Benoit

.....

p. d.

STATEMENT OF COSTS PROCEEDINGS

Fine	$.....
Clerk	$.....
Com. Atty.	.....
Witnesses	.....
Sgt.	.....
Court Reporter	.....
Atty. (Appt.)	.....
Jury	.....
D. M. V.	.....
Abstracts	.....
Warrant	.....
Municipal Ct. Fee	.....
Atty. (Lower Ct.)	.....
Total Costs	$.....
Total Fine & Costs	$.....

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* * * * * * *

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THE COURT: Commonwealth vs Charles Lewis Ellison.

MR. AXELSON: Commonwealth is ready, Your Honor.

MR. KNOWLES: Your Honor, the Defendant is ready.

THE COURT: You said you had some motions you wanted before the jury is sworn on the voir dire?

MR. SPRINKLE: Correct.

THE COURT: I think you had better bring the Defendant and Mrs. Berry, come in the conference room.

(Present in chambers: The Court, the Defendant, Messrs. Axelson, Knowles, and Sprinkle, Deputy Sheriff Dobrosky, and Deputy Clerk Diggs.)

THE COURT: All right, Mr. Knowles.

MR. KNOWLES: Your Honor, Mr. Sprinkle and I, as co-counsel for Mr. Ellison, would like to offer some voir dire questions, and I would like to introduce the original and have it made part of the Court's record.

Your Honor, with respect to questions #4, #5, and #6, the authority which I cite in support of either the Court, or the Court permitting Mr. Sprinkle or I to ask those questions is the case of Breeden vs Commonwealth found in Vol. 217 VA at page 297, and in that particular case,

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lawyers who have been appointed for some 2 months.

The Defendant's sister who is supposedly providing this information is not even here although Mr. Knowles and Mr. Sprinkle - I know that Mr. Knowles talked with her yesterday afternoon from information that he provided me that he talked to her yesterday afternoon, and she is not here.

She has not been subpoenaed. There is no proof other than her say that this Nita Thompson even exists.

I am not suggesting to the Court that Mr. Knowles and Mr. Sprinkle are in any way responsible for a fabrication. In fact, I would assure them I don't believe they would be a party in that sort of thing; but it is possible this is being done through them.

There is no proof that Nita Thompson even exists as a real person.

MR. KNOWLES: May I say - I am sorry, I didn't mean to interrupt.

We obtained Joseph Brown's statement. This immaterial witness just happened to have confessed to this particular crime to a witness who is subpoenaed and ready to testify this morning.

1 Joseph Brown happens to be a very important
2 witness in another aspect of Mr. Ellison's
3 defense. He is critical.
4 We have the statement right here, Your
5 Honor.
6 MR. SPRINKLE: Which we didn't get until Friday
7 afternoon.
8 MR. KNOWLES: That is of last week, and we
9 absolutely have to have him.
10 THE COURT: Is he available? Is he here, the
11 one you got the statement from?
12 MR. SPRINKLE: No, sir.
13 MR. AXELSON: Just one second.
14 The Commonwealth indicted Joseph Brown for
15 the robbery-murder on the basis of an alleged
16 statement given by him to a Karen Hampton, who
17 is over here in jail, something that he said
18 about murder to Karen Hampton.
19 MR. KNOWLES: Was that statement used as evidence
20 in his preliminary?
21 MR. AXELSON: That statement was used as evidence
22 at his preliminary hearing.
23 MR. KNOWLES: Before the grand jury?
24 MR. AXELSON: Before the grand jury.
25 MR. KNOWLES: Fine.

1 MR. AXELSON: But it contains no reference to
2 this man, Charles Ellison. Nothing in there
3 about Charles Ellison, and quite frankly, once
4 we obtained later evidence, the Commonwealth
5 nol-prossed the case.
6 MR. SPRINKLE: Of course, Your Honor has already
7 inferred that Virginia follows the minority view
8 and allows into evidence when the person who has
9 made a statement saying that he committed a crime,
10 even though out of court, which might exonerate
11 the accused. That is admissible in Virginia.
12 MR. AXELSON: There is no exoneration there.
13 MR. KNOWLES: It certainly is.
14 MR. SPRINKLE: His statement said he, Jo-Jo,
15 said he was talking about the old man at Carma's
16 down there, and that he had splattered him all
17 over the street; that he had killed the man,
18 not this Defendant.
19 We subpoenaed him. We want him here. We
20 didn't know about it until Friday after 5:00
21 o'clock.
22 I think this man ought to be here. We
23 have to have him available to get that into the
24 evidence under the Virginia rule.
25 THE COURT: Is there any evidence that that

1 person is existing under that name?

2 MR. SPRINKLE: Yes, sir.

3 THE COURT: He has just raised the question.

4 MR. AXELSON: Joseph Brown exists.

5 MR. SPRINKLE: They indicted him for this crime.

6 THE COURT: Is Joseph Brown a witness?

7 MR. SPRINKLE: We subpoenaed him.

8 MR. AXELSON: Not until yesterday.

9 MR. SPRINKLE: We didn't know until Friday after-

10 noon that this statement existed. We talked to

11 Joseph Brown yesterday morning, got his address,

12 1002-F South Street.

13 THE COURT: You say you have talked to him, one

14 of you two?

15 MR. SPRINKLE: I have talked to Mr. Backus at

16 the time this matter was nol-prossed in your

17 court, as a matter of fact.

18 MR. AXELSON: I believe Mr. Backus indicated to

19 you that Joseph Brown was not going to testify?

20 MR. SPRINKLE: No, sir.

21 Judge, we have to lay the foundation. We

22 have to put him on the stand. We have to put

23 him on the stand, and then if he refuses to

24 testify, his statement is admissible.

25 Hines vs Commonwealth 136 VA 728;117 SE.

1 THE COURT: What?

2 MR. SPRINKLE: Hines 136 VA 728.

3 Newberry vs Commonwealth, 191 VA 445,

4 especially pages 461 through 462; also cited in

5 Michie's JURISPRUDENCE under section 237; also

6 cited under McCormick's on EVIDENCE.

7 MR. KNOWLES: Did you give him Newberry?

8 MR. SPRINKLE: Newberry is 191 VA 445.

9 I will be glad to give you other copies of

10 them in the morning. I have them in the office.

11 The Virginia Supreme Court in the Atlantic

12 Coastline case has cited this, I believe on the

13 back of that.

14 192 VA 172 says it is still good law, and

15 I have shepherdized it, and I have seen no

16 decision to the contrary.

17 MR. KNOWLES: May we make another eleventh hour

18 check to see if our witnesses are here?

19 THE COURT: Yes, sir. We certainly will let you

20 make a late check. Certainly.

21 Is there any idea where you can find this

22 man?

23 MR. KNOWLES: Judge, as soon as we found out

24 his address. we rushed down to Mrs. Lollar's

25 office and had a subpoena letter drawn up, and

a subpoena went out for him.

We discussed it with you.

THE COURT: Reduce down to writing what you expect to produce by this witness, and have it sworn to.

MR. AXELSON: Your Honor, he would have no knowledge of it.

THE COURT: Who? Mr. Ellison?

MR. AXELSON: No.

THE COURT: Of course not.

MR. AXELSON: Your Honor, this is third-hand hearsay.

THE COURT: That is the reason I asked. There is no evidence of any reliability in it at all.

MR. KNOWLES: What is third-hand hearsay?

MR. AXELSON: This is what you are saying that somebody else told you that somebody else saw.

MR. KNOWLES: Am I going to sit here and mislead the Court and lie to you?

THE COURT: No, we are not accusing you.

MR. AXELSON: I feel sure you are passing on exactly what you were told. I have no doubts about that, but there are at least 2 other people who could have lied in this information before it even got to you.

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this robbery and murder was committed, and that he was so drunk he couldn't get up and go anywhere.

THE COURT: All right, Mr. Sergeant, let's get a subpoena out for what witnesses you want, and get another sergeant with you, and let - if necessary, I want one of these lawyers, if necessary, to go along and help find them.

We will put him back into custody, and we will continue this case until 2:30.

(Back in the courtroom.)

THE COURT: Ladies and gentlemen of the jury, a problem of a witness that we are looking for has developed, and we are getting radio cars and going to search for him, so we are going to recess until 2:30 to see if they can't have the witnesses here.

We are not going to continue this case. We would rather go on with it, so you all can go and come back at 2:30. All the jurors come back at 2:30 this afternoon.

Let everybody remain in the courtroom except the jurors, until the jury leaves.

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(Present in chambers: The Court, the Defendant, Messrs. Axelson, Knowles, and Sprinkle

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Deputy Clerk Diggs Deputy Sheriffs, and the press, after luncheon recess.)

THE COURT: All right, Mr. Sprinkle, you all went out looking for your witnesses. Tell us the result of what you have done.

MR. SPRINKLE: Okay, Judge, there were 3 people who were to be served with a - 4 people to be served with subpoenas: Joseph Brown, Yvette Britt, Johnny Britt, Nita Thompson.

We first went to look for the Britts, and we discovered that they do indeed live at 21 Suburban Circle, that they were not at home.

Mr. Dobrosky, Deputy Sheriff, checked with the Lee Hall Apartments Office, and the lady had a lease, and they had signed it.

We checked to see where Mr. Britt worked. We were told - we saw on the application that he worked at Frederick Academy.

We went out to Mr. Beazley's academy, checked out there. They said the man had been terminated not long ago - isn't that correct?

DEPUTY SHERIFF DOBROSKY: 6 months ago.

MR. SPRINKLE: We asked for a forwarding address and they didn't know where he was.

THE COURT: His name was what?

1 MR. SPRINKLE: This is Mr. Johnny Britt. But
2 the fact that they are listed as residents of
3 25 Suburban Circle, but they were not home, we
4 went right there and checked, and after we went
5 to the office, we went back and checked again.
6 With regards to Joseph Brown, Deputy
7 Dobrosky put out an all-points bulletin for
8 Joseph Brown after obtaining a picture of
9 Mr. Brown.
10 We checked at the ABC store on High Street,
11 which one of the officers told him he might find
12 him. This is on police leads, anyway.
13 He put, like I say, an all-points bulletin.
14 We went to several houses on South Street and
15 Crabtree Street to discover where Mr. Brown lived.
16 We discovered he did, indeed, live at 1010 South
17 Street in the City of Portsmouth, and as he was
18 subpoenaed yesterday, Cecil from Judge Bain's
19 court told me he did go and check the house, and
20 his family did live there, and he posted a sub-
21 poena late yesterday with Joseph Brown.
22 MR. AXELSON: Was the subpoena still on the door
23 when you checked?
24 MR. SPRINKLE: No, it was not.
25 We were told by a neighbor who lived at

1 1002 South Street that Mrs. Brown lived at
2 1010 South Street, and that Joseph Brown was
3 seen in the area.
4 DEPUTY SHERIFF DOBROSKY: Mr. Joseph Brown was
5 the son of the lady who lived at 1010, and he
6 was living in the area. His picture was identi-
7 fied by a little girl who lived at 1002 South
8 Street. Isn't that correct?
9 MR. SPRINKLE: Right.
10 Then we came back to the court, and we
11 found that we had some information that Nita
12 Thompson might be a student at Truxton School
13 here in Portsmouth, so we trucked on out to
14 Truxton School, and we talked to a young lady
15 there.
16 Let me see what the name is. Her name is
17 Barbette - Babette, I am sorry, B-a-b-e-t-t-e
18 Nanita (N-a-n-i-t-a) I am sorry - Thomas who
19 lives at 1207 Barbour Drive in the City of
20 Portsmouth, who told us that there is a person
21 named Anita Ellis who is in fact, a sister of
22 the Defendant - sister, I believe, of the
23 Defendant or related to the Defendant.
24 MR. KNOWLES: Would that be Anita Ellison?
25 MR. SPRINKLE: Yes, Ellison. I am sorry.

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old who is in school, but Babette Nanita Thomas - and correct me if I am wrong - I did ask her and she said that Anita Ellis did, to the best of her memory, live in this city in Park View in September of 1976 when this crime was allegedly committed, and she left the area after that, not before, so there is some evidence that she might well have something to say on that.

So from there, we don't know where to take it, but that is what I know about these witnesses.

THE COURT: Let me ask you, Mr. Sprinkle, have you any assurance of what these witnesses are going to say, or is it a sort of nebulous thing?

MR. SPRINKLE: I would like Mr. Knowles to speak on the Britts, but for Mr. Brown, that is a different case.

I have already gone through that this morning. He is material, and I think it is material under that Hines case and other cases I cited. There isn't any doubt about that.

THE COURT: Well, he is the one that you saw him when?

MR. SPRINKLE: Mr. Brown is the one who gave a statement to a third person that he actually committed this crime which Mr. Ellison is being

tried with.

MR. AXELSON: According to that third person.

MR. SPRINKLE: According to that third person, who we spoke to yesterday, who we spoke to in jail, who we brought back from Goochland.

THE COURT: Is that person still in jail?

MR. AXELSON: Yes, sir, she is.

THE COURT: Would she know where this man is?

MR. SPRINKLE: She doesn't have any way of knowing where Jo-Jo Brown is. We do know where Jo-Jo Brown lives at 1010 South Street on occasion. We can leave a subpoena there. We just can't get him today.

Now regarding the alibi, Mr. Knowles can speak more effectively on that than I can because I don't know what Mr. Britt is going to say.

Like I said before, I would like the record to show that we didn't know anything about this until 11:30 yesterday.

We told the Commonwealth's Attorney in good faith that we didn't have any alibi defense, and that was true until at that time, not until yesterday morning at 11:30 when Mr. Knowles was in the Law Library, working on the case, and

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Mr. Axelson, what have you got to say on it?

MR. AXELSON: Judge, I have Mr. Hinton Hoffler here, a man who is in poor health. It is difficult for him to get here.

Betty Southall, a very reluctant witness on behalf of the Commonwealth, who is most unhappy at having to come here, didn't even want to come back this afternoon.

I have 2 Special Agents from the FBI here, one who has come down - well, both have come from some distance away, out of state.

I have Mr. Phil Butler here from the FBI, who has had to set up all of his equipment here, spent 2 hours this morning getting the equipment set up so we could go forward with trial today.

I have 2 doctors on call who have had to stay close to the phone all day long.

I am ready to go to trial, and I have been ready to go to trial, and I would like to go forward with trial today.

MR. KNOWLES: Your Honor, we can't possibly defend Charles Ellison without Joseph Brown and without Johnny Britt. We cannot do it.

As we explained to you this morning, we have got to have Joseph Brown to lay the proper

1 foundation to get the statement in to Karen
2 Hampton.
3 We have got to have Johnny Britt if we are
4 going to develop the possibility of an alibi
5 defense.
6 We are absolutely crippled without these
7 2 witnesses.
8 THE COURT: Mr. Knowles, what assurance have you
9 that they are going to be able to furnish this
10 information?
11 Isn't it more a flimsy cloud information
12 for speaking nebulously in some way?
13 MR. KNOWLES: Your Honor, I think, as I said in
14 my affidavit, I think the alibi possibility is
15 something I have to explore.
16 I abhore the fact it came to my attention
17 so late in the day. Joseph Brown is an absolute
18 must. We have to put him on the stand if he
19 tells us to go wherever.
20 We have to have that man here, or have him
21 served, and he refuses to come.
22 Now we are talking about 2 elements of
23 2 possible defenses.
24 THE COURT: How do you know you are ever going
25 to get him?

1 MR. KNOWLES: Your Honor, if we serve him and
2 give him the proper statutory notice, a minimum
3 of 5 days, and he does not show up, I think we
4 have a very good argument at that point that he
5 is unavailable for trial, and hopefully we can
6 proceed in his absence.
7 By this time, we will have had the oppor-
8 tunity to explore more thoroughly the alibi
9 possibilities.
10 THE COURT: Is this the man that you have got
11 the address that you know he lives there?
12 MR. SPRINKLE: 1010 South Street. Isn't that
13 correct?
14 DEPUTY SHERIFF DOBROSKY: That is correct.
15 MR. SPRINKLE: 2 deputy sheriffs know he lives
16 there, or have knowledge that he lives there.
17 DEPUTY SHERIFF DOBROSKY: Plus, Judge, like I
18 stated, there is an all points bulletin out on
19 him.
20 If the police find him, they are going to
21 pick him up; but they haven't found him yet.
22 I was told by one person that they thought he
23 had gone out of state; that he had gone to New
24 York is what one of the people that I have
25 talked to said.

1 MR. AXELSON: Detective Benoit?

2 DEPUTY SHERIFF DOBROSKY: Yes, that he believed

3 he had gone out of state.

4 Everyone I have talked to about Joseph Brown,

5 as Mr. Sprinkle will verify, doesn't know where

6 he is, and haven't seen him, don't know how long

7 since he has seen him.

8 MR. SPRINKLE: The little girl says he lives

9 there.

10 THE COURT: But you don't know whether he is in

11 town or where?

12 MR. SPRINKLE: No.

13 DEPUTY SHERIFF DOBROSKY: I have called the

14 Norfolk Jail, Chesapeake Jail, and he is not

15 there.

16 THE COURT: Nobody knows if he is working or

17 what?

18 DEPUTY SHERIFF DOBROSKY: No.

19 MR. KNOWLES: Your Honor, Can I have a couple

20 of minutes with Mr. Sprinkle?

21 DEPUTY SHERIFF DOBROSKY: I understand also

22 there is a possibility he is a wino, and it is

23 going to be hard to find him.

24 THE COURT: All right, gentlemen. Mr. Knowles?

25 Mr. Sprinkle?

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Mr. Sprinkle.

MR. KNOWLES: The triggering event, Your Honor, is to have that man present, and he either refuses to testify, or he ignores the Court's lawful subpoena.

He then becomes unavailable, and we have a point of law to argue, as to whether or not his statement is admissible; but we must have service or have some reliable information that that man is gone.

Your Honor, I know it is a terrible imposition on everybody who has been involved.

THE COURT: Not only an imposition, but as the Commonwealth's Attorney has pointed out, you have got a man that is right sick here, I understand. He is not in the best of health. Is that correct?

MR. AXELSON: That is correct, Your Honor. I don't want the Court to be under the apprehension that bringing him down here causes him any damage.

He is just not in good health. It doesn't help him any.

THE COURT: That is what I understood you to say. Where is he from?

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do you, I think.

MR. AXELSON: No, sir, Judge.

MR. KNOWLES: Your Honor, I would say this. I haven't talked to Mr. Sprinkle about this. If Dave will stipulate this guy is unavailable possibly -

MR. AXELSON: No.

MR. KNOWLES: You will not?

MR. AXELSON: No. I will not.

MR. KNOWLES: Then, Your Honor, we are going to have to have a continuance. We are going to have to get another date.

MR. AXELSON: Judge, what Mr. Knowles has told me is if I stipulate the central fact that makes -

THE COURT: I am not going to ask you to do that.

MR. AXELSON: That makes the third party confession admissible. I can't do that.

THE COURT: I understand that.

MR. KNOWLES: Just a thought.

MR. AXELSON: Why don't you plead your client guilty? Just a thought.

MR. KNOWLES: Why don't you nol-pros? Just a thought.

(Off the record.)

THE COURT: If you know if that man is living

there, there is no reason he shouldn't be there tonight unless there is some reason or other -

MR. SPRINKLE: Well, we tried to subpoena him yesterday. Got a subpoena yesterday. Nobody answered the door. Nobody answered the door when Mr. Dobrosky and I went out there.

The people in the neighborhood say he lives there with this woman. We don't know that.

THE COURT: Nobody would answer the door?

MR. KNOWLES: Let me ask you something, Your Honor. If he is given the statutory requirement and served within 5 days of trial -

THE COURT: How do you know you are going to serve him, though? He is not there.

MR. KNOWLES: Door service. Let's assume that it is at worst only door service. Does that make him unavailable for trial?

THE COURT: It doesn't have to be 5 days. It only has to be reasonable service. The only reason that you talk about the 5 days is if you would have him up for contempt, something of the other kind. Then he might be able to take advantage of it, but he can't disobey the order to come.

MR. KNOWLES: Yes, sir.

THE COURT: Don't you see?

MR. SPRINKLE: We have no assurance that if we serve him tonight that he is going to be here tomorrow.

THE COURT: You have no assurance he is going to be here next week. That is what I am worried about.

MR. SPRINKLE: That is true.

MR. KNOWLES: At what point does he become unavailable as a witness?

THE COURT: If we serve him tomorrow for trial in July, that is plenty of time. Get in touch with his attorney, Mr. Backus, and ask him what is going on, and we will try.

Who is to say? Detective Benoit says he is in New York.

MR. KNOWLES: Which would make him unavailable as a witness.

MR. SPRINKLE: We could come back tomorrow after all the people here, and have to continue it again.

DEPUTY SHERIFF DOBROSKY: All the people I have talked with say they haven't seen him, and haven't seen him in a long time.

THE COURT: That is what you are going to run

1 into. I don't think you are ever going to find
2 him. That is what worries me.
3 MR. SPRINKLE: Some people did say that. That
4 is, he has been in the neighborhood, but has
5 been in Portsmouth for a long time.
6 One thing for sure, he does have a criminal
7 record, and he seems to be staying in Portsmouth,
8 regardless of what his past is like.
9 All we are asking is time to get him here.
10 One day isn't enough, and 2 days isn't enough.
11 THE COURT: The last address we have in this
12 record is King Street.
13 MR. SPRINKLE: What happens if his lawyer says
14 under no circumstances would he let him testify?
15 THE COURT: Then he becomes unavailable, and you
16 would have to argue that it is admissible.then.
17 I am not ruling on that right now. But,
18 I mean, it says in the Newberry case - in the
19 Newberry case, they use that expression that if
20 he becomes unavailable by taking the Fifth
21 Amendment, that makes him unavailable.
22 I mean, the Court said that in the Newberry
23 case.
24 MR. SPRINKLE: Said that in both cases.
25 THE COURT: I know it said that in Newberry case.

1 MR. SPRINKLE: Said it in the Hines case, too.
2 But if you go to trial without him here, we don't
3 have that right. We don't have that chance.
4 We don't really have a chance. We have
5 2 chances, the right to bring in the statement
6 or chance to bring in an alibi.
7 MR. KNOWLES: Do you want to read it this morning?
8 MR. SPRINKLE: I read it this morning. The key
9 phrase is that they shot this man.
10 MR. AXELSON: I don't believe it says shot.
11 MR. KNOWLES: That he splattered him all over
12 the sidewalk, to be more accurate.
13 THE COURT: If we grant a continuance, can you
14 try this next Tuesday?
15 That is one week from today. That is
16 7 days. Regardless of what we have got on the
17 docket or not, we will put this ahead of it.
18 MR. KNOWLES: That is the 31st.
19 MR. AXELSON: I can, Judge.
20 MR. KNOWLES: Your Honor, right now I have a
21 temporary support hearing set in Suffolk at
22 10:00 o'clock.
23 THE COURT: I think you can get that continued
24 by telling them this case has been set and it
25 is mandatory. I think the Judge will yield to

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Now, do you want to start the trial at 9:00 o'clock, or do you want to start it regularly at 10:00?

MR. KNOWLES: I think it would be best to try to start at 9:00; perhaps not with the jury until 10:00, but if we could be here on motions.

THE COURT: The jury, that is what I am talking about.

We can take up what we have to at 9:00, but you all come back next Tuesday, one week from today, at 10:00 o'clock.

All spectators keep your seats until the jury leaves.

(Jury leaves the courtroom.)

* * * * * * * * * * *

(Court reconvened May 31, 1977, to continue the trial of Charles L. Ellison, #28311.)

(Present in chambers: The Court, the Defendant, Messrs. Axelson, Knowles, and Sprinkle, Deputy Clerk Diggs, 2 Deputy Sheriffs, and the press.)

THE COURT: Tell me what we are about.

MR. KNOWLES: I think there is, Mr. Axelson, some question about Karen Hampton's statement.

MR. AXELSON: Judge, the last time this came up,

1 it was made known to me by the defense attorneys
2 that he planned to introduce the statement
3 allegedly made by Joseph Brown to a person by
4 the name of Karen Hampton.
5 Karen Hampton is currently a prisoner in
6 the jail. I don't know whether Joseph Brown
7 has been found or not. They were attempting to
8 subpoena him as of last week.
9 I think that is probably the first issue
10 we need to get settled. Was Jo-Jo located?
11 MR. KNOWLES: I don't know. Who has the return?
12 THE CLERK: I have looked for the returns.
13 There were no returns in here.
14 DEPUTY SHERIFF DOBROSKY: I went that night.
15 THE CLERK: That is the old one, for the 24th.
16 MR. AXELSON: That was left posted?
17 THE CLERK: That was marked not found. That
18 was left posted.
19 MR. AXELSON: Judge, we have a subpoena for
20 Joseph Brown, Yvette Britt, Johnny Britt, and
21 Anita Thompson; and Anita Thompson was posted,
22 Johnny Britt was not found, Yvette Britt was
23 not found, and Joseph Brown was not found.
24 DEPUTY SHERIFF DOBROSKY: You had better check
25 that again. That was personal service.

1 MR. AXELSON: Excuse me. That is the old one,
2 for the 24th.
3 Have they gotten personal service? Found
4 Joseph Brown?
5 DEPUTY SHERIFF DOBROSKY: No, I am talking
6 about Anita Thompson.
7 THE COURT: No returns?
8 THE CLERK: I don't have them here, no, sir.
9 That subpoena was requested, Your Honor, the
10 very day that the case was continued last
11 Tuesday.
12 MR. AXELSON: No question but they have attempted
13 to locate him.
14 DEPUTY SHERIFF DOBROSKY: Your Honor, may I say
15 something? That night, I went around 11:00
16 o'clock to Joseph Brown's house, and I couldn't
17 get nobody to the door, either.
18 THE COURT: That was last week, wasn't it?
19 DEPUTY SHERIFF DOBROSKY: Yes, sir. That was
20 the same day the subpoena was issued.
21 MR. AXELSON: Judge, leaving aside the question
22 of Joseph Brown's availability to testify right
23 at the moment, although I think it is going to
24 be a material issue, it is the Commonwealth's
25 position that this alleged statement should not

be allowed to be presented to the jury, either beginning with a reference to it in the opening statement of counsel and going throughout the trial.

Now I am not unaware of the cases cited by defense counsel, Hines vs Commonwealth and Newberry vs Commonwealth. I think the Court is familiar with those as well.

In addition, I have presented the Court with what I believe to be the leading Supreme Court case on the subject, which is Chambers vs Missippi, a 1973 case and somewhat more recent than Hines and Newberry.

The reason that I feel that this case should not be - excuse me - this alleged statement should not be introduced is that it lacks the reliability, the indicators of truthfulness that the statements contained in Hines and Newberry and in Chambers, which the Court said should have been allowed in.

This is a statement ascribed by a convicted felon, under somewhat questionable circumstances, to another individual.

There are in essence 2 questions the Court would have to answer. (1) First of all, whether

or not the statement was actually made. The only testimony - the only evidence that we have that the statement was, in fact, made is Karen Hampton's statement, as I understand the circumstances at this time.

The second question the Court would have to answer is whether or not that statement is reliable enough, presents something that should go to the jury.

Now I have provided the Court with a lengthy document, and I have provided defense counsel last week with the same document the same afternoon, which details the facts as they arose in this case, and, Your Honor, the summary of events provided the Court, I will have witnesses between now and 10:00 o'clock to substantiate each of these events, that the murder occured on September 10, that on November 3d the Commonwealth first became aware of this alleged statement by Karen Hampton, the fact that on the 16th the credit cards were sold to the Seawall Operation, that is the undercover fencing operation.

On December 9 - now I have the tape out here now, and will have the officers here in a

1 matter of half an hour or so that could identify
2 the tape, but I think the Court might be willing
3 at this point to accept my representation that
4 this is the tape that was made of the conver-
5 sation involving Michael Roberts.
6 This is obviously hearsay, Your Honor, but
7 so is the statement made by Joseph Brown, so I
8 think we are dealing with - it is at least
9 balancing at this point.
10 I think the Court should hear, or be aware
11 of the statements that I can ascribe to Michael
12 Roberts in trying to assess the value that should
13 be given to the statement by Joseph Brown.
14 Michael Roberts described to the police
15 officers in great detail what happened in the
16 course of this robbery, and I provided the Court
17 with a copy of the transcript of the relevant
18 portions of that conversation.
19 Mr. Knowles has received a copy of that -
20 excuse me. Mr. Knowles and Mr. Sprinkle has
21 received a copy of the Roberts conversation as
22 well.
23 MR. KNOWLES: Your Honor, before we go further,
24 it sounds like to me Mr. Axelson is going ahead
25 and discuss Michael Roberts' statement.

1 We would like for the record to show we
2 object to this at this point.
3 Mr. Axelson is talking about a balancing
4 situation. We are talking about a confession
5 of a co-defendant, which there is - unquestionably
6 it is inadmissible in evidence as opposed to a
7 statement of Karen Hampton related to a third-
8 party confession, which under the cases we have
9 cited to the Court where the issue had been
10 decided that the issue is clearly admissible.
11 We want the record to reflect we are going
12 to object to Mr. Axelson discussing even at this
13 point the statement of a confession to a co-
14 defendant.
15 MR. SPRINKLE: Object to any confession evidence
16 now. It is clearly a violation of the consti-
17 tutional rights and hearsay, not just hearsay.
18 MR. AXELSON: Your Honor, what they are objecting
19 to, the objection they have stated goes to
20 whether or not the statement could be admitted
21 before a trier of fact at the trial itself.
22 We are not at that stage. We are at the
23 stage of deciding whether or not this alleged
24 confession by Joseph Brown should be presented
25 to the jury, and I think in order to decide that,

the Court has to be fully aware of the entire background of the case.

MR. KNOWLES: I disagree with that.

MR. SPRINKLE: That is completely irrelevant. All these cases -

MR. KNOWLES: What we should be discussing at this point is what admissible evidence the jury should hear this morning.

MR. AXELSON: That is what we are discussing.

MR. KNOWLES: You are moving that we should suppress Karen Hampton's statement, but we should discuss the case of a co-defendant which is clearly inadmissible. I don't understand your reasoning there.

MR. SPRINKLE: May I make a statement? What you are saying is - correct me if I am wrong - based on this scenario of what happened and what the police have found out, you are saying her statement is inherently incredible, or may well be, therefore it should be inadmissible with the facts you are proving.

MR. AXELSON: I think the Judge is advised as to all the facts on the admissibility of Joseph Brown's statement through Karen Hampton.

MR. SPRINKLE: Granting that is important, will

you read the Hines case?

MR. AXELSON: I have read the Hines case.

MR. SPRINKLE: Have you read page 745, 136 VA? "Unfortunately, as all must concede, witnesses sometimes swear falsely, and it cannot be doubted that alleged confessions of crime by third parties may easily be foisted on the courts and juries, but so may alleged admissions in civil cases, as, for example, regarding location of a corner tree or other real estate controversy. As to both classes of admissions they must be admitted, if at all, because the evidence itself is important to the ends of justice, and because it may be assumed that no man will speak falsely to his own hurt. The truth of the admission itself, and the credibility of the witness who undertakes to repeat the admission, must, like the truthfulness of all other testimony, address itself to and be settled by the jury." What we are talking about is a jury question.

THE COURT: What is the citation?

MR. SPRINKLE: 136 VA 745.

What I am saying is everything he has brought up and is wasting our time has already been settled by the Hines case.

1 MR. AXELSON: The Hines case said it was only
2 applicable to that case, not authority in
3 anything.
4 THE COURT: Let me find out what evidence you
5 propose. Do you propose to put this Karen on
6 to prove that what Brown said is right?
7 MR. KNOWLES: Yes, sir.
8 THE COURT: Brown is not here?
9 MR. SPRINKLE: So far as we know, he is not
10 here.
11 THE COURT: Did Brown ever say this to any other
12 person that you know of, besides this one?
13 MR. SPRINKLE: Not that we know of.
14 MR. KNOWLES: No, sir.
15 MR. AXELSON: Nor that I am aware of.
16 THE COURT: Well, what other corroborative
17 evidence have you got that he ever made that
18 statement to her?
19 MR. KNOWLES: 2 police officers that took that
20 statement and introduced it in court.
21 THE COURT: I mean from Brown. Did Brown ever
22 tell anybody else that he did it?
23 MR. SPRINKLE: Not that we are aware.
24 THE COURT: All you have got is Karen Hampton's
25 statement that Brown told her that, and she told

it to a police officer?

MR. KNOWLES: Your Honor, if I may say one thing -

THE COURT: I am just trying to get what your evidence is. Is that the only thing you have got? Nothing else but her statement?

MR. KNOWLES: That is all, Your Honor.

THE COURT: No corroboration of anything, to corroborate her statement in any way?

MR. SPRINKLE: Well the fact that the man was robbed and killed.

THE COURT: I know that, but I mean anything to give any assurances to the Court that her statement is truthful?

MR. KNOWLES: Your Honor, no, sir, we have no other evidence that Joseph Brown ever made this similar statement to anyone else, but in the Hines case and the other case that we have cited in support of the admissibility of this third-party admission, the Hines case and the other Virginia Supreme Court case.

THE COURT: The Newberry case?

MR. KNOWLES: Yes, sir. It involves statements that were totally untested by oath or cross examination.

1 In this case, we have this statement by
2 Karen Hampton being subject to both her oath
3 when she testified at Joseph Brown's preliminary
4 hearing and subject to cross examination by
5 Mr. Brown's attorney, Jim Backus, whom we have
6 subpoenaed; so her statement has been subject
7 to both oath and cross examination, 2 of the
8 key elements that the Courts in Hines and
9 Newberry said this is the reason why the
10 majority doesn't want to let third-party con-
11 fessions in. They have never been subjected
12 to oath, never been subjected to cross examina-
13 tion.
14 THE COURT: But you have in the Hines case,
15 and others, there were other circumstances.
16 The Hines case was the one they found a cap,
17 wasn't it?
18 MR. KNOWLES: Yes, sir.
19 THE COURT: Found a cap that belonged to this
20 man who made the confession while in his last
21 illness.
22 Isn't this where he made the statement in
23 his last illness? In the Hines case, wasn't it?
24 MR. SPRINKLE: I don't recall exactly that.
25 THE COURT: He made it, but he owned a gun

1 exactly like - they proved he owned a gun
2 exactly like the one that killed the man.
3 Proved, in order to let the statement in, that
4 he had a cap exactly like it, and they proved
5 that he had the same motive to kill the man.
6 MR. SPRINKLE: I think we can also show this
7 today, that this lady, Karen Hampton, identified
8 the tape player that was taken from Mr. Marks,
9 the one that was killed in this case; identified
10 that in front of the police.
11 MR. KNOWLES: The police showed her a photograph.
12 MR. SPRINKLE: The photograph, and identified
13 one of the items taken from Mr. Marks -
14 MR. KNOWLES: - as exactly the one that was
15 being offered her by Joseph Brown.
16 MR. SPRINKLE: I think that supports her
17 testimony.
18 THE COURT: Where did she get it?
19 MR. SPRINKLE: What? The Picture? The police
20 showed her the picture.
21 THE COURT: No. The tape. She never had the
22 tape, did she?
23 MR. KNOWLES: It was offered to her by Joseph
24 Brown.
25 MR. AXELSON: According to her.

1 MR. KNOWLES: If she wanted to buy a radio-tape
2 player.
3 Now, Your Honor, the statement itself
4 involves some detail, too; in my opinion, more
5 detail than the statement allegedly made by
6 Charles Ellison.
7 The man knew exactly what occurred. He
8 knew exactly what was taken, and said so in his
9 statement.
10 MR. SPRINKLE: Why don't you read the whole
11 statement?
12 MR. AXELSON: Wait a minute. Now you have just
13 objected to my introducing hearsay evidence.
14 MR. SPRINKLE: Because we have cases, and you
15 haven't got anything.
16 MR. AXELSON: Because this issue has never been
17 offered before.
18 THE COURT: You don't have a statement by anyone
19 else that Brown made a statement that he did it,
20 have you?
21 MR. SPRINKLE: No, sir.
22 THE COURT: This is one person?
23 MR.SPRINKLE: Yes, sir.
24 THE COURT: Karen Hampton?
25 MR. SPRINKLE: I still think you ought to look

at the statement. I don't see anything wrong with that.

THE COURT: I think I am going to have to have it all to make a proper ruling on it.

MR. KNOWLES: Your Honor, I think the Newberry case also involved 2 defendants, one who took the stand and refused to testify.

I don't think any elaborate foundation was laid there before his confession came in as evidence.

We are not talking about a very elaborate foundation as I read either of these cases. It just said the ends of justice required that this very relevant and material evidence be admitted where the declarant is shown to be unavailable.

MR. AXELSON: But in Hines and Newberry, there is no question that (A) the statement was made, and that's - that's the first question that is not settled in the instant case.

Secondly, there was corroboration independent of the statement itself for the facts contained in the statement.

Now neither of those 2 elements is contained in Karen Hampton's statement.

MR. KNOWLES: I am not at all sure Newberry

1 states that.

2 MR. SPRINKLE: Judge, I have both of them right

3 here. Here's Hines, and here's Newberry.

4 THE COURT: Well, the Newberry case is the one

5 I want.

6 MR. AXELSON: It doesn't say it explicitly, but

7 if you read the facts in the case, you find that -

8 THE COURT: That is what I wanted to read.

9 What is it? 191 what?

10 MR. SPRINKLE: 136 and 191.

11 THE COURT: I know. 191 what?

12 MR. SPRINKLE: 136 or 445.

13 MR. AXELSON: Judge, I have found the parts that

14 I want to refer the Court to. In Hines, on page

15 136 VA 728.

16 THE COURT: All right.

17 MR. AXELSON: Down at the bottom, they talk

18 about the corroborative evidence that the man -

19 the cap belonged to the man that made the third-

20 party confession that he was on the outlook for

21 the officers, that he had threatened the police

22 officers of Richmond, that they knew, they were

23 trying to apprehend him, that he had a .38 cali-

24 ber pistol, that he was out that night, that he

25 was about the size of the man who was seen to

1 run from the place of the crime, that he turned
2 up next morning without his cap - those are all
3 things that tend to corroborate the confession.
4 Now the confession itself, the Court went
5 on to discuss the fact that this was a purely
6 circumstantial case.
7 They cite a case in which the language,
8 coupled with circumstances pointing to its truth,
9 in referring to the case.
10 Then they cite the opinion of Professor
11 Wigmore in this, referring to a confession by
12 another person, and then they refer to a prima
13 facie case resting on several concurring pieces
14 of evidence.
15 In other words, there is physical evidence
16 in addition to the confession itself.
17 The Supreme Court followed this same line
18 in analyzing Newberry - the circumstances in
19 Newberry on page 445. They note the cases,
20 the confession is written, that it was made to
21 more than one witness, and it is corroborated
22 by other evidence.
23 That's the same opinion expressed by the
24 Supreme Court in the Chambers vs Mississipi case.
25 They use the language that it is made under

1 circumstances that provide considerable assurance
2 of their reliability, made spontaneously to a
3 close acquaintance shortly after a murder, on
4 3 occasions, that each of the confessions is
5 corroborated by some other evidence in the case.
6 They note the number of independent con-
7 fessions.
8 Now all of that corroboration is totally
9 missing under these circumstances. There is
10 nothing but Karen Hampton's association that
11 Jo-Jo Brown said it to her.
12 MR. KNOWLES: But, Your Honor, there is no
13 requirement under either Hines or Newberry, and
14 if the Supreme Court of Virginia intended for
15 there to be an exact foundation laid before this
16 type of testimony could come in, they would have
17 said so.
18 Now the first thing Mr. Axelson pointed
19 to was the Hines case where the Court mentioned
20 the fact that the facts revealed that the third-
21 party declarant possessed a .38 caliber pistol,
22 he lost his hat, returned the next day without
23 a hat, etc.
24 The Court states that it is a very well-
25 settled ruling in the State of Virginia that that

1 sort of evidence is admissible. There was no
2 question about that in this case.
3 The only novel question presented in this
4 case, was this man's third-party confession
5 admissible.
6 Now I didn't see the Court go into very
7 great detail that the foundation must be laid;,
8 there must be corroborative evidence.
9 They were presented with the question of
10 is a third-party admission admissible in a
11 criminal case as exculpatory evidence to show
12 that the accused may not have been the man who
13 committed the crime, and the Court went to great
14 length to discuss his majority view. No, it is
15 not. It is hearsay. It is untested by oath
16 or cross examination.
17 But the Court, nevertheless, said that the
18 ends of justice demand that this sort of evidence
19 be admitted into evidence.
20 No requirement that there be an elaborate
21 foundation. They said let it in for whatever
22 it is worth. The jury is going to determine how
23 reliable is the person who is speaking the
24 declaration itself.
25 THE COURT: Well, in both of those cases, they

1 were going to permit it under the facts and
2 circumstances of this particular case, but they
3 were not saying this is a rule of law.
4 It is a rule in this particular case, that
5 we are letting it in under the facts as set
6 forth in these cases.
7 They don't say that this is necessarily
8 going to admit just one statement that somebody
9 else made.
10 Did you read that Chambers case?
11 MR. KNOWLES: I have read it sometime ago, Your
12 Honor. I have not read it recently.
13 THE COURT: In the footnote, I think they pose
14 a question to the Supreme Court that is very
15 pertinent to this, if you remember it.
16 MR. SPRINKLE: They also quote Hines as an
17 example of the fact that they allowed these
18 circumstances in, not only under circumstances
19 of corroborative evidence, but that it is held
20 to the fact of the case.
21 They cite it as a rule of Virginia. So does
22 Michie. So does McCormick.
23 Like we discussed last Tuesday. The Supreme
24 Court says limit it to the facts of the case.
25 Fine. They do it for 2 cases along the same

1 line. You really have to think was it rule, or
2 rule for that case?
3 THE COURT: That is exactly it. They say we
4 are making a rule if there is some corroboration
5 to this statement.
6 MR. SPRINKLE: That is what you are saying that
7 is what he is saying, not in the cases in here.
8 THE COURT: Where? It says in the Hines case,
9 it tells you all the other circumstances that
10 corroborate this. They tell you the circumstances,
11 the same cap, the same type of gun, same motive.
12 They quote all of that in the opinion.
13 Now in the Newberry case, they come along,
14 this statement was made to 2 other independent
15 witnesses, and - Mrs. Price and somebody else
16 in the Newberry case. I just read it a second
17 ago.
18 MR. KNOWLES: Your Honor, here's the rationale
19 of the Hines case, as I see it, very clearly.
20 741, in the middle of the first paragraph.
21 "If a charge involving the life or liberty
22 of a citizen, and depending solely upon circum-
23 stantial evidence, cannot stand the test of
24 allowing the jury to determine from the testimony
25 whether a third party has in fact confessed guilt,

1 and if so, whether such confession is true, a
2 conviction ought not to follow."
3 THE COURT: I understand in this case it is not
4 based entirely on circumstantial evidence.
5 MR. KNOWLES: Your Honor, the statement, so far
6 as we are aware, is the absolutely only evidence
7 that the Commonwealth is going to offer this
8 morning that tie this man to the crime. I may
9 be wrong.
10 THE COURT: The evidence is what?
11 MR. KNOWLES: This statement that he allegedly
12 made to the Seawall agents.
13 MR. AXELSON: Well a confession is not circum-
14 stantial.
15 MR. KNOWLES: Your Honor, that is all the
16 evidence. They are offering this man's statement
17 that they claim he confessed the killing.
18 Here we have a statement of another person.
19 Certainly the ends of justice, the jury can
20 weigh the two and decide who is going to weigh
21 the truth.
22 THE COURT: Are you going to permit to go to
23 the jury that you don't know whether it is
24 reliable or not?
25 Let me cite an example of what happened a

1 few years back. You may remember. Out in
2 Illinois. A man committed a horrible murder out
3 there, several people, nurses in a hospital.
4 He was sentenced to die. 10 days before the
5 execution, 8 people came up and confessed to it.
6 The governor granted a reprieve, investigated
7 it and found all 8 people were liars. Don't you
8 see, it is so easy to get a confession from
9 somebody else. I was told somebody else did it,
10 or something of the kind. You would have to
11 find the motive behind all of that.
12 MR. KNOWLES: That most certainly is the danger,
13 and it most certainly is the rationale for the
14 majority view that this type of evidence should
15 be excluded, but we didn't go out and run up
16 this evidence.
17 The Commonwealth offered this evidence in
18 a trial before this Court, trial for Joseph
19 Brown for the same offense.
20 MR. AXELSON: Once we had done that, and got all
21 this other evidence we were able to, I tried to
22 go into it before the Court.
23 The first thing we did was turn around and
24 nol-pros the case against Joseph Brown because
25 we realized we had the wrong man.

1 MR. SPRINKLE: But you thought it was reliable
2 to bring charges of murder and robbery against
3 him.
4 MR. AXELSON: That was all we had at the time.
5 MR. KNOWLES: In the Circuit Court, if this man
6 hadn't surfaced, are you going to say you wouldn't
7 have tried Joseph Brown for robbery?
8 MR. AXELSON: In the Circuit Court, if this man
9 hadn't surfaced, I would say his statements,
10 corroborated by all the additional evidence that
11 involves him, would have been sufficient to get
12 Joseph Brown -
13 MR. KNOWLES: I say if this man had not surfaced,
14 you had gone to preliminary hearing, you indicted
15 Joseph Brown, he stood ready for trial in the
16 Circuit Court, would you?
17 MR. AXELSON: Are you going to ask my opinion
18 or what I would have done had I had control of
19 the entire thing?
20 MR. KNOWLES: Having reached that stage, if this
21 man wasn't in the picture, would you have tried
22 Joseph Brown for this crime?
23 MR. AXELSON: I would have tried Joseph Brown,
24 and I would have lost the case, too.
25 MR. KNOWLES: And it would have been on the basis

of Karen Hampton's statement?

MR. AXELSON: And I would have lost the case, too.

MR. KNOWLES: This was not conjured up. It was on November 3, as I recall, she was questioned and gave the statement.

Now this is not one of those whimsical people off the street who comes in at the last hour to try to save a man's life.

This is a statement that the police officer investigating this crime dug up and offered for proof against the declarant.

MR. SPRINKLE: Not long after these incidents happened.

MR. AXELSON: 2 months.

THE COURT: Was this Karen Hampton under some arrest at the time?

MR. AXELSON: Yes, sir. She was.

THE COURT: I think that is most material.

MR. KNOWLES: She is, and it will be brought out unquestionably.

MR. AXELSON: She has been convicted of a felony.

THE COURT: I didn't mean that. Was she under custody at the time she made this statement accusing Brown?

1 MR. KNOWLES: That I don't know.

2 MR. AXELSON: She was. She was indeed.

3 MR. KNOWLES: But she was, nevertheless, under

4 oath and subject to cross examination.

5 She could have been revealed a liar very

6 definitely on one occasion, at the preliminary

7 hearing of Joseph Brown, but the evidence was

8 apparently strong enough and apparently convin-

9 cing enough for Judge Sandie to send it to the

10 grand jury for indictment, and for the Common-

11 wealth to prepare its case against Joseph Brown

12 for trial in the Circuit Court.

13 MR. AXELSON: Your Honor, under all the circum-

14 stances of this case, there is absolutely nothing

15 that corroborates this statement allegedly made

16 to Karen Hampton; absolutely nothing, which takes

17 it out of the realm of Hines, it takes it out

18 of the realm of Newberry, it takes it out of the

19 realm of Chambers.

20 In those cases, there is no question but

21 that the statement was made in the first instance,

22 and there is evidence to corroborate the facts

23 in the statement.

24 Now those 2 key essential elements are

25 missing in what we have here. We have no proof,

other than Karen Hampton's statement when she was under arrest for other charges, that the statement was made, and secondly, we have no corroboration for the statement itself, the facts contained in the statement.

On the other hand, we do have, although it is not admissible to the trier of fact, it is not admissible to the jury, a great deal of evidence that corroborates - that indicates that Joseph Brown was not involved.

We have a great deal of evidence that negates Joseph Brown's involvement.

THE COURT: Was he present at the time of this robbery? Was he present at the scene?

MR. AXELSON: No, sir. No, sir. Not by all of the evidence that I have been able to find, other than that one statement to Karen Hampton, if he in fact made it.

THE COURT: I mean there is no other evidence going to be offered to try to show that he was present?

MR. AXELSON: Not a bit.

MR. KNOWLES: Your Honor, I don't think the Commonwealth knows who was present. Of course, they are alleging that certainly this man was

present.

THE COURT: I know, but you are asking that this statement come in that this girl makes. I am trying to find out if there is any truthfulness, that is.

MR. SPRINKLE: I think the evidence will show a lot of things she says in the statement will be supported by what comes out in evidence. $100.00 taken. This particular tape player was taken. She identified it, and they are going to introduce that today, or they have a picture of it. She identified that.

Mr. Brown had it on his person. He said he took it from the person when he killed him with a shotgun. He said, "splattered him all over the street."

THE COURT: Unless that is so - Does anybody identify a tape recorder? They are all alike, aren't they?

MR. KNOWLES: Karen Hampton looked at the Panasonic 8-Track AM-FM tape recorder-tape player. The police showed her a photograph of Mr. Marks's tape recorder, and the officer asked her if she could identify it.

She said that is exactly like the one that

1 was offered to me for sale by Jo-Jo Brown.
2 MR. AXELSON: There are hundreds of thousands of
3 tape recorders. If I tried to offer a case in
4 court on that, I would be laughed out of court.
5 MR. SPRINKLE: You prepared for that.
6 MR. AXELSON: I was prepared to go on that
7 because that was all I had. Now I have a great
8 deal more that exonerates Joseph Brown. Exone-
9 rates him. Shows that he had nothing at all to
10 do with it.
11 His statement is completely contradicted
12 by everything else we have gotten as a result
13 of the Seawall Operation, all of the taped
14 statements made by all of the participants.
15 Dwight Sessoms has been tried and convicted,
16 and his statement indicates the tape recorder,
17 he took it and busted it on the railroad tracks.
18 MR. KNOWLES: He recanted that statement.
19 MR. AXELSON: No question about that, but his
20 first statement to the police was that he took
21 the tape player and broke it immediately after
22 the robbery, and that means it couldn't have
23 been the tape recorder that Karen Hampton saw.
24 MR. KNOWLES: What admissible evidence before
25 the jury do you have to show that Joseph Brown

1 did not commit this crime?

2 MR. AXELSON: One alleged statement, allegedly

3 made to Karen Hampton, the same statement that

4 you are trying to put in right now, and that's

5 it. There is nothing else.

6 MR. KNOWLES: No. What else evidence that is

7 admissible before the jury tends to show con-

8 clusively, beyond any shadow of a doubt, that

9 Joseph Brown was the perpetrator of the crime,

10 the trigger man?

11 MR. AXELSON: His statement to Karen Hampton.

12 There is nothing else.

13 THE COURT: No. He is talking about the

14 Defendant.

15 MR. AXELSON: Are you talking about Charles

16 Ellison?

17 THE COURT: Yes, that is what he means.

18 MR. KNOWLES: You told the Judge there is ample

19 evidence to show that Joseph Brown was not the

20 man who committed this crime.

21 MR. AXELSON: Aside from what is admissible to

22 the jury, a great deal.

23 MR. KNOWLES: I am asking you. Dave, you are

24 going to offer, if this statement comes in, any

25 evidence that you have available to you that is

1 admissible to show that Joseph Brown did not
2 commit the crime.
3 You are going to attack Karen Hampton as
4 a convicted felon.
5 MR. AXELSON: I sure am.
6 MR. KNOWLES: And for some reason, presumably,
7 you are going to try to show she had some motive
8 in making the statement.
9 Well, the jury is going to hear all that.
10 No question. They are going to decide whether
11 or not she is telling the truth.
12 MR. AXELSON: Your Honor, the problem with
13 taking the line that Mr. Knowles is suggesting
14 to the Court is that there is additional evidence,
15 additional, reliable evidence that is not
16 admissible before that jury, that that jury
17 cannot have in assessing what weight to give
18 to Karen Hampton's alleged - to Karen Hampton's
19 statements of what Joseph Brown allegedly told
20 her.
21 There is additional evidence which indicates
22 that Joseph Brown had nothing to do with it, and
23 I know as sure as I am sitting here, the Court
24 simply cannot permit me to introduce that
25 evidence, although it has the same indications

of reliability, in fact, greater indications of reliability than what is contained in Joseph Brown's supposed statement to Karen Hampton.

Now the Court can assess those here. I am prepared to offer those things here, but I am aware, as Mr. Knowles is aware, and Mr. Sprinkle is aware, and the Court is aware, from reviewing this material I have put before the Court, that the Court is not going to let this stuff get before the jury.

THE COURT: I am going to ask them. What, outside the bare statement that Karen Hampton made, have you got to show that Brown had anything to do with this thing?

MR. KNOWLES: Your Honor, the only thing that we can show - I believe Wayne will agree with me - is that Joseph Brown, in his statement, knew exactly what was taken, and the officers are going to testify as to what exactly was taken.

The officers will testify that, I believe, $100.00 was taken, and his Panasonic 8-Track radio-tape player.

Joseph Brown also said that the man was splattered. The evidence will show that the man

1 was shot with a shotgun.

2 Now that certainly is corroborative.

3 THE COURT: Now what was the occasion of Joseph

4 Brown telling this Karen anything?

5 MR. KNOWLES: They saw each other casually on

6 the street, and it is my understanding from the

7 statement that Joseph Brown offered Karen Hampton

8 to sell an 8-Track Panasonic radio-tape player.

9 He asked her if she wanted to buy it, and

10 then proceeded to tell - he proceeded to tell

11 her, rather, that it was one that he got from

12 shooting Mr. Marks at Carma's.

13 THE COURT: You mean he was just boasting?

14 MR. KNOWLES: I don't think it was boasting,

15 Your Honor.

16 MR. AXELSON: I think he was. Your Honor -

17 MR. KNOWLES: Would you read the statement?

18 MR. SPRINKLE: Isn't that for the jury to decide,

19 not for Judge McMurran or Wayne Sprinkle?

20 THE COURT: I just asked for the motive, if he

21 gave any. I hadn't heard any other than that.

22 MR. SPRINKLE: $100.00. Told he got $100.00.

23 MR. KNOWLES: Your Honor, the element of relia-

24 bility comes from the fact that this man made

25 a statement that so definitely implicates him

in a crime.

MR. SPRINKLE: Supported by what happened. $100.00 taken, shot with a shotgun, murdered.

MR. AXELSON: That is just as reliable as Karen Hampton being there, that she knew all those things.

MR. SPRINKLE: She didn't incriminate herself. Joseph Brown.

MR. AXELSON: Only if you believe Karen Hampton.

MR. SPRINKLE: You did. You took her to trial.

MR. AXELSON: There is no corroboration outside of what she says, and it is not reliable enough.

MR. KNOWLES: Then Detectives Gavin and Benoit and Harvey are not going to testify that $100.00 was taken, that a radio-tape player was taken?

MR. AXELSON: All that is contained in the statement itself. That is not independent corroboration. That is what the Judge is asking.

MR. KNOWLES: Is that going to be the evidence of what was taken?

MR. AXELSON: $100.00 was taken from the man by the evidence I had.

MR. KNOWLES: And a 8-Track player.

MR. AXELSON: A Panasonic, 8-Track, AM-FM radio-tape player was.

1 MR. KNOWLES: Was the man shot with a shotgun?
2 MR. AXELSON: He was shot with a shotgun.
3 MR. KNOWLES: Was he killed at the Carma's chicken
4 place?
5 MR. AXELSON: No. He died at the hospital.
6 MR. KNOWLES: Where was he shot?
7 MR. AXELSON: He was shot at Carma's Chicken.
8 There is a great deal more, but there is
9 no corroboration.
10 MR. KNOWLES: Your Honor, all we can say is that
11 on November 3, and a little less than 2 months
12 after this crime occurred, Joseph Brown, meeting
13 a friend on the street - he had no reason to lie
14 to the friend - offered for sale to her a radio
15 which he said he took from the man he shot, and
16 told her in addition that he had splattered him
17 all over the street and got only this $100.00
18 and this particular radio.
19 Now that evidence, I believe, is going to
20 be proven by the Commonwealth as what was taken
21 from the man and the means of his death.
22 I have to emphasize again that this is not
23 a witness that we went out and got. I am
24 prepared to have Karen Hampton testify she doesn't
25 know this man. She doesn't know him. He doesn't

1 know her, so certainly there is no relationship
2 between them that would foster perjury.
3 MR. AXELSON: You would have to believe Karen
4 Hampton.
5 MR. KNOWLES: It is your witness, though.
6 MR. AXELSON: Not my witness. I am not calling
7 her.
8 MR. KNOWLES: But you put her on the stand at
9 one time.
10 MR. AXELSON: And had doubts all the time.
11 MR. KNOWLES: But she testified to you, got you
12 right into the grand jury, and testified there
13 for you.
14 MR. AXELSON: As soon as we got other evidence
15 more reliable than her statement, we nol-prossed
16 the case against Joseph Brown.
17 It is clear from reading all the evidence
18 here that Joseph Brown wasn't involved. Karen
19 Hampton was trying to buy herself a little light
20 treatment by coming up and being willing to
21 testify in a murder trial.
22 MR. KNOWLES: I see you did offer that case to
23 Jim Backus when he was trying to defend the man
24 against murder.
25 MR. SPRINKLE: She says she wasn't given anything

1 for making the statement.

2 MR. KNOWLES: This is the kind of evidence the

3 jury ought to hear. If we had gone out and

4 walked the street and come up with a witness

5 that offered to make this statement, I would

6 agree with Your Honor, that maybe the lady was

7 lying, maybe has a reason to lie.

8 But this lady has told the same thing since

9 2 months after this murder-robbery occurred. I

10 didn't know the lady until about a week and a

11 half ago when we discovered the Commonwealth had

12 this evidence.

13 MR. SPRINKLE: I believe the Commonwealth

14 interviewed her. She has been telling the same

15 story to everybody.

16 MR. KNOWLES: The jury ought to hear this. If

17 they decide a convicted felon is not a reliable

18 witness, they are going to disregard what she

19 said, but it certainly tends to exculpate

20 Mr. Ellison, and it should go to the jury.

21 MR. AXELSON: Your Honor, as you pointed out,

22 there is nothing to corroborate - absolutely

23 nothing to corroborate Karen Hampton's version

24 of Joseph Brown's statement.

25 It doesn't exist. There isn't anything

1 there except what is contained in the statement
2 itself.
3 On the other hand, there is a great deal
4 of counter evidence, if you will, evidence that
5 Joseph Brown was not involved, and this is the
6 evidence that the Court is not going to allow
7 me to put before the jury.
8 THE COURT: I wonder if you put that in there
9 if you wouldn't be allowed to show. That is
10 what runs through my mind. If you come in here
11 and say that, and they are using that as a
12 statement to help clear the Defendant -
13 MR. AXELSON: Judge, I would be glad to put all
14 the rest in.
15 THE COURT: Wait a minute - whether you would
16 have a right to show that, this untruthfulness
17 of this statement, by the fact it couldn't
18 possibly have existed, and therefore this woman
19 is telling an absolute falsehood.
20 Wouldn't that be allowed to prove that
21 everything in the world - well.
22 MR. SPRINKLE: To your own knowledge, but how
23 would she know that? How would she know that
24 somebody else might have been there if she
25 wasn't told, or wasn't there?

1 THE COURT: How does anyone know that she is
2 not lying from beginning to end?
3 MR. SPRINKLE: We would never know that.
4 MR. KNOWLES: That is true of any witness.
5 MR. SPRINKLE: That is what we have a jury for.
6 THE COURT: There is nothing to corroborate it.
7 He didn't go tell anybody else that.
8 MR. SPRINKLE: We don't know, Judge.
9 THE COURT: I know, but that is all you have got.
10 That is all you know.
11 In every one of these cases, the Virginia
12 case, the party went out and told 2 other people
13 about it who were friends, etc. In the Newberry
14 case.
15 MR. SPRINKLE: I believe it is true that no one
16 had been arrested for this crime at the time he
17 made this statement to Karen Hampton. Why would
18 someone say something like that at the time when
19 they were looking for somebody who committed
20 this murder and robbery?
21 Why would somebody make a statement like
22 that? Why? If it is unreliable, I believe you
23 would get yourself in hot water. I believe the
24 fact he made the statement under those circum-
25 stances cuts toward the reliability of the

1 statement itself.

2 MR. AXELSON: There is no independent evidence

3 that he, in fact, made that statement.

4 It is not that they say you have to have

5 proof that the statement was made. In each of

6 those cases, there is clear evidence that the

7 statement was made, and you don't have that in

8 this case.

9 MR. SPRINKLE: We have a witness who says the

10 statement was made.

11 MR. AXELSON: You have nothing other than that

12 witness, and she is not a very credible witness.

13 MR. SPRINKLE: That is your judgment. It is

14 for the jury.

15 MR. AXELSON: If the issue were trying to prove

16 whether or not the statement had been made, you

17 might have some admissible evidence, but not

18 the contents of the statement. That is going

19 too far.

20 MR. KNOWLES: Diane Flythe can testify she saw

21 Karen Hampton discussing this matter with

22 Joseph Brown from across the street. Now she

23 didn't hear the substance of it, but Diane

24 Flythe has been subpoenaed, too.

25 She can testify that Karen Hampton

1 was talking to Jo-Jo Brown on the corner. Slim
2 was holding a radio in her hand.
3 We will be happy to offer that evidence.
4 That is corroborative testify. We just thought
5 it was repetitive.
6 THE COURT: Now you see, in the Hines case,
7 there was a corroboration in that a cap was
8 found near the scene of the offense, which was
9 identified as belonging to the accused.
10 It really belonged to the third party who
11 was making the statement. Don't you see there
12 are other facts here, and that the man who made
13 the statement had a pistol like the one used
14 to kill the decedent.
15 He owned a pistol exactly like it. They
16 have proved that, don't you see? And he had
17 the same opportunity and the same motive for
18 killing the deceased as the accused, and who had
19 admitted during his last illness, to others, that
20 he and not the accused had killed the deceased.
21 Now I don't know that Brown has said that
22 this man didn't do it.
23 MR. KNOWLES: No. He just said that he did.
24 THE COURT: In this case here, the man says that
25 'I did it. The other man didn't do it.'

1 This man didn't say that in this case. I
2 am talking about the Hines case.
3 MR. KNOWLES: Your Honor, we have one additional
4 piece of evidence that I just mentioned to
5 Mr. Axelson.
6 Karen Hampton was not alone when she met
7 these people on the street. A friend of hers
8 was on the other side of the street and knows
9 that she did meet with Joe Brown, that they
10 talked, and that Slim was holding a radio while
11 they were talking.
12 Now she doesn't know what was said because
13 she was on the other side of the street, but she
14 can testify that the conversation took place.
15 MR. AXELSON: All she could testify to was that
16 a conversation took place, Your Honor. There is
17 still no corroboration.
18 MR. SPRINKLE: With Joseph Brown?
19 THE COURT: See, in the Newberry case, they went
20 so far as to have a written confession, not a
21 mere statement the man may have written out
22 confessing it. A written confession by Newberry.
23 Testimony of Mrs. Price and Mrs. Combs
24 should have been given to the jury for what it
25 was worth, its credibility and weight being left

to the jury.

Of course, he went out and confessed to Mrs. Price and Mrs. Combs besides giving a written statement. He himself gave the written confession, and they admitted it.

Now -

MR. SPRINKLE: I believe in Hines and Chambers there were oral statements given, not written statements.

THE COURT: In the Hines, yeah.

MR. AXELSON: Independently given. The number tending to corroborate them, I believe is the way the court phrased it.

THE COURT: In the Chambers case, it was a Reverend Stokes that induced the man to go, and told him he would get some money out of it when he confessed.

I think there is a serious question whether they had a right to convict a man for, I believe the police officer's name in that case was Liberty.

Chambers was supposed to have shot Liberty. Several people could have done it, and when the police officer was shot, everybody went to him and didn't go to Chambers, who was also shot

in that case, and nobody investigated whether he had a gun or anything else. They just didn't do anything in the Chambers case.

I think when you analyze all the facts in that case, the facts were not strong enough really to convict that man, but the U. S. Supreme Court couldn't reverse the Supreme Court of a state on that theory, I don't think. They didn't want to do it on that theory.

MR. KNOWLES: I know at one time the Supreme Court of the United States held as the majority of states have held, that this type of evidence was not admissible.

As I understand it there is a case now by the U. S. Supreme Court that has reversed that position.

THE COURT: That is Chambers.

MR. SPRINKLE: Going back to Chambers vs Mississippi, regardless of whether you analyze that on the facts of whether the guy was innocent or guilty, on the evidence presented, they still talk about this question of exception to the hearsay rule as declaration against interest.

Go through 3 or 4 factors here. As we have said, in some we have covered a couple of

1 these factors. " First, each of McDonald's
2 confessions was made spontaneously" plus "to a
3 close acquaintance shortly after the murder
4 occurred." We are saying about the same thing
5 happened here.
6 They also say that - this is at page 300,
7 410 US 300 - "whatever may be the parameters of
8 the penal-interest rationale, each confession
9 here was in a very real sense self-incriminatory
10 and unquestionably against interest."
11 McDonald stood to benefit nothing by dis-
12 closing his role in the shooting to each of his
13 3 friends, which, as you are aware, led to
14 criminal prosecution.
15 Like I said before, no one had been arrested
16 for this crime. People were looking for people.
17 Here's a man out of a clear blue sky says he
18 did it, less than 2 months after it happened,
19 and if you want to talk about whether this is
20 trustworthy or not, I think we satisfied some of
21 these reasons that the Supreme Court of the
22 United States said look at as to whether it is
23 credible and trustworthy.
24 I still protest that we are reading in these
25 the fact you have to bring in corroborative
evidence. The Supreme Court of the United States

1 doesn't say. None of these say that directly,
2 as a whole, reading that case. I read you what
3 it said.
4 THE COURT: These other things are persuasive
5 assurances. He uses that language.
6 MR. SPRINKLE: That is exactly what the Supreme
7 Court- as you know, that is exactly what the
8 Supreme Court is doing in Virginia in Hines and
9 Newberry.
10 It is just making what to put on there, to
11 show everybody else the decision they made, the
12 ruling they made was right, and that is what
13 they want to follow; just to assure themselves
14 and the lawyers and the judges, but the rule, I
15 still maintain, in Hines and Newberry, whether
16 you say it goes to the facts in the case or not,
17 it is more than that.
18 It is a principle laid down in Virginia and
19 other people have analyzed these and come to
20 different conclusions, and apparently what the
21 feeling is around this table at this moment,
22 a recommendation in Virginia that when you
23 have a third-party admission against interests,
24 criminal interest, that statement can be used
25 to exonerate the defendant.
Nothing there says you have to bring in

1 independent evidence to support that third-
2 party's statement. Nothing in those cases that
3 he is directly saying that.
4 THE COURT: But that is the universal rule
5 except in these cases. You know that. It is
6 the universal rule.
7 MR. SPRINKLE: I said the Supreme Court in Hines
8 already addressed that, said unfortunately you
9 have people who perjure themselves, but this is
10 a circumstance where it is a high crime, and a
11 person comes in and says he did it. It is
12 exculpatory evidence on its face and should be
13 used regardless of the circumstances, and the
14 check there is the jury.
15 The jury can say for what it is worth,
16 whether we believe Karen Hampton, Charles
17 Ellison, or who we believe.
18 It is not the Judge, the Commonwealth's
19 Attorney, or defense attorneys. I believe it
20 is exculpatory, ought to be presented to the
21 trier of fact. I think we are putting too
22 restrictive a reading on these cases.
23 We don't want perjured evidence to go to
24 the jury, don't want to mix up their rulings.
25 There is an interest there, but there is evidence

there. They should have a constitutional right to all the evidence.

THE COURT: You want reliable evidence, not necessarily that you don't know whether it is reliable or not.

MR. KNOWLES: Mr. Axelson is certainly going to argue that, Your Honor, in his closing argument. I could assure you right now that he is going to jump all over there, that there is no corroborating factors. He is going to make that known to the jury.

THE COURT: Overall reliability is a question for the trier of fact.

MR. AXELSON: I can't put on all the facts that indicate Joseph Brown's statement is unreliable.

MR. KNOWLES: The Defendant has the constitutional guarantee.

MR. AXELSON: The Defendant is guaranteed to a fair trial. So is the Commonwealth.

THE COURT: Of course, I haven't heard really. This has all been argument around here. I haven't heard what actually the evidence would be that you are attempting to proffer.

MR. KNOWLES: This is it, Your Honor. (Hands sheet of paper to the Court.)

MR. AXELSON: What is this you are handing?

1 MR. AXELSON: What is this you are handing?
2 MR. KNOWLES: This is the statement of Karen
3 Hampton.
4 MR. AXELSON: The Judge has a copy of that
5 statement as a part of everything that I put in.
6 Judge, I believe I gave you a copy of that.
7 THE COURT: I don't think I had that.
8 MR. AXELSON: I think it was a part of that.
9 THE COURT: Maybe it is. Here it is. (Reads.)
10 What was the date of the murder?
11 MR. AXELSON: September 10.
12 MR. SPRINKLE: 1976.
13 MR. KNOWLES: Did she handwrite that statement,
14 or do you know?
15 MR. AXELSON: I don't know right offhand.
16 Your Honor, -
17 THE COURT: Yes, sir.
18 MR. AXELSON: We have argued here, and is it
19 the Court's ruling that that statement is to be
20 inadmissible in the trial here?
21 THE COURT: That is what I am trying to get at
22 now, to make up my mind about it.
23 Without anything else other than the mere
24 statement itself, the bare statement without any
25 other evidence to corroborate anything in there,

I will sustain the objection to it.

MR. KNOWLES: Your Honor, can we -

THE COURT: Anything to show reliability in the statement.

MR. KNOWLES: For the record, can we summarize for the Court what we would offer as corroborative?

THE COURT: Have you got the woman?

MR. KNOWLES: Yes, sir.

THE COURT: If you want to vouch for the record, I think you had better do it with her.

MR. SPRINKLE: Do I understand you to say that your ruling is that without any evidence outside of the statement to support it, then it is inadmissible in this case?

THE COURT: Well, I don't think that there is proof of any reliability to it.

MR. SPRINKLE: What if the evidence shows during the trial $100.00 was taken, this particular stereo was taken, and this man was killed with a shotgun? Is that enough to let this statement in?

THE COURT: I don't think so.

MR. SPRINKLE: You don't think so?

THE COURT: No.

MR. SPRINKLE: We certainly respectfully object.

THE COURT: I think I would like to show, if you want to vouch for the record, what you intended to prove.

You have to do that. Otherwise, it wouldn't amount to anything.

MR. KNOWLES: We have another motion. We have motions to last as long as that one right there.

THE COURT: What other motions?

MR. KNOWLES: Your Honor, he is going to offer, of course, the tape recording, and I think the tape recording ought to be authenticated now, in chambers, rather than having that done before the jury.

The jury is all wired with earphones and everything.

MR. AXELSON: Judge, I will be happy to put the evidence on.

THE COURT: Let's open court and tell them we are winding up a few details.

* * * * * * *

(In open court.)

DEPUTY SHERIFF: The jury has been called.

THE COURT: Ladies and gentlemen, we will get underway in a few moments. We have been on

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see somebody in the room, don't go and talk to them; in the restaurant, I mean; anywhere. Do not, because you all are not to talk to anybody, and you are not to discuss among yourselves the case yet, because you haven't heard enough to discuss it, so I want you to keep it - just make no discussion.

If anybody sitting near you says anything about the case, you get the Sergeant to go and tell those people to shut up and not talk about it. He will go over and do it.

I don't want you all to be influenced by anything that you hear outside of the courtroom. In other words, we want you to hear the evidence here, and not from some other source.

Go in the jury room until they can get the machine here to take you.

* * * * * * *

(Court reconvened after luncheon recess.)

BETTY SOUTHALL, witness having first been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. AXELSON:

Q Would you state your full name, please.

A Betty Southall.

Q Mrs. Southall, in September of 1976, where were you working?

A At Carma's Chicken.

Q Where is that located?

A On Elm Avenue.

Q In the City of Portsmouth?

A Yes.

Q (Photo shown to defense.)

Is this the business that you worked at?

A Yes.

MR. AXELSON: Your Honor, the Commonwealth would move to introduce the photograph of Carma's Chicken as Commonwealth's Exhibit #1.

MR. SPRINKLE: No objection, Judge.

THE COURT: "Commonwealth's Exhibit #1."

MR. AXELSON:

Q Could you tell the members of the jury some of the other people that worked there, please, at that time?

A That night?

Q Yes, ma'am.

A Mr. Marks and I was working.

Q Do you know his full name?

A Mr. Ernest Marks.

Q Mr. Ernest Marks?

(Photo shown to defense.)

Q Now, can you identify the person shown in this photograph?

A That is Mr. Marks.

Q This is Mr. Marks?

MR. AXELSON: Your Honor, the Commonwealth would move to introduce the photograph of Mr. Ernest P. Marks in evidence.

THE COURT: "Commonwealth's Exhibit #2."

MR. AXELSON:

Q Mrs. Southall, were you working there on the evening of September 9 and the morning of September 10?

A Yes.

Q What time did Carma's Chicken close up?

A It was about a few minutes after 12:00.

Q All right. Did you leave at 12:00?

A Yes. It was a few minutes after we left, because we have to clean up. Sometime we leave about -

Q Who is the we you are referring to?

A Mr. Marks.

Q And yourself?

A Yes.

1 Q Tell the members of the jury what happened
2 as you were cleaning up and as you left on that evening.
3 A After I left, I went out - I went out the
4 door, and Mr. Marks went out to his car. I usually go
5 pick up my children at my mother's house. That is about
6 2 blocks from Carma's place.
7 I got a half block from Carma's Chicken,
8 and I heard Mr. Marks arguing with 3 people, and I turned
9 around and they were struggling with Mr. Marks.
10 Q Who was struggling with Mr. Marks?
11 A The 3 men were struggling with Mr. Marks.
12 Q 3 men?
13 A Yes.
14 Q Were they black men or white men?
15 A It seemed they were black. It was dark
16 outside, and so while I was walking towards my mother's
17 house, I heard some shooting.
18 Then I ran to my mother's house. Then I
19 called the police.
20 Q All right. Were you able to see who these
21 men were?
22 A No.
23 Q Did you call the police?
24 A Yes.
25 Q All right. Have you seen Mr. Marks alive

since that day?

A No.

Q Did you look back after you heard the shooting?

A No.

MR. AXELSON: Your witness.

CROSS EXAMINATION

EXAMINED BY MR. KNOWLES:

Q Mrs. Southall, do you know a man by the name of Joseph Brown?

A Yes.

Q Did he come to Carma's Chicken? Has he been there to purchase chicken at all in the past?

MR. AXELSON: Your Honor, I object to this line of questioning. I would like to approach the bench on it, if we may.

(Counsel approach the bench.)

MR. KNOWLES:

Q So you do know a man by the name of Joseph Brown?

A Yes.

Q Has he ever been up to Carma's that you are aware?

A Yes, he has been there.

Q Okay. Has he ever had any problems with Mr. Marks at Carma's?

A No.

Q Okay. Do you know a lady by the name of Karen Hampton?

A No.

Q How about Diane Flythe?

A No, not as I know of. Not by that name.

MR. KNOWLES: That is all, Mrs. Southall.

* * * * * * *

HINTON B. HOFLER, witness
having first been duly sworn,
was called to the witness
stand and upon being examined,
testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. AXELSON:

Q Would you state your full name, please, sir?

A Hinton B. Hofler.

Q Where do you work, Mr. Hofler?

A 620 Elm Avenue, Carma's Chicken.

Q Were you working there in September of 1976?

A Yes, sir.

Q And did you know Mr. Ernest P. Marks?

A Yes, sir.

Q Mr. Hofler, I am going to show you a photograph which has been introduced as "Commonwealth's Exhibit

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for him.

THE COURT: You may step aside.

* * * * * * *

CAROLYN P. SIMMONS, witness
having first been duly sworn,
was called to the witness
stand and upon being examined,
testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. AXELSON:

Q Would you state your full name, please?

A Officer Carolyn P. Simmons.

Q What is your connection with the Portsmouth Police Department?

A I am in Uniformed Patrol Division, assigned to A Watch Division.

Q Were you working the evening of September 9 and the morning of September 10?

A Yes, I was.

Q Did you receive a call to go to the corner of County and Elm Street?

MR. KNOWLES: Your Honor, I object to Mr. Axelson leading the witness.

THE COURT: Well, -

MR. AXELSON: Your Honor, Mr. Knowles' objection

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THE COURT: They said they could see it.

JURORS: We can't hear very well.

MR. AXELSON: Lean forward and speak into the microphone. Say something, testing.

Can you all hear that now?

THE COURT: Count one, two, three, four.

Can you all hear?

(Affirmative.)

MR. AXELSON:

All right. I show you "Commonwealth's Exhibit #2." Is this the photograph of the man you found there?

A Yes, sir, it is.

Q What condition was Mr. Marks in?

A As I said, Mr. Marks was in a crouched position around the stoop. He was bleeding profusely from what appeared to be a gunshot wound approximately 1 1/2 inches in diameter, and it would be in the extreme upper cavity of the abdomen.

Q Would you stand up and point out to the jury where you are talking about?

A (Stands up and indicates.)

Q Did you question Mr. Marks as to how he came to receive these injuries?

A Yes, sir, I did.

Q What did you say to him?

A I asked him who did this to him. He said 3 black males.

I asked him had he been robbed. He said yes.

I asked him did he know who shot him. He said no.

I asked him had he ever seen them before? He said yes.

I asked him which way did they go. He said toward Ida Barbour.

Mr. Marks was going into shock. As I said, he was bleeding profusely, and the ambulance arrived shortly thereafter and transported him to the hospital.

Q Did you ask him any further questions than that?

A Asked him what they were wearing, and he said he didn't know.

Q Do you know what time this all occurred?

A Yes, sir. I received the call at 12 minutes past - correction - 2 minutes past 12:00. I arrived there at 3 minutes past 12:00. AM.

Q So that would be 3 minutes into September 10?

A Yes, sir, it was.

Q And this location was in the City of Portsmouth?

A Yes, sir, it was.

MR. AXELSON: Your witness, gentlemen.

MR. KNOWLES: We have no questions, Your Honor.

* * * * * * *

DR. CHARLES O. BARCLAY, JR.,
witness having first been duly
sworn, was called to the
witness stand and upon being
examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. AXELSON:

Q Would you state your full name and occupation, please, sir?

A Dr. Charles O. Barclay, Jr. I am a physician.

Q You are also a Medical Examiner? Deputy Medical Examiner for the City of Portsmouth?

A I am a Medical Examiner for the cities of Portsmouth and Chesapeake.

Q In your capacity as Medical Examiner, Dr. Barclay, did you examine an Ernest P. Marks on the 10th day of September, 1976?

A Yes, sir, I examined him in the hall of the Portsmouth General Hospital at 5:42 AM on September 10, 1976.

Q Now, Dr. Barclay, does this photograph,

which is marked as "Commonwealth's Exhibit #2," is that the man you examined on that date?

A Yes, sir.

MR. KNOWLES: Your Honor, may we approach the bench for just a second, please?

THE COURT: Yes, sir.

(Counsel approach the bench.)

THE COURT: Well, I overrule your objection.

MR. AXELSON:

Q Dr. Barclay, could you describe the condition of Mr. Marks, especially the condition of his body at the time you examined him, please?

A He was dead at the time I saw him. There was a wound 3 inches above and 4 inches to the left of his navel that had been abraded and elongated by surgical procedures.

Q What does that mean?

A The wound had been partly removed and elongated by the surgeons that had attempted to operate on him.

Q All right. What else did you find?

A It was obvious it was a gunshot wound of his abdomen.

Q Were you able to determine what sort of a gunshot caused it?

A It was a shotgun type of wound.

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ALAN R. HARVEY, witness having first been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. AXELSON:

Q Detective, would you state your full name and connection with the Portsmouth Police Department for the members of the jury, please?

A Alan R. Harvey, Detective assigned to the Homicide and Robbery Squad, Portsmouth Police Department.

Q Were you so assigned in September of 1976?

A Yes, I was.

Q Specifically, on September 10 of 1976?

A Yes, sir.

Q All right. Did you respond to a call during the early morning hours of that date?

A Yes, sir.

Q Where did you go?

A We were dispatched to the - well, actually, we were dispatched to Portsmouth General Hospital in reference to a shooting that had occurred at Carma's Chicken in the 600 Block of Elm Avenue.

Q When you say we, who are you referring to?

A Detective Milo Gavin and myself.

Q Your partner?

A Yes, sir.

Q What time did you arrive at Portsmouth General?

A Within approximately 10 minutes after midnight. It would have been on the 10th.

Q When was the first time that you saw Ernest P. Marks?

A It would have been at that time, in the emergency room at Portsmouth General.

Q Now, this is the man that you saw in the emergency room on that date?

A Yes, sir, it is.

MR. AXELSON: Your Honor, for the record, he is referring to "Commonwealth's Exhibit #2."

Q Detective Harvey, were you able to have any conversation with Mr. Marks?

A Yes, but just very briefly.

Q What questions were asked him at that time?

A We were attempting to find out if he could identify anyone of the suspects involved, and at that point, he said no. He could only say that 3 black males robbed him outside of the Carma's Chicken, and that they had taken his wallet, personal papers, and approximately

$100.00 in cash that was in the wallet, and his radio.

He also indicated that 3 black males ran in the direction of Ida Barbour after the shooting had taken place.

MR. AXELSON: Your witness.

CROSS EXAMINATION

EXAMINED BY MR. KNOWLES:

Q Detective Harvey, did you testify some credit cards were taken?

A No. He indicated personal papers. At the time we talked to him, he didn't specifically say credit cards had been taken. Just personal papers, items that would have been in his wallet.

Q Did he describe to you the radio that was taken?

A No. The description of the radio came from his family in a later part of our investigation.

Q Do you have that description?

A Yes. It was a Panasonic radio. It was a 8-track player, also. Portable radio.

Q Do you have a photograph of that radio in your files?

A I have a photograph of one similar to the one he supposedly had. What we did was we went to the pawn shops and checked, you know, during our investigation,

and checked for all the radios that had been pawned that would have fit the general information we had, general description, and we found a couple that we thought would fit, and we took those back to Mr. Marks's son, and he identified the photographs as being, you know, looking similar to the radio that belonged to his father, and of course, neither one of the radios we recovered were, in fact, Mr. Marks' radio, but they were similar, according to his son.

Q Okay. Did you conduct any investigation at the scene of the crime itself?

A Later. Approximately 2:00 o'clock in the morning, Detective Gavin and myself and Detective Stegall went back to the scene, and we searched the immediate area of the crime scene and all through Ida Barbour, hoping to find something they may have dropped or something, but we had no luck.

Q You didn't discover any fingerprints at the scene?

A Well, Detective Stegall is our evidence technician. If any were discovered, he would have to testify to that.

Q Would he have been the one who conducted that type of investigation, that aspect of it?

A Yes, sir.

Q And approximately $100.00 was taken, is that what you testified to?

A Yes, according to what Mr. Marks related to us.

MR. KNOWLES: We have no further questions. Thank you, very much.

MR. AXELSON: Call Mrs. Ernest P. Marks.

MR. KNOWLES: Your Honor, we would ask that Detective Harvey stay around the court in case we need him later.

* * * * * * *

NANNIE E. MARKS, witness having first been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. AXELSON:

Q Mrs. Marks, would you state your full name, please?

A Nannie E. Marks.

Q And, Mrs. Marks, in September of last year, 1976, you were married to Mr. Ernest P. Marks, were you not?

A That is right.

1 Q Mrs. Marks, this is a photograph of your
2 husband, is it not?
3 A That is true.
4 MR. AXELSON: Your Honor, for the record, she is
5 referring to "Commonwealth's Exhibit #2."
6 Q Mrs. Marks, did your husband have any credit
7 accounts at the time, the night that he was killed?
8 A He had the credit card of the Bank of
9 Americard, and GEX.
10 Q Where did he carry these cards, Mrs. Marks?
11 A In his wallet.
12 Q Now, are these his credit cards, Mrs. Marks?
13 A They sure are.
14 Q Is that his signature that appears on them?
15 A That is his signature.
16 Q And on the back of this GEX card, whose
17 signature appears on the back of that?
18 A That is mine.
19 Q There is some tape down here because it is
20 broken; but that is your signature?
21 A Yes, sir.
22 Q (Shown to defense.)
23 MR. AXELSON: Your Honor, the Commonwealth would
24 move to introduce Mrs. Marks' credit cards.
25 MR. SPRINKLE: No objection.

THE COURT: "Commonwealth's Exhibit #5." I will put them in an envelope. Put them together, and put them in an envelope.

MR. AXELSON:

Q Mrs. Marks, where did your husband carry his credit cards?

A In his wallet.

MR. AXELSON: Mr. Knowles?

CROSS EXAMINATION

EXAMINED BY MR. KNOWLES:

Q Only one question. Mrs. Marks, did your husband carry with him a Panasonic 8-track radio-tape player?

A He sure did. He took it every day to work.

MR. KNOWLES: No further questions from Mrs. Marks.

Thank you, very much.

THE COURT: Mrs. Marks, may I ask you how old he was?

A How old was he? He was 59 years old.

THE COURT: That is all.

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MR. AXELSON: Special Agent Morris Smith.

Your Honor, the Commonwealth has no further objections if Mrs. Marks remains in the courtroom.

THE COURT: If she wants to stay here, she may. You can do as you see fit. Stay or go, either way.

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MORRIS N. SMITH, witness having first been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. AXELSON:

Q Would you state your full name, please, sir?

A Yes, sir. My name is Morris N. Smith.

Q By whom are you employed?

A I am a Special Agent with the Federal Bureau of Investigation.

Q FBI?

A Yes, sir.

Q Were you so employed in September of 1976? And November of 1976?

A Yes, sir, I was.

Q What were you doing for the FBI at that time?

A From approximately March of '76 to January 14, of '77, I worked in an undercover capacity in Operation Seawall.

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Q All right. During the course of Operation Seawall, what was your appearance like, Special Agent Smith?

A I had an Afro and a beard. I had lived in this area for about 3 1/2 years, and as a result of that, I did have to change my appearance.

Q So you did not look, and do not look - or did not look as you do now?

A No, sir.

Q Special Agent Smith, I show you 3 credit cards marked "Commonwealth's Exhibit #5," and ask you if you are familiar with these? If you have seen them before today?

A Yes, sir, I have.

Q When was the first time you came into contact with those credit cards?

A I will get the date here. It was on November 16. I purchased these credit cards at our second location on Shore Drive in Norfolk.

Q Who did you buy the cards from?

A I actually made the buy from an individual I knew as Slim at that time. His true name was Edward Lee Davis.

Q Who else was present when the buy was made?

A On that day, Curtis Moore from Portsmouth,

1 Edward Lee Davis, Michael Roberts, and a new individual
2 that we had never met prior to that time, by the name of
3 Marcus Joyner, came to our location.
4 The purpose was not to make any buys, but
5 to show them where that operation was located so we could
6 do business with them in the future; and Edward Lee Davis
7 just pulled these credit cards up and stated he had been
8 holding them for 2 or 3 months, that he would like to sell
9 them.
10 Q All right. Did Michael Roberts have a nick-
11 name? Was he known to you by a nickname?
12 A Yes, sir.
13 Q What was the nickname?
14 A His nickname was Charles and Charles B. And
15 it wasn't until, in fact, November 16 that we got his true
16 name, as well as Edward Lee Davis's true name.
17 Q What name had Curtis Lee Moore gone by?
18 A His true name.
19 Q Curtis?
20 A Yes, sir.
21 Q Did you see Curtis and Charles or Michael
22 Roberts at a later date?
23 A Yes, I did. I saw them on the 9th of
24 December, and again on the 10th of December.
25 Q Who was with Charles and Curtis on the 10th

1 of December?

2 A An individual they brought to us, who is

3 seated at that table. We were introduced as Charlie Red.

4 Charles Lewis Ellison.

5 Q Are you referring to the Defendant?

6 A Yes, sir, I am.

7 Q Where were you when you met with these

8 3 individuals on the 10th of December?

9 A We were at Agent Don Stenham's apartment.

10 We both used the apartment on numerous occasions. It was

11 3849 Flowerfield Road, Apartment C.

12 Q In the City of Norfolk, I believe?

13 A Yes, sir.

14 Q Was there a recording device in the apartment?

15 A Yes, sir, which had, I think it was a 3 or

16 4-hour tape that was secured inside a bar which separated,

17 more or less, the kitchen from the living room.

18 Q Was the conversation that you had that

19 evening taped?

20 A Yes, sir, it was.

21 Q Approximately how long did the conversation

22 last?

23 A I think on the 10th it was slightly under

24 3 hours. I think the evening before it was a little over.

25 Q All right, Special Agent Smith, would you

1 describe the language that was used during the course of
2 this evening?
3 A Yes, sir. The part that we played in posing
4 as criminals ourselves -
5 MR. KNOWLES: Your Honor, if we may - I hate to
6 interrupt the officer's testimony, but it seems
7 to me that if the ladies and gentlemen of the
8 juary, and the rest of us, are going to hear the
9 tape, that the language on the tape would speak
10 for itself, that it doesn't need explanation.
11 MR. AXELSON: Your Honor, it is perfectly proper
12 to ask him about the language that is going to
13 be used.
14 We are going to offer the tape any minute
15 now.
16 MR. KNOWLES: Well, I think the tape can speak
17 for itself, Your Honor.
18 THE COURT: I overrule your objection. There's
19 no objection to it.
20 MR. KNOWLES: Please note our exception, if you
21 will.
22 A The language is very vulgar in the tape.
23 In fact, every transaction, whether it was a buy at our
24 store front, whether we were out at a bar at night, or
25 whether it was tape recorded from that apartment, we

1 played the part of a hood.

2 We lived the parts, and we felt to be

3 accepted, you had to get right down in the dirt. You had

4 to act like an animal, and the language is going to be

5 very crude.

6 MR. AXELSON:

7 Q When you say we, who are you referring to?

8 A Agent Stenham and myself.

9 Q He was also present that evening?

10 A Yes, sir.

11 THE COURT: What was his last name, sir?

12 A Stenham. S-t-e-n-h-a-m.

13 MR. AXELSON:

14 Q Special Agent Smith, can you identify this

15 cassette?

16 A Yes, sir, I can.

17 Q Have you played the material, listened to

18 the material that is on that cassette?

19 A Yes, sir, I have.

20 Q Does that represent a portion of the con-

21 versation that took place that evening?

22 A Yes, sir, it does. It is an excerpt from

23 the lengthy tape that we made.

24 Q Is it an accurate representation of the

25 conversation as it occurred on the evening of December 10,

1976?

A Yes, sir, it is verbatim.

MR. AXELSON: Your Honor, the Commonwealth would move to introduce the tape in evidence.

THE COURT: That is an original, isn't it? It is an abridgement of what actually was taken, not the whole tape?

A No, sir. Excerpts that were taken from the entire tape.

MR. KNOWLES: Your Honor, as we noted when we began the afternoon sessions, there are certain questions about that tape that we would like to discuss with Your Honor.

THE COURT: I think you have a right to ask them, and put it in the record.

MR. AXELSON: Your Honor, are we going to take this up out of the presence of the jury?

MR. KNOWLES: It involves certain portions of the tape. I think it involves sitting down and listening to it so we can identify to the Court those portions we feel are objectionable.

THE COURT: Do you want to - you mean you want to take it up in the -

MR. KNOWLES: Yes, sir. There is a player back there. We would like to identify those portions

that we feel need the Court's ruling.

THE COURT: Of course, I don't know what they are. He says it is -

Well, we can take it up. I understood him to say that that accurately reflected -

MR. AXELSON: That is correct, Your Honor.

THE COURT: - something that was taken off the 3-hour tape.

A Yes, sir, Your Honor.

Q In other words, you played the 3-hour tape and recorded a part of it?

A (Nods.)

Q And that is a part that came off that 3-hour tape. Isn't that what I understood you to say?

A Yes, sir.

THE COURT: Are there some parts of that that you have some objections to?

MR. KNOWLES: Yes, sir.

THE COURT: Well, I haven't heard them. I don't know. Maybe we will have to hear them in the conference room.

MR. KNOWLES: Yes, sir.

THE COURT: All right, sir.

(Present in chambers: The Court, the Defendant, Messrs. Axelson, Knowles, and Sprinkle,

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at a later time.

THE COURT: Do you all have any objection to that?

MR. SPRINKLE: Judge, he told us this morning he has heard the thing 8 times. I don't know why he has to hear it again. He can testify from his own recollection.

The witnesses were excluded. We moved to separate the witnesses. He has heard the tape 8 times.

THE COURT: I don't want to run into any difficulty, as you well know what the Supreme Court has done with that.

MR. KNOWLES: That is fine, Your Honor.

THE COURT: Let the record show -

MR. SPRINKLE: He states he can hear what is going on.

THE COURT: I want the record to show that.

MR. AXELSON: There should be a slight hiss right now. Can everyone hear a slight hiss?

(Jurors shaking heads at first; then nodding.)

(Tape is played through.)

MR. AXELSON: All right, Your Honor, I have some additional questions for the witness.

Your Honor, I am going to move a chair up here (referring to what was formerly the desk

provided for probation officers when they attended trials). It is a little bit easier for me.

MR. AXELSON:

Q Special Agent Smith, is that the conversation as it occurred - is that the portions as they occurred on the evening of December 10, 1976?

A Yes, it is.

MR. AXELSON: All right, Your Honor, I am going to begin playing the tape again. I am going to stop at various points and ask Special Agent Stenham to identify the speakers.

A Smith.

MR. AXELSON: Excuse me. Special Agent Smith.

MR. SPRINKLE: Just a minute. Do you have the transcript in front of you?

A Yes, I do.

MR. SPRINKLE: I don't think he ought to have the transcript in front of him if he is going to identify voices.

If he is going to identify voices, he ought to have it after the tape, just like the jury, not what is typed.

MR. AXELSON:

Q Did you yourself prepare the original of that transcript?

A Yes, I did.

Q From listening to the tape?

A Yes.

MR. AXELSON: Your Honor, he is referring to notes that he himself made. I think it is proper.

MR. SPRINKLE: He can refresh his memory, but not have the whole statement there.

THE COURT: I thought he had been over all this carefully before, had he not?

MR. SPRINKLE: I believe he said this morning -

Q You listened to the tape 8 times?

A At least.

MR. SPRINKLE: I am sure with that many times, he can identify the voices off the tape just like the jury has to, or anyone else has to.

THE COURT: He can use his notes over the tape.

(Tape is being run a second time:

JOE: Red, how you doin?

RED: Huh?

JOE: How you doin?)

MR. AXELSON:

Q Who was that first voice?

A I didn't pick that out.

(That portion of the tape was rerun.)

That was myself, "how you doin?"

1 Q Who were you speaking to?

2 A I was speaking to Charlie Red.

3 Q The Defendant?

4 A Yes, sir.

5 (Tape:

6 LUCKY: Ya got problems I understand.)

7 Q Who was that?

8 A That was Agent Don Stenham.

9 Q Also with the FBI?

10 A Yes, sir.

11 (Tape:

12 RED: Yeah.

13 LUCKY: Well maybe we can help you out.

14 JOE: What do you want, to get out of the area?

15 RED: Yeah.

16 JOE: Where you wanna go?

17 RED: Anywhere.)

18 Q Whose voice is answering those questions?

19 A That is Charlie Red. Charles L. Ellison.

20 I am having trouble. I will just put them

21 both on.

22 Q Can you hear my questions with that?

23 A Yes.

24 (Tape:

25 JOE: Where you wanna go?

RED: Anywhere.

LUCKY: What's your choice, what's your preference?

RED: Huh?

LUCKY: We didn't make any plans for ya, we wanted to talk to ya first.

RED: Right.

LUCKY: You don't know us.

RED: Right.

LUCKY: We don't know you.

RED: Right.

LUCKY: Did you talk to your boys?

RED: No.

LUCKY: Talking about our little talk last night?

RED: (inaudible) did what.

LUCKY: Have you talked with Curtis and. . .

JOE: Charles.

LUCKY: . . .Charles about what we talked about last night?

RED: No.)

Q Who was present while this conversation was going on?

A Agent Stenham, myself, Charlie Red, Curtis Moore, and Michael Roberts.

Q And who is the Charles that is referred to?

A That is Michael Roberts.

(Tape: " - talked about last night?

RED: No.

JOE: You didn't tell him we were. . .

RED: Right.

LUCKY: We we got we got a little something going, alright.

JOE: Yeah, see, you kinda fucked up our plans here. we planned on using you around here now, you know.

LUCKY: Had a hell of a job for you.

JOE: Yeah.

LUCKY: We been doing business with Charles and Curtis and Slim rest of um, quite awhile. Gotta little something going here. We got something going in Portsmouth. Gonna get something going in Portsmouth. Curtis, Slim, Charles are gonna run the place. We needed a fourth man...for a couple of reasons. And...

JOE: Well that's out of the picture now.

LUCKY: Uh, you came highly recommended. Now we're not, we got people up north we ship all our shit to, alright. We got contacts up there that are pretty good. We got contacts in D. C. that are pretty good. I gotta call today 'bout you from Curtis, said you in a little bit of trouble.

1 Nothing real serious but nothing that can't be
2 takin care of but...
3 RED: Right.
4 LUCKY: You're a little bit too warm now to...
5 JOE: To stay in Portsmouth.
6 LUCKY: ...For working as a fucking alter boy
7 at the church right?
8 RED: Right.
9 LUCKY: So I made a couple of phone calls in view
10 of the fact if you're interested, if your not
11 interested, fuck it, I'll...
12 RED: 'm interested
13 LUCKY: We can use you, we can use you, we'll put
14 you to work. But you can't do it now what we
15 talked about last night with this situation
16 changing, but uh, we can make the proper calls,
17 we don't know where the fuck you wanna go. I
18 got good contacts. I said I, Joe and I, I can get
19 good contacts in D. C. good contacts in New York.
20 Wanna go somewhere else, it's gonna take...
21 JOE: Jersey, Baltimore, really anywhere, but...
22 LUCKY: Depending where you wanna go. You can't
23 do it...
24 RED: I'm I'm ready to go to California.)
25 Q Who was that that just responded there?

1 A That was Charlie Red. He said he would
2 like to go to California.
3 (Tape:
4 LUCKY: California.
5 RED: Yeah see uh.
6 LUCKY: Well, I'll tell ya, another reason we
7 didn't do anything, number one we didn't talk to
8 ya, wanted to talk to you first. Two, you're so
9 fucking hot right now I'm afraid to make any move
10 at all because you can't take a bus, you can't
11 take a fucking plane, cause they got them staked
12 out. I know they do, you know they do, but, see
13 the difference is this. I been in your shoes,
14 right, so I can sympathize with ya.
15 RED: Right.
16 LUCKY: I know what the fuck you're going through,
17 know what the fuck's going through your head and
18 I know what your stomach feels like, it's like
19 in fucking knots, right? You're running; you
20 don't know who the fuck you can trust.
21 RED: Right.
22 LUCKY: However, you're not dealing with the
23 fucking locals, you're dealing with the Feds.
24 RED: Right.
25 LUCKY: That's the problems you got because they

1 got fucking outlets all over this fucking country.
2 They got they work twenty-four hours a day; they
3 don't give a fuck about time, so we can't move
4 tonight.
5 JOE: Are you pretty safe where you're staying
6 right now?
7 RED: Yeah, I was safe you know, I was at a friend
8 of mine house, I'll be safe there.
9 LUCKY: You're sure you're safe?
10 RED: Friend of mine (inaudible)
11 LUCKY: See, here's the reason we didn't pick you
12 up.
13 RED: Huh.
14 LUCKY: Joe went through the area today, alright.
15 RED: Uh.
16 LUCKY: Which we we're careful gotta be careful.
17 RED: Right.
18 JOE: Shit I wouldn't taken him back over there
19 last night if I'd a know, I didn't know a fucking
20 bank got robbed...
21 LUCKY: That's the problem, that's the problem...
22 JOE: You know. (Inaudible)
23 LUCKY: That's the problem, they got the fucking
24 state, they got the G, they got got the Feds,
25 they got the fucking local. See a white man in

1 that area picking up a couple colored dudes,
2 brother, they gonna nail ya.
3 RED: Yeah.
4 LUCKY: We're thinking of you as well as us.
5 RED: Yeah.
6 LUCKY: From practical views, uh, I got a couple
7 of suggestions, you can take um if you want, I
8 don't give a fuck, I'm not telling you what to
9 do, we'll...
10 RED: Right.
11 LUCKY: ...I'm not telling you nothing. I'm just
12 giving, I'm just throwing out suggestions, you
13 don't like um, say fuck you Lucky, I don't like
14 what you're saying, and I won't say no more, the
15 fuck (Inaudible) right? Only suggestion I'm
16 gonna give you, there again, you disagree or you
17 disagree you fucking tell me. Alright, just stay
18 out of Portsmouth. That's where they're looking
19 for ya.
20 RED: Right.
21 LUCKY: Alright, you wanna take a place around
22 here around the ocean. Go somewhere else where
23 you can be safe, give me your number, let me know
24 where you gonna be when I can get you outta town
25 safe cause Joe come up with a good idea; if you

1 don't like it, fuck it, tell us.

2 JOE: Well California could come a little later,

3 but...

4 LUCKY: (inaudible) California.

5 JOE: But the thing is we run car carriers out

6 here with cars when we get six, eight, twelve,

7 fifteen, we will...

8 RED: (inaudible) D. C. would be alright.

9 JOE: ...give you a ride.

10 RED: D. C. Be alright.

11 LUCKY: D. C. be alright?

12 RED: Yeah.

13 LUCKY: When we got a load to D. C. coming?

14 JOE: We'll have some going out next week which

15 will be better than moving now.

16 RED: Right.

17 JOE: Cause ain't nobody's gonna stop a truck

18 car carriers, they're not gonna do it. That's

19 better than getting on a bus or on a plane all

20 this shit.

21 RED: Right.

22 LUCKY: Alright. Let me lay it out on ya, alright?

23 First of all, the (inaudible) you wanna work for

24 us right?

25 RED: Mmm.

LUCKY: Number two you wanna get out'a town?

RED: Right.

LUCKY: We'll get you out'a town. You stay... stay cool. Three - three maybe four days. We'll get ya out. We'll get ya out, but you gotta get when it's safe. Number three, we told you guys last night. Ah, look, you're a friend of theirs, you're a friend of ours. I feel like you're confidin' and trustin' in . . . What the fuck you got more to lose than I do. Put me in the trick bag, I'll put you in the trick bag. Alright?

RED: Yeah.

JOE: They can't put us in the trick bag, we ain't we ain't done anything. We're sitting here . . . in in uh apartment. . .

LUCKY: If ya work for us, there's certain times which happen, that happen to us. Where some people need to be talked to a little more.

RED: Yeah.

LUCKY: Alright? And, how far you willing to go for this (inaudible) . . Uh, how far you willing to go if the opportunity comes up where you gotta shit or get off the pot?

RED: (Inaudible) down there, you know.

JOE: See somebody last night and, you know,

without sayin' who, it had to be somebody where you said you had to, what, icewater in your veins. All right. That's good if you got it. That's real good. You know? You're pretty cool or you wouldn't be sittin' there like you are.

?? : (Inaudible) . . . cool?

JOE: (Inaudible) talkin' about Portsmouth.

LUCKY: Well, we'll run into the same problems no matter where we go.

CURTIS: Yeah.

LUCKY: (Inaudible) problem right here. Right here in fuckin' Norfolk. Some motherfucker comes in and he says hah, ba ba ba ba. You gotta do somethin'.

JOE: Well, here's somethin' that's important, really, what do you want to do? Alright, you're not . . . you're not, uh talkative outgoing guy. You couldn't . . . you couldn't work a counter in a place. I don't believe. You could, but it . . . it wouldn't be your thing, you know. You're not Bull shitter number one. You know. What do you wanna do?

LUCKY: Alright, say we need a person to take. That's give us some shit. You willing to take care of 'em for me?

1 RED: Right, that's what I want to do.

2 LUCKY: You ever done it before?)

3 Q All right, who asked that question?

4 A Agent Stenham asked the question, and

5 Charlie Red answered.

6 (Tape:

7 LUCKY: You ever done it before?

8 RED: Yeah.

9 LUCKY: When was the last time you killed somebody?

10 RED: When we . . . when we hit that uh place uh

11 Carma's in Portsmouth.)

12 Q Whose response was that?

13 A That was Charlie Red's.

14 (Tape:

15 LUCKY: What's that?

16 RED: Carma's.

17 LUCKY: Commons?

18 RED: Carma's, yeah.

19 LUCKY: Commerce?

20 RED: Uh . . . Chicken snack place . . .

21 JOE: Street?

22 LUCKY: Huh?

23 RED: Chicken snack . . . uh, chicken uh, place.

24 LUCKY: Chicken place.

25 RED: And sells chicken snacks (inaudible)

1 CURTIS: Snacks, you know, (inaudible) snacks. . .
2 JOE: That's a robbery though. You didn't go
3 there to kill him, right?
4 RED: No, we uh, you know . . .
5 JOE: (Inaudible) . . .
6 RED: (Inaudible) you know, we didn't have to kill
7 him, you know, but he seen our face, you know,
8 and . . .)
9 Q Whose response was that?
10 A That was Charlie Red also.
11 (Tape:
12 LUCKY: You showed face again, right?
13 RED: Right.
14 JOE: Alright, but. . .
15 LUCKY: What'd you kill him with?
16 RED: A double barrell
17 LUCKY: Shot gun.
18 RED: Right.)
19 Q Who was answering those questions?
20 A That was still Charlie Red.
21 (Tape:
22 LUCKY: He's the one I read about in the paper?
23 RED: Yeah.
24 LUCKY: How much money'd you get out'a that?
25 JOE: Nothin'.

LUCKY: What'd you get?

RED: I dind't get nothin'.

LUCKY: You didn't get no money at all? You get zero?

RED: Got uh, we got his wallet, you know. But, you know, we didn't get no big money.

LUCKY: How much money'd you get? How much money'd you get?

RED: How much money we got in the wallet?

LUCKY: Yeah. Don't bull shit me now cause I know what the . . . what the answer is.

RED: Ha. . . I don't know exactly how much we got out'a (inaudible) the wallet.

LUCKY: Give me appro. . . approximate amount. You got a hundred dollars, right?)

Q Did he respond to that question, "You got a hundred dollars, right?"

A I will have to look at my 302. I dictated that right after - (referring to papers)

Yes, sir, in that particular instance he did nod "yes".

(Tape:

LUCKY: You got a hundred dollars, right? That's it ridiculous. Let me ask you this. Let me tell ya this.

1 RED: Alright.

2 LUCKY: Here's the reason I'm tellin ya this.

3 We ask to hit somebody. You ain't workin' for

4 fuckin' peanuts. A hundred dollar bill for

5 Christ's sake, I'll get two (inaudible), I'll

6 give somebody a hundred dollar bill to clean your

7 fuckin' shoes.

8 RED: Right.

9 LUCKY: Mechanic's a hit man.

10 RED: Right.

11 LUCKY: You're gonna be a fuckin' mechanic and we

12 give you a goddamn contract, you're gonna make

13 more than a hundred dollars. Make a lot more.

14 Fuckin' hundred dollars, you light your cigarettes

15 with.

16 RED: Yeah.

17 LUCKY: So, I'm sayin' are you sure you're ready?

18 RED: I'm ready.

19 LUCKY: To leave the fuckin' amateurs and get in

20 the big leagues.

21 RED: Right.

22 LUCKY: Instead of blowin' some fuckin' guy

23 away with a double barrell shotgun for a lousy

24 hundred dollar bill, you gotta split three ways,

25 two ways, four ways (inaudible) gives a fuck,

You gotta (inaudible) you did it on your own, you still . . .

JOE: Well, he didn't know he had a hundred dollars, still, you know.

RED: Yeah.

LUCKY: That's what I'm saying.

CURTIS: Hundred dollar bill (inaudible) . . .

LUCKY: This is what I'm talkin' about, and I want you to think about it, and I want you to think about it good.

RED: Yeah.

LUCKY: 'Cause I'm not gonna say it twice. If you're ready for this, we're ready to. . . to give you a fuckin' education.

RED: I'm ready.

LUCKY: How old are ya?

RED: Twenty-one.

LUCKY: Twenty-one. I was twenty-one when I started, too. I was twenty-one when I went to jail the first time too for my first big mistake.

JOE: Yeah, and now you're twenty-three and rotten.

LUCKY: Twenty-three shit. I wish the fuck I was twenty-three again. Now this is what I'm talkin'. Now you make goddamn sure in your own mind you're

not just blowin' smoke up my ass.

RED: Right.

LUCKY: Cause if you are, it's gonna be your ass.

RED: Right.

LUCKY: Now we need people. I'm watchin' you. . . you're fuckin'. . . you're calm as a bastard. You're calm as a cucumber, even though, give a sh. . .even (inaudible) shake a bit. If I had pressure that I had on. . . that you have, I'd be . . . I'd be nervous. But you're not. And you're what. . .what we, we're told last night like Joe said, Curtis and Charles said we got a man that's got icewater in his fuckin' veins. And you look like the man they're talkin' about. But you need a little education.

RED: Yeah.

LUCKY: Alright.

JOE: Now, when you're not workin' for peanuts, you get that real quick. Real quick.

LUCKY: For the average hit, we'll give fifty thousand.

CURTIS: (Chuckles). . . (inaudible). . .

LUCKY: If it's done right.

RED: (inaudible). . .

LUCKY: If it's done wrong, it's gonna cost you

1 fifty for fuckin' burial fees. But you get an
2 education before (inaudible). . .
3 CURTIS: Uh (inaudible). . .I may come in that.
4 JOE: We're not in to kill some. . . some, you
5 know. . .
6 CURTIS: (Inaudible). . .
7 LUCKY: Alright. . .
8 JOE: It's not much money if you don't stick your
9 fuckin'ass out.
10 CURTIS: Hey, I get my hands on fifty thousand.
11 LUCKY: Who's the trigger man on that job, you?
12 RED: What?
13 LUCKY: Who was the trigger man, you?
14 RED: Yeah.
15 LUCKY: Alright.
16 JOE: Did you enjoy it?)
17 Q Who was answering those questions?
18 A This was also Charlie Red.
19 Q Who was asking the questions?
20 A Well, Agent Stenham and I both. The last
21 question, I asked.
22 Q What question are you referring to?
23 A I said, "Did you enjoy it?"
24 (Tape:
25 RED: It was alright.

LUCKY: Divine?

(Laughter)

LUCKY: (Inaudible). . .

JOE: You're not gonna even go home and cry. . .

RED: (Inaudible). . .

LUCKY: You're alright, brother, you alright.

JOE: Yeah.

LUCKY: You're alright. You're alright, you're cool. You are. You're a cool fucker. Joe, I think we can take a chance with the man. What d'you think?

JOE: Well, I think you got a chance. He's. . . he's the one taking the chances. I think we. . .

* * * * * * * * *

KNOWLES: Your Honor, while we are a pause in the tape -

Q Special Agent Smith, Curtis Moore injects from time to time in this conversation some statements, did he not?

A Yes, sir, that is correct.

Q He just, I believe, injected one, "Hey, I get my hands on fifty thousand."

A Yes, sir.

(Tape:

JOE: See, you got no hangups killin' somebody

1 just for the hell of it. (Inaudible)

2 RED: That's right.

3 JOE: A hundred dollars. Black, white, you don't

4 give a fuck.

5 RED: Mm. It don't make no difference.

6 JOE: You never killed anybody like that, though,

7 have you?

8 RED: What?

9 JOE: Just cause somebody said do it, here's some

10 money.

11 RED: NO. But I'll do it, for money with it.

12 JOE: All right, you, you're fightin for you ass

13 when you shot that old fucker, you know.

14 RED: Right. (laughter)

15 * * * * * * * * *

16 JOE: We got to talking bout that last night,

17 I shouldn't said nothing. That's gotta be a let

18 down. Stick your fucking neck out for life and

19 you end up with a fucking hundred dollars and

20 what two or three credit cards. Shit.

21 RED: Nah, well see. . .we. . .we figured he had

22 more on him you know.

23 JOE: Yeah well that's what I say yea.

24 RED: Uh, we didn't case it out you know.)

25 MR. AXELSON:

1 Q All right. Who was responding to those
2 questions?
3 A That was Charlie Red.
4 Q The Defendant?
5 A Yes, sir.
6 Q And you were asking the questions at that
7 point?
8 A Yes, I was.
9 MR. AXELSON: Your Honor, may I approach the
10 bench a minute?
11 (Counsel approach the bench.)
12 THE COURT: Does that conclude the tape?
13 MR. AXELSON: Yes, sir, Your Honor.
14 THE COURT: Ladies and gentlemen, if there is
15 any part of that tape that you didn't understand
16 and want it replayed, they can do it now for you.
17 Any part of it you would like to have replayed,
18 we will be glad to do it for you.
19 I don't think we are going to allow you to
20 take the tape in the jury room because we would
21 rather you would ask any questions about it now.
22 Do any of you want to ask any questions
23 about it now? Do you think you heard it all and
24 understand it all?
25 All right.

(Off the record)

MR. AXELSON:

Q Special Agent Smith, all of this conversation took place on what date?

A This conversation was taped on December 10, 1976.

Q Did you see the Defendant Charles Lewis Ellison at a later date?

A Yes, sir, I did. On one more occasion I saw him, on the - on December 14.

Q What occurred on that date?

A Well, following the conversation on the 10th, I drove Mr. Ellison and Curtis Moore and Michael Roberts up Ocean View Avenue, and gave Charlie Red the instructions just pick out whatever motel he wanted to stay at, that it didn't matter to me, and he decided on one, and we got some food in there, and then we didn't see him until the day that supposedly he was going to meet this car carrier which was going to be at the Coliseum Mall Shopping Center in Hampton, and we called him up there, of course, told him, "We won't give you instructions until you get to the apartment. We will give you plenty of time to get there and that will get you to Washington, D. C."

Q What precautions did you take when he came by?

A Well, we were just a little leary because of the time that he had set out in that motel room. We weren't sure whether he had stayed in the motel room or not. We were just a little bit edgy that day.

We agreed Agent Stenham would go to the door and I would sort of stay back toward the bedroom just in the event anything happened, and then further, it was agreed that once they got inside, I'd put down the directions on a sheet of paper, also to the best of my recall, a phone number for him to call, and I knew that showing the directions to Mr. Ellison, my eyes would be strictly on the sheet of paper and on him, so we had Agent Stenham keep his eyes on everybody else while I gave the instructions to him as to how to get to the place.

Q Who was waiting for him at Coliseum Mall?

A No one was really waiting for him there. A lot of police and FBI agents were waiting on the way there.

MR. AXELSON: Your witness, gentlemen.

CROSS EXAMINATION

EXAMINED BY MR. KNOWLES:

Q Special Agent Smith, you testified that on November 16, some credit cards belonging to Mr. Marks were sold to you by Slim?

A Yes, sir.

Q Is that correct?

1 A That is correct.

2 Q And that Curtis Moore, Marcus Joyner, and
3 Michael Roberts were with Slim?

4 A Yes, sir, that is correct.

5 Q There is no question in your mind that they
6 were the credit cards that belonged to Mr. Marks? They
7 bore his name?

8 A Yes, sir. At the time, I didn't know, but
9 no question later.

10 Q I mean you saw his name on the cards, but
11 you didn't make the connection?

12 A Oh, no.

13 Q Slim told you he had been holding those
14 cards for 3 or 4 months?

15 A Yes, sir.

16 Q And he wanted to get rid of them?

17 A Yes, sir.

18 Q All right. I believe that the tape contained
19 a reference to the fact that Curtis had called you on the
20 day of December 10 and told you that Michael Roberts was
21 in trouble with the federal authorities?

22 A Curtis Moore called Agent Don Stenham
23 because Stenham was at the apartment, and then I, in turn,
24 when Don Stenham called me, I called Curtis at his home.

25 I had his home phone number. I was at my

1 residence at that particular time.

2 Q And Curtis told you that Charles Ellison

3 had been involved in an attempted bank robbery?

4 A That is correct, and that Slim also had been

5 picked up for it, and that he was innocent of it.

6 Q All right. And they are, of course, the

7 reference to the federal authorities being after him, and

8 that was for a bank robbery offense?

9 A Yes, sir, it was.

10 Q Do you know when that attempted robbery did

11 occur?

12 A Yes, sir. There was an attempt and an

13 actual bank robbery, both on the 9th, the day prior. In

14 other words, Thursday.

15 Q The day before the conversation with

16 Mr. Ellison?

17 A Yes, sir, that is correct.

18 Q All right. And on the way to - it was on

19 the way to Hampton Coliseum that he was arrested by the

20 police and FBI?

21 A Yes, sir, as I understand it. I was still

22 at the apartment. I think it was just prior to them

23 reaching the tunnel they were pulled over.

24 MR. SPRINKLE: May we just have a moment, Judge?

25 (Defense attorneys confer.)

MR. SPRINKLE: No further question from him, Your Honor.

THE COURT: Anything further of this witness?

MR. AXELSON: Not at this time, Your Honor.

Your Honor, there is a - I want to put Special Agent Stenham on, but there is a possibility Dr. Ladaga is here, and I would like to hold up for just a moment and determine if he is here.

THE COURT: Come up here, gentlemen.

(Counsel approach the bench.)

* * * * * * *

DONALD E. STENHAM, witness having first been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. AXELSON:

Q Would you state your full name for the Court, please?

A Special Agent Donald E. Stenham.

Q Your occupation, Mr. Stenham?

A I am employed as a Special Agent of the Federal Bureau of Investigation.

Q How were you employed from February of '76 to January of 1977?

A I was employed in an undercover capacity, using the alias Lucky Cataldo.

Q Did you have an apartment in the course of your undercover work?

A Yes, sir.

Q Where was that located?

A 3849 Flowerfield Road, Apartment C, in Norfolk, Virginia.

Q Were you renting that apartment on December 10 of 1976?

A That was correct.

Q Did you see the Defendant there on that evening?

A Yes, sir, I did.

Q Who was there, and who went there?

A Present on the 10th of December was an individual identified to me as Charlie Red, who later was identified as Mr. Ellison, Curtis Moore, and Michael Roberts, known to Special Agent Smith and myself as Charles.

MR. AXELSON: Your Honor, I would like to play a brief portion of the tape for the purpose of having Special Agent Stenham identify the voices.

(Tape:

JOE: See somebody last night and, you know, without sayin' who, it had to be somebody where you said you had to, what, icewater in your veins. All right. That's good if you got it. That's real good. You know? You're pretty cool or you wouldn't be sittin' there like you are.

?? : (Inaudible) . . . cool?

JOE: (Inaudible) talkin' about Portsmouth.

LUCKY: Well, we'll run into the same problems no matter where we go.

CURTIS: Yeah.

LUCKY: (Inaudible) problem right here. Right here in fuckin' Norfolk. Some motherfucker comes in and he says hah, ba ba ba ba. You gotta do somethin'.)

Q Special Agent Stenham, whose voice was that that was just on there?

A That was mine, sir.

(Tape:

JOE: Well, here's somethin' that's important, really, what do you want to do? Alright, you're not, uh talkative outgoing guy. You couldn't . . . you couldn't work a counter in a place. I don't believe. You could, but it . . .it wouldn't be your thing, you know. You're not Bull shitter

1 number one. You know. What do you wanna do?

2 LUCKY: Alright, say we need a person to take.

3 That's give us some shit. You willing to take

4 care of 'em for me?

5 RED: Right, that's what I want to do.

6 LUCKY: You ever done it before?

7 RED: Yeah.

8 LUCKY: When was the last time you killed some-

9 body?

10 RED: When we . . .when we hit that uh place uh

11 Carma's in Portsmouth.

12 LUCKY: What's that?

13 RED: Carma's.)

14 Q Special Agent Stenham, who was asking the

15 questions there?

16 A I was asking the questions, and that was

17 Mr. Ellison that answered.

18 Q About Carma's?

19 A Yes, sir.

20 Q The Defendant?

21 A Yes, sir.

22 Q Was that tape, the portions that you heard

23 just then, was this an accurate reflection of the questions

24 and answers that were given on the evening of December 10,

25 1976?

A Yes, sir.

MR. AXELSON: Your witness, gentlemen.

CROSS EXAMINATION

EXAMINED BY MR. SPRINKLE:

Q You recall that conversation you had with Charles Red - Charlie Red on December 10, 1976. Do you recall $100.00 being mentioned?

A Yes, sir, on a couple of occasions.

Q Is it a fact that you were the first one to mention the $100.00?

A Yes, sir, I believe it was.

Q And you mentioned that to the Defendant, is that correct?

A Yes, sir. I believe the way that the conversation went, I asked him how much money he got, and I then stated, tell me the truth, because I already know the answer.

MR. SPRINKLE: Could we have just a moment, Judge?

(Confers with Mr. Knowles.)

MR. SPRINKLE: We don't have any further questions for the agent, Judge.

REDIRECT EXAMINATION

EXAMINED BY MR. AXELSON:

Q Special Agent Stenham, referring to the

$100.00, do you recall what question you asked him concerning the $100.00?

A I asked him how much money he got from the incident of the shooting of the gentleman at Carma's Chicken Snack, to which he replied he didn't know how much money was in the wallet.

I then told him words to the effect, I know how much money you got, so tell me the truth. It was $100.00? And he says, "Yeah." That was the answer he gave.

THE COURT: In that conversation, did he say who had the gun?

A Yes, sir, he said he was the trigger man.

Q Did he say anybody else had a gun? If you recall. If you don't, say so.

A (Hesitating.) I don't believe - I don't believe it was mentioned on the 10th of December, Your Honor.

THE COURT: All right, sir.

MR. AXELSON: Thank you, Special Agent Stenham, -

Unless you gentlemen have something else?

MR. KNOWLES: No, we have no further questions for the Special Agent.

* * * * * * *

MR. AXELSON: Your Honor, I am expecting

Dr. Ladaga to arrive momentarily.

Your Honor, Dr. Ladaga's testimony will be very brief. Once he gets here, it is going to be a matter of minutes.

THE COURT: Are you sure he has left his office?

MR. AXELSON: That is what I have been told, Your Honor. I was told he was on his way about half an hour ago.

THE COURT: Where is his office? Over in Norfolk?

MR. AXELSON: Over in Norfolk, Your Honor.

THE COURT: Suppose we take a few minutes recess and wait.

(Brief recess.)

* * * * * * *

LEOPOLD E. LADAGA, witness having first been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. AXELSON:

Q Would you state your full name, please?

A Leopold E. Ladaga.

Q And your occupation, Dr. Ladaga?

A I am a physician and pathologist.

***

Where on the vehicle did you dust for prints?

A It would have been along the passenger - I mean the driver's side of the vehicle. I tried right in front of the door, the front door, along the top or the roof of the vehicle, and the left, rear fender area.

Q You couldn't take any prints off of the restaurant itself?

A Off the wall?

Q Yeah?

A No, sir.

Q And did you find any spent cartridges from a shotgun or a gun of any type at the scene?

A Not any spent shells, no, sir.

Q Did you take a photograph of the 8-track stereo player that Mr. Marks may have had on his person?

A No, sir.

MR. SPRINKLE: Thank you very much.

MR. AXELSON: Thank you, Detective Stegall.

THE COURT: You may go.

* * * * * * *

MR. AXELSON: YourHonor, the Commonwealth rests.

MR. KNOWLES: Your Honor, at this time we would like to offer some evidence. We would like to have the Court hear us in chambers on the admissibility of this evidence.

THE COURT: All right, sir. Bring the Defendant in.

(Present in chambers: The Court, the Defendant, Messrs. Axelson, Knowles, and Sprinkle, Deputy Clerk, Deputy Sheriff, press.)

MR. SPRINKLE: First of all, just for the record, we would like to make for the record motion to strike based on insufficient evidence.

MR. AXELSON: Your Honor, we have played the man's confession for the jury. I think we have established all the necessary elements of the crime. I don't think there is a basis for a motion to strike.

THE COURT: I will have to overrule the motion. Take your exception.

MR. KNOWLES: Please note our exception.

Your Honor, it was my understanding when we brought up the fact of Karen Hampton's statement as Joseph Brown related that statement to her and she gave the statement, of course, to the Portsmouth Police Department Detectives Gavin and Benoit, when we raised that point yesterday, it was my understanding that you had not ruled one way or the other on it, that you merely allowed the groundwork by saying the statement would not

1 be admissible unless we could show corroborating
2 evidence.
3 THE COURT: Or some other evidence lending credi-
4 bility is what I meant to say. Whether you use
5 the word corroborating, unless you had something
6 that would strengthen its reliability in some way -
7 MR. KNOWLES: All right, Your Honor.
8 MR. SPRINKLE: Some way to show that the statement
9 was credible, is that what you are saying?
10 THE COURT: I didn't say it was incredible.
11 MR. SPRINKLE: Some evidence to show that was
12 credible.
13 THE COURT: I thought my ruling was you had to
14 show some other circumstances, too, showing there
15 is reason to believe it was credible.
16 MR. KNOWLES: All right, sir. With the Court's
17 indulgence, I would like to start by reading the
18 statement into the record, if the Court will
19 permit it.
20 MR. AXELSON: Why don't you just introduce the
21 statement into evidence?
22 MR. KNOWLES: I would like the facts, because I
23 am going to have to relate some of the facts.
24 MR. AXELSON: We have all read it. We are all
25 familiar with it.

1 MR. KNOWLES: I am familiar with it.

2 THE COURT: Read it.

3 MR. KNOWLES: I am going to read a bunch of stuff

4 in it on the way, too, take notice.

5 I am reading a typed statement which has

6 typed names of Sergent T. Benoit, Detective M. L.

7 Gavin, the name Karen Hampton appears at the

8 bottom of the statement on the second page.

9 MR. SPRINKLE: All being signatures by those

10 people.

11 MR. KNOWLES: "Statement of Karen Hampton, black

12 female, 21, reference to homicide of Ernest Marks

13 at Carma's Chicken, Elm and County Street, on

14 (blank) date," -

15 Commonwealth has proven, of course, that

16 was September 10, 1976.

17 - "as given to Sergeant Benoit and Detective

18 M. L. Gavin on November 3, 1976 at 1410 hours.

19 "It was early on this past Monday night about

20 6:00 or 6:30. Spencer Johns, Diane, and I were

21 coming up County Street."

22 This is Karen Hampton speaking.

23 "I told Dee and Spencer to wait up the street,

24 that I was going to Bell's Tavern to see what was

25 happening.

"I went in and stayed for 3 or 4 minutes and came back out. Joe Scott, also known as Slim, and Jo-Jo Brown were standing in front of the Bell's Tavern." It reads Bear Tavern.

"I went to go over where Dee was, and Slim grabbed my arm, started tugging at me, asked me if I wanted to buy a radio with the tape on it.

"I asked him to let me see it, that I had to talk to Dee about it.

"I asked Jo-Jo what he had been up to.

"Jo-Jo said that the white people were behind him.

"I said, 'What they behind you for?'

"Jo-Jo said, 'For wasting some nigger down the street that I only got $100.00 from him and this radio.'

"Jo-Jo said he was going to stay" - "he was going home to stay cause he was scared to stay out because the police had talked to some stinky whore named Betty that worked down there and didn't know what she was going to do.

"I said to Slim what he was up to. He said he was trying to get some money together for some wine.

"Q Did anyone, Jo-Jo or Slim, say who shot

the man at Carma's Chicken?

"A Jo-Jo said the nigger was splattered everywhere.

"Q How did you know that they were talking about the man at Carma's?

"A I asked Jo-Jo who he was talking about. He said he was talking about old man Carma's down there, and that he had splattered him all over the street.

"Q When Jo-Jo said 'nigger that he splattered, is he referring to a black person or a white person?

"A We call black or white people niggers. Everybody does. He is talking about the white man at Carma's.

"Q This picture I show you of a Panasonic 8-track AM-Fm radio and tape player, is this like the one Jo-Jo was trying to sell?

"A Exactly like it except for the writing.

"Q This picture I show you, record #22120, is this Jo-Jo Brown that you are referring to?

"A That's him.

"Q Is this statement true to the best of your knowledge?

"A Yes, sir.

"Q Have you been promised any reward or leniency to make this statement?

"A No."

And then the names appear at the bottom of the second page, Sergeant Benoit, Detective Gavin, and Karen Hampton, indicating a signature.

Now, Your Honor, unquestionably the statement is relevant and material to the guilt or innocence of Charles Ellison. I think everybody will concede that -

MR. AXELSON: I will not concede that. I do not concede that.

MR. KNOWLES: Your Honor, and of course, very crucial to our case.

Now, Your Honor, you indicated that you believed under Hines, before this statement made by Joseph Brown to Karen Hampton would be admissible, that there must be some factors which tend to show its reliability.

Through the Commonwealth's case, a few more factors have become clear. Some of the factors we mentioned yesterday. Some we hope to be able to prove this morning, showing its reliability.

First of all, the Commonwealth has used this statement by Karen Hampton in evidence against

1 Joseph Brown who was previously charged with
2 these crimes that Mr. Ellison is now charged with.
3 The statement of Karen Hampton - she appeared
4 as a witness at Mr. Brown's preliminary hearing,
5 she testified to the substance of this statement,
6 she was subject to cross examination by Mr. Backus
7 who represented Joseph Brown. She was under oath.
8 The Commonwealth, I think, implicity in that
9 relied upon the statement, and the credibility
10 of the witness as they offered it into evidence.
11 The statement was also offered before the
12 grand jury, which did return an indictment against
13 Joseph Brown.
14 Now, secondly, Jo-Jo, in this statement, says
15 that Marks was splattered all over the street. I
16 think the inference from that, the inference that
17 the jury might draw is that he was shot with a
18 shotgun. That appears to be the Commonwealth's
19 evidence.
20 Secondly, Jo-Jo offered to sell Karen
21 Hampton Marks's radio, in fact. He said, "I got
22 this radio," and offered it for sale to her. The
23 radio was in his possession. At least it was in
24 Slim's possession, and Slim and Joseph Brown were
25 together when this conversation took place.

1 Fourth, Your Honor, Slim was with Jo-Jo when
2 he told Karen Hampton of the killing. Diane
3 Flythe is prepared to testify that she saw the
4 conversation take place, that Slim was there, that
5 Joseph Brown was there, that Slim did have the
6 radio.
7 Fifthly, a person named Slim, according to
8 Special Agent Smith, sold him credit cards.
9 MR. AXELSON: He has identified that as a different
10 Slim. Different name.
11 MR. KNOWLES: We don't know whether different
12 names are used or not.
13 MR. AXELSON: The different name is used in there.
14 It is a different name.
15 MR. KNOWLES: Well, some credit cards were very
16 definitely sold to him. We don't know how many
17 names the man uses, but we know both men were
18 referred to as Slim.
19 MR. AXELSON: There is some question as to the
20 subject now.
21 THE COURT: Who is Slim now?
22 MR. AXELSON: Two different people. Slim is
23 identified in here as Joe Scott. Slim was identi-
24 fied by Special Agent Smith yesterday as Edward
25 Lee Davis, I believe, as being the Slim who sold

him the credit cards.

THE COURT: All right.

MR. KNOWLES: Certainly, Your Honor, Jo-Jo says that a lady named Betty had been talking to the police about him, and he didn't know what she was going to do.

That was his statement to Karen Hampton. Betty was presented to the jury yesterday. It was Betty Southall. She worked at Carma's. She worked there when the shooting occurred, and Jo-Jo's statement says that Betty worked down there.

Eighthly, Mrs. Marks testified yesterday, which is a part of the Commonwealth's case, that Mr. Marks carried with him every day a Panasonic 8-track AM-FM tape player, and of course, the statement does refer to a radio-tape player.

She was shown - Karen Hampton was shown a photograph of that tape player. That photograph is available to be offered into evidence this morning.

I think the evidence will show, if I am not mistaken, it was testified to yesterday, that a Panasonic 8-track AM-FM radio was taken from Mr. Marks. That is the same radio, we submit,

1 that was shown to Karen Hampton that she identi-
2 fied. The police showed her that, and she identi-
3 fied it.
4 Also, the statement reveals - the statement
5 of Joseph Brown reveals that the man who was shot
6 was a white man, he was an older man, and he
7 worked down at Carma's, and of course, the Common-
8 wealth's evidence corroborates that fact.
9 He was 59 years old, I believe the record
10 will show. He was a white man, and he was the
11 night manager down at Carma's.
12 Now, Your Honor, in view of all these factors,
13 the facts of this statement are corroborated by
14 some of the very witnesses of the Commonwealth.
15 The only evidence against Lewis Ellison at
16 this point is his statement. We have a statement
17 here that the police have taken from a lady who
18 talked to another man that said he did it.
19 Statement for statement should go to the
20 jury, Your Honor, and they can assign whatever
21 weight to their statement they feel it is worth.
22 But this man's statement is being offered
23 as evidence against him. Why in the world shouldn't
24 the jury hear the statement of another man who
25 said he did it?

1 THE COURT: Well, you haven't offered him.
2 MR. KNOWLES: Beg pardon?
3 THE COURT: You haven't offered Brown. You haven't
4 had him here.
5 MR. KNOWLES: We have his mother here, who has
6 been subpoenaed to testify.
7 THE COURT: You say why should we when he said
8 it. He hasn't said it. He's in New York.
9 MR. KNOWLES: Joseph Brown has not said it?
10 THE COURT: No, Joseph Brown has not said it.
11 MR. KNOWLES: He said it to another person.
12 MR. AXELSON: Allegedly said.
13 THE COURT: Also he made other statements you
14 told me yesterday, under oath, that he absolutely
15 had nothing to do with it; that he made other
16 statements.
17 MR. KNOWLES: No, Your Honor, there is no evidence
18 of that.
19 MR. AXELSON: I don't think the Court has been
20 told that.
21 THE COURT: That he didn't make a statement
22 denying it?
23 MR. KNOWLES: He has never denied it as we know.
24 MR. AXELSON: Judge, the best information I have
25 is that when the police questioned him about it,

1 he refused to make any statement at all to them.
2 He has never testified about it one way or the
3 other, that I am aware of.
4 MR. KNOWLES: Your Honor, this statement was made
5 less than 2 months after the robbery and murder
6 occurred. It was a statement developed by the
7 police department, used by the police department.
8 THE COURT: When did she make the statement?
9 MR. KNOWLES: This was made on November 3, 1976.
10 THE COURT: How long after the murder?
11 MR. KNOWLES: That the murder occurred in September,
12 the 10th, so it was less than 2 months.
13 THE COURT: 2 months later she makes a statement?
14 MR. KNOWLES: She was repeating the words of
15 Joseph Brown.
16 THE COURT: When did Jo-Jo talk to her?
17 MR. KNOWLES: That preceding Monday, which would
18 have been November 1.
19 THE COURT: Almost 2 months afterwards, she said
20 that? Afterwards he told her he did it?
21 MR. KNOWLES: Yes, sir. She was picked up on
22 another charge, and she was in custody at the
23 time she told me.
24 MR. AXELSON: Your Honor, Mr. Knowles has told
25 me -

1 THE COURT: I don't know if he's initialed this.
2 MR. SPRINKLE: I believe this is correct. No
3 one had been arrested for this crime at that time.
4 MR. AXELSON: That is true.
5 MR. KNOWLES: She said she was arrested the next
6 day on some other charges. November 2, Election
7 Day.
8 MR. SPRINKLE: Correct me again. Police were
9 looking, of course, for someone who committed
10 this crime. Here's a guy out of a clear blue sky
11 makes a statement that he did it.
12 THE COURT: She herself was under arrest at the
13 time?
14 MR. KNOWLES: Not at the time Joseph Brown talked
15 to her.
16 MR. AXELSON: But at the time she talked to the
17 police.
18 MR. KNOWLES: Uh-huh. Now Mr. Axelson can
19 develop all this on cross examination, whether
20 there was any offer of reward or leniency.
21 MR. AXELSON: No, there is nothing I can say on
22 cross. Nothing I can show that this statement is
23 false.
24 MR. KNOWLES: Everything relates to credibility.
25 It can be brought out on cross examination.

1 MR. AXELSON: I should be able to bring out on
2 cross everything that bears on whether or not
3 there is a legitimate statement.
4 MR. KNOWLES: I disagree. What you were talking
5 about, using the statement of two co-defendants.
6 MR. AXELSON: That is right.
7 MR. KNOWLES: The decisions of the courts are
8 unanimous -
9 MR. AXELSON: That is exactly right.
10 MR. KNOWLES: - that that sort of testimony is
11 not admissible for the purpose of proving the
12 guilt of this man.
13 But what we are talking about is a statement
14 which the Supreme Court of Virginia in 2 cases
15 has said is admissible. It follows the minority
16 view, and with the concurrence of Professor Wig-
17 more, Professor McCormick, and a lot of the
18 modern penal codes.
19 MR. AXELSON: When corroborated, as the Judge has
20 pointed out. There is no corroboration independ-
21 ent of certain consistencies within the alleged
22 statement itself, and these could be ascribed to
23 any number of factors.
24 MR. SPRINKLE: The Judge didn't say that. We
25 just started off this morning. He said evidence

1 that is credible, not that it is corroborated.
2 You showed that yesterday, right here in this
3 trial. A number of things came out.
4 MR. AXELSON: It is totally uncorroborated excpet
5 that it happens to fit some of the facts brought
6 out on trial.
7 MR. SPRINKLE: A number of facts. $100.00.
8 Betty Southall works there. Go down the list.
9 They are all there.
10 MR. AXELSON: All these facts appear in the
11 newspapers, available to anyone.
12 MR. KNOWLES: Here's Jo-Jo, according to Karen
13 Hampton, with his radio.
14 THE COURT: Karen Hampton is under arrest herself,
15 and she then makes a statement to the police. Is
16 it done for the purpose of trying to help her get
17 out of her trouble?
18 MR. KNOWLES: She said no.
19 MR. SPRINKLE: She wasn't helped in the case, I
20 believe.
21 THE COURT: There is an inference. She didn't
22 come forward before that. Almost 2 months. She
23 didn't open her mouth.
24 MR. SPRINKLE: It is a question of credibility.
25 THE COURT: It may be credibility, but I am just

1 talking about no corroboration of why these things
2 were done, whether it is even worthy of letting
3 it come in.
4 It is pure hearsay. Everybody agrees it is
5 pure hearsay testimony. 100% hearsay.
6 MR. KNOWLES: It is hearsay, Your Honor, but our
7 court has said on 2 occasions that this type of
8 hearsay should be admissible.
9 MR. AXELSON: When corroborated.
10 MR. KNOWLES: It doesn't say that.
11 THE COURT: The cases say now you take the Hines
12 case, the deceased - I mean the accused as well
13 as the man who died owned a cap exactly like the
14 one was found, and it was proved that the cap at
15 the scene of the crime belonged to the dead man.
16 MR. KNOWLES: They were the facts of the case.
17 THE COURT: That is what was proven. They proved
18 in addition to that that he had a gun exactly like
19 the gun that the man was killed with. They proved
20 he had exactly the same motive for killing - that
21 the accused did.
22 With all of those things, you could come to
23 the conclusion that he had something to do with
24 it.
25 Now the purpose of showing this case of

1 what you want to show this for is trying to show
2 that somebody else did it, and you are trying to
3 show it by hearsay evidence solely. Now from what?
4 From one person. From a girl who was under arrest,
5 and who was in police headquarters, and she makes
6 a statement about something that happened 2 months
7 before.
8 MR. KNOWLES: We have his statement was made
9 4 or 5 months after.
10 MR. AXELSON: 3 exactly.
11 THE COURT: Well, it is a little different. Any
12 statement he makes is not hearsay.
13 MR. KNOWLES: It is an exception to the hearsay
14 rule.
15 THE COURT: Well, it is not hearsay, what he
16 himself says.
17 MR. KNOWLES: But it is an exception. It is an
18 admission against interest, and that is an
19 exception to the hearsay rule.
20 What we are talking about is another exception
21 to the hearsay rule.
22 THE COURT: Hearsay is a statement made out of
23 court by a party not a party to the proceedings
24 for the truth of the statement.
25 He is a party to the statement.

1 MR. SPRINKLE: This requires that you interpret
2 Hines and Newberry that you must have some support
3 of the statement.
4 Aren't you really talking about some sort of
5 support after the case has been tried and they
6 are trying to open the case in Hines, where you
7 know you have to produce evidence to corroborate
8 this type of evidence after the case has been
9 tried?
10 That is what happened in Hines, and that is
11 what happened in Zimmerman vs. Commonwealth.
12 THE COURT: Unless there is something, you open
13 the door to all sorts of fabrication of testimony.
14 MR. KNOWLES: Your Honor, may I read from Pro-
15 fessor Wigmore? He deals with this very point.
16 He is talking about this particular exception,
17 and he states, "Furthermore, it cannot be justi-
18 fied on grounds of policy. The plausible reason
19 of policy advanced for such a limitation is the
20 possibility of procuring fabricated testimony to
21 such an admission if oral."
22 He further states, "This would be a good
23 argument against admitting any witness at all
24 for it is notorious that some witnesses will lie
25 and that it is difficult to avoid being deceived

by their lies. The truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent."

He acknowledges the danger eminent. All the courts acknowledge the danger. That is the rationale for the majority view, but, Your Honor, we have offered to the Court, I believe, details which we extracted from the Commonwealth's case, details which corroborate the internal factors set forth in this statement.

It would certainly seem to me that we presented enough, especially where the only evidence against this man is his statement, to let the jury know that another man has confessed to the crime.

Mr. Axelson can develop this on cross examination. The jury can so, 'Okay, we don't believe this statement. It's nonsense. This lady was arrested at the time she made this statement," but at least it's there.

The jury knows that someone else has made a statement confessing to this crime. They can lend credence to it. They can reject it. They can do whatever they will, but at least they know

1 someone else besides Charles Ellison has confessed
2 to this particular crime.
3 MR. AXELSON: Your Honor, there are so many
4 objections to letting this in that I am going
5 to forget a bunch of them in stating them.
6 First of all, there is no proof other than
7 Karen Hampton's statement that Jo-Jo Brown's
8 statement was ever made, that he ever made any
9 statement to her.
10 Secondly, -
11 MR. KNOWLES: Diane Flythe can testify.
12 MR. AXELSON: She didn't hear it.
13 MR. KNOWLES: No, but -
14 MR. SPRINKLE: She saw it.
15 MR. KNOWLES: - but together.
16 MR. AXELSON: She didn't hear it. There is no
17 corroborating evidence for the statement itself.
18 There is nothing to show that Jo-Jo Brown ever
19 actually made that statement.
20 There is a wealth of hearsay evidence which
21 I am prepared to offer to the Court, and have
22 offered to the Court, including statements by
23 Dwight Sessoms and Michael Roberts, which clearly
24 show that Jo-JoBrown was not involved.
25 There is Dwight Sessom's statement which

1 was used in convicting him, that the radio was
2 thrown down and smashed on the railroad tracks
3 the night of the robbery-murder, and therefore
4 it cannot have been that radio.
5 There is the difference between the Slims,
6 shown right there. There is one Slim with a Joe
7 Scott, with that man, and a Slim that sells the
8 credit cards later.
9 The credit cards were sold while Jo-Jo Brown
10 was in jail. Michael Roberts details exactly who
11 was there.
12 He says 3 men were there, lays out who the
13 3 men were, who did what.
14 There is a wealth of evidence that completely
15 exonerates Joseph Brown. There is just nothing
16 to give credibility to this obviously hearsay
17 statement; and the Court, I think properly,
18 focused on the issue of whether or not there was
19 corroborating evidence for Joseph Brown to have
20 made this statement.
21 There is nothing but - there is no corrobo-
22 rating statement that he was involved or made
23 the statement, and furthermore, there is a great
24 deal of evidence which I cannot go into with the
25 Court - with the jury because the Court is not

1 going to let me put on Michael Robert's statement
2 that indicates that Joseph Brown had nothing to
3 do with it.
4 Now Mr. Knowles has made a big issue out of
5 the fact that the Commonwealth relied on that
6 evidence.
7 We relied on it until we got the contrary
8 evidence, and immediately on getting that contrary
9 evidence, we turned around and let Joseph Brown
10 go and Nol-prossed the charge against him, and
11 there is no way that I am going to be able to
12 bring that out before the jury.
13 MR. SPRINKLE: Judge, can I make a suggestion?
14 That is, why don't we just bring Karen Hampton
15 in and have her testify, and you can judge her
16 credibility right here.
17 MR. AXELSON: He is not the trier of the facts.
18 MR. KNOWLES: He is the judge of the credibility.
19 MR. AXELSON: If Karen Hampton testifies here, I
20 want an opportunity to put on Michael Roberts'
21 statement for you, the testimony of the FBI
22 agents again on all of these things that tend to
23 show that Jo-Jo Brown never made this statement
24 and wasn't involved in the crime, and -
25 We are making the sideshow rule the

1 circumstances, Judge.

2 You are getting totally away from the issues

3 in this trial out here.

4 MR. KNOWLES: We are going to proffer this evidence

5 anyway for the record. What we would like to do

6 is bring in Mrs. Brown to testify as to Jo-Jo's

7 present whereabouts, and go on and bring in

8 Detective Gavin and Detective Benoit as to the

9 facts of their investigation, Diane Flythe to

10 the fact that the conversation between Karen

11 Hampton, Jo-Jo Brown, and Slim, standing right

12 there with the radio, took place, and then offer

13 Karen Hampton back here in chambers; and, Your

14 Honor, you can determine her credibility and

15 whether or not what she is saying is inherently

16 unreliable.

17 THE COURT: Not only that, what she says, you

18 are trying to say that Brown is the one that you

19 say was telling the truth when he talked to her.

20 MR. KNOWLES: Yes, sir.

21 THE COURT: You have got - that is what you are

22 asserting.

23 MR. KNOWLES: But, Your Honor, that presented no

24 difficulty for the Commonwealth.

25 THE COURT: You are saying he told her the truth

when he told her the statement. That is what you are trying to get the Court to say what it is because there wouldn't be any purpose in introducing the statement otherwise, don't you see?

MR. KNOWLES: If Jo-Jo Brown were on trial today for this crime, wouldn't this be admissible evidence? Is there any question in anybody's mind that it would come in?

MR. AXELSON: Against Jo-Jo Brown.

THE COURT: Against him, yes.

MR. AXELSON: Jo-Jo Brown is not on trial today because the Commonwealth got other evidence that indicated he was completely innocent of the crime.

MR. SPRINKLE: Why can't we let her testify that statement was made whether true or false. We don't care. That Joseph Brown made it that he did these things.

What about declaration against pecuniary interests?

MR. AXELSON: Against Joseph Brown.

MR. SPRINKLE: We are dealing with what is hearsay evidence.

MR. AXELSON: I know, but he hasn't told this Court or this jury anything against penal interests. He told somebody else. A third person.

1 MR. KNOWLES: But, Your Honor, that doesn't
2 render it inadmissible, not if it comes under an
3 exception to the hearsay rule.
4 MR. SPRINKLE: Third party.
5 THE COURT: If there is any reliability of what
6 she is saying, but I don't think there is anything
7 we can say that her statement is reliable, because
8 it is nothing but hearsay, and the reasons for
9 excluding it are obvious because it opens the
10 door to perjury.
11 You are not subject to cross examination. I
12 mean she is, but I mean Brown is not. He is not
13 here. He is not subject to cross examination,
14 and I don't see how in the world that - of course,
15 he was not under oath when he made the statement
16 or anything else of the kind.
17 MR. KNOWLES: But, Your Honor, we have subpoenaed
18 him here. We want to put the man on the stand,
19 whether he admits or denies the statement. Pre-
20 sumably he would deny it, or maybe he would take
21 the Fifth Amendment.
22 That is the foundation that the Supreme
23 Court cases have laid down. We are prepared to
24 meet that obligation to lay the foundation.
25 THE COURT: I don't think, gentlemen, this is

1 reliable enough evidence here for her to be
2 admitted. I will have to sustain the objection.
3 MR. KNOWLES: Your Honor, can we call Detectives
4 Gavin and Benoit and inquire as to through the
5 course of their investigation if they recovered
6 statements implicating anyone else?
7 MR. AXELSON: Judge, we are just going over it
8 and over it. You have just ruled on it.
9 MR. KNOWLES: He said that Karen Hampton couldn't
10 testify to it.
11 MR. AXELSON: Well, Gavin and Benoit can only
12 testify to what Karen Hampton told them. Instead
13 of double hearsay it is now triple hearsay.
14 MR. KNOWLES: Your Honor, I cannot believe that
15 the Commonwealth locates a witness that they let
16 testify against a man that is charged with
17 3 terrible crimes, and that we can't admit into
18 evidence in this man's behalf that fact to this
19 jury.
20 They are going to retire for their delibe-
21 rations with one thought in mind. Who is the
22 man that confessed to this crime? This man.
23 There is no evidence before that jury that
24 any other man has ever confessed to it.
25 MR. AXELSON: All right, I will be glad to put

on Michael Roberts' confession. With your permission, I will put it before the jury.

MR. KNOWLES: His confession to what?

MR. AXELSON: To the fact that he was there, and this man was here, and Dwight Sessoms was here. I have got that on tape, and will be glad to play it.

If you want a confession from somebody else, let's put that on.

MR. KNOWLES: Let's put on what you relied on in a prior prosecution, because what is wrong with that?

MR. AXELSON: Let's put on what I relied on in dismissing a prior prosecution.

MR. KNOWLES: Your Honor, I do think there is a constitutional point involved. This man is being prevented from calling witnesses in his own behalf, and I would like to note that as a further objection to the Court's ruling.

THE COURT: Well, I can't prevent you from calling them. I am not ruling you can't call them.

MR. KNOWLES: Your Honor, we want to call Karen Hampton, but she can't testify to what she has told the police.

MR. AXELSON: She can't testify to hearsay. I

1 strenuously object.

2 THE COURT: I can't prevent your calling her.

3 I may prevent you from asking her the question.

4 I wouldn't prevent you from calling her, not for

5 one minute.

6 It is a question of how far you would go,

7 and certain questions you would ask her, of course,

8 that wouldn't be objectionable. What is her age,

9 and all of that. Nobody would object to it.

10 MR. KNOWLES: I know that wouldn't be objectionable,

11 Your Honor. I understand that wouldn't.

12 THE COURT: Huh?

13 MR. KNOWLES: I understand that wouldn't be

14 objectionable. It wouldn't be helpful, either.

15 THE COURT: No. Of course not.

16 MR. KNOWLES: Your Honor, do you want us to go

17 ahead with our proffer of proof at this time?

18 MR. AXELSON: Your Honor, I think it is clear

19 from what they have offered.

20 MR. KNOWLES: No. We are going to offer the

21 testimony at some point for the record of all

22 4 witnesses.

23 THE COURT: They want to vouch the record. Of

24 course, you have a right to do that. I wouldn't

25 stop you from doing that.

1 MR. KNOWLES: Well, should we do that at this
2 point in the trial, or take that up at a later
3 point in the trial?
4 THE COURT: Well, I will do it at any time you
5 want to.
6 (Off the record.)
7 MR. KNOWLES: We would like to go on and proceed
8 with our case, call the witnesses that we origi-
9 nally intended to call.
10 Mr. Axelson will make his objection, and
11 the Court will rule on it.
12 THE COURT: I can't stop you from doing that.
13 MR. AXELSON: I would like Mr. Knowles and
14 Mr. Sprinkle instructed at this point not to ask
15 Karen Hampton any sort of leading questions, any
16 sort of question that goes close to what the
17 Court has ruled as inadmissible.
18 THE COURT: I think that is true. I think that
19 would be improper.
20 MR. SPRINKLE: What about the officers? We can't
21 ask the officers whether a confession has been
22 made to this crime by any other party?
23 THE COURT: I wouldn't allow that anyway. That
24 wouldn't be admissible by any evidence.
25 MR. SPRINKLE: How about a declaration? You

1 didn't rule on declaration against pecuniary
2 interests. The fact someone makes a wrongful
3 death statement, liability? Even though third
4 party, it is admissible.
5 THE COURT: He is not here making it, though.
6 What you are doing is to have Karen Hampton
7 repeat what somebody else said.
8 MR. KNOWLES: What if he testified and said he
9 didn't make such a statement. Is it admissible
10 at that point?
11 THE COURT: What?
12 MR. KNOWLES: If he took the stand and said, "I
13 never made such a statement, never told anybody
14 that I committed this crime." Is her statement
15 then admissible?
16 MR. AXELSON: Your Honor, then they are impeaching
17 their own witness.
18 MR. KNOWLES: Then we would have him declared
19 adverse.
20 THE COURT: You are familiar with the Chambers
21 against Mississippi, too.
22 MR. KNOWLES: Yes, sir.
23 THE COURT: Decided by the United States. I am
24 not going to rule on that now, not until it is
25 presented. I am not going to be premature on that.

1 MR. AXELSON: Your Honor, I think the defense
2 counsel should also be instructed not to ask if
3 another individual has been arrested on that.
4 MR. KNOWLES: Wait a minute.
5 MR. AXELSON: They are going to go into the same
6 thing by the back door, that Joseph Brown was
7 arrested on this.
8 MR. KNOWLES: These are facts within the personal
9 knowledge of the police officers. Now we are not
10 going to get into any hearsay problems there.
11 THE COURT: I don't know. I think I might allow
12 the question on that, because they have arrested
13 other people, too. They arrested 2 others. One
14 of them has been tried.
15 MR. AXELSON: Your Honor, I am going to be able
16 to go into an awful lot if I tried to go into it
17 by myself would be ruled objectionable.
18 The Court would rule mistrial. The fact
19 somebody else has been arrested has nothing to
20 do with this case.
21 THE COURT: No, it has nothing to do with it.
22 That others were arrested makes no difference.
23 MR. SPRINKLE: So what is the status? Can we
24 ask the question or can't we?
25 THE COURT: What?

1 MR. SPRINKLE: The question Dave just raised,
2 whether someone else has been arrested for these
3 crimes, -
4 THE COURT: I am going to rule that it is not
5 material.
6 (Back in the courtroom.)
7 THE COURT: Call your first witness.
8 MR. SPRINKLE: Call the Defendant, Your Honor.
9 * * * * * * *
10 CHARLES LEWIS ELLISON, Defendant,
11 having first been duly sworn,
12 was called to the witness stand
13 and upon being examined, testified
14 as follows:
15 DIRECT EXAMINATION
16 EXAMINED BY MR. SPRINKLE:
17 Q Charles, will you tell the jury your name,
18 please?
19 A Charlie Lewis Ellison.
20 Q You are going to have to move up closer to
21 the microphone.
22 A Charlie Lewis Ellison.
23 Q Charlie, how old are you?
24 A 21.
25 Q On September 9-10 of last year, where did

you live?

A 1051 Ann Street.

Q Is that A-n-n?

A Yes.

Q Is that in the City of Portsmouth?

A Yes, sir.

Q How far did you get in school?

A To the 3d grade.

Q Did you finish the 3d grade?

A No, sir. Yes, sir.

Q Drawing your attention to December 10, 1976, did you have a conversation with those 2 gentlemen who testified yesterday, in Norfolk?

A Yes, sir.

Q Now the tape that was played yesterday to the jury and to the lawyers and to the Judge, what was on that tape, was it an accurate accounting of what the conversation was on that day?

A Yes, sir.

Q Explain to the jury. Do you want to explain to the jury why you said those things?

A The FBI, the police were looking for me for a robbery in Suffolk. I was scared. I met these 2 friends. They were talking about these 2 people, anytime they had anything like that, they would help them out.

1 That is why I said that to the people in
2 Norfolk. I never been in nothing like it before.
3 Q Did you rob Mr. Marks on September 10, 1976?
4 A No, sir.
5 Q Did you shoot him?
6 A No.
7 Q That street, Ann Street in Portsmouth, is
8 that your mother's address?
9 A Yes, sir.
10 Q How long did you live there?
11 A I have been staying there about 6 years.
12 Q That attempted bank robbery that you are
13 talking about, did you plead guilty to that?
14 A Yes, sir.
15 MR. SPRINKLE: That is all.
16 CROSS EXAMINATION
17 EXAMINED BY MR. AXELSON:
18 Q Your nickname is Charlie Red, isn't it?
19 A That is what they call me. It ain't my
20 nickname, but I use Charlie Red.
21 Q You use the name Charlie Red? That is what
22 they called you that night?
23 A No, sir.
24 Q They didn't call you Red that night?
25 A No. I say that is not no street name.

Q And you are a convicted felon?

A Yes, sir.

Q All right, now, do you recall during the course of that evening Lucky, Don Stenham, the dark-haired FBI Agent, asked you when was the last time you killed somebody?

Do you recall your answer to that question?

A Yes, sir.

Q What did you tell them?

A I told them that what I heard on the street that the Carma's man had been killed.

Q Is that what you told them, that you had heard it on the street?

A I told them. I didn't do it, but I didn't. I used it for an excuse.

Q Didn't you tell them, "We hit that man in Carma's"?

A That was just a front.

Q You told them, "We hit that man"?

A Yes, sir.

Q How did you know more than one person was involved?

A I just heard it on the street.

Q You just heard it on the street?

A Yes, sir.

1 Q Okay, now, you know the man at Carma's had
2 been shot in a robbery?
3 A Yes, sir.
4 Q All right. How did you know he had been
5 shot in a robbery? How did you know it wasn't just a
6 straight murder?
7 A That is what I heard.
8 Q You heard it on the street?
9 A People I heard talking.
10 Q So when Joe asked you, "That is a robbery,
11 though. You didn't go there to kill him?" you just
12 responded to what you knew from having been on the street?
13 A Yes, sir.
14 Q And then you told Joe something about, "We
15 didn't have to kill him, but he had seen our faces." Do
16 you recall telling him that?
17 A Yes, sir.
18 Q How did you know the robbers didn't have
19 masks on?
20 A I don't know. Like I say, I just heard it
21 on the street.
22 Q You just heard that on the street, too?
23 A Yes, sir.
24 Q And Lucky asked you, "What did you kill him
25 with?" Do you recall what you responded to that?

1 A Yes, sir.

2 Q What was that?

3 A I said a double barreled shotgun.

4 Q How did you know he was shot with a double

5 barreled shotgun?

6 A I - this I don't know. I just heard he was

7 shot with a shotgun.

8 Q You just made up double barreled shotgun?

9 You just made that up?

10 A Yes, sir.

11 Q How did you know his wallet was taken in the

12 robbery?

13 A I heard it on the street.

14 Q Just heard that on the street, too?

15 A Yeah.

16 Q All right. Do you recall Lucky asking you

17 how much you got out of it?

18 A Yes, sir.

19 Q What did you tell him?

20 A I didn't tell him nothing.

21 Q He asked you if you got $100.00 out of it.

22 A I didn't know nothing.

23 Q You nodded at that time. He asked you, "You

24 got a hundred dollars, right?"

25 A Yes, sir.

1 Q How did you know $100.00 was taken in the
2 robbery?
3 A I don't know.
4 Q Is this the first time you heard it?
5 A No.
6 Q You didn't hear that on the street?
7 A No.
8 Q Just the wallet, but you didn't know how
9 much was taken?
10 A No, sir.
11 Q Lucky asked you who was the trigger man.
12 How did you respond to that?
13 A I told him I was.
14 Q Why did you tell him you were a trigger man
15 in the robbery and murder?
16 A The friend carried me over said I had to
17 tell the man something that they would help me get out of
18 town. I wanted to get out of town for a crime I had
19 committed.
20 Q You were trying to persuade them you were
21 tough? You were willing to lie to them so they would do
22 something for you? You figured it was to your advantage,
23 so you were willing?
24 A Yes, sir.
25 Q If it is to your advantage here today, are

1 you going to lie?

2 A I am not telling you. I am telling you the

3 truth, that I didn't do it.

4 Q Do you recall Joe asked you if you enjoyed

5 it? Enjoyed the killing?

6 A Yes, sir.

7 Q What did you respond to that?

8 A I think I said it wasn't nothing, or some-

9 thing.

10 Q It wasn't nothing?

11 A Yeah.

12 Q Do you recall Joe asking you, "You stick

13 your neck out for life and you end up with what, $100.00

14 and 2 or 3 credit cards?" And you responded what? Do

15 you recall that?

16 A No.

17 Q You responded you figured he had more than

18 that on him. Is that what you responded to that?

19 A I don't recall.

20 Q You just don't recall that answer?

21 A No.

22 Q Where were you on the evening of September 10?

23 A I was over at my sister's house.

24 Q At your sister's house?

25 A Yes, sir.

1 Q What were you doing over there?

2 A Over there drinking.

3 Q How much did you have to drink that night?

4 A We had a quart of Rich's.

5 Q When was the first time that you heard about

6 the robbery?

7 A I heard about it 3 days later after it was

8 committed.

9 Q Now during the course of the conversation

10 that you had with Lucky and Joe, didn't they tell you that

11 they were going to get you out of town?

12 A Did they tell me this?

13 Q Didn't they tell you number one you want to

14 work for us, number two you want to get out of town?

15 A Yes, sir.

16 Q Didn't they tell you, "We are going to get

17 you out of town"?

18 A Yes, sir.

19 Q Didn't they tell you that before they went

20 on to discuss this robbery?

21 A No, sir.

22 Q That came afterwards?

23 A Not that I recall.

24 Q Perhaps if I replayed the tape for you, it

25 would refresh your memory.

1 MR. KNOWLES: Your Honor, we are going to object
2 if Mr. Axelson intends to play the whole tape
3 again.
4 MR. AXELSON: I am not going to replay the whole
5 tape. I am going to replay the portion that I
6 just asked him.
7 MR. KNOWLES: All he said was he didn't recall.
8 MR. AXELSON: I am going to refresh his memory
9 and see if he recalls after having his memory
10 refreshed.
11 (Tape:
12 LUCKY: Alright. Let me lay it out on ya, alright?
13 First of all, the (inaudible) you wanna work for
14 us right?
15 RED: Mmm.
16 LUCKY: Number two you wanna get out'a town?
17 RED: Right.
18 LUCKY: We'll get you out'a town.)
19 MR. AXELSON:
20 Q All right. He just told you he would get
21 you out of town, correct?
22 A Yes.
23 (Tape:
24 LUCKY: Three maybe four days. We'll get ya' out.
25 We'll get ya out, but you gotta get when it's

safe.)

Q All right, going on from then, he said,

(Tape:

LUCKY: You're a friend of theirs, you're a friend of ours.)

(Skips)

(Tape:

LUCKY: You ever done it before?

RED: Yeah.

LUCKY: When was the last time you killed somebody?

RED: When we . . .when we hit that uh place uh Carma's in Portsmouth.

LUCKY: What's that?

RED: Carma's.)

Q So he had already told you he was going to get you out of town?

A Yes, sir.

Q Isn't that correct?

A Yes, sir.

Q And then you went on to confess to the robbery and to the murder?

A I don't see he said he was going to get me out of town.

Q He already told you he was going to get you

out of town?

A The dude that took me over there said that I had to say this to him to get me out of town.

Q Isn't it a fact, Charles Lewis Ellison, that on the night of September 10, 1976 -

MR. KNOWLES: Now, Your Honor, I am going to object to Mr. Axelson making his closing statements now.

MR. AXELSON: I am asking him a question, a perfectly legitimate question, Mr. Knowles.

MR. AXELSON:

Q Isn't it a fact, Charlie Lewis Ellison, that on the night of September 10, 1976, that you took a shotgun and went and shot and robbed Mr. Ernest Marks at Carma's Chicken? Shot him in the stomach?

A No, sir.

MR. AXELSON: No further questions.

(Mr. Knowles stood up to examine the witness)

THE COURT: Wait a minute. Both of you are not going to examine him.

MR. SPRINKLE: Can I have a word with him?

THE COURT: He started examining him.

(Defense counsel confer.)

THE COURT: Mr. Sprinkle can go on. I have no

1 objection to him. We can't let attorneys change
2 on examination.
3 REDIRECT EXAMINATION
4 EXAMINED BY MR. SPRINKLE:
5 Q So you are not known as Charlie Red, are you?
6 A No, sir. That is what some people call me.
7 Q When you made that statement about they
8 already told you they were going to take you out of town,
9 as Mr. Axelson just played back to you, was it your under-
10 standing if you hadn't admitted to these things that they
11 weren't going to take you out of town?
12 A Yes, sir.
13 Q Do you know what it is to swear in court?
14 To testify?
15 A Yes, sir.
16 Q Do you know the consequences of telling a
17 lie in court?
18 A Yes,sir.
19 MR. SPRINKLE: Okay. That is all.
20 * * * * * * *
21 M. L. GAVIN, witness having first
22 been duly sworn, was called to
23 the witness stand and upon being
24 examined, testified as follows:
25 DIRECT EXAMINATION

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object to him leading the witness.

MR. AXELSON: It is cross examination. It is your witness.

THE COURT: He testified to it.

MR. AXELSON:

Q Detective Gavin, at that time, Charles Lewis Ellison told you that he had never told anyone that he was involved in the murder?

A Yes, sir, that is right.

Q That was on January 17, 1977? Or January 18?

A January 18, I believe.

THE COURT: How long after the event was that?

A It took place in September, Your Honor.

MR. AXELSON: That is something like 5 months.

Thank you, Detective Gavin.

MR. SPRINKLE: Judge, we have one more question for him.

(Defense attorneys confer.)

REDIRECT EXAMINATION

EXAMINED BY MR. KNOWLES:

Q Detective Gavin, isn't it true that Mr. Ellison told you when you visited him at Virginia Beach City Jail that he was not aware that anybody had ever recorded a statement that he had made, as opposed to the fact that he had never told anyone that he committed this

offense?

A (Refers to file.) I have it here. It will be a couple of minutes.

He told us that he was not involved in any murder, and that he had never told anyone that he was involved in a murder.

Q You don't recall, apart from that particular statement, that he told you to his knowledge nobody had recorded any conversation - any kind of statement, though?

A We advised him we had him on tape - the FBI had him on tape. He advised us that he did not. That they did not.

MR. KNOWLES: Call your next witness.

* * * * * * *

THE COURT: Call your next witness.

MR. KNOWLES: Could we have just a moment, Judge?

THE COURT: Come up here and let me ask you all a question.

(Counsel approach bench.)

THE COURT: You all have no more witnesses at this time?

MR. KNOWLES: That is correct, Judge.

THE COURT: Well, I think we might as well let you all go eat. Go now, and I think you can get back here by 1:30 anyway. I think that will

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that it was overruled.

MR. KNOWLES: Were they overruled, Your Honor.

THE COURT: I reckon so, yes.

MR. KNOWLES: All right. We made a motion for discovery on behalf of the Defendant pursuant to Rule 3A:14, which Mr. Axelson has complied with, and this one was granted anyway, I believe.

MR. KNOWLES: Motion to be furnished with evidence favorable to the accused.

MR. AXELSON: I think I have complied with that.

THE COURT: I thought I granted the motion for any exculpatory evidence tnat they had, that they furnish you.

MR. AXELSON: Your Honor, I think I have complied with that much, to my sorrow.

MR. KNOWLES: Subparagraph 3(f). This is a motion to be furnished with evidence favorable to the accused, related to evidence which would reasonably tend to show that the accused did not commit the offense charged; and of course, that led to the discovery of Joseph Brown's statement.

MR. AXELSON: That is what I said. I think I have complied with that.

MR. SPRINKLE: That is all the exculpatory evidence?

MR. AXELSON: All that I know of.

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(Present in chambers: The Court, the Defendant, Messrs. Axelson, Knowles, and Sprinkle, Deputy Sheriff, and witness.)

(Witness sworn.)

MRS. EVA MAE BROWN, witness
having first been duly sworn,
was called to the witness stand
and upon being examined, testified
as follows:

DIRECT EXAMINATION

EXAMINED BY MR. SPRINKLE:

Q What is your name again?

A Mrs. Eva Mae Brown.

Q Mrs. Eva Mae Brown, is that correct?

A Yes, sir.

Q Where do you live, Mrs. Brown?

A 1010 South Street

Q Okay. Do you have a son named Joseph Brown?

A I do.

Q Does he have any nicknames?

A Call him Jo-Jo.

Q Okay. When is the last time you saw Joseph Brown?

A It's been around about 3 weeks.

Q In the last 2 weeks or so, have any subpoenas

1 been brought to your house for Joseph Brown?
2 A One. I have it right here.
3 Q Do you have it with you?
4 A Uh-huh. (Takes subpoena from purse.)
5 Q Now, Mrs. Brown, before we go into the
6 subpoenas, does Joseph Brown live there?
7 A No, he doesn't live there. He stay there
8 sometimes.
9 Q When was the last time he stayed there,
10 Mrs. Brown?
11 A Before those 3 weeks, he has been gone. He
12 have stay there. He don't stay there steady no more.
13 Q Before the last 3 weeks, you saw him?
14 A The last time I saw him, they didn't live
15 there, but they come and go.
16 Q Does he have any of his clothes there?
17 A No. Not now.
18 Q Do you know where he lives?
19 A Just a few old pieces. I certainly don't.
20 Q Do you have any idea where he might be
21 located at this time?
22 A No, I don't. When they come and go, I don't
23 ask them no questions. They are grown, and I don't ask
24 them no questions.
25 Q Do you know where he is employed?

A He wasn't employed when he left home.

Q Does he have a brother named Ronnie Brown?

A Ronald. It is not Ronnie.

Q Do you know where he might be found?

A No, I don't know.

Q Do you have any indication where Joseph Brown might be located?

A No, I don't, because if I had known, I would have gave them those subpoenas.

Q This is a subpoena that you got. Does it say "Joseph Brown" up there?

A Yes.

Q Does it say "1010 South Street"?

A 1010 South Street.

MR. SPRINKLE: For the record, I am showing her a copy of a subpoena.

A See, the Sheriff called me and talked with me before he brought this subpoena down.

MR. SPRINKLE:

Q Right.

A And I told him I didn't know where Joseph was at that time. He wasn't at home, living at home. I hadn't seen him then in around 2 weeks or a little better.

MR. SPRINKLE: Okay. I would like to make this

Do you want to see this?

That is fine. I would like to make this a part of the record. This is a subpoena issued for Joseph Brown for Charles L. Ellison's trial for May 31, 1977, subpoenaed by the Defendant's Attorney, J. Wayne Sprinkle.

That is all I have of Mrs. Brown at this time.

THE COURT: Wait a minute and let me get a clerk.

Do you want to ask her any questions now?

MR. AXELSON: No, sir.

THE COURT: Didn't he tell you where he was going before he left?

A No, they don't ever tell me where they are going. See, Joseph is 32 years old.

Q Does he have a wife?

A No, he is not married.

Q Well, while he was living at your house, was he working anywhere?

A When he had a job. He has been looking for work part of the time, but he hadn't been working.

MR. SPRINKLE:

Q Let me ask. The last address that you had

for him, to your knowledge, is 1010 South Street?

A My address. It was 1002, but they changed the addresses in the project, but now it is 1010.

Q 1010 South Street?

A That is correct.

Q Do you know who lives at 1002 South Street now?

A 1002?

Q Yes, ma'am?

A Well, mine was 1002 before, but I am at the same place but they changed the address.

Q Do you know who lives at 1002 now?

A I do. It is the same number.

MR. SPRINKLE: Thank you.

THE COURT: Between what streets is that on South?

A It is on South Street right across the street from Riddick Weaver School in the back. The house sits in the back.

Q What are the 2 side streets?

A Between? In between, you mean? Well, I guess you would say Barbour Drive, I guess. Between Barbour Drive and South, but I am just sitting in the back.

MR. SPRINKLE:

Q Your front door, does it front on South

Street?

A My front door faces South Street.

MR. SPRINKLE: I could vouch for that since I went there to deliver some subpoenas.

THE COURT: All right. She can go outside.

* * * * * * *

(Deputy Clerk and Deputy Sheriff come in.)

MR. KNOWLES: Just an explanation, Your Honor. Mrs. Brown's testimony and the witnesses who follow are testifying as a proffer of proof relating to the admissibility of the statement of Karen Hampton, the statement, of course, being that Joseph Brown made a statement involving himself in this particular robbery and murder.

(Subpoena given to Clerk.)

* * * * * ***

JAMES BACKUS, witness having first been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. KNOWLES:

Q You are Jim Backus?

A Yes.

1 Q Have you represented Joseph Brown in the
2 past? Recent past?
3 A Yes, I have.
4 Q On what charges did you represent him?
5 A Murder, armed robbery, and use of a fire-
6 arm in the commission of a felony.
7 Q Were those offenses arising out of the
8 incident that occurred at Carma's Chicken on Elm and
9 County Street in the City of Portsmouth?
10 A Yes.
11 Q You were appointed by the Court to repre-
12 sent him?
13 A Yes.
14 Q Do you know his whereabouts at this time?
15 A I have not had any contact with him since
16 then, since that occasion.
17 Q Let me ask you if you recall his preliminary
18 hearing in Judge Sandie's court?
19 A Yes, I do.
20 Q Were you present and represented him at
21 that time?
22 A Yes.
23 Q Do you recall as a part of the Commonwealth's
24 offer of proof at that time that Karen Hampton was
25 called as a witness?

1 A Yes.

2 Q Did she testify to a statement made to her

3 by Joseph Brown?

4 A Yes.

5 Q An incriminating statement?

6 A Yes.

7 Q Did you have the opportunity to cross

8 examine Karen Hampton?

9 A Yes, I did.

10 Q Was she sworn as a witness on behalf of

11 the Commonwealth?

12 A Yes, she was.

13 Q Did you cross examine her?

14 A Yes, I did.

15 Q As best you can recall the statement to

16 which she testified, can you recall what that testimony

17 was?

18 A I could summarize the effect of that

19 testimony. I do not recall exact language.

20 Q Well, what was the effect, as best you

21 recall?

22 A Karen Hampton stated that she had talked

23 with Joseph Brown and another individual sometime after

24 the incident at Carma's - I believe it was a month or

25 2 later - and she indicated that Joseph Brown told her

that he had to lay low because the Man was after him for, I think his words were "wasting some nigger at Carma's."

Q All right. Do you recall anything else she said?

A She also stated that he had a radio with him at that time that fit the description of the radio stolen in the course of the robbery at Carma's.

Q All right. Were you aware that Joseph Brown was subpoenaed as a witness to appear at this trial?

A Yes, I was.

Q If Joseph Brown were called as a witness at this trial - you have testified that you represented him - what would be your advice to him in your legal capacity as his attorney with respect to his testifying?

A If he sought any advice, I would advise him that he would have nothing to gain by testifying in this matter, and that to testify would put him under the rigors of cross examination, and for that reason, I would not recommend that he make any statement in the course of this trial.

Q Are you saying, then, that you would advise him to take the Fifth Amendment?

A Yes.

Q All right. Let me direct your attention to the accused and ask you if this is Joseph Brown?

A This is not Joseph Brown.

MR. KNOWLES: All right. That is all the questions I had.

CROSS EXAMINATION

EXAMINED BY MR. AXELSON:

Q Mr. Backus, you would base that opinion to Joseph Brown, the hypothetical that Mr. Knowles asked you, based on everything that you knew about the case, including conversation that you had had with Joseph Brown - as that would be a part of what you based your opinion on, would it not?

A Yes, I don't think I could isolate that. I take that question from the facts as I know them to be. That is not isolation.

Q As a matter of fact, Joseph Brown has denied making the statement to you - excuse me - denied making any statement to Karen Hampton, and he denied being involved in it, denied being -

Joseph Brown has denied making the statement to Karen Hampton, and further he has denied being involved in the Carma's Chicken robbery-murder, to you, to the extent that you can answer that question?

A (Hesitating.)

MR. KNOWLES: Could you repeat the question?

MR. AXELSON:

Q Joseph Brown denied to you that he was involved in the Carma's Chicken robbery-murder?

MR. SPRINKLE: Wouldn't that be privileged?

MR. AXELSON: That is what I said, to the extent that he feels he can answer that question.

It is not your privilege, not the Defendant's privilege. It is Mr. Brown's and Mr. Backus's privilege.

THE COURT: I didn't hear that.

MR. AXELSON: I understand, Your Honor, that this is something that has come in that may be privileged.

MR. SPRINKLE: This case was nol-prossed. It was not dismissed against Joseph Brown.

MR. AXELSON: It would not be admitted in a court of law, but we are dealing with hearsay here.

MR. AXELSON:

Q Mr. Backus, I am putting you in an awkward spot, but to the extent you can, please do.

A I would feel that to answer that question would put me on the spot.

Q It is your duty as an attorney. Did he tell you he was guilty of it?

A No, he did not.

Q Did he say he was not guilty of it?

A Yes, sir.

REDIRECT EXAMINATION

EXAMINED BY MR. KNOWLES:

Q Let me ask you another question. Following his preliminary hearing, was his case sent on to the grand jury?

A Yes, it was.

Q Was he indicted on these charges?

A Yes, he was.

Q Charges of murder, robbery, and use of a firearm in the commission of a felony?

A Yes.

Q Arising out of the Carma's Chicken holdup and slaying?

A Yes.

MR. KNOWLES: That is all.

RECROSS EXAMINATION

EXAMINED BY MR. AXELSON:

Q Mr. Backus, subsequently I came to you and we went before Judge Oast and had Jo-Jo Brown's bond reduced significantly, made sure he was out within a matter of hours, and further went on to nol-pros the case when it came up for trial?

A Yes.

Q That is also correct?

A That is exactly it. The bond was minimal or non-existent, I do not recall which.

MR. KNOWLES: We have no further questions of Mr. Backus.

* * * * * * *

M. L. GAVIN, witness having previously testified, was recalled to the witness stand and upon being examined, testified as follows:

THE COURT: You were sworn this morning. You understand you are still under oath.

DIRECT EXAMINATION

EXAMINED BY MR. KNOWLES:

Q Would you state your name, please?

A Detective M. L. Gavin.

Q And you are a detective with the Portsmouth Police Department?

A Yes, sir.

Q In that capacity, were you involved in the investigation of the robbery and the slaying of Mr. Marks at Carma's Chicken place down on County and Elm Avenue?

A Yes, I was.

Q Were you able to determine what was taken

from Mr. Carma at the time of the robbery? Mr. Marks, I mean?

A At the time of the robbery?

Q Yeah? Did your investigation reveal as to what was taken?

A His wallet, $100.00, and some credit cards.

Q Anything else?

A A radio and a paper bag.

Q Do you know what kind of radio it was?

A Yes. It was a - the name of it - (refers to file) Panasonic 8-track tape.

Q During the course of your investigation, did you speak with a Karen Hampton?

A Yes, I did.

Q All right, sir, did she give you a statement?

A Yes, she did.

Q In connection with this offense?

A Yes, she did.

Q What is the date of that? Do you have that in your file?

MR. AXELSON: November 3, I believe is the correct date.

A November 3.

MR. KNOWLES:

1 Q Is the statement written in her own hand?

2 A No, it isn't.

3 Q Was the statement orally given or taken

4 down by whom?

5 A It was taken down by Sergeant Benoit in my

6 presence.

7 Q Did Karen Hampton sign in her own name, in

8 her own handwriting, that statement?

9 A Yes, she did.

10 Q Do you have that in your file?

11 A Yes, I do.

12 MR. KNOWLES: We would like to introduce that,

13 Your Honor.

14 THE COURT: Give it to the Clerk. (Handwritten

15 copy.)

16 MR. KNOWLES:

17 Q Did you show her a photograph of a radio-

18 tape player?

19 A Yes, I did.

20 Q Do you have that with you?

21 A (Hands photo to Mr. Knowles.)

22 Q And this is the photograph of the radio-

23 tape player?

24 A Right.

25 Q Did she identify this?

A She said it was one like that. Just like that.

Q That who had?

A That Jo-Jo Brown had.

Q And relating back to her statement that we have already introduced into evidence, did you ask her about - did you show her this photograph at the time you took this statement from her?

A I think so. Let me check the statement.

Q Do you just want to refer to that?

A (Refers to handwritten statement.)

Yes, I do.

"It looks exactly like the one."

Q Is that what she said?

A Uh-huh.

Q That Jo-Jo had?

A Yes, that Jo-Jo had.

Q All right. Did this statement implicate -

MR. AXELSON: Well, Your Honor, I am going to object.

THE COURT: The statement speaks for itself.

MR. KNOWLES:

Q All right. Did you also show her a photograph of a black male?

A Yes, I did.

Q Whose photograph was that?

A Jo-Jo Brown.

Q What is his proper name? Do you know?

A Joseph Brown.

Q Is this Joseph Brown - and I am pointing at the accused - ?

A No, sir.

Q Do you have any idea where Joseph Brown lives or where he is at the present time?

A Today?

Q Yeah?

A No. He is in Portsmouth. I saw him yesterday on County Street.

Q Do you have any idea where he is staying - if he is staying in that area?

A He was staying on Elm Avenue the last I knew.

Q Are you aware of an all-points bulletin being out on Joseph Brown?

A No one has notified me of it on the air.

Q Let me ask you if you appeared as a witness for the Commonwealth at the preliminary hearing of Joseph Brown?

A I believe so. I was there. I don't believe I testified.

1 Q Did Karen Hampton testify?

2 A I believe she did.

3 Q Was she under oath at the time?

4 A Yes, sir.

5 Q Do you know if Joseph Brown was represented

6 by an attorney at that time?

7 A Yes, sir, he was.

8 Q Was he present?

9 A Yes, sir, he was.

10 Q All right. Was Karen Hampton's statement,

11 if you know, presented to the grand jury on the charges

12 against Joseph Brown, or as evidence on the charges?

13 A Sergeant Benoit went to the grand jury, so

14 more than likely -

15 Q More than likely what?

16 A It was presented.

17 Q Do you know if an indictment was returned

18 against Joseph Brown?

19 A I believe so.

20 MR. KNOWLES: That is all the questions we have

21 of him.

22 THE COURT: Mr. Gavin, how long after the event

23 of this killing was it that you - that Karen

24 talked to you?

25 A Approximately 2 months.

THE COURT:

Q 2 months later?

A Yes, sir.

Q What is the occasion for her saying anything about this?

A We had picked her up on a couple of other charges.

Q And she just opened up and told you about this?

A We were talking to her and her companion, Diane Flythe, about some related charges, and they came out with this and said, "Maybe if I give you all some information, you all might be able to help me.

Q Did she tell you who else was involved? The names of any other person involved?

A She told me that Jo-Jo was the only one that had mentioned anything about it.

CROSS EXAMINATION

EXAMINED BY MR. AXELSON:

Q She gave you this information, and said, "Maybe if I help you, you all can help me"?

A Yes.

REDIRECT EXAMINATION

EXAMINED BY MR. KNOWLES:

Q The second page of the statement was taken by whom, you or Detective -

A Sergeant Benoit.

Q Were you there?

A Yes, I was.

Q Isn't that last question, "Have you been promised any reward or leniency to make this statement?"

MR. AXELSON: Now, Your Honor, the statement speaks for itself.

A We didn't promise her.

MR. KNOWLES: Okay. That is all.

Thank you, very much.

* * * * * * *

KAREN CARLOTTA HAMPTON, witness having first been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. KNOWLES:

Q Would you state your name, please?

A Karen Carlotta Hampton.

Q Miss Hampton, about the first of November of 1976, did you have an occasion to see Jo-Jo Brown?

A Yes.

Q On the street?

A Yes.

Q Where was that?

A On County Street in front of Bell's Lounge.

THE COURT: Speak up just a little louder, will you.

A On County Street in front of Bell's Lounge.

MR. KNOWLES:

Q Was he alone?

A No.

Q Who else was with him?

A Joe Scott. They called him Slim.

Q Were either of them carrying a radio?

A Joe Scott was.

Q Did Joseph Brown - Jo-Jo - what is his full name? Do you know?

A I think it is Joseph Brown.

Q Did he make any statement to you with respect to his involvement in a robbery at Carma's, and slaying at Carma's Chicken on Elm and County?

A Yes, sir.

Q Do you recall what he said?

A I can recall the conversation, but I can't -

Q Tell us first how you saw him.

A Okay. I was coming up the street with

Spencer Johns and Diane Flythe. I told him to wait across the street for me because I was going into Bell's to see what was going on in there.

So I went in there and stayed 2 or 3 minutes. When I came back out, Slim grabbed me by the arm, asked me what was happening, did I want to buy a radio.

I asked him could I see it. He showed it to me, told me he didn't want but a pound for it.

Q What is a pound?

A That's $5.00.

I told him I had to check with Dee about it first, you know.

Q Who is Dee?

A That is Diane Flythe.

So Jo-Jo was standing almost behind me. I looked back and I had seen what was happening. He told me wasn't much except the white folks was after him again.

I asked him what was they after him for. He said he was supposed to have splattered some nigger across the street, and he didn't get nothing but a radio and a lousy hundred dollars, you know.

And, you know, we just got into a conversation, you know. He told me they had talked to some whore named Betty.

Q Who is they?

A I don't know who Betty is.

Q Who is they?

A He was talking about the police had talked to some whore named Betty, and he didn't know what she was going to do.

When he said he had splattered some nigger on the street, I asked him who he was talking about. He said, "Old man Carma," pointing in that direction, down County Street.

Q Did he say he shot the man at Carma's?

A No. He just said he splattered.

Q He said splattered?

A Said, "We didn't get but a lousy hundred dollars and this radio."

He pointed to that radio, said he was offering it?

Q The one he was offering for sale?

A (Nods.) Slim said he was trying to sell the radio so they could get some wine.

Q All right. Did you - What you have just testified to, did you tell the Portsmouth Police Department this?

A I did.

Q Was a statement - this written statement

(shows statement to her) - can you identify that?

A Yeah. Those are my initials.

Q Is that your signature on the bottom of the second page?

A Yes.

Q That is your handwriting?

A (Nods.)

MR. KNOWLES: I would like for the record to show that she has identified the statement that we just introduced through Detective Gavin.

MR. KNOWLES:

Q Did he say if anybody else was involved in this?

A No.

Q Jo-Jo, I mean?

A No.

Q Did the police officers that you told this to show you a photograph?

A Yeah.

Q Of whom?

A Jo-Jo Brown.

Q Did you identify that? As the person who had made this statement to you?

A Yes.

Q Is - I am pointing to the accused - is this

1 Jo-Jo Brown?

2 A I haven't ever seen him before in my life.

3 Q You have never seen this man before?

4 A (Shakes head.)

5 Q Have you testified to what you have just

6 told us at Joseph Brown's preliminary hearing?

7 A I did.

8 Q Were you under oath?

9 A Yes.

10 Q Were you cross-examined by Joseph Brown's

11 attorney?

12 A Yes, sir.

13 Q Did the police officers - do you remember

14 their names, that you told it to?

15 A I told it to Detective Benoit.

16 Q Did he show you a photograph of a radio

17 or anything like that?

18 A Yes.

19 Q Now, let me show you this photograph that

20 through Detective Gavin we have introduced into evidence.

21 Is that the photograph he showed you?

22 A Naw, that is not the one he showed me.

23 Q It is not?

24 A This is not the photograph he showed me.

25 It is the radio, though, but it is not the photograph he

showed me.

Q All right. This is the radio? When you say this is the radio, what are you referring to?

A That is the one Jo-Jo Brown showed me.

THE COURT: Let her go on back, and we will take the verdict of the jury and then come on back.

(Back in the courtroom.)

(Jury returns to jury box.)

THE COURT: Let me announce to everyone in the courtroom here that when the verdict is read, there will be no display of any emotions of any kind.

Do we all understand that?

THE CLERK: Mr. Ellison, stand up, please.

Ladies and gentlemen of the jury, have you reached your verdict?

JURORS: Yes, we have

THE CLERK: Indictment #28311, Commonwealth of Virginia vs Charles Ellison, Defendant.

On the indictment for murder, "We, the jury find the Defendant guilty of murder of the first degree, and fix his punishment at life imprisonment." Signed G. B. Causway, Foreman.

In the indictment for robbery, Commonwealth

of Virginia vs Charles Lewis Ellison, Defendant. Verdict: "We, the jury, find the Defendant guilty of robbery and fix his punishment at life imprisonment." Signed G. B. Causway, Foreman.

In the indictment for the use of a firearm in the commission of a felony, Commonwealth of Virginia vs Charles Lewis Ellison, Defendant, verdict: "We, the jury, find the Defendant guilty of the use of a firearm in the commission of a felony, robbery and murder, and fix his punishment at 5 years in the penitentiary." Signed G. B. Causway.

Ladies and gentlemen of the jury, these are your verdicts, so say you all?

JURORS: (Answer in the affirmative.)

THE COURT: (Starts to excuse the jury.)

MR. SPRINKLE: Judge, can we poll the jury?

THE COURT: Yes, sir.

Just wait a minute.

THE CLERK: Mrs. Laura Renn, are those - the verdicts I just read - yours?

MRS. RENN: Yes, sir.

THE CLERK: Michael Eason, are those the verdicts yours I just read?

1 MR. EASON: Yes, sir.

2 THE CLERK: Marjorie Chenoweth, are the verdicts

3 I just read yours?

4 MS. CHENOWETH: Yes.

5 THE CLERK: G. B. Causway, are the verdicts I

6 just read yours?

7 MR. CAUSWAY: Yes, sir.

8 THE CLERK: Mildred Bartlett?

9 MS. BARTLETT: Yes, sir.

10 THE CLERK: Are the verdicts I just read yours?

11 MS. BARTLETT: Yes, sir.

12 THE CLERK: William Aldridge, are the verdicts

13 I just read yours?

14 MR. ALDRIDGE: Yes, sir.

15 THE CLERK: Hugh Adams, Jr., are the verdicts

16 I just read yours?

17 MR. ADAMS: Yes, sir.

18 THE CLERK: Mildred Ackley, are the verdicts I

19 just read yours?

20 MS. ACKLEY: Yes, sir.

21 THE CLERK: Emma Van Horn, are the verdicts I

22 just read yours?

23 MS. VAN HORN: Yes, sir.

24 THE CLERK: Frederick Gibson, are the verdicts

25 I just read yours?

1 MR. GIBSON: Yes, sir.

2 THE CLERK: Frances Twitty, are the verdicts I

3 just read yours?

4 MS. TWITTY: Yes, sir.

5 THE CLERK: Ann Anderson, are the verdicts I

6 just read yours?

7 MS. ANDERSON: Yes, sir.

8 THE COURT: Thank you very much. You all may

9 be excused now. Thank you very kindly for your

10 services.

11 (Jury leaves.)

12 THE COURT: Any motions, gentlemen?

13 MR. SPRINKLE: Can we make that back in the room

14 where we are making the proffer, Judge?

15 THE COURT: You can make it in open court. The

16 jury is gone now.

17 MR. SPRINKLE: Judge, we are going to move to

18 set aside the jury's verdict as contrary to the

19 law and the evidence.

20 THE COURT: Well, gentlemen, I think this verdict

21 was purely a matter for the jury, and not for

22 the Court, and I will have to overrule your

23 motion to set it aside.

24 MR. SPRINKLE: Can you hold up judgment on this

25 case until we get a transcript?

1 Can you hold up judgment on this case
2 until we get a typed up transcript which may be
3 made part of the record?
4 THE COURT: All right, sir. We can do that.
5 I just won't sentence him. Until he is sentenced
6 anyway, your time won't run on it. That is the
7 only thing you are working for, is your time.
8 MR. SPRINKLE: That is right, Judge. Yes, sir.
9 THE COURT: Well, I won't sentence him today,
10 then.
11 I have overruled your motion, though. I
12 just won't pronounce sentence today.
13 MR. SPRINKLE: Thank you, Judge.
14 THE COURT: At your request, I will not pronounce
15 sentence in order that you may have time to get
16 the transcript written up.
17 MR. SPRINKLE: Thank you, Judge.
18 THE COURT: I would like for the record to show
19 that.
20 MR. SPRINKLE: Judge, we would also move for a
21 presentence report.
22 THE COURT: All right, sir. Well, that will
23 give you the time then, if you do that.
24 (Presentence report set for July 11, 1977,
25 at 9:00 o'clock.)

(Present in chambers: The Court, the Defendant, Messrs. Axelson, Knowles, and Sprinkle, Witness Karen Hampton, Deputy Clerk, Deputy Sheriffs.)

MR. KNOWLES: I believe the last question I asked you was is this man Jo-Jo Brown, and I am pointing to the accused, Charles Ellison.

A No.

MR. KNOWLES:

Q Have you ever seen him before?

A Unh-uh.

Q All right. Now you testified earlier that you had appeared as a witness at the preliminary hearing of Joseph Brown?

A (Nods.)

Q Did you appear as a Commonwealth's witness?

A Yes.

Q All right. Were you made any promise of leniency or anything of that nature to make this statement to Officer Benoit that you have just testified to?

A Nothing except he let me go in the same cell with the girl that I go with.

MR. KNOWLES: That is all. Answer any questions Mr. Axelson has.

CROSS EXAMINATION

EXAMINED BY MR. AXELSON:

Q Who is that? That is Diane Flythe, isn't it?

A Uh-huh. Everybody knows that.

Q And he said that - what did you tell him before you gave him this statement?

A What do you mean before I -

What did I tell?

Q Did you say anything to him about - what did you say to him before you gave the statement?

A He had been asking us a whole lot of questions about the robberies and things that went down in the street, did we know anything about it.

We told him yeah.

He asked Diane did she know anything about the Carma's. She said no.

I told her I had rapped with the dude the night before.

He asked me would I make a statement about what went down.

I told him yeah.

Q Did you tell him - maybe if you told him that that maybe he could do something for you?

A It wasn't necessary.

Q You were out looking for drugs that night?

A Uh-huh.

Q The night that all of this supposedly occurred?

A (Nods.)

Q And you are a convicted felon?

A (Nods.)

MR. AXELSON: That is all the questions I have.

THE COURT: Are you in jail now?

A They brought me back from Goochland.

REDIRECT EXAMINATION

EXAMINED BY MR. KNOWLES:

Q Just one more question. Ms. Hampton, you are under oath, now. You have testified to that statement?

A Yes, sir.

Q Did Jo-Jo Brown tell - give to you that statement?

A That is the god's truth.

* * * * * * *

(Proffer of Proof Exhibit #1 - radio)

(Proffer of Proof Exhibit #2 - Statement)

(Proffer of Proof Exhibit #3 - subpoenas)

MR. KNOWLES: Diane Flythe. Can we have her?

* * * * * * *

DIANE FLYTHE, witness having first been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. KNOWLES:

Q State your name, please.

A Diane Flythe.

Q Diane, did you have an occasion on or about November 1 of 1976, while with Karen Hampton, to see Jo-Jo Brown on the street?

A Yes.

Q Did Karen Hampton have a conversation with him?

A Yeah. She had a conversation with him.

Q Who was with Jo-Jo?

A Slim.

Q Was either one of them carrying a radio?

A Slim were taking a radio in his hands.

Q He had it in his hands?

A Yeah.

Q Do you know what kind of radio it was?

A 8-track tape was on it.

Q Were you standing close by when they were

1 having that conversation?

2 A I was across the street.

3 Q But you know it was Jo-Jo Brown?

4 A Yeah.

5 Q I am pointing to the accused, Charles

6 Ellison. Is this Jo-Jo Brown?

7 A Naw.

8 Q Do you know this man?

9 A Naw.

10 Q You could not hear the conversation that

11 Jo-Jo was having with Karen?

12 A Naw.

13 Q Did Karen talk to you later about purchasing

14 a radio?

15 A Yeah, she asked me, you know, Jo-Jo had

16 one and wanted to sell it, but Slim had the radio. He

17 wanted $5.00 for it, but that was all to it. But she

18 didn't get it, though.

19 Q She didn't get it?

20 A Naw.

21 MR. KNOWLES: That is all.

22 CROSS EXAMINATION

23 EXAMINED BY MR. AXELSON:

24 Q You are a convicted felon, aren't you, Diane?

25 A Yeah.

Q You all were out looking for drugs that night?

A Yeah.

MR. AXELSON: That is all the questions I have.

THE COURT: That is all.

* * * * * * *

THE COURT: Is that all?

MR. KNOWLES: Yes, sir, that is all the evidence we have.

THE COURT: As I understand you, you have no other person that Brown is supposed to have made this statement to except this one? That is the only one that you know of?

MR. KNOWLES: Yes, Your Honor, that is true.

THE COURT: All right, sir.

MR. SPRINKLE: Of course, this proffer of evidence, we would take into consideration all the other cases that have been cited by the defense and the Commonwealth to be considered, and we simply object and except to the fact that we haven't been able to admit this statement into evidence even though it is exculpatory.

THE COURT: I understood that. I understood that.

MR. SPRINKLE: I just wanted to make sure for

the record.

THE COURT: I have read every one of those cases you have cited, and I don't think this case falls within the brackets of those cases.

That is my opinion, of course.

MR. SPRINKLE: Of course, we have read many other cases we haven't cited. We read many more last night, federal, state, and otherwise. Mississippi, Illinois, Alabama, Wigmore, McCormick, everything.

We have read all those cases, and the treatises. And Justice Holmes in his dissent, and Donnelly. We have all those things.

* * * * * * *

OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS

MR. KNOWLES: This is Instruction 3A offered by the defense, which was refused by Judge McMurran on June 1, 1977, with the comment that it was already covered.

Our objection to the exclusion of this instruction is that we feel it is valid law, that the instruction has been offered many times, and that it emphasizes to the jury the very important point of the strength of the presumption of innocence, and where in a doubtful case, the presumption is strong enough to justify an

July 11, 1977

IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH
ON MONDAY, THE 11TH DAY OF JULY,
IN THE YEAR OF OUR LORD,
NINETEEN HUNDRED AND SEVENTY-SEVEN

PRESENT: THE HONORABLE ROBT. F. McMURRAN, CHIEF JUDGE

COMMONWEALTH OF VIRGINIA	)	
		Upon an Indictment for Murder,
v.	)	Robbery, and Use of a Firearm
		Criminal Docket No. 28311 -
CHARLES LEWIS ELLISON	)	July term, 1977

Charles Lewis Ellison, born on February 22, 1955, who stands convicted of murder of the first degree and his punishment fixed at confinement in the State Penitentiary for the term of his natural life (1st count), robbery and his punishment fixed at confinement in the State Penitentiary for the term of his natural life (2nd count), and use of a firearm in commission of a felony and his punishment fixed at five (5) years in the State Penitentiary (3rd count), the period by the jury in its verdict rendered on June 1, 1977, was led to the bar in custody of the jailer of this Court, and came also J. Wayne Sprinkle and W. Thomas Knowles, attorneys for the said Charles Lewis Ellison, said attorneys having been heretofore appointed by the Court to represent the prisoner, Charles Lewis Ellison, and came as well the Attorney for the Commonwealth and the Probation Officer of this Court, who filed in open Court in the presence of the prisoner who was advised of its contents, his report as prescribed by Section 19.2-299 of the Code of Virginia, which said report is ordered filed as a part of the record in this case; and thereupon, the prisoner, by counsel, advised the Court that he did not wish to cross-examine the said Probation Officer as to any matter contained therein; and did not wish to present any additional facts bearing upon the matter; and the Court having considered all

the evidence in the case and the report of the Probation Officer, doth deny probation; and thereupon, the prisoner, by counsel, renewed their motion to set aside the jury's verdict as being contrary to the law and the evidence and grant him a new trial on the grounds that the said verdict is contrary to the law and the evidence, which motion for a new trial is overruled as to the first and second counts of the indictment and granted as to the third count of the indictment charging use of a firearm in the commission of a felony, said motion being granted on the third count of the indictment due to an erroneous instruction given the jury as to the punishment for the offense, the instruction reading that the jury could give as much as five (5) years for the offense, which as a matter of fact, under the law, the sentence is a mandatory sentence of one (1) year, and for the reason set forth in Jones against Commonwealth, reported in 20 Gratt., page 848, the Court is of the opinion that the punishment of five (5) years is invalid as not in conformity with the Statute, Section 18.2-53.1, and as Section 19.2-295 makes it mandatory that the jury ascertain the punishment, the Court doth set aside, for this reason only, the conviction under the third count of the indictment which charges the use of a firearm in the commission of a felony, and a new trial is ordered on this count of the indictment, if the Commonwealth is so advised; and thereupon, it being demanded of the said Charles Lewis Ellison, if anything for himself, he had or knew to say, why the Court here should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay of judgment, it is ordered that the said Charles Lewis Ellison be confined in the State Penitentiary for the term of his natural life for murder of the first degree as charged in the first count of the indictment and for

the term of his natural life for robbery as charged in the second count of the indictment, the period by the jury in its verdict rendered on June 1, 1977; whereupon, the Court advised the said Charles Lewis Ellison that he has a right to apply for an appeal from this conviction to the Supreme Court of Virginia and was also advised that counsel would be appointed for that purpose if requested; and thereupon, the said Charles Lewis Ellison, by counsel, noted an appeal; and it appearing to the Court that the said Charles Lewis Ellison has been held in the jail of this city 112 days, awaiting the trial of this case, it is ordered that he be credited with the time so spent by him upon his sentence aforesaid. And the Clerk of this Court is directed to forthwith transmit a copy of this order to the Superintendent of the State Penitentiary in Richmond, Virginia.

And the prisoner, Charles Lewis Ellison, is remanded to jail.

The Court certifies that the prisoner and his counsel were present in person at every stage of the proceedings.

The Court certifies that it provided Elizabeth P. Berry, a Court Reporter, to record verbatim the evidence and incidents of trial and doth further order that the expense of reporting and recording the same shall be paid by the Commonwealth of Virginia, and the charges therefor have been taxed as a part of the costs of this case.

rtified
State

* * * * * * * * * * *

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

COMMONWEALTH OF VIRGINIA

-vs-

CRIMINAL DOCKET NO. 28311

CHARLES LEWIS ELLISON

NOTICE OF APPEAL

Now comes the Appellant, Charles Lewis Ellison, by counsel, and give Notice of Appeal from the judgment of the Court rendered herein on the 11th day of July, 1977, as required by Rule 5:6 of the Rules of the Supreme Court of Virginia.

A transcript of the trial proceedings in this case will be hereafter filed.

CHARLES LEWIS ELLISON

By W. Thomas Knowles
J. Wayne Sprinkle
Of Counsel

W. Thomas Knowles
603 Professional Building
505 Washington Street
Portsmouth, Virginia 23704

J. Wayne Sprinkle
704 Professional Building
505 Washington Street
Portsmouth, Virginia 23704

I hereby certify that I mailed a true copy of this Notice to James A. Cales, Commonwealth's Attorney, P. O. Box 1417, Portsmouth, Virginia 23705 on the 11th day of July, 1977.

W. Thomas Knowles
J. Wayne Sprinkle

ASSIGNMENT OF ERROR

The trial court committed reversible error in refusing to admit into evidence, as being unreliable as a matter of law, testimony of a third-party confession to the crimes which were charged to the defendant.